

FILE UNDER AB 2020-116
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SUBMITTED BY: Ben Elenbaas
(Councilmember)
 COUNCIL MEETING
 Health Board (Special mtg.)
EXHIBIT: _____

To: Executive Sidhu, County Health Board Members, Health Officer Greg Stern M.D.

From: Councilmember Elenbaas

Date: 3/12/2020

RE: Board of Health roles and responsibilities as it relates to COVID 19 Emergency Declaration and Response

It is important to recognize that we are embarking on ground not often traveled. I think the chair said it best in yesterdays meeting when he stated, "this is not a drill." We are about to ask our citizens to do things that can feel very uncomfortable and far outside of what their local officials have ever asked them to do. It is for this reason that we take a deeper look at our structure and purpose as the "Board of Health" and the roll we must play in this operation.

Last week the Governors office sent out a slide packet and we were given training on roles and responsibilities, specifically in regards to Non-pharmaceutical interventions, with our guiding light being RCW 70.05.

As we are all aware, we are a home rule charter county. This is addressed in RCW 70.05.035 which states in part, "In Counties with a home rule charter the County legislative authority shall establish a local board of health and may prescribe the membership and selection process for the board" which we have done in Chapter 24 of our county code

" 24.01.020 Establishment.

Under authority of the Whatcom County Home Rule Charter Section 2.20(c), RCW Chapter 70.05, and other applicable state statutes, there is created a health department (hereafter referred to as the "department"), an executive department.

24.01.050 Creation of health board.

The Whatcom County council shall constitute the official county health board, in accordance with RCW 70.05.035. Items for health board consideration shall be referred to the county council, unless required by law. (Ord. 2004-004; Ord. 99-025; Ord. 95-055; Ord. 93-024; Ord. 91-040 (part); Ord. 90-10 Exh. A (part); Ord. 89-24 (part))."

RCW 70.05.035 continues, "the county legislative authority may appoint to the board of health elected officials from cities and towns and persons other than elected officials as members so long as persons other than elected officials do not constitute a majority." It is my opinion that the intent of this section of the RCW is very important to consider in just such occasion as we

find ourselves in right now. This importance, in my opinion, is due to the significant responsibility and duty that is put on the local board of health, the administrative officer or County Executive and the Local Health Officer. These duties are further defined in RCW 70.05.060 and RCW 70.05.070 as well as WCC 24.01. In our training we received from the Governors office a court case was used as an example of how the powers of the local health board and health officer are special and can go “above and beyond” the duties as elected officials. This court case is Spokane Board of Health v. Brockett, in this case the judge found, “Because protecting and preserving the health of its citizens from disease is an important governmental function, public health statutes and the actions of local health boards implementing those statutes are liberally construed. Snohomish Cy. Builders Ass'n v. Snohomish Health Dist., 8 Wn. App. 589, 595, 508 P.2d 617 (1973); see also Brown v. County of Pierce, 28 Wash. 345, 349, 350, 352, 68 P. 872 (1902); State ex rel. McBride v. Superior Court, 103 Wash. 409, 419-20, 174 P. 973 (1918). The legislatively delegated power to cities and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context. McBride, 103 Wash. at 420.”

“unreasonable in another context,” let that sink in for a second.

It is my presumption the mandate in the law for the majority of Health Board members to be elected officials is to maintain some form of accountability to the public in instances where “extraordinary power” must be implemented. While I believe our Health Officer is empowered to take actions by himself. I feel that the intent of the law is for him to work in a coordinated effort with the Board of Health and would be wise to do such at this unprecedented time. Again, as mentioned we are asking people to do things they have never been asked to do by their local and state governments. I believe the most effective way to do this, is to present in a coordinated fashion, in accordance with the law.

Our County code states in 24.01.060 Powers and duties of health board.

“The county council in its capacity as health board shall have the following legislative powers, in accordance with RCW 70.05.060, and other legislative duties that may be established by state or county law:”

RCW 70.05.060 goes on to define,

Powers and duties of local board of health.

Each local board of health ***shall*** have supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction and ***shall***:

- (1) Enforce through the local health officer or the administrative officer appointed under RCW 70.05.040, if any, the public health statutes of the state and rules promulgated by the state board of health and the secretary of health;
- (2) Supervise the maintenance of all health and sanitary measures for the protection of the public health within its jurisdiction;
- (3) Enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof;
- (4) Provide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department;
- (5) Provide for the prevention, control and abatement of nuisances detrimental to the public health;
- (6) Make such reports to the state board of health through the local health officer or the administrative officer as the state board of health may require; and
- (7) Establish fee schedules for issuing or renewing licenses or permits or for such other services as are authorized by the law and the rules of the state board of health: PROVIDED, That such fees for services shall not exceed the actual cost of providing any such services.

This conversation is not complete without looking at,

RCW 70.05.070 Local health officer—Powers and duties.

The local health officer, **acting under the direction of the local board of health or under direction of the administrative officer** appointed under RCW 70.05.040 or 70.05.035, if any, shall:

- (1) Enforce the public health statutes of the state, rules of the state board of health and the secretary of health, and all local health rules, regulations and

ordinances within his or her jurisdiction including imposition of penalties authorized under RCW 70.119A.030 and 70.118.130, the confidentiality provisions in RCW 70.02.220 and rules adopted to implement those provisions, and filing of actions authorized by RCW 43.70.190;

(2) Take such action as is necessary to maintain health and sanitation supervision over the territory within his or her jurisdiction;

(3) Control and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction;

(4) Inform the public as to the causes, nature, and prevention of disease and disability and the preservation, promotion and improvement of health within his or her jurisdiction;

(5) Prevent, control or abate nuisances which are detrimental to the public health;

(6) Attend all conferences called by the secretary of health or his or her authorized representative;

(7) Collect such fees as are established by the state board of health or the local board of health for the issuance or renewal of licenses or permits or such other fees as may be authorized by law or by the rules of the state board of health;

(8) Inspect, as necessary, expansion or modification of existing public water systems, and the construction of new public water systems, to assure that the expansion, modification, or construction conforms to system design and plans;

(9) Take such measures as he or she deems necessary in order to promote the public health, to participate in the establishment of health educational or training activities, and to authorize the attendance of employees of the local health department or individuals engaged in community health programs related to or part of the programs of the local health department.

Looking at both powers and duties sections, it is clear that the local health board has the duty to supervise "all matters" and the health officer is "acting under the direction of the health board or administrative officer" and it is also clear that our county code does not contradict the state law but as written, affirms it. Legal council made mention that our county code made the

RCW somewhat irrelevant because we are a home rule charter county, I don't believe that to be the case. Section 24.01.100 concludes that, "If it would appear that any provisions of this title are in conflict with any statutory provisions of the state of Washington, such provisions of the title shall be deemed inoperative and void and shall be modified to conform to such statutory provisions." (of the state law) However, it does not appear our code contradicts state law. The court case mentioned above goes one step further in defining, "defendants (local health board and health officer) here are not relying on the general powers granted local officials under the state constitution. Rather, they are acting pursuant to public health statutes, namely RCW 70.05, which defines the powers and duties of local health officials, ... RCW 70.05

The Legislature's broad grant of powers to local health officials is evident in RCW 70.05. The SCHED Board of Health is a "[l]ocal board of health", RCW 70.05.010(3), and as such

*149 shall have supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction and shall: ... (4) [p]rovide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department . . .[.]

RCW 70.05.060.

[2] Local health officers, including plaintiff Dr. Beare (RCW 70.05.010(2)), likewise enjoy broad authority and are required to

(2) [t]ake such action as is necessary to maintain health and sanitation supervision over the territory within his jurisdiction; (3) [c]ontrol and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his jurisdiction; (4) [i]nform the public as to the causes, nature, and prevention of disease and disability and the preservation, promotion and improvement of health within his jurisdiction;

Former RCW 70.05.070. **Use of the word "shall" mandates that officials perform these duties.** See State ex rel. Nugent v. Lewis, 93 Wn.2d 80, 82, 605 P.2d 1265 (1980)."

In conclusion it is clear from County Code, State law and supported by Case law that we as a local health board and our local health officer are **mandated to perform our duties**. It is also my conclusion, due to the unprecedented path we are walking, that the local health officer not walk this path alone. I believe it would be prudent at this time to fully utilize the Health Board

moving forward in its capacity as prescribed by law. I am in no way asking to micro manage the office of the executive, the health department or the local Health officer but to work together in accordance with the law to carry out our **shared duty** to protect the citizens of Whatcom County. While I have full faith in our Health Officer to make the correct decisions moving forward policy wise, he should not have to walk this path alone and I feel strongly any further actions asked of the public will be better received and more likely adhered too, therefore more effective, if they come from a coalition of elected officials and Health professionals. Our goal is to be able to control the spread of COVID 19 with voluntary measures, however if we need to enact policy that is mandatory, I feel our best chance of success is to work in full cooperation, which will require changes moving forward which we can discuss in today's meeting. Thank you.