BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

STATE OF IDAHO

IN THE MATTER OF SUNNYSIDE PARK UTILITIES' APPLICATION FOR SEWAGE DISPOSAL PERMIT	Docket No. 0103-07-02
SUNNYSIDE PARK UTILITIES, INC., Petitioner, v. IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.	FINAL ORDER ON PETITION FOR REVIEW OF PRELIMINARY ORDER

I. INTRODUCTION

On February 20, 2007, Sunnyside Park Utilities, Inc., ("Sunnyside") filed a Petition to Initiate a Contested Case challenging the Idaho Department of Environmental Quality's ("DEQ") denial of Sunnyside's application for a permit to expand its individual subsurface sewage system. On July 8, 2008, the hearing officer issued *Findings of Fact, Conclusions of Law, and Preliminary Order On Motions For Summary Judgment and Other Pending Motions* ("Preliminary Order") upholding the denial of Sunnyside's permit application. On August 26, 2008, the Idaho Board of Environmental Quality ("Board") granted Sunnyside's Petition for

Review of the Preliminary Order. On February 11, 2009, the Board, after fully considering the record and the oral and written arguments of the parties, unanimously voted to (1) reject the Preliminary Order of the hearing officer; (2) deny the motions for summary judgment of both parties; (3) vacate the denial of the permit application by DEQ; (4) require DEQ to allow the applicant to amend its application to provide all information relevant to its application; and (5) require DEQ to articulate its reasons for granting or denying the amended application.

II. STANDARD OF REVIEW

When reviewing a Preliminary Order, the Board has the authority to "exercise all of the decision-making power that he [the Board] would have had if the agency head [the Board] had presided over the hearing." Idaho Code § 67-5245(7). This means that, in reviewing the Preliminary Order, the Board may review all of the evidence *de novo* and does so here.

III. FINDINGS OF FACT

DEQ's Individual/Subsurface Sewage Disposal Rules ("Rules"), IDAPA 58.01.03.005. *et seq.*, require an installation permit prior to modifying or constructing an individual/subsurface sewage disposal system. In implementing its Individual/Subsurface Sewage Disposal Program, DEQ has partnered with the local health districts to review permit applications for individual septic systems through a Memorandum of Understanding pursuant to Idaho Code §§ 39-414 and 39-101 through 39-130.

More specifically, the Rules provide that the Director of DEQ may deny a permit application for an onsite system if:

a. The application is incomplete, inaccurate, or misleading;

b. The system as proposed is not in compliance with applicable rules and regulations;

c. The system as proposed would, when put into use, be considered a failing system;

d. The design and description of a public system was not made by a professional engineer;

e. Public or central wastewater treatment facilities are reasonably accessible.

On January 4, 1996, Sunnyside met with the District 7 Health District ("Health District") to discuss the installation and operation of an individual subsurface sewage system for the proposed Sunnyside Industrial & Professional Park Subdivision ("subdivision").[1] In a subsequent letter summarizing the discussion, DEQ stated:

> As discussed, the proposed development is not currently served by the City of Idaho Falls municipal sewer system. However, there is an existing 12-inch sanitary sewer serving the adjacent property. The use of individual onsite wastewater disposal systems in a high density development may lead to local groundwater quality degradation. Therefore, DEQ strongly supports a hookup to the municipal sewer system as the most feasible alternative for wastewater and disposal.

On June 10, 1996, Idaho Falls provided written notice to Sunnyside that municipal water and sewer services would not be made available to the subdivision unless the property was properly annexed. This letter was consistent with Idaho Falls' unwritten policy requiring voluntary annexation of properties located outside the boundaries of the city as a condition for delivery of municipal water and sewer services. A July 31, 1996 response letter from Sunnyside to the Mayor of Idaho Falls stated that, although the developer was willing for the property to be annexed, he had concluded that the rate and fee structure for annexation would render the development of the subdivision financially infeasible.

[1] Sunnyside Park Utilities, Inc., which serves the subdivision with water and sewer services, was created on March 29, 2002 by the owners of Sunnyside Industrial and Professional Park, LLC.

On August 15, 1996, Sunnyside submitted an application to the Health District for a permit to install and operate an individual subsurface sewage system. That same day, the Health District issued a permit allowing Sunnyside to install and operate a septic tank that could receive a minimum of 750 gallons of waste at a rate of 300 gallons per day. The Health District's approval letter stated that acceptable methods of wastewater treatment and disposal at the subdivision included connecting to Idaho Falls' sewer system or the installation and operation of a permitted onsite septic system. A subsequent inspection report documented that Sunnyside had installed a septic tank with a capacity of 1000 gallons.

On December 10, 1996, acting upon a request regarding the estimated fees that would be imposed for annexation, Idaho Falls provided the following information to Sunnyside:

> As per your request, a review was conducted on the proposed development of Sunnyside Industrial Park. Estimated fees for annexation of the total parcel to the City, based upon the information available, are as follows:
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> | | | |
> |---|---|---|
> | Platting and Inspection Fees | $ 28,525.00 | |
> | Less reimbursement | $ 18,153.00 | |
> | Net Platting & Inspection Fees | | $ 10,372.00 |
> | Road & Bridge Fees | | $ 134,465.00 |
> | Surface Drainage Fees | | $ 16,264.00 |
> | Water & Sewer Front Foot Fees | | $ 8,435.00 |
> | **Total Estimated Fees** | | **$ 169,536.00** |
>
> These amounts could change depending upon the manner in which the property develops.

In 1997, as required by Idaho Code § 50-1326, Sunnyside submitted a subdivision application to the Health District for 70.76 total acres, and 27 lots at 1¾ acre per lot which was approved on November 5, 1997. The application indicated that the subdivision would be

served by a central sewer system,[2] rather than a central or private septic system. A subsequent application was submitted for 77.5 acres and 28 lots, at 1.5 acre per lot and approved by the Health District on July 30, 1999. This application indicated that the subdivision would be served by a central septic system.

In 2002, Sunnyside and the Health District met to discuss Sunnyside's interest in expanding its septic system because the system was reaching capacities of 300 to 400 gallons per day. In a follow up letter summarizing the issues addressed at the meeting, the Health District stated, in relevant part:

> 3. During the March 29, 2002 meeting, three options for solving the issues concerning sewage disposal for this development was presented.
>
> a. Connect to an approved municipal sewer system.
>
> b. Install a Large Soil Absorption System that is constructed to handle the wastewater flow from all lots within the subdivision and meets all the IDAPA 58.01.03 requirements for Large Soil Absorption System.
>
> c. Re-plat the subdivision to allow an individual septic system on each lot.
>
> 4. During the March 29th meeting, it was agreed that Benton Engineering would provide D7HD with a conceptual plan for a Large Soil Absorption System. . . .
>
> 5. The users of the current septic system will be allowed to continue using the system until the Large Soil Absorption System (LSAS) is ready for use, at which time the sewer collection system will be connected to the LSAS.
>
> 6. No new connections will be allowed on the current sewer collection system until a Large Soil Absorption System, that replaces the current

[2] A "central system" is "any system which receives blackwaste or wastewater in volumes exceeding twenty-five hundred (2500) gallons per day; any system which receives blackwaste or wastewater from more than two (2) dwelling units or more than two (2) buildings under separate ownership." IDAPA 58.01.03.003.08. A "centralized" wastewater treatment system refers to municipal wastewater treatment plants used for cities and towns, whereas a "central septic system" is considered a decentralized system where wastewater is treated on-site or off-site and is generally applicable for subdivisions, resorts, and schools not connected to municipal systems. *See* http://www.deq.idaho.gov/water/prog_issues/waste_water/wastewater_graphic.pdf.

septic system, is approved and operating.

The letter also stated that, in the Health District's opinion, when the subdivision site was platted in 1996, the intent was to have a central sewer system.

On June 9, 2006, Sunnyside reported to the Health District that the subdivision's sewage disposal system had failed. Interim sanitary measures were identified. However, a June 28, 2006 onsite inspection revealed that the overflow was not being safely contained and treated as required by IDAPA 58.01.03.004.01.[3] As a consequence, the Health District notified Sunnyside that it must properly contain and treat the sewage and submit a timeline for developing a permanent solution by July 7, 2006. The letter also stated that only two options for increasing the capacity of the subdivision's wastewater treatment facilities were available. Sunnyside could "either connect to Idaho Falls' municipal system through annexation or install a LSAS that meets the flow needs of the property."

On June 29, 2006, Sunnyside submitted an application to the Health District requesting a permit to install a replacement system that would accommodate the demands for wastewater treatment within the subdivision. That same day, the Health District issued a permit allowing for the installation of an additional 1000 gallon septic tank because, as noted in the inspection report, the existing tank was significantly undersized for the subdivision's requirements. The permit stated: "System temporary & must be abandoned when permanent system approved & completed (installed)."

In a letter dated August 3, 2006, Idaho Falls provided information to Sunnyside regarding the cost of annexation. The letter stated:

> This correspondence is in response to your request for information regarding annexation. I emphasize that the information I am providing is approximate and

[3] IDAPA 58.01.03.004.01 sets forth the intent of the Rules which is to "insure that blackwastes and wastewater generated in the state of Idaho are safely contained and treated."

actual costs depend upon a number of options as well as detailed information you would need to provide to the City. . . .

To approximate the cost of annexation, I suggest using the following information:

- Arterial Street and Bridge Fee $2500 per acre (less public street rights-of-way).
- Surface Drainage Fee $.0075 per square foot.
- Sanitary Sewer Service Connect Fee $600 per connection.
- Culinary Water Service Connection Fee:

1 inch	$	620
1-1/2 inch	$	1240
2 inch	$	2480
4 inch	$	9920
6 inch	$	22,320
8 inch	$	39,680

Based upon the size of the subdivision, Sunnyside estimated that the specific fees and costs set forth in the letter would exceed $446,000.[4] This estimate did not include costs for other requirements of annexation.

In a September 8, 2006 letter, the Health District asked Idaho Falls whether it had the capacity and willingness to provide wastewater treatment services for the subdivision. In response, DEQ was advised that the city had the capacity and willingness to provide wastewater disposal service to the subdivision, subject to the condition that the property be annexed. On September 14, 2006, Idaho Falls notified Sunnyside as follows: "Your proposal that the City waive all hook-up and annexation fees was presented to the Public Works Committee; it was determined that waiving the fees would not be an option."

On September 21, 2006, the Health District issued to Sunnyside a "Notice of Intent to Reimpose Sanitary Restrictions" on the subdivision plat because "to date, no permanent

[4] DEQ contests the accuracy of these and other cost estimates submitted by Sunnyside. In light of the disposition of this case, it is not necessary to describe all of the cost estimates submitted by Sunnyside in this proceeding or make findings as to the actual costs of annexation or an expanded septic system.

correction has taken place" for the failure of the system on June 9, 2006. *See* Idaho Code § 50-1326. Pursuant to Idaho Code § 67-5270, this action was appealed by Sunnyside and declared null and void by the district court on the ground that only DEQ, not the Health District, was authorized to issue certificates of disapproval and reimpose sanitary restrictions. The case was remanded to the Health District for action consistent with the court's decision.[5]

On December 5, 2006, Sunnyside submitted an application to the Health District for a permit authorizing the expansion of its septic system to a capacity of 2499 gallons. On January 16, 2007, DEQ denied Sunnyside's application to enlarge its system. The denial of the permit rested solely on the basis that Idaho Falls' wastewater treatment facilities were reasonably accessible to Sunnyside's wastewater collection system. The letter stated:

> The reason for denial of the permit application is based on public wastewater treatment facilities, City of Idaho Falls' wastewater collection and treatment system, being reasonably accessible to Sunnyside Utilities' wastewater collection system in accordance with IDAPA 58.02.03.005.05.

Sunnyside filed a petition for a contested case on February 20, 2007. During the proceedings, Sunnyside submitted additional estimates regarding the cost of annexation. Sunnyside contends that the costs of annexation could be in excess of $2,700,000 as compared to its estimation that expanding the existing system to 2,499 gallons per day will cost approximately $2700.

A hearing on the parties' motions for summary judgment was held on August 21, 2008. At the conclusion of the proceedings, the hearing officer issued a Preliminary Order upholding the denial of the December 5, 2006 permit application.[6] The Preliminary Order rejected Sunnyside's argument that DEQ was required to consider the cost of connecting to Idaho Falls'

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[5] *See Sunnyside Industrial & Professional Park, LLC and Sunnyside Park Utilities, Inc. v. Eastern Idaho Public Health District*, Memorandum Decision and Order, CV-07-1123 (September 24, 2007).

[6] The hearing officer also denied DEQ's motions to strike documents Sunnyside sought to submit in support of its motion for summary judgment.

central wastewater system in making its reasonably accessible determination pursuant to IDAPA 58.02.03.005.05(e). The hearing officer also rejected the alternative argument that, because Sunnyside relied upon the December 5, 1996 and the June 26, 2006 permit approvals in the development of the subdivision, DEQ should be estopped from denying the December 5, 2006 application.

In its Petition for Review, Sunnyside asks the Board to:

1. Make findings of fact concerning the estimated cost to expand Sunnyside's septic system.

2. Conclude that Idaho Falls' central wastewater system is not reasonably accessible to the subdivision because the cost of annexation makes connection to the system financially infeasible and is significantly more expensive than expanding Sunnyside's existing septic system.

3. In the alternative, if the Board determines that Idaho Falls' system is reasonably accessible, DEQ should be estopped from denying the permit application because Sunnyside developed a business plan in reliance on prior permit approvals.

4. Order that Sunnyside's permit application be approved.

In response, DEQ asks the Board to:

1. Conclude that the estimated cost to Sunnyside of an expanded septic tank is irrelevant because there is no rule, statute, or law requiring DEQ to consider the cost of septic system expansion when evaluating whether a subdivision is reasonably accessible to a superior wastewater system.

2. Conclude that the City of Idaho Falls' central wastewater system is reasonably accessible to the subdivision pursuant to IDAPA 58.02.03.005.05(e) and Idaho case law, because there is a trunk line in the subdivision and Idaho Falls will provide services.

3. Conclude that DEQ cannot be estopped from denying Sunnyside's permit application.

4. Uphold DEQ's decision to deny Sunnyside's permit application.

IV. ANALYSIS

Under the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 *et seq.*, ("APA"), the Board must determine whether DEQ has acted reasonably and in accordance with law. *See* Idaho Code §§ 67-5248(a) and 67-5279. These requirements provide parties subject to regulation with a reasoned explanation for agency action and furnish a basis for effective administrative and judicial review. For the reasons set forth below, the Board concludes that the record before us is inadequate to determine whether DEQ acted reasonably and in accordance with law in denying Sunnyside's permit application.

IDAPA 58.01.03.005 allows the Director to deny a permit application for an individual subsurface sewage system on a number of grounds. DEQ can refuse to issue a permit where the application is incomplete, inaccurate, or misleading and where the proposed system does not comply with the applicable rules and regulations. IDAPA 58.01.03.005(a) and (b). A permit application also may be rejected if the proposed system would be considered a failing system or the system has not been designed by a professional engineer. IDAPA 58.01.03.005(c) and (d). Finally, a permit may also be rejected where DEQ determines that a municipal wastewater system is reasonably accessible to the subdivision, as DEQ determined here, without explaining why it reached that conclusion. IDAPA 58.02.03.005.05(e).

The January 16, 2007 permit denial does not explain or set forth the factors taken into account in DEQ's review of the application and DEQ did not submit evidence showing the specific facts and concerns addressed in the course of evaluating Sunnyside's application. It is unclear whether physical proximity and Idaho Falls' willingness to provide services were the primary criteria used to determine reasonable accessibility. DEQ also points to evidence in the record from which a reasonable inference could be made that the agency was concerned about

specific environmental issues surrounding the expansion of Sunnyside's septic system. If the permit denial was actually based on concerns that the proposed expanded system would be a failing system pursuant to IDAPA 58.01.03.005(c), this is not explained or set forth in the letter denying the application and again, no evidence was introduced to show that these factors were actually considered by DEQ in the decision-making process.

Under the APA, specificity in the findings and reasonings of a lower tribunal (the Board) is vital. *Mercy Medical Center v. Ada County Comm'n*, 146 Idaho 226, 232, 192 P.3d 1050, 1056 (2008). What is essential are sufficient findings to permit a reviewing court to determine that the tribunal acted non-arbitrarily. *Hayden Pines Water Co. v. Public Util. Comm'n* (111 Idaho 331, 336, 723 P.2d 875, 880 (1986) (citing *Boise Water Corp. v. Idaho Public Util. Comm'n*, 97 Idaho 832, 840, 555 P.2d 163, 171 (1986)). Not only must the Board make and enter proper findings of fact, the Board must set forth its reasoning in a rational manner. *Washington Water Power v. Idaho Public Util. Comm'n*, 101 Idaho 567, 575, 617 P.2d 1242, 1250 (1980).

If the Board cannot discern from the record information about the facts, circumstances, and policies considered in the permit review process, it is likely that a reviewing court would have the same difficulty. We are unable to determine whether DEQ considered cost in its deliberations, and if not, for what reasons. We are unable to discern whether concerns about past system failures or soil composition entered into the decision to deny the permit. Simply put, we are unable to tell exactly what criteria DEQ chose to apply in determining whether Idaho Falls' central wastewater system was reasonably accessible to the subdivision. Since we cannot determine that DEQ's reasoning and conclusion were rational, the permit denial must be set aside.

Setting aside the permit denial will allow DEQ to process the application again, or to process an amended application should Sunnyside decide to submit one, and in so doing identify the facts and circumstances that should be considered, apply its expertise to the facts and issues, and provide an adequate explanation for its decision.

DEQ argues that its decision was defensible because there is no statute, rule, or policy requiring consideration of cost when making a reasonably accessible determination and because the agency has broad discretion when it is acting in the interest of the public health and welfare. We agree that granting or denying a permit application under the Rules is entirely within DEQ's discretion and that the absence of legislative or policy guidance makes this exercise of discretion challenging. It is important, however, that permit applicants understand the factors DEQ considered in reaching a determination of reasonable accessibility. Moreover, an appellate court reviewing agency actions under the APA for abuse of discretion must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason. *Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 54, 137 P.3d 438, 441 (Idaho 2006) (although within State Board of Medicine's discretion to assess attorney fees, the Board must demonstrate how an award related to the specific discipline imposed). Vacating the permit denial allows DEQ to exercise its discretion in reviewing Sunnyside's permit application and document the rationale for its decision.

Sunnyside argues that DEQ must consider cost, proximity, the terms and feasibility of connection to public wastewater facilities, and any and all factors which affect whether or not connection is reasonable and accessible. In support of this argument, Sunnyside points to an

internal agency memorandum dated April 12, 2005, stating that DEQ "uses 7 factors that the Director may consider in determining reasonable access to public or central wastewater facilities." A number of factors are set forth in the memorandum, including "whether the cost to construct the offsite sewer line to the development property line, less any late-comers reimbursement, is less than two-hundred percent of the estimated costs of installing permittable subsurface sewage disposal systems." On the basis of the internal memorandum and other permit approvals issued in the past few years in which the cost of connection was discussed, Sunnyside contends that DEQ is required generally to consider the cost of connection to a central system, and in this particular case, cost is clearly a significant factor that should have been addressed.

To counter Sunnyside's argument, DEQ submitted affidavits from DEQ personnel, stating that "the discretionary use of the factors listed an internal email dated April 12, 2005 is not official department policy and was not official department policy in January 2007." DEQ also asserts that the agency is not bound by the doctrine of *stare decisis* and is not required to decide all cases in the same way they have been decided in the past. *See McNeal v. Idaho Public Util. Comm'n,* 142 Idaho 685, 690, 132 P.3d 442, 447 (2006); *Rosebud Enterprises v. Idaho Public Util. Comm'n*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996); *Intermountain Gas Co. v. Idaho Public Utilities Comm'n*, 97 Idaho 113, 540 P.2d 775 (1975).

We agree, that, as a regulatory agency, DEQ must be free to take such steps as may be proper in specific circumstances, irrespective of its past decisions. This is because administrative understanding or conditions may change, and the agency must be free to exercise its discretion in carrying out its statutory responsibilities. *Washington Water Power v. Idaho Public Utility Comm'n.*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980).

We note as well that, although administrative agencies have wide discretion in exercising their responsibilities, they must also adequately explain their actions and the need for an adequate explanation is enhanced when there is a change in agency policy.[7] Where an agency departs from prior rulings, the courts will consider whether the agency has adequately explained the departure so that a reviewing court can determine that the decisions are not arbitrary and capricious. *Rosebud at* 618, 917 P.2d at 775; *Intermountain Gas Co.* at 119, 540 P.2d at 781. Change in policy or not, we conclude that DEQ should have articulated the policy, facts, and circumstances underlying its decision to deny the December 5, 2006 permit on the ground that Idaho Falls' central wastewater system was reasonably accessible to the subdivision pursuant to IDAPA 58.02.03.005.05.

Finally, we turn to Sunnyside's alternative argument that DEQ should be estopped from denying the permit application on the basis of reasonable accessibility. Sunnyside contends that the 1996 permit was based in part on DEQ's determination that Idaho Falls' sewer system was not reasonably accessible, it relied upon the 1996 and 2002 permit approvals in developing a business plan for the subdivision, and thus, it would be unfair for DEQ to deny the December 5, 2006 permit application. For the following reasons, the Board concludes that neither equitable estoppel nor quasi-estoppel applies. First, the general rule is that estoppel may not generally be invoked against a government or public agency functioning in a sovereign or governmental capacity. *See Christensen v. City of Pocatello*, 142 Idaho 132, 139-140, 124 P.3d 1009, 1015-1016 (2005); *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003) (equitable estoppel may not be invoked against IDWR when acting in its

[7] We reach no conclusion as to whether the memorandums or permit approvals represented official or unofficial policy and note as well that the agency has considerable discretion to reach a determination on the unique facts and circumstances relevant to each permit application.

regulatory capacity). Moreover, the facts in this case do not support a finding of estoppel under either theory.

The elements of equitable estoppel are:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth, (2) the party asserting estoppel did not know or could not discover the truth, (3) the false representation or concealment was made with the intent that it be relied upon, and (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his [or her] prejudice.

Regjovich v. First Western Invest., 134 Idaho 154, 158, 997 P.2d 615, 619 (2000). One of the elements of equitable estoppel is a false representation or concealment of a material fact with actual or constructive knowledge of the truth. The 1996 permit approval did not make a determination on reasonable accessibility nor did it indicate in any way that DEQ would approve the future expansion of Sunnyside's system beyond the permit conditions. The 1996 permit approval was based upon the site conditions when the permit was issued. Further, there is nothing in the record demonstrating that DEQ falsely represented or concealed material facts regarding the permit. To the contrary, DEQ explicitly advised Sunnyside of its concern that the use of individual wastewater disposal systems in high density developments could lead to local ground water quality degradation. The doctrine of equitable estoppel would not bar DEQ from denying the 2005 permit application on these facts.

"Quasi-estoppel prevents a party from successfully asserting a position inconsistent with a previously-taken position, with knowledge of the facts and of its rights, to the detriment of the person seeking to invoke it." *Birdwood Subdivision Homeowners Assoc., Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007). For quasi-estoppel to apply, however, it must be unconscionable to allow the party estopped to maintain an inconsistent position. Unconscionability must be shown in addition to the change of position; a change in

position itself does not establish unconscionability. *Id.*

Sunnyside argues that it is unconscionable to deny the December 2006 application to expand its septic system because, had it known that DEQ would not allow expansion of the system to 2,499 gallons per day, Sunnyside would not have constructed the subdivision if too costly, or would have applied city building standards in anticipation of future annexation.

Sunnyside's argument is not persuasive. First, prior to the 1996 permit approval, Sunnyside had been advised of the Health District's concerns about the use of individual onsite wastewater disposal systems in high density developments and that the Health District "strongly" supported connecting to the municipal sewer system as the most feasible alternative for wastewater and disposal. Moreover, there is nothing in the 1996 permit approval indicating that the Health District would approve future applications to expand Sunnyside's septic system. Thus, Sunnyside was not induced to develop a business plan dependent on the future expansion and permitting of an individual septic system.

Second, in 2002, the Health District expressly advised Sunnyside that only three options were available for addressing the issues concerning sewage disposal for the subdivision. Sunnyside could connect to the municipal system, install a LSAS, or re-plat the subdivision to allow for individual septic systems on each lot. It was only because of immediate public health concerns that a temporary permit approving expansion of the system was issued in 2002. Therefore, even if the doctrine of quasi-estoppel were available, we conclude that there is no basis for its application under these circumstances.

V. CONCLUSION

In consideration of the foregoing, it is hereby ordered:

(1) The Preliminary Order of the hearing officer is vacated;

(2) Sunnyside's and DEQ's motions for summary judgment are denied;

(3) DEQ's January 16, 2007 denial of Sunnyside's December 5, 2006 application to expand the subdivision's septic sewer system is vacated;

(4) As of the date of this Order, Sunnyside's December 5, 2006 application is considered submitted to DEQ for review and shall be acted upon within a timely manner or as otherwise agreed to by DEQ and Sunnyside. If Sunnyside intends to submit an amended application, Sunnyside shall provide written notification to DEQ of the same within fourteen (14) days of this order and as of the date of notification, the December 5, 2006 application shall be deemed withdrawn;

(5) Sunnyside may submit all information it considers relevant in an amended application and upon receipt of an amended application, DEQ shall conduct a timely review;

(6) DEQ may consider all information it deems relevant in acting upon the December 5, 2006 application or an amended application and shall articulate all factors considered and the specific reasons for granting or denying the application.

This is a final order of the Board. Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which (i) a hearing was held; (ii) the final agency action was taken; (iii) the party seeking review of the order resides, or operates its principal place of business in Idaho; or (iv) the real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of the service date of this final order. *See* Idaho Code § 67-5273 and IDAPA 58.01.23.791.02. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED THIS 7th day of April 2009.

IDAHO BOARD OF ENVIRONMENTAL QUALITY

Craig D. Tibbs

Nick Purdy

Kermit V. Kiebert

Dr. Joan Cloonan

Donald J. Chisholm

Dr. J. Randy MacMillan

Carolyn S. Masteralexis

DATED THIS 7th day of April 2009.

IDAHO BOARD OF ENVIRONMENTAL QUALITY

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DATED THIS 17th day of April 2009.

IDAHO BOARD OF ENVIRONMENTAL QUALITY

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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

IN THE MATTER OF SUNNYSIDE PARK UTILITIES' APPLICATION FOR SEWAGE DISPOSAL PERMIT	Docket No. 0103-07-02
SUNNYSIDE PARK UTILITIES, INC., Petitioner, v. IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.	CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2009, a true and correct copy of **Final Order on Petition for Review of Preliminary Order** was served on the following:

Mark R Fuller
Fuller & Carr
PO Box 50935
Idaho Falls ID 83405-0935
FACSIMILE TO (208)524-7167

Susan E Hamlin
Courtney E Beebe
Office of the Attorney General
Department of Environmental Quality
1410 N Hilton
Boise ID 83706-1255
HAND-DELIVERY

Paula J. Wilson
Hearing Coordinator
Department of Environmental Quality
1410 N Hilton
Boise ID 83706-1255
(208)373-0418/Fax No. (208)373-0481