

*Note: These handouts are the order in which they'll be addressed in the Video and PowerPoint presentation training.*

## **DECISION MAKING - LEGAL ASPECTS**

This memo is intended to provide guidance to the Health Department regarding the processing of appeals made under the District Sanitary Code (the Code). The Code provides for a Board of Appeals (BOA) for each county. Each BOA consists of 5 residents of that county and alternates are allowed as well. County Commissioners may be appointed as well as citizens. As elected officials, County Commissioners are not accustomed to having their discretion limited and, typically, are not involved in appellate decision-making involving an ordinance or local code. In addition, unless they have served on a planning commission or zoning board of appeals, most citizens are unfamiliar with the legal aspects of local appellate decision-making.

Thus, training in handling appeals is important. Appellate decisions, which are NOT made consistent with the law, can result in unjust decisions, unequal treatment of citizens and wasted money on needless litigation.

When serving on the BOA, a member is essentially acting as a "judge" and not as an elected official. Ethical and legal guidelines apply to a person or group, who is acting in a semi-judicial capacity. Technically, BOA decisions are called "quasi-administrative" decisions.

### **Proper Procedure**

When handling an appeal under the sanitary code, it is recommended that the following procedures and ethical considerations be followed:

1. **Applications**. Every appeal or variance request must be submitted via an Application as provided in Section 11-4 of the Code. For example, there is a 60 day time limit and specific information must be provided (see PowerPoint slide). Per Mich. law, an incomplete appeal form is not "ripe" for consideration, which simply means that a decision should not be made.
2. **Site Visits**. Site visits may be made by BOA members prior to the hearing date. However, there should be no discussion with the property owner or anyone else regarding the merits or substance of the appeal. During the hearing, board members may vote to adjourn the meeting so that it can be reconvened at the site. When this is done, the Open Meetings Act must be followed.
3. **Meetings & Discussions**. All meetings must be held in compliance with the Open Meetings Act (the Act). The Act also applies to deliberations or situations where substantive matters (such as the facts) related to the appeal are discussed. It makes no difference whether this discussion is between board members, with the applicant or with other persons. There should never be a

discussion regarding the merits of an appeal with anyone unless that discussion takes places during a properly noticed open meeting.

#### 4. Variances.

1. Granted by Health Officer or BOA (sec. 10-1.A.). BOA has broad authority (any new condition). Health Officer is limited to existing situations. NOTE: I strongly recommend clarifying the wording regarding 10-1 A & B to avoid future problems.
2. Variance Standards in 10-2 must be met (similar to “undue hardship” in zoning).
3. What if property owner appeals a decision and fails to request a variance when a variance would resolve the problem? It might violate due process to grant a variance when it has not been requested in the property owner’s application for an appeal. This means that there has been no public notice that the property owner has ALSO requested a variance. When in doubt, get LEGAL ADVICE prior to the meeting.

#### 5. Burden of Proof for Appeals (or Initial Variance Requests).

1. The applicant or appellant has the burden of proof and by a preponderance of the evidence must establish that EACH “Standard For Decision” (see section 11-6) has been met.
2. When there is conflicting evidence, the law allows the BOA to decide which evidence is the most credible.

6. Decisions. The BOA must make its decision in an open meeting and in writing. The written decision must (a) be supported by facts on the record, (b) state why the standards in the sanitary code have been met or have not been met and (c) state the actual decision (i.e., whether the appeal was granted or denied and the specific variances, if any, that are granted). Meetings may be temporarily adjourned while a board member drafts a proposed motion (without input from other board members). In complex cases, when civil counsel is not present, it can be wise to adjourn the hearing and reconvene with civil counsel present so that assistance can be obtained in drafting the motion and the factual basis for that decision. The attorney does not make the decision. The BOA does. However, the attorney can provide guidance on wording, completeness of the decision and ultimately help insure that the decision meets legal procedural requirements. In complex cases, the most efficient procedure can be for the BOA to discuss applying the facts to each standard and then adjourning to a later date so that either HDNW staff or the HDNW attorney can do a proposed draft of the

written decision which can be reviewed, altered, finalized and adopted by the BOA at its next meeting. Another efficient procedure is for HDNW staff to do a “discussion draft”

## CONCLUSION

The procedures listed above are not intended to be a comprehensive list. Rather they highlight key procedures that typically can cause the most problems if they are not followed.

In conclusion, the importance of following proper procedures cannot be over-emphasized. It is unfair to board members, the applicant, interested citizens, the Health Department and taxpayers for a decision to be overturned in Court due to procedural irregularities. Using proper procedures sets good precedent, provides for fair hearings and eliminates one basis for attacking the decision in Court, which thereby can help save on legal expenses.

In addition, following proper procedure can reduce or eliminate the risk of civil liability to HDNW and BOA members. It could be asserted by a Plaintiff’s attorney that the intentional failure of the BOA to follow established legal requirements in deciding an appeal constitutes “willful and wanton misconduct” or “gross negligence”. When gross negligence occurs, Michigan’s Governmental Immunity Statute does not provide liability protection to employees, members or volunteers of a governmental agency. (The Environmental Health Director has a legal opinion from the Marquette County Prosecuting Attorney that addresses this issue).

### Recommendations

My experience advising governmental bodies and defending their decisions in Court leads to the following recommendations:

A. Training Seminar. Training should be held either in each County or in a centralized location for board members and Health Department staff. Training should include a realistic case study and provide the board members an opportunity to apply the standards in the sanitary code to the facts in the case study and reach a written decision.

B. Sanitary Code Amendments. BOA decisions and training seminars might lead to improvements in Code wording or the addition or deletion of provisions that benefit the public and the environment. Amending the sanitary code of a district health department is complex. It is wise for HDNW to compile a list of potential amendments so that they can be evaluated and processed together in a cost effective manner. Suggested changes to the Code should be given to the Environmental Health Director, the Health Officer and/or the Board of Health.

### C. Application and Hearing Suggestions.

1. Application. The wording and layout of an application for an appeal or a variance should help guide the applicant to ensure that the application is COMPLETE. This helps avoid HDNW from rejecting the application or the BOA from having to adjourn a hearing because the application is missing required information. Also, to help ensure equal treatment of residents regardless of county, a UNIFORM application is recommended.

2. Hearing Format. Have a procedural format for appeal hearings and follow it. The Chair should control the meeting.

3. Advance Preparation. Read all submitted materials before the hearing. Have list of questions, if needed.

4. Hearing Presentations. A written decision is required and must contain specific findings of fact regarding the Standards For Decision in the Code. Also, questions can be asked to persons who have presented evidence.

5. Expert vs Lay Opinions - personal opinions should be respected, but an opinion should have a scientific or professionally reliable basis or it is not reliable evidence.

6. Avoid these mistakes:

- applying your personal perspective rather than the actual Code provisions. Personal perspectives can include: “the Code is too restrictive of private property rights” or “the Code does not adequately protect the environment” (please recommend changes to the Code as you deem reasonable, but apply the Code as written)

- Open Meetings Act violations, such as discussing the substance of the appeal with others, including BOA members, outside of a public meeting. Contacting legal counsel with questions is typically appropriate.

- Conflict of Interest. This is a situation when you, as a BOA member, are making a decision which impacts **your**: (1) Finances, (2) Family & Business Interests (including employer/employee/ business partner) or (3) Property Value (due to proximity of land in question). When in doubt, get a legal opinion from HDNW’s legal counsel. Avoid potential liability and/or remand of decision if your vote was a deciding vote.

- Complex or Contested Appeal/Variance scenario. It could be cost-effective to get legal advice prior to the meeting &, perhaps, have legal counsel attend the meeting. The attorney also can help in drafting a proposed Decision for the BOA's review, modification & adoption. Conflicting draft decisions can be made depending on the facts.



# Health Department of Northwest Michigan

*serving Antrim, Charlevoix, Emmet, and Otsego Counties*

[www.nwhealth.org](http://www.nwhealth.org)

## MEMORANDUM

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Date: May 25, 2021  
To: Sanitary Code Board of Appeals  
From: Angie Cooper, Environmental Sanitarian  
Subject: John & Paula Jo Peters appeal request of Existing system evaluation

This department has received a request for an appeal hearing in accordance with Section 11-4 of the District Sanitary Code. The request was received within the Section 11-4 required 60-day time frame and was submitted with a written request as required. Attached to this memorandum are copies of pertinent documents pertaining to the application for the service conducted by the department and any other information related to the premise.

The following are the findings of fact known to the department:

1. Mr. & Mrs. Peters submitted an application for a sewage disposal permit on January 14, 2021.
2. On February January 25, 2021, two hand-dug soil borings were observed in the area near the road and approximately 185 feet from Elk Lake. Both borings revealed similar soil conditions which were the following:
  - 0-7" Loam topsoil
  - 7-21" Loamy sand (mottling beginning at 9", soil became wet at 19 inches)
  - 21-42" sandy loam (mottled to grey, saturated)
  - Maximum high groundwater elevation 9"
3. The determination of the Health Department as stated in the February 8, 2021 land evaluation report (attached) is that request for approval of development of the lot with on-site sewage treatment and disposal system is denied in accordance with Sections 4-9, 4-10, 4-11 and 5-11 of the District Sanitary Code due to maximum high groundwater elevation above 12".
4. Following the denial Mr. Peters contracted Top of the Mitt Engineering to review the site in preparation for appeal of the department's decision. The engineer has submitted groundwater monitoring records for the period between March 2, 2021 and May 22, 2021. Groundwater monitoring well installations in the proposed drainfield area were observed every 5 to 7 days. During this period groundwater levels ranged between 15 inches to 21 inches below grade.

The engineer has also presented information indicating that recorded precipitation totals from October 1, 2020 through the monitoring period were within 90% of normal averages.

Mr. & Mrs. Peters believe the groundwater monitoring information demonstrates that groundwater levels are not as high as determined by the Health Department and that the requirements of the Code are met.

5. Mr. & Mrs. Peters are requesting approval of the appeal because they are retiring and purchased the property with the intent of building a retirement home. They feel that since they have been paying taxes on the property as a buildable site since 1976 that this warrants issuing a variance if necessary. They are requesting approval for a five-bedroom home so that they have room enough for their children and grandchildren to visit.

**Example situation and relative code sections:**

- **Section 2-31 Definition of Maximum High Groundwater Elevation**
- **Sections 4-9(B), 4-10(B) and 4-11(B) Vertical separation to maximum high groundwater elevation**
- **Section 5-11 Vertical separation requirements (vertical separation to water table from natural ground surface, depth to groundwater less than 12" does not qualify for conventional, mound or ATS)**
- **Technical Guidance Memorandum TG18-002 "Groundwater Monitoring"**

HEALTH DEPT. OF NW MICHIGAN  
CHARLEVOIX COUNTY  
BOARD OF APPEALS

EXAMPLE A

DECISION AND ORDER

Applicant: John & Paula Jo Peters

Hearing Date: August 12, 2021

PROPERTY DESCRIPTION

The property of John & Paula Jo Peters described as:

EAST BAY BEG ON S LI OF LOT 2 SD EAST BAY PLAT 626.98 FT S 84 DEG 45'55"E FROM SW COR OF SD LOT TH N 47 DEG 55'21"W 179.69 FT TO N LI OF SD LOT 2 TH S 87 DEG 13'25"E 779.38 FT TH S 76 DEG 13'10"E 699.82 FT TO SH OF WALLOON LK TH S 39 DEG 16'55"W AL SD SH 144.90 FT TH N 77 DEG 37'29"W 666.82 FT TH N 84 DEG 45'55"W 584.14 FT TO POB BEING PT OF LOT2 EAST BAY

hereinafter referred to as the "property" or the "site".

APPLICATION FOR APPEAL

WHAT APPLICATION SEEKS: The Application appeals the decision of the Health Officer dated May 25, 2021, which is attached hereto.

The Board has considered the Application and after public notice, as required by law, a public hearing was held on August 12, 2021. Based on facts presented at the public hearing, including all written documents and Exhibits which have been made a part of the record in this matter, the Board has reached a decision on this matter and states as follows:

FINDINGS OF FACT REGARDING THE APPEAL

1. The Board finds that the Applicants have established the most accurate determination of site conditions related to their application for an on-site sewage treatment and disposal system (the Application) for the following reasons:
  - A. On Jan. 25, 2021, the Health Officer observed soil conditions, as revealed by 2 soil borings, which led to his determination that the ordinary high water mark was 9 inches.
  - B. Because Section 5-11 of the District Health Code (the Code) requires the ordinary high water mark to be 12 inches or more, the Health Officer denied the Application.
  - C. To promote the fair and equal treatment of all citizens, Section 12-6 of the Code authorizes the Health Officer to create internal policies or rules that implement the Code.
  - D. As authorized by Section 12-6, on 11-21-18 the Health Officer issued a Technical Guidance Memorandum (TGM - see Exhibit X) regarding groundwater monitoring and the determination of the Maximum High Groundwater Elevation, as defined in Section 2-31 of the Code.
  - E. After denial of the Application by the Health Officer, Tip Of The Mitt Engineering (the Engineer), on behalf of the Applicant, measured groundwater levels multiple times consistent with the TGM. The Engineer's report is Exhibit Y.
  - F. The Engineer's report showed groundwater levels between 15-21 inches and that recorded precipitation levels from October 1, 2020 through the monitoring period were within 90% of normal averages.
2. The Board finds that the Health Officer failed to properly apply the applicable requirements of the Code for the existing site conditions for the following reasons:

- A. The Health Officer properly determined that Sections 4-9(B), 4-10(B), 4-11(B) and 5-11 Code were applicable to this Application.
  - B. However, when those Code Sections are applied to most recent comprehensive data, which is in the Engineer's report (Exhibit Y), the requirements of those Code Sections are met.
3. The Applicant has shown by competent material and substantial evidence that this appeal should be granted for the following reasons:
- A. The groundwater monitoring information contained in the Engineer's report establishes the following:
    - a. Groundwater monitoring was conducted in accordance with Health Department Technical Guidance Memorandum (TGM):
      - i. The monitoring period was March 2 through May 22, 2021
      - ii. Observations were made at least every seven (7) days
    - b. The results of the monitoring information indicate that groundwater levels during the monitoring period ranged between 15 to 21 inches (below 12 inches)
    - c. The period of the monitoring was a significant and representative amount time frame (over 2.5 months).
  - B. The Engineer's report establishes that the Application meets the requirements of Code Sections Sections 4-9(B), 4-10(B), 4-11(B) and 5-11.

DECISION

Upon motion, seconded and passed, the Board RULES that the Applicants' appeal be GRANTED.

JUDICIAL REVIEW

As authorized by law and within the time constraints provided by law, a party aggrieved by this decision may have the right to appeal this decision to the Circuit Court. This is merely a notification of the potential rights of an aggrieved party. It is the responsibility of an aggrieved party to comply with all legal requirements.

DATE DECISION AND ORDER ADOPTED

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Chairperson

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Secretary

HEALTH DEPT. OF NW MICHIGAN  
CHARLEVOIX COUNTY  
BOARD OF APPEALS

EXAMPLE D

DECISION AND ORDER

Applicant: John & Paula Jo Peters

Hearing Date: August 12, 2021

PROPERTY DESCRIPTION

The property of John & Paula Jo Peters described as:

EAST BAY BEG ON S LI OF LOT 2 SD EAST BAY PLAT 626.98 FT S 84 DEG 45'55"E FROM SW COR OF SD LOT TH N 47 DEG 55'21"W 179.69 FT TO N LI OF SD LOT 2 TH S 87 DEG 13'25"E 779.38 FT TH S 76 DEG 13'10"E 699.82 FT TO SH OF WALLOON LK TH S 39 DEG 16'55"W AL SD SH 144.90 FT TH N 77 DEG 37'29"W 666.82 FT TH N 84 DEG 45'55"W 584.14 FT TO POB BEING PT OF LOT2 EAST BAY

hereinafter referred to as the "property" or the "site".

APPLICATION FOR APPEAL

WHAT APPLICATION SEEKS: The Application appeals the decision of the Health Officer dated May 25, 2021, which is attached hereto.

The Board has considered the Application and after public notice, as required by law, a public hearing was held on August 12, 2021. Based on facts presented at the public hearing, including all written documents and Exhibits which have been made a part of the record in this matter, the Board has reached a decision on this matter and states as follows:

FINDINGS OF FACT REGARDING THE APPEAL

1. The Board finds that the Health Officer accurately determined the existing site conditions for the following reasons:
  - A. Mottling is evident in the soil at a depth of 9 inches below the natural ground surface.
  - B. The Health Officer provided photographs which depict the observation of standing water in the excavations at a depth of 19 inches on 1-25-21.
  - C. Groundwater was observed at a depth of 22 inches in a hand boring during the appeal hearing site review.
  - D. The determination of maximum high groundwater elevation was determined by the Health Officer in accordance with Section 2-31 of the District Sanitary Code through photographic evidence of direct measurement of groundwater elevations and groundwater indicators (mottling).
2. The Board finds that the Health Officer properly applied the applicable requirements of the Code for the existing site conditions for the following reasons:
  - A. The maximum high groundwater elevation, as determined by soil mottling, is within 12 inches of the natural ground surface which does not qualify for approval in accordance with Sections 4-9(B), 4-10(B), 4-11(B) and 5-11 of the District Sanitary Code.
3. The applicant has not shown by competent material and substantial evidence that this appeal should be granted for the following reasons:
  - A. The applicant has not presented any facts that contradict the findings of the Environmental Sanitarian as contained in Environmental Sanitarian's Memorandum

dated May 25, 2021 (see Exhibit X) or which justifies an alternative finding, as authorized by the District Sanitary Code.

DECISION

Upon motion, seconded and passed, the Board RULES that the Applicants' appeal request is DENIED.

JUDICIAL REVIEW

As authorized by law and within the time constraints provided by law, a party aggrieved by this decision may have the right to appeal this decision to the Circuit Court. This is merely a notification of the potential rights of an aggrieved party. It is the responsibility of an aggrieved party to comply with all legal requirements.

DATE DECISION AND ORDER ADOPTED

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\_\_\_\_\_  
Chairperson

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Secretary

HEALTH DEPT. OF NW MICHIGAN  
CHARLEVOIX COUNTY  
BOARD OF APPEALS

EXAMPLE D

DECISION AND ORDER

Applicant: John & Paula Jo Peters

Hearing Date: August 12, 2021

PROPERTY DESCRIPTION

The property of John Peters and Paula Jo Peters Husband and Wife, described as:

EAST BAY BEG ON S LI OF LOT 2 SD EAST BAY PLAT 626.98 FT S 84 DEG 45'55"E FROM SW COR OF SD LOT TH N 47 DEG 55'21"W 179.69 FT TO N LI OF SD LOT 2 TH S 87 DEG 13'25"E 779.38 FT TH S 76 DEG 13'10"E 699.82 FT TO SH OF WALLOON LK TH S 39 DEG 16'55"W AL SD SH 144.90 FT TH N 77 DEG 37'29"W 666.82 FT TH N 84 DEG 45'55"W 584.14 FT TO POB BEING PT OF LOT2 EAST BAY

hereinafter referred to as the "property" or the "site".

APPLICATION FOR VARIANCE

WHAT APPLICATION SEEKS: Pursuant to Article X of the District Sanitary Code (the Code), the Applicant has made one or more variance requests which are stated in the Application which is attached hereto. Specifically, the Applicant has requested a variance to permit

The Board has considered the Application and after public notice, as required by law, a public hearing was held on August 12, 2021. Based on facts presented at the public hearing, including all written documents and Exhibits which have been made a part of the record in this matter, the Board has reached a decision on this matter and states as follows

Board makes the following findings of fact as required by Article X of the Code for each of the standards listed in Section 10-2:

1. Strict compliance cannot be achieved.
  - a. The Board finds that strict compliance with the District Sanitary Code CANNOT be achieved because the maximum high groundwater elevation is within 12 inches of the natural ground surface. This conclusion is based on the undisputed facts contained Memorandum of the Environmental Sanitarian (Exhibit X) which establishes that the maximum groundwater elevation is 9 inches at the site.
2. There are exceptional or extraordinary circumstances or conditions applicable to the subject property and such circumstances or conditions have not been created for personal convenience of the applicant or due to economic hardship on the applicant.
  - a. The Board finds that there are NO exceptional circumstances or conditions applicable to the property because the site's maximum groundwater elevation is 9 inches is a natural condition of the property.

3. The variance request is not due to a self-created condition or is not the result of actions of the property owner (the Applicant) or a previous property owner(s) which occurred after the enactment of the Code provisions for which the variance is sought.
  - a. The Board finds that the variance request IS NOT a self-created condition or the result of the actions of any person because the variance request is due to a natural condition of the property.
  
4. The granting of such variance will constitute an improvement of existing conditions and will provide a greater level of protection to the health, welfare and safety of the public and will not be materially injurious to other properties in the area which the subject property is located.
  - a. The Board finds that the granting of a variance WILL NOT constitute an improvement or provide a greater level of protection to the health, welfare and safety of the public and MAY be injurious to other properties because the requested variance would allow the installation of a sewage disposal and treatment system contrary to the requirements of Section 5-11 of the District Sanitary Code.

DECISION

For the reasons stated above and upon motion, seconded and passed, the Board RULES that the Applicants' variance request(s) be DENIED.

CONDITIONS, IF ANY

1. NOT APPLICABLE

JUDICIAL REVIEW

As authorized by law and within the time constraints provided by law, a party aggrieved by this decision may have the right to appeal this decision to the Circuit Court. This is merely a notification of the potential rights of an aggrieved party. It is the responsibility of an aggrieved party to comply with all legal requirements.

DATE DECISION AND ORDER ADOPTED:

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\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Secretary



# **Health Department of Northwest Michigan**

EXAMPLE C

*serving Antrim, Charlevoix, Emmet, and Otsego Counties*

[www.nwhealth.org](http://www.nwhealth.org)

## **MEMORANDUM**

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Date: May 15, 2022  
To: Sanitary Code Board of Appeals  
From: Brian Maturen, Environmental Sanitarian  
Subject: Lilly Potter appeal request of Existing system evaluation

This department has received a request for an appeal hearing in accordance with Section 11-4 of the District Sanitary Code. The request was received within the Section 11-4 required 60-day time frame and was submitted with a written request as required. Attached to this memorandum are copies of pertinent documents pertaining to the application for the service conducted by the department and any other information related to the premise.

The following are the findings of fact known to the department:

1. Ms. Potter submitted an application for existing system evaluation on March 21, 2022. The proposal for the application is to construct a successor three (3) bedroom home on the lot to replace the previous three-bedroom home which was lost to fire in February 2022.
2. The previous house was 3100 square feet and the proposed successor house is 3150 square feet.
3. The premise is served by an existing low-pressure distribution mound drainbed which was installed in accordance with replacement sewage disposal permit 06-378 issued in 2006. Due to the lack of available area and that the system was strictly a replacement system for the existing house built in 1964, a variance was granted to Section 5-12 "Horizontal Isolation Distances" by the Health Officer for a reduced isolation of 78 feet from Walloon Lake in accordance with Section 10-1(A) "Variances".
4. The edge of the drainstone in the mound drainbed has been confirmed to be 78 feet from Walloon Lake.
5. On April 5, 2022 two hand dug soil borings were observed in the area of the existing mound drainbed. Both borings revealed similar soil conditions which were the following:
  - 0-7" Loamy sand topsoil
  - 7-31" Loamy sand (mottled at 26", groundwater stabilized at 29")
  - 31-44" sand (saturated)
  - Maximum high groundwater elevation 26"
6. The soil conditions and the separation from groundwater meet the minimum requirements for installation of a mound system in accordance with Sections 4-10 "Criteria Approval Mound" and 5-11 "Vertical Separation Requirements" of the District Sanitary Code as the maximum high groundwater elevation is greater than 24 inches below the ground surface and the infiltrative surface is separated from groundwater by 48 inches.
7. The existing system is not adequate in terms of the provisions of the Code in accordance with Sections 4-10, 4-19 "Successor Buildings" and 5-12 due to the mound drainbed being less than 100 feet from the lake (78') which is the basis of the denial by the Health Officer.

### **Example situation and relative code sections:**

- **Section 4-10 Criteria for Permit Approval for Mound Systems**
- **Section 4-19 Successor Buildings**
- **Section 5-11 Vertical Separation Requirements**
- **Section 10-1(A) Variances**
- **Section 10-2 Variance Standards**

**HEALTH DEPT. OF NW MICHIGAN  
CHARLEVOIX COUNTY  
BOARD OF APPEALS**

DECISION AND ORDER

Applicant: Lilly Potter

Hearing Date: June 11, 2021

PROPERTY DESCRIPTION

The property of Lilly Potter described as:

EAST BAY BEG ON S LI OF LOT 2 SD EAST BAY PLAT 626.98 FT S 84 DEG 45'55"E FROM SW COR OF SD LOT TH N 47 DEG 55'21"W 179.69 FT TO N LI OF SD LOT 2 TH S 87 DEG 13'25"E 779.38 FT TH S 76 DEG 13'10"E 699.82 FT TO SH OF WALLOON LK TH S 39 DEG 16'55"W AL SD SH 144.90 FT TH N 77 DEG 37'29"W 666.82 FT TH N 84 DEG 45'55"W 584.14 FT TO POB BEING PT OF LOT2 EAST BAY

hereinafter referred to as the "property" or the "site".

APPLICATION FOR VARIANCE

WHAT THE APPLICATION SEEKS: Pursuant to Article X of the District Sanitary Code (the Code), the Applicant has made a variance request as stated in the Application which is attached hereto.

The Board has considered the Application and after public notice, as required by law, a public hearing was held on June 11, 2022. Based on facts presented at the public hearing, including all written documents ("called Exhibits") which have been made a part of the record in this matter, the Board has reached a decision on this matter and states as follows

Board makes the following findings of fact as required by Article X of the Code for each of the standards listed in Section 10-2:

1. Strict compliance cannot be achieved.
  - a. This standard is met because the Board finds that, based upon evidence submitted by the Health Officer (Exhibit X), this property lacks available area for a drainfield which strictly complies with the 100 ft horizontal isolation distance from a lake as required by Sections 4-10 and 5-12 of the Code.
2. There are exceptional or extraordinary circumstances or conditions applicable to the subject property and such circumstances or conditions have not been created for personal convenience of the applicant or due to economic hardship on the applicant.
  - a. Based on the statements of the Applicant at this hearing and the evidence submitted by the Health Officer (Exhibit X), the Board finds that this standard is met because the Applicant's home was destroyed by fire and the existing drainfield was permitted pursuant to a variance to Code requirements that had been granted by the Health Officer in 2006.
3. The variance request is not due to a self-created condition or is not the result of actions of the Applicant or a previous property owner(s) which occurred after the enactment of the Code provisions for which the variance is sought.

a. Based on the statements of the Applicant at the hearing and the evidence submitted by the Health Officer (Exhibit X), the Board finds that this standard is met since this variance request is due to the existing soil conditions of the property and is consistent with the variance that was granted in 2006. In addition, this variance is for a replacement home that will have essentially the same dimensions as the original building for which the 2006 variance had been granted (original house was 3100 sq. ft. and the successor house is proposed to be 3150 sq. ft.).

4. The granting of such variance will constitute an improvement of existing conditions and will provide a greater level of protection to the health, welfare and safety of the public and will not be materially injurious to other properties in the area which the subject property is located.

a. Based on the Applicant's statements at this hearing and the Health Officer's report (Exhibit X), the Board finds that this standard is met because this variance will allow the remains of this fire-destroyed house to be removed and replaced by a similarly-sized house that uses the same sewage disposal and treatment system as has been used in the past. In addition, this system has operated historically consistent with the Code and the 2006 variance. There is no evidence that this variance, which is identical to the 2006 variance and simply permits continued use of the existing sewage disposal and treatment system, would create any condition which would threaten the health, welfare or safety of the public or has been or would be materially injurious to other properties or will in the future.

#### DECISION

Upon motion, seconded and passed, the Board RULES that the Applicants' variance request(s) be GRANTED.

#### CONDITIONS

1. The Health Department shall be provided with a copy of the floor plans for the successor building to review and determine whether there is compliance with the Variance Application and this Decision of the Board of Appeals.

#### JUDICIAL REVIEW

As authorized by law and within the time constraints provided by law, a party aggrieved by this decision may have the right to appeal this decision to the Circuit Court. This is merely a notification of the potential rights of an aggrieved party. It is the responsibility of an aggrieved party to comply with all legal requirements.

#### DATE DECISION AND ORDER ADOPTED:

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\_\_\_\_\_  
Chairperson

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Secretary

# Sanitary Code Board of Appeals Training

## District Sanitary Code Sections Used in Training Examples

### **2-31 MAXIMUM HIGH GROUNDWATER ELEVATION**

Maximum high ground water elevation means the elevation of the upper surface of the zone of saturation as may occur during the normally wet periods of the year. The term includes perched and apparent conditions that are seasonally saturated for a time period in excess of two weeks. For the purpose of this Code, the high ground water elevation will be determined by observing subsurface saturated conditions and/or groundwater indicators, such as soil mottling and redoximorphic features.

### **4-9 CRITERIA FOR CONSTRUCTION PERMIT APPROVAL – CONVENTIONAL SEWAGE TREATMENT AND DISPOSAL SYSTEM**

A conventional sewage treatment and disposal system may be permitted at a site where all of the following site characteristics or conditions exist:

- A. An available sewer system is not available.
- B. The area of the proposed sewage treatment and disposal system complies with the minimum vertical separation requirements for conventional systems in Table 5-11.
- C. The property served includes sufficient area to provide for the minimum horizontal isolation distances required in Table 5-12.
- D. The natural ground slope does not exceed twelve (12) percent. Sites may be approved with greater slopes if design includes methods designed to work with slopes (drip irrigation, step trenches, distribution chambers etc.).

### **4-10 CRITERIA FOR CONSTRUCTION PERMIT APPROVAL – ELEVATED ABSORPTION FIELD (MOUND)**

An elevated absorption system (mound) may be permitted at a site where all of the following conditions are met:

- A. An available sewer system is not available.
- B. The area of the proposed sewage treatment and disposal system complies with the minimum vertical separation requirements for elevated absorption systems in Table 5-11.
- C. The property served includes sufficient area to provide for the minimum horizontal isolation distances required in Table 5-12.
- E. The natural ground slope does not exceed twelve (12) percent.
- F. The site is not subject to flooding or significantly impacted by surface runoff.

#### **4-11 CRITERIA FOR CONSTRUCTION PERMIT APPROVAL – ADVANCED TREATMENT SYSTEM (ATS)**

An Advanced Treatment System shall be permitted where the applicant has provided competent, material and substantive evidence which allows the Health Officer to find that all of the following standards have been met and all of the following required information has been provided:

- A. An available sewer system is not available.
- B. The area of the proposed sewage treatment and disposal system complies with the minimum vertical separation requirements for advanced treatment systems in Table 5-11.
- C. The property served includes sufficient area to provide for the minimum horizontal isolation distances required in Table 5-12.
- D. The natural ground slope does not exceed twelve (12) percent.
- E. The proposed ATS is capable of producing effluent with:
  - 1. Biological Oxygen Demand (BOD<sub>5</sub>) less than or equal to 30 mg/L
  - 2. Total Suspended Solids (TSS) less than or equal to 30 mg/L
  - 3. Total Inorganic Nitrogen (TIN) less than or equal to 30 mg/L
- F. The site is not subject to flooding or significantly impacted by surface runoff.
- G. A wetland determination may be required and, if required by law, a wetland permit shall be obtained prior to issuance of a construction permit.
- H. The applicant shall provide the Health Officer with the maintenance specifications of the manufacturer and the maintenance specifications of the engineer for the entire ATS.
- I. The applicant shall provide the Health Officer with a notarized copy of a Notice of Advanced Treatment System that has been recorded with the Register of Deeds in the county in which the premises is located and which contains the page and liber numbers of the recordation.
- J. An approved operation permit shall be acquired for the proposed Advanced Treatment System (ATS).
- K. A maintenance contract meeting the requirements of Section 4-12 shall be provided prior to permit approval.

#### **4-19 SUCCESSOR BUILDINGS**

A building or mobile home using an existing sewage treatment and disposal system may be replaced or succeeded by a building or mobile home which may use the same treatment and disposal system provided approval of the Health Officer is first obtained and the system is deemed adequate for the replacement building in terms of the provisions of this Code.

## 5-11 VERTICAL SEPARATION REQUIREMENTS

**TABLE 5-11 MINIMUM VERTICAL SEPARATION DISTANCES**  
(INCHES OF SEPARATION)

The infiltrative surface of a sewage treatment and disposal system shall be separated by the minimum vertical distances from the item named:

Water Table <sup>1</sup>	Ordinary High Water Mark <sup>2</sup>	Impervious/Limiting Stratum
48	48	60

The natural ground surface within the entire sewage treatment and disposal system area shall be separated by the minimum vertical distances from the items named for the types of systems noted:

Type of System	Water Table	Ordinary High Water Mark <sup>2</sup>	Impervious/Limiting Stratum
Conventional	48	48	60
Low Pressure Dist. Mound	24	24	36
Advanced Treatment (ATS)	12	12	24

<sup>1</sup>Water table cannot be artificially lowered to meet requirement. <sup>2</sup>Measurement from relative elevation of ordinary high water mark

# Sanitary Code Board of Appeals Training

## District Sanitary Code Sections Related to Appeals and Variances

### 10-1 VARIANCES

As provided in this Article, one or more variances may be granted by the Health Officer or Board of Appeals. The granting of such variances shall be limited to the fewest variances needed to achieve substantial compliance with this Code. A variance may be granted by:

- A. the Health Officer for a variance request related to an existing sewage treatment and disposal system or its replacement or an existing water supply system or its replacement.
- B. the Board of Appeals for a variance request related to any condition or situation.

### 10-2 VARIANCE STANDARDS

A variance from the requirements of this Code may be granted only if the applicant shows by competent, material and substantive evidence that all of the following special conditions have been met:

- A. Strict compliance with the Code cannot be achieved.
- B. There are exceptional or extraordinary circumstances or conditions applicable to the subject property, and is not created for personal convenience or due to economic hardship.
- C. The request for the variance is not a self-created condition or the result of actions of the property owner or previous property owner(s) which occurred after the enactment of the Code provisions for which the variance is sought.
- D. The granting of such variance will constitute an improvement of existing conditions and will provide a greater level of protection to the health, welfare and safety of the public and will not be materially injurious to other properties in the area which it is located.

### 10-4 CONDITIONS ON VARIANCE

Conditions may be imposed on the variance that are designed to implement compliance with the performance standards of this Code or that are necessary to provide the same protection to persons or the environment as if there had been strict compliance with the provisions of this Code.

## 11-4 APPEALS

An applicant may appeal to the Board of Appeals any order, requirement, decision or determination that is made the Health Officer. Except for the filing of an appeal, which must be filed with the Health Officer as described below.

Each appeal shall be in writing and shall be filed with the Health Officer. Such appeal must specify the following: the order, requirement, decision or determination that is being appealed; the section(s) of this Code that apply to the appeal; and those facts on which the appellant will rely to support the appeal. An appeal that is incomplete is not ripe for decision by the Board of Appeals.

An appeal must be filed within sixty (60) days after the date of the decision that is being appealed. An untimely appeal shall be dismissed by the Board of Appeals. The appellant shall deposit a fee with the Health Officer when the appeal is filed. Fees for appeals shall be as established by the Board of Commissioners and the amount of the fee shall reflect the cost of processing the appeal, including legal or other professional services.

The Health Officer shall transmit to the Board of Appeals a summary report of all previous action taken and the entire file pertaining to the subject of the appeal.

The final disposition of such appeal shall be in writing, concurred in by three (3) or more members of the Board, and may reverse, modify, or affirm the decision or the determination made by the Health Officer.

## 11-6 STANDARD FOR DECISION

The decision of the Board of Appeals shall be the final administrative decision, shall be in writing, and shall include specific findings of fact by the Board of Appeals, and further, shall be subject to such judicial review as by law may be provided.

In deciding an appeal, the Board of Appeals shall determine the following:

- A. The Health Officer accurately determined the existing site conditions.
- B. The Health Officer properly interpreted and applied the requirements of the Code for the existing site conditions.
- C. The applicant has shown by competent, material and substantial evidence that the appeal should be granted.
- D. Variances granted as part of an appeals decision shall comply with Section 10-2 of the Variance section.

**Health Department of Northwest Michigan**  
**ENVIRONMENTAL HEALTH DIVISION**

TECHNICAL GUIDANCE MEMORANDUM TGM18-002  
DATE: NOVEMBER 21, 2018  
REVISED: MAY 16, 2022  
COUNTIES: ANTRIM, CHARLEVOIX, EMMET AND OTSEGO

## **GROUNDWATER MONITORING**

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### **Determining Maximum High Groundwater Using Monitoring Wells**

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#### **Discussion:**

The 2017 District Sanitary Code requires that, when determining the suitability of a site for wastewater disposal, that the Maximum High Groundwater Elevation (Section 2-31) be accurately determined and compared against approval criteria for sewage treatment and disposal systems (4-9, 4-10 and 4-11). Groundwater elevations may vary throughout the year and over time, due to a variety of climatic and/or hydrological factors and this can result in difficulty in accurately identifying the Maximum High Groundwater Elevation. This guidance document should be used when using groundwater monitoring points or wells to determine high groundwater conditions during the normally wet period of the year.

Based on evaluations of National Weather Service data and USGS groundwater data, it is accepted that the months of the year where groundwater is at its highest is generally between the months of October and June.

#### **Maximum High Groundwater Elevation (Section 2-31):**

"Maximum high groundwater elevation means the elevation of the upper surface of the zone of saturation as may occur during the normally wet periods of the year. The term includes perched and apparent conditions that are seasonally saturated for a time period in excess of two weeks. For the purpose of this Code, the high groundwater elevation will be determined by observing subsurface saturated conditions and/or groundwater indicators, such as soil mottling and redoximorphic features."

#### **Procedures:**

1. Groundwater monitoring shall occur through the wettest time periods of the year, October 1 through December 31 and March 1 through May 31. Any of the following persons shall provide monitoring data results to the department:
  - a. A licensed professional engineer
  - b. A professional surveyor
  - c. A registered sanitarian
  - d. A certified professional geologist
  - e. A certified professional soil scientist
  - f. A professional approved by the department
2. Monitoring shall continue over a period no less than eight consecutive weeks.
3. Proposed monitoring well locations, design and number shall be reviewed and approved by the department prior to installation.

4. The department shall have access to the site and monitoring wells during the monitoring period as a condition of approval. After approval, the monitoring wells shall be installed at the approved locations and depths. The department shall be notified of monitoring well installation within 48 hours of installation completion.
5. The designated person shall make observations on the first day of the monitoring period and at least once every seven (7) days thereafter until the monitoring period is complete.
6. The designated person shall provide the department with representative precipitation data and a summary of the compiled data for the time period one month prior to the first monitoring date and extending through the monitoring period. Results of high groundwater elevation monitoring are inconclusive if recorded precipitation totals are less than 90% of normal averages during the monitoring period.
7. The department may assess fees for the review of the monitoring well proposal and monitoring data.

**Authority:**

Section 12-6: INTERNAL POLICIES AND RULES

"The Health Officer may create internal policies or rules applicable to employees of the Health Department to assist in the implementation of this Code (District Sanitary Code) and promote fair, equal treatment of all citizens"

**Regulatory Reference and Supporting Documentation:**

2017 District Sanitary Code (Antrim, Charlevoix, Emmet and Otsego Counties)  
Proposed Michigan Criteria for On-Site Wastewater Treatment (proposed 01-29-13)