

PITKIN BOARD OF HEALTH
HEARING
Newcomb Community Center

July 5th, 2017 at 6:00 PM

Hearing to address an alleged OWTS violation at 724 State Street, Pitkin, Colorado, 81241. Complaint filed by Ramon Reed and Patrice Boyd.

Mayor Rachel New called the hearing to order at 6:00p.m.

Board of Health members Shawn Cleveland, Eddy Balch, Rachel New, and Brad Wick were present.

Notice - Clerk Sara Gibb reported that notice of the hearing was provided to the petitioners, respondents, and adjacent property owners via certified mail, return receipt requested, mailed no less than 20 days prior to the scheduled hearing.

Conflicts of interest –Board of Health Members Chris Nasso, Cory Nasso and Ralph Bush have voluntarily recused themselves following a request filed by Ramon Reed. They took seats in the gallery for the hearing.

Ex-Parte communications – Members of the Board of Health were polled regarding ex-parte communication. Rachel New, Shawn Cleveland, Eddy Balch and Brad Wick confirmed that no ex-parte communications took place.

Mayor Rachel new questioned Brad Wick regarding photos she received by email from Trustee Brad Wick. These same photos were included in Ramon Reed’s evidence packet. Brad Wick stated that he was asked by Phil Deutsch to take the photos and he does not know how the photos came into the possession of Ramon Reed.

Petitioner

Ramon Reed would like the Board to consider the following motions, which were prepared by his attorney:

1. The hearing protocol states that “witnesses need not swear an oath prior to testifying.” He would like all witnesses, the petitioners and respondents to swear an oath to provide truthful testimony.

Mayor Rachel New stated that in this hearing, the swearing of an oath will be required.

Attorney Jim McDonald swore in Ramon Reed, who promised to tell the truth subject to perjury.

2. Ramon Reed would like witnesses, excluding the parties, to be sequestered until the time of their testimony.

Respondent Jerra Garetson objected to this request because Mr. Reed did not provide a list of witnesses.

Mayor Rachel New stated that in this hearing, witnesses will be sequestered.

3. Ramon Reed would like recused officials to remove themselves from further participation in this hearing by leaving the gallery.

Attorney Jim McDonald stated that the voluntary choice to recuse oneself does not entail the need to ostracize oneself from the hearing. Furthermore, this could be detrimental in terms of preserving the recording of this hearing because Cory Nasso takes and maintains video recording of public meetings.

Mayor Rachel New stated that in this hearing, Mr. Reed's proposal is denied and the recused will be able to witness and/or view in the proceedings from the gallery.

Ramon Reed stated that his complaint was filed after a lawsuit against 724 State Street was discontinued by the Town of Pitkin. His complaint is only about the septic system. Short-term rentals are not part of his complaint. The OWTS ordinance refers to "change of use" of the septic system. This refers to the use of the septic, not the use of the house. He claims that the Town's ordinance uses "change of use" in the same way that Reg 43 uses "expanded use." Mr. Reed referenced his exhibit 12 (Gunnison County property record), which lists the number of bedrooms at 724 State Street as 3. This is the baseline. Furthermore, there is no record of the initial approval of the septic system. Exhibit 15 (waste disposal application to Gunnison County) is for a repair in 1989. This lists 4 bedrooms/8 persons. It also says the size of the tank is "1,000" and the absorption area as a thirty (30) linear foot trench. Exhibit 20 (pumping record from Schmalz in June 2016) estimates the tank size to be 1200 gallons. Mr. Reed believes that water was flowing into the tank as it was being pumped, so the estimate may not be indicative of how much the tank can hold. Mr. Reed states that in response to a November 18th letter from Mr. McDonald, Meg Parrish (State of Colorado) responded that regulations allow for up to 4 bedrooms on a 1250 tank. The capacity of the system is limited by the component with the smaller capacity (leach field, tank.) He believes this property has a septic system designed for 3 bedrooms/6 people.

Regarding expanded use, Mr. Reed stated that design capacity is a maximum, not an average. In Exhibit 24 (An email between William Chronistet and Cory Nasso), Mr. Reed points out that this email demonstrates that the home now has 5 bedrooms and can accommodate 14 people. He believes that this shows the intent of the rental – to accommodate large groups of up to 14 people.

Mr. Reed referred to Exhibit 25 (photos). Mr. Reed reports that he sat in his car on the street in front of his home and took these photos. He waited for all the people to come out of the house at 724 State Street and get in their ATVs. He took photos of them as they came out of the driveway. He believes that these people were all staying in the house. This is not one of the times when riders joined the renters from other properties. Based on his photos, he believes there were 11 people staying on the property.

Mr. Reed referred to Exhibit 26 (photos from Labor Day Weekend). Mr. Reed excluded individuals that appeared to come from outside 724 State Street. He believes he has photographed 15 people who stayed at 724 State Street.

Mr. Reed referred to Exhibit 10 (Pitkin's Ordinance 2015-4). Mr. Reed would like to point out that on pg. 2 a "change of use shall require a new permit and a licensed Colorado engineer's written approval. Also, pg. 6 states "any OWTS for which a change of use is contemplated within the Town of Pitkin, Colorado shall be supported by certification by a licensed Colorado engineer that the change of use can be supported by the existing OWTS." He believes that Cory's email demonstrates what was contemplated.

Questions from the Board of Health – no questions at this time.

Adjacent Property Owners – One individual present. He does not wish to make a statement

Respondents

Attorney Jim McDonald swore in Jerra and Jesse Garetson.

Mrs. Garetson stated that in their experience, all septic problems were known in the Town. If there had been a problem in the past, it should have been noted. She maintains that Mr. Reed is making this a short-term rental problem. There are 14 beds in the home because She and Jesse have 12 grandchildren who stay there with them when they visit.

In response to Mr. Reed's exhibit 25 (photos), Mrs. Garetson pointed out that her car is in the photos and that some of the riders were her grandchildren who she brought that day. She states that she, Jesse, and guests regularly come and go between 724 State and their home. She does not believe that Mr. Reed's photos demonstrate how many people were staying at 724 State Street.

Witnesses

Jesse Garetson called Chris Nasso as a witness. Attorney Jim McDonald swore in Chris Nasso.

Chris Nasso – The complaint period is June 13, 2016 – July 7, 2016 per the letter of complaint. Mr. Nasso reviewed lodging data and the maximum number of renters was 8 for two weeks. All other weeks were 7 or fewer. He has not witnessed ground water contamination or the septic system backing up into the house (either of which would determine a failure.)

Jesse Garetson called Gary Winget as a witness. Attorney Jim McDonald swore in Gary Winget.

Gary Winget – Mr. Winget is a septic inspector for the Town of Pitkin. He was onsite for the 2015 septic inspection. Gene Daniel and Mr. Winget inspected the system July 13, 2015. He recommended that the scum be treated and reported that the second compartment was "excellent." In his experience as an inspector, this system was working as it should. Board of Health member Eddy Balch questioned Gary Winget about the tank size listed on the inspection report. Mr. Winget stated that this was determined based on the type of openings on the tank and the space between them. In his experience, tank sizes jump from 1,000 to 1,500. In his opinion, the tank is larger than 1,000 gallons.

Jesse Garetson called Ralph Bush as a witness. Attorney Jim McDonald swore in Ralph Bush.

Ralph Bush – Mr. Bush has resided at 724 State Street from October 2016 to May 2017. He hosted events where there were up to 15 family members in the residence and there were no issues with the septic system backing up. A problem with the system was rectified within 48 hours. Board of Health member Brad Wick asked what was repaired. Mr. Bush stated that there was a breach at the site of a rubber boot. It was moved back into place.

Jesse Garetson states that he purchased 724 State Street as a 4 bedroom/2 bathroom home from the Trauernicht family. The Gunnison County waste disposal application (repair) dated 1989 states the home is 4 bedrooms. On 8/11/08, there was an inspection by James Sharpton. There was a lack of inspections from 2008 to 2015. The home was purchased in 2013 and Mr. Garetson was informed by Suzy Metzler in 2015 that it needed to be inspected. Mr. Winget and Mr. Gene Daniel inspected the system in 2015. On 6/15/2016, Schmalz Construction pumped and inspected the septic tank. The truck pumped 1150 gallons. The repair bill/statement indicated that 1,050 gallons was charged at the dump. Because of the overflow position, the top 8-10 inches of a tank are not used. Based on this, he maintains that the tank must be at least 1250 gallons.

In July of 2016, Mr. Garetson sampled the creek in two places (upstream from the Rupp bridge – eColi count of 17.3 and downstream at the center of the creek at the Ashford property – eColi count of 4.3). When Mr. Garetson picked up the samples, he was informed that every contributory to Blue Mesa has eColi.

Gold Hill Excavation repaired a disconnect in the overflow pipe on 4/23/17.

Mr. Garetson purchased and installed a flow meter, which counts every gallon of water that comes out of the well. Since 2015, the flow has reached 50% of what is maximum for an 8-gallon home. Board of Health member Brad Wick wondered if the size of the septic was discussed when the Garetsons purchased this property. Mr. Garetson stated that it was not, only that the home has 4 bedrooms.

Board of Health member Brad Wick wondered if Gold Hill Excavation took any photographs. The Garetsons are not aware if photographs were taken or not.

Rebuttal

Ramon Reed – Mr. Reed does not believe that flow meter records are informative or relevant. He points out that in the conference call former Mayor Pinkston asked specifically if a flow meter could be used to determine flows instead of using the 2 person/bedroom standard. Chuck Cousino (State of Colorado) replied that flow was determined by the 2 person/bedroom standard. Flow meters were used for commercial or multi-family situations. The standard of 2 persons/bedroom, 75 gal/person/day is established. Meg Parrish stated that “two person/bedroom is hardwired into the regulation to cover old systems with incomplete records.”

Mr. Reed believes that the Silver Plume rental records are meager. He asked that the Board of Health to again look at exhibit 25 (photos). The first two pictures were taken on the 13th and the rest on the 14th. There are 4 pickup trucks, three haulers, and multiple ATVs. He does not believe that all these vehicles

are there for the six people that were reported by the rental records. He states that no one got out of the white suburban that is parked in the photos. He again stated that the email from Cory shows the intent for expanded use. Exhibit 28 (Transcription of a portion of a work session that took place October 11, 2016. Mr. Reed believes a statement from Chris Nasso shows that he (Chris) can't control the number of renters within a rental property.

Mr. Reed believes that based on the evidence he has provided, the Board of Health should find that the OWTS at 724 State St. has a maximum capacity of 6 people. The Board of Health should find that the rental at 724 State St. has caused and is causing expanded use. He would like the Town to use the authority provided in Regulation 43 and stop what he believes is a clear violation. He would like the Town to issue a stop order on the septic system at 724 State Street. He referenced his Exhibit 5 (September 2015 filing made by Attorney Jim McDonald), which reads in part, "the operation of STR facilities without an engineer certification that existing ISDS can support the change in use or a specific plan for repairs or maintenance creates a risk of irreparable harm to the groundwater in the Town of Pitkin."

Rebuttal

Jesse and Jerra Garetson – Mr. Garetson would like the panel to consider June 13-July 7 as the issue. Many of Mr. Reed's comments are outside of that window. The State court system has already ruled that STRs are still a single-family dwelling and are not commercial, nor do they imply a change of use. Within paragraph seven, the reply to the letter sent by Suzy Metzler as Environmental Health Agent, it is stated that the Garetsons could be contacted for further discussion. There was no response.

A class-action lawsuit was filed against five STRs in Pitkin, yet 724 State Street is the only property targeted with an OWTS violation. This lawsuit was dropped. The suggestion that the Town planned to further pursue the matter in municipal court after hiring a judge is hearsay.

Response to Mr. Reed's exhibit 12 – there are several places in several documents where there are conflicts regarding number of bedrooms and size of tank. This is why the system was pumped in 2016, to attempt to determine the size of tank.

Response to Mr. Reed's Exhibit 14 – Mr. Garetson is unsure why "holding tank" is written across the top. This shows more discrepancies.

Response to Mr. Reed's Exhibit 19 – 1500 gallons is marked out, 1250 written in. Mr. Garetson is unsure why.

Response to Mr. Reed's exhibit 20 – Mr. Garetson sees no way that can the tank hold 1050 gallons with a void at the top and be a 1,000 gallon tank.

In response to the final paragraph in Mr. Reed's letter – if there were no leaks in the tank how could water be flowing in? It was pumped dry and it stayed dry. Furthermore, the exit is higher than the leach field.

Response to Mr. Reed's exhibits 23 and 24 – Cory was contacted under false pretense. The email writer never rented 724 State. What Cory emailed him stands. The advertisement was immediately changed to 8, however, following the council meeting about the 14.

Response to Mr. Reed's exhibit 25 – Number of pickups and trailers is easily explained. One came from 3rd and Main after a discussion of parking those vehicles on Main. The renters at 724 State were family/friends of the renters at 3rd and Main.

Response to Mr. Reed's exhibit 26 – The date is 9/2/16, after the time of Mr. Reed's complaint, so this should be disregarded.

Mr. Garetson stated that renters are gone from the premises all day and not using the septic. He further maintains that the final statement on pg. 11 of Mr. Reed's letter is untrue. No information can be found to support a change in the size of the leach field.

Response to Mr. Reed's exhibit 33 – This should be thrown out because the dates are outside the time of Mr. Reed's complaint.

Mrs. Garetson believes the photos from June 29th are irrelevant but she would still like to point out that the individuals are her family and that there were no more than 8 staying at 724 State. The remainder of the family group stayed at their home. Mrs. Garetson stated that she and Jesse have no desire to damage the town and if anything was ever wrong with their septic they would be the first to know and would rectify the situation.

Sequestered witnesses returned to the gallery at this time

Discussion amongst the Local Board of Health

Attorney Jim McDonald – Mr. McDonald pointed out that the civil standard of evidence is preponderance of the evidence, which means “more likely than not.” The petitioner must meet this burden. There are two questions before the Board, the first being whether there was an expanded use or change of use and the second being whether or not there was a fundamental violation of the design capacity.

The HOA case (Houston v. Wilson Mesa Ranch Homeowners Association) was referenced and while not necessarily on point, this case currently represents the only available precedent and brings expanded use or change of use into doubt. A quote from the case reads, “mere temporary or short-term use of a residence does not preclude that use from being ‘residential.’” This case stands for the proposition that a short-term rental use is a residential use.

There has been mixed evidence regarding the second question - whether there was a fundamental violation of the design capacity. Mr. Reed contends that the design capacity is meant to be a maximum and not an average. If Mr. Garetson's numbers flow meter are accurate, those numbers do not appear to exceed 450 gal/day assuming that the Board of Health makes the determination based on the smaller size of septic.

Board of Health member Eddy Balch believes that there is evidence for both a 3- and a 4-bedroom design. Information from an outside source, Schmalz, shows that at least 1,050 gallons were pumped. There is nothing in the note from Schmalz stating that water was flowing into the tank. An assumption must be made that either there was water flowing into the tank or that there was water flowing and Alvin (Schmalz employee) didn't notice water flowing into the tank or that there was no water flowing into the tank. If no water, the tank must be more than 1,000 gallons capacity. The State clearly talks about adding bedrooms, etc. to expand the use of the residence/building as expanded use. If it is determined that the capacity is 1,000 gallons then the records of the flow meter can be used to show that there hasn't been an exceedance of the capacity. Without exceedance of the capacity there has not been an expanded use violation.

Board of Health member Brad Wick stated that he initially believed that the house was built as a 3 bedroom house. Somewhere between May '78 and Sept '89 the records change from "holding tank" to "septic system." He would like to know what the absorption field is. There is no documentation. He wonders if there is an economical way to determine this.

Board of Health member Eddy Balch responded that inspecting a soil treatment area would destroy it and it would need to be replaced to 2017 standards.

Mayor Rachel New pointed out that the standard is 2 people/bedroom especially if the soil treatment area is unknown. The soil treatment area and tank size are not definitively known. Furthermore, the documentation for number of bedrooms is unclear. Also, if the Garetsons' and Mr. Nasso's records are correct, then the occupancy has been exceeded by 2 for a limited time.

Board of Health member Eddy Balch added that Mr. Reed has made the point that he has observed many people at 724 State Street. If you take 75 gallons, per person, per day and multiply it by 6 people, they are still very much within reason. Even if a flow meter under-registers by 10%, the numbers still are not beyond the capacity of a 6- or 8-person system. Board of Health member Brad Wick disagreed. He does not know if the flow rate is within the design capacity of the absorption field because there is no data other than the document which says it is 30 linear feet.

Board of Health member Eddy Balch wondered if what Board of Health member Brad Wick's point is that without knowing the soil treatment area, it can't be known if there was an exceedance of the capacity. Board of Health member Brad Wick confirmed.

Board of Health member Brad Wick believes that the evidence presented does not give a clear answer as to the number of bedrooms at 724 State Street.

Mayor Rachel New wondered if it was fair to say that the Board is not comfortable setting a maximum occupancy for this home based on information provided. The Board agreed.

Mayor Rachel New wondered if the difference of a 3-bedroom or a 4-bedroom is enough to warrant a violation of the septic's capacity.

Board of Health member Brad Wick wondered if the Board of Health could establish that the occupancy

is 6 people and give the Garetsons 20 days to find out something about their leach field. Also, can a fiber-optic camera be run along the length of the pipe? Board of Health member Eddy Balch stated that unless it is perfectly clean, nothing can be seen in a leach field pipe.

Mayor Rachel New wonders if it's appropriate for the Board to set that number based on what has been received. Also, she wonders if it would make a difference as to whether the system has been overused.

The Board of Health will respond to the following two questions:

On or around July 7, 2016 was there a violation of Regulation 43 or Ordinance 4, Series 2015 (an expanded use or change of use) at 724 State Street?

On or around July 7, 2016 was there a violation of the design capacity of the septic system at 724 State Street?

Motion made by Board of Health member Eddy Balch to take a vote as to whether there has been a violation at 724 State Street. Seconded by Board of Health member Shawn Cleveland.

Was there a violation of Regulation 43 or Ordinance 4, series 2015 (OWTS Ordinance)?

Brad Wick – yes

Rachel New – No

Eddy Balch – No

Shawn Cleveland – No

Was the system used in excess of its design capacity on or around July 7th, 2016?

Shawn Cleveland – No

Eddy Balch – No

Rachel New – No

Brad Wick – Yes

The Board of Health voted that on or about July 7, 2016, neither was there expanded use/change of use nor was there use in excess of the design capacity of the OWTS at 724 State Street.

Attorney Jim McDonald stated that the Garetsons, Patrice Boyd, and Ramon Reed did a tremendous amount of work.

At some point in the future, there should be a work session to debrief after the hearing and determine how procedures can be improved in the future.

Hearing adjourned at 9:17 p.m.