

Original

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION II**

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THURSTON COUNTY and its BOARD OF HEALTH,  
Appellants,

and

BRUCE CARTER, SHARI RICHARDSON, GEORGIA BICKFORD,  
BARBARA BUSHNELL and JANE ELDER BOGLE,  
Appellant Interested Parties.

v.

JEFF GRIFFIN,  
Respondent

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THURSTON COUNTY'S OPENING BRIEF

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## **A. ASSIGNMENT OF ERROR**

1. The trial court erred in entering the order granting Jeff Griffin's LUPA petition on February 3, 2006 and the judgment on cost bill filed March 3, 2006.

### Issues Pertaining to Assignment of Error

1. Whether the Superior Court failed to defer, under RCW 36.70C.130(1)(b), to the Thurston County Board of Health's (Board) construction of its own rules and regulations governing disposal of sewage when it reversed the Board's decision to deny a septic permit to Mr. Griffin for his undersized lot on the Puget Sound shoreline.
2. Whether the Board's decision to deny Mr. Griffin a septic permit on his 2,825 square foot lot on the Puget Sound shoreline, which is one-fifth the required lot size under the Thurston County Sanitary Code (Sanitary Code), was an erroneous interpretation of the Board's rules under RCW 36.70C.130(1)(b).

## **B. STATEMENT OF THE CASE**

In 2004, Jeff Griffin applied for an on-site sewage system permit for undeveloped property he purchased on Steamboat Island northwest of Olympia in Thurston County. (AR 14-15) The property is located on the shore of Puget Sound and is only .07 acres in size or 2,850 square feet.

The lot is an existing legal lot platted in 1927, but it does not meet the minimum lot size requirements of the Sanitary Code, Art. IV. (AR 7) The minimum lot size appropriate for a septic system is 12,500 square feet under the Sanitary Code, Art. IV, secs. 21.2.5 and 21.3. (CP 115 and 118)

Steamboat Island is a small body of land which sits within the eastern portion of the mouth of Totten Inlet. The island is less than one-half mile wide and less than one-half mile long and its soil types are highly saturated in the winter and spring. (AR 96) There are 42 homes on the island and the existing on-site sewage disposal systems on the island are considered seasonally inadequate or marginal sewage systems. (AR 97) The fact that these marginal sewage systems are located in close proximity to Puget Sound is an environmental concern. (AR 98)

In Washington State, ch. 246-272 WAC, establishes the minimum land area requirement for an on-site sewage treatment disposal system of 12,500 square feet. (AR 160) The minimum lot size is based on the amount of soil area that is needed to properly treat and dispose of the sewage and on the ability to fit the development structures, driveways, and the on-site sewage system, including a reserve area, on the property while complying with all of the required setbacks. (AR 160-161)

The goal of an on-site sewage system is to treat and dispose of

wastewater in a manner which protects public health and the receiving environment. On-site sewage systems need to remove bacterial and viral pathogens before the effluent reaches surface or groundwater. (AR 160). Lot size will affect the amount of dilution and treatment of the contaminants in the effluent as it goes through the soil before it reaches the water. (AR 160) The direction of subsurface flow on the Griffin property is toward Puget Sound. (AR 77) The inlets of south Puget Sound are extremely susceptible to pollution from septic tanks, fertilizers, and various human activities. (AR 196)

The United States EPA On-Site Wastewater Treatment Systems Manual shows that on average a person uses about 70 gallons per day for indoor household water use. (AR 70-71) The Sanitary Code requires a minimum standard of design of 240 gallons per day capacity for an on-site septic system for a house. (AR 197) Other Puget Sound area health districts routinely require 240 gallons per day for on-site sewage design flows for a single family dwelling. (AR 199, 202, 204)

Just southwest of Steamboat Island are shellfish farms, including geoduck, oyster, and clam beds on a three mile section of beach on Totten Inlet. This area has some of the most valuable and historic shellfish producing tidelands in Puget Sound. (AR 206) It is necessary to limit septic densities along the marine shorelines in order to protect water

quality for shellfish. (AR 207)

The staff of the health department granted Mr. Griffin a permit for his on-site septic system, but only after waiving several requirements of the Sanitary Code. The first waiver was for a winter water table evaluation which is required to show how high the groundwater will rise during the wet winters of Western Washington. Sanitary Code, Art. IV, § 11.4.1. (CP 173-174). The second waiver was reducing the separation between the septic tank and the water supply line for the proposed house from ten feet to five feet. Sanitary Code, Art. IV, § 10.1, Table 1. (CP 175) A third waiver was from the horizontal set back requirement between the drain field and the building foundation of the proposed house from ten feet to two feet. *Id.* (CP 175) The fourth waiver was for the horizontal set back requirement between the drain field and the adjacent property line from five feet to two and one-half feet. *Id.* (CP 176) A fifth waiver was also for a horizontal set back requirement, so that the set back between the drain field and the surface water of Puget Sound was reduced from 100 feet to 75 feet. (CP 175) The sixth waiver was a reduction in the minimum design flow from 240 gallons per day to 120 gallons per day for the proposed single family residence. (CP 174)

Adjacent property owners to the Griffin property, Bruce Carter, Shari Richardson, Georgia Bickford, Barbara Bushnell and Jane Elder

Bogle, Appellant Interested Parties, appealed the issuance of the permit by the staff. (AR 62-64) After a hearing, the Administrative Hearing Officer reversed the staff decision and denied the permit, upholding the neighbors' appeal. (AR 37-46) Mr. Griffin then appealed the Hearings Officer's decision to deny the permit and, after another hearing, the Board of Health adopted the findings of fact, conclusions, and decision of the Hearings Officer and upheld the denial of the on-site septic system permit to the Griffins by a two to one vote. (AR 1-6) Mr. Griffin then appealed the Board's decision under the Land Use Petition Act (LUPA), ch. 36.70C RCW. (CP 3-13) The Superior Court granted the LUPA petition, reversing the Board, and ordered that the permit be issued. (CP 198-199) This appeal followed. (CP 200-209)

### **C. ARGUMENT**

1. The Board of Health Did Not Err In Denying The Septic System Permit To Mr. Griffin For His Undersized Waterfront Lot On Steamboat Island.

a. SCOPE OF REVIEW

Judicial review of land use decisions is governed by the Land Use Petition Act (LUPA), ch. 36.70C RCW. A court may grant relief only if the party seeking relief establishes that at least one of the standards set forth in RCW 36.70C.130(1) has been met. The trial court

concluded that Mr. Griffin had met his burden of establishing that the Board had made an error of law under RCW 36.70C.130 (1) (b) in denying the septic permit. The pertinent section of LUPA provides:

[T]he land use decision is an erroneous interpretation of the law, after allowing for such deference as is due a construction of a law by a local jurisdiction with expertise.

Under LUPA, the appellate court stands in the shoes of the superior court and limits its review to the record before the county Board of Health. *Isla Verde Int'l Holdings, Inc., v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002); RCW 36.70C.120. As the party seeking relief from the land use decision, Mr. Griffin bears the burden of showing how the Board made an erroneous interpretation of law. *Homeowners v. Cloninger & Assocs.*, 151 Wn. 2d 279, 288, 87 P.3d 1176 (2004). Whether a land use decision involves an erroneous interpretation of the law within the meaning of RCW 36.70C.130 (1) (b) of LUPA is a question of law that is reviewed *de novo* by the appellate court. *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 894, 83 P.3d 433 (2004). The Court's review is deferential to the Board's interpretation of its own rules. *Cingular Wireless, LLC v Thurston County*, 131 Wn. App. 756, 768. The Court reviews the evidence and any reasonable inferences in the light most favorable to the County Health Department which is the party that prevailed in the highest forum exercising fact finding authority. *Schofield*

*v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). It is proper for the Court to defer to the Board's interpretation of the law where the Board has special expertise in dealing with such issues. *Schofield*, 96 Wn. App. at 587.

b. ANALYSIS

Applying those principles of deference to the Thurston County Board of Health's decision in this case requires that the denial of the permit be upheld. This case involves the interpretation of the Board's own rules and regulations governing sewage disposal. The protection of public health and sanitation constitutes one of the most important and far-reaching functions of county government. *Ford v. County District Bd. Of Health*, 16 Wn.App. 709, 712, 558 P.2d 821 (1977).

Sanitary Code Art. IV, § 21.4.5 (Appendix A) states that the Health Officer may permit the installation of an on-site sewage system where the minimum land area requirement, or lot size cannot be met, only when all of three criteria are met. The one criterion that is not met here is SC, Art. IV, § 21.4.5, which states "the proposed system meets all the requirements of these regulations other than minimum land area." Here six requirements of the Sanitary Code had to be waived in order to grant the permit for Mr. Griffin's undersized lot.

It is clear that the lot at issue is only 2,850 square feet in size,

which is about one-fifth of the minimum 12,500 square feet required under SC, Act. IV, § 21.2.5.1. And it is clear that the septic system does not meet all of the requirements which include: 1) the water table evaluation; 2) the separation of the septic tank and pump chamber of ten feet; 3) the horizontal set back between the disposal component and the building foundation of ten feet; 4) the horizontal set back between the disposal component and the adjacent property line of five feet; 5) the horizontal set back between the disposal component of the surface water of 100 feet; and 6) the minimum design flow for a single family residence of 240 gallons per day.

Under LUPA, this court must defer to the Board of Health's interpretation of its own Sanitary Code and uphold the Board's decision to deny the permit. The superior court substituted its interpretation of the Sanitary Code for the Board's own interpretation in order to reverse the Board. This was error under RCW 36.70C.130 (1) (b). The Court cannot substitute its judgment for that of the Board, rather the Court must defer to the expertise of the Board in applying its own rules unless it has a definite and firm conviction that a mistake has been made. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). The superior court did not give proper deference to the Board of Health's interpretation of its own health rules and could not conclude that the Board's interpretation of

the law was erroneous. Because the use of “may” in the septic rule is ambiguous, the Board of Health’s interpretation of its own rule is accorded great weight in determining intent. *Waste Management v. UTC*, 123 Wn.2d 621, 628, 884 P.2d 1339 (1994).

Mr. Griffin also argued that the land use decision of the Board to deny the permit violated his constitutional rights under RCW 36.70C.130(1)(f). Analyzing this argument, the superior court properly found that Mr. Griffin’s constitutional rights were not violated. (RP 6) Mr. Griffin alleged that his constitutional rights had been violated by the Board’s denial of his septic system permit under theories of substantive due process and as an unconstitutional taking of his property. In this case, the trial court correctly concluded that the Board’s denial of his septic permit had not denied Mr. Griffin all economically viable use of his property.

The Supreme Court has held that recreational uses of small waterfront properties are a reasonable use of salt water properties on Puget Sound shorelines. *Buechel v. Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994). Denial of a septic permit does not infringe on a fundamental attribute of ownership and the denial of the permit protects the public from harm to the health, safety and the environment of Puget Sound. Therefore, the denial of the septic permit cannot constitute a taking for constitutional

purposes. *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992);

Neither can the Board's denial of Mr. Griffin's septic system permit violate his substantive due process rights. A violation of substantive due process depends on the reasonableness of the regulation's attempt to achieve a legitimate public purpose through the exercise of the government's police powers and whether its impact is unduly oppressive on the land owner. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990). For purposes of exercising the Court's discretion in determining whether a land use regulation violates due process by being unduly oppressive on a land owner, the Court must balance the public's interest against the owner's interest by considering the nature of the harm, the regulation it is intended to protect, the availability and effectiveness of alternative measures and the economic loss borne by the owner.

*Christianson v. Snohomish Health*, 133 Wn.2d 647, 661-666, 946 P.2d 768 (1997).

The purposes of the Sanitary Code are prevention of surface and groundwater pollution through the regulation of septic systems and the protection of public health. Those interests clearly outweigh any economic loss borne by Mr. Griffin. In fact, there is no economic loss borne by Mr. Griffin since the Carters' have offered to purchase the property for the same amount that Mr. Griffin paid for the property. In

addition, Mr. Griffin cannot show that the regulation and its application deny him all economic viable use of the property as required by *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992).

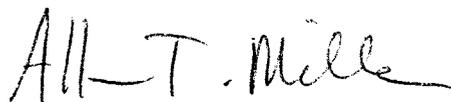
Mr. Griffin knew that the property was not buildable for residential purposes before he purchased the property. (AR 195) The only unreasonable position being taken in this case is Mr. Griffin's position that he should be allowed to place a house and septic system on a too-small lot on the Puget Sound shoreline of Steamboat Island which would harm the public health and Puget Sound. The Board of Health clearly acted within its discretion under the Sanitary Code to protect the public by denying Mr. Griffin the permit.

#### D. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and uphold the Board of Health's decision to deny the on-site septic system permit to Mr. Griffin.

DATED this 20<sup>th</sup> day of June, 2006.

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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on JUNE 20, 2006.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: JUNE 20 2006

Signature: *Bruce D. Carter*

COMMUNICATIONS  
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9 6 2 2 Identification of an adequate financing mechanism to assure the funding of operation, maintenance, and repair of the OSS

9 7 The health officer shall not delegate the authority to issue permits

9 8 The health officer may stipulate additional requirements for approval of a particular application if necessary for public health protection

**SECTION 10 LOCATION**

10 1 Persons shall design and install OSS to meet the minimum horizontal separations shown in Table I, Minimum Horizontal Separations

**TABLE I  
 MINIMUM HORIZONTAL SEPARATIONS**

Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line <sup>1</sup>
Non-public well or suction line	100 ft	50 ft	50 ft
Public drinking water well	100 ft	100 ft	100 ft
Public drinking water spring <sup>2 3</sup>	200 ft	200 ft	100 ft
Spring or surface water used as drinking water source <sup>2 3</sup>	100 ft	50 ft	50 ft
Pressurized water supply line <sup>4</sup>	10 ft	10 ft	10 ft
Properly decommissioned well <sup>5</sup>	10 ft	N/A	N/A
Surface water <sup>3</sup> Marine water Fresh water	100 ft 100 ft	50 ft 50 ft	10 ft 10 ft
Building foundation	10 ft <sup>6</sup>	5 ft <sup>6</sup>	2 ft

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Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line <sup>1</sup>
Property or easement line <sup>6</sup>	5 ft	5 ft	N/A
Interceptor / curtain drains/ drainage ditches, stormwater drywells Down-gradient <sup>7</sup> Up-gradient <sup>7</sup>	30 ft 10 ft	5 ft N/A	N/A N/A
Down-gradient cut or bank with at least 5 ft of original, undisturbed soil showing above a restrictive layer due to a structural or textural change <sup>7 8</sup>	25 ft	N/A	N/A
Down-gradient cut or bank with less than 5 ft of original, undisturbed, soil showing above a restrictive layer due to a structural or textural change <sup>7 8</sup>	50 ft	N/A	N/A
Downgradient cut or bank that extends vertically less than 5 feet from the toe of the slope to the top of the slope that doesn't have a restrictive layer showing <sup>7 8</sup>	10 ft		

<sup>1</sup> "Building sewer" as defined by the most current edition of the Uniform Plumbing Code "Non-perforated distribution" includes pressure sewer transport lines

<sup>2</sup> If surface water is used as a public drinking water supply, the designer shall locate the OSS outside of the required sanitary control area

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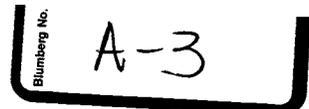
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- 3 Measured from the ordinary high-water mark
- 4 The health officer may approve a sewer transport line within 10 feet of a water supply line if the sewer line is constructed in accordance with section 2 4 of the Washington state department of ecology's "Criteria For Sewage Works Design," revised October 1985, as thereafter updated, or equivalent
- 5 Before any component can be placed within 100 feet of a well, the designer shall submit a "decommissioned water well report" provided by a licensed well driller, which verifies that appropriate decommissioning procedures noted in chapter 173-160 WAC were followed Once the well is properly decommissioned, it no longer provides a potential conduit to groundwater, but septic tanks, pump chambers, containment vessels or distribution boxes should not be placed directly over the site
- 6 The health officer may allow a reduced horizontal separation to not less than two feet where the property line, easement line, or building foundation is up-gradient
- 7 The item is down-gradient when liquid will flow toward it upon encountering a water table or a restrictive layer The item is up-gradient when liquid will flow away from it upon encountering a water table or restrictive layer
- 8 This setback is unrelated to setbacks that are necessary for slope stability or other purposes
- 10 2 Where any condition indicates a greater potential for contamination or pollution, the health officer may increase the minimum horizontal separations Examples of such conditions include excessively permeable soils, unconfined aquifers, shallow or saturated soils, dug wells, and improperly abandoned wells
- 10 3 The horizontal separation between an OSS disposal component and an individual water well, spring, or surface water can be reduced to a minimum of 75 feet, upon signed approval by the health officer if the applicant demonstrates
- 10 3 1 Adequate protective site specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration Examples of such conditions include evidence of confining layers and or aquatards separating any potable water from the OSS treatment zone or there is an excessive depth to groundwater, or
- 10 3 2 Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in Table IV in subsection 12 2 6 of this article, or

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**11 3 1.2 Allow determination of the soil's texture, structure, color, bulk density or compaction, water absorption capabilities or permeability, and elevation of the highest seasonal water table, and**

**11 3 2 Assume responsibility for constructing and maintaining the soil log excavation in a manner to reduce potential for physical injury by.**

**11 3 2 1 Placing excavated soil no closer than 2 feet from the excavation, and**

**11 3.2.2 Providing a ladder, earth ramp or steps for safe egress to a depth of 4 feet, then scoop out a portion from the floor to gain the additional 2 foot depth necessary to observe the 6 feet of soil face, however the scooped portion is not to be entered; and**

**11 3 2.3 Provide a physical warning barrier around the excavation's perimeter, and**

**11 3 2 4 Fill the excavation upon completion of the soil log**

#### **11.4 The health officer**

**11.4.1 May require water table measurements to be recorded during months of probable high-water table conditions, if insufficient information is available to determine the highest seasonal water table. If this is required, the health officer shall render a decision on the height of**

the water table within 12 months of receiving the application if precipitation conditions are typical for the region;

11 4 2 May require any other soil and site information affecting location, design, or installation;

11 4 3 May reduce the required number of soil logs for the OSS if adequate soils information has previously been developed.

## **SECTION 12 DESIGN.**

12.1 The health officer shall require a design for all OSS and that the OSS be designed only by an engineer, registered sanitarian, or a designer certified as per subsection 23 1 of this article, except:

12 1 1 Where at the discretion of the health officer a resident owner of a single family residence is allowed to design a system for that residence after passing a test to demonstrate competency and paying a fee for taking the test; or

12 1.2 The health officer performs the soil and site evaluation and develops the design

12 2 The health officer and the secretary shall require the following design criteria

12 2 1 All the sewage from the building served is directed to the OSS;

12 2 2 Drainage from the surface, footing drains, roof drains, and other non-sewage drains is prevented from entering the OSS and the area where the OSS is located,

12.2 3 The OSS is designed to treat and dispose of all sewage generated within the facility to be served by the OSS

12.2 3.1 For single family residences, the design flow for both the primary and reserve area shall be 120 gallons per bedroom per day with a minimum of 240 gallons per day, unless technical justification is provided to support calculations using a lower design flow

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- 21 2 1 Site evaluations as required under section 11 of this article This may include information gained in a project review as noted in subsection 10 5 of this article,
- 21 2 2 Where a subdivision with individual wells is proposed
  - 21 2 2 1 Configuration of each lot to allow a 100-foot radius water supply protection zone to fit within the lot lines, or
  - 21 2 2 2 Establishment, through protective or restrictive covenants, as appropriate, of a 100-foot protection zone around each existing and proposed well site Such zones shall be shown on the final plat map
- 21 2 3 Where a subdivision to be served by a community well or wells is proposed, all requirements of WAC 246-290 and WAC 246-291 shall be met This will include wellhead protection when applicable
- 21 2 4 Where preliminary approval of a subdivision is requested, provision of at least one soil log per proposed lot, unless the health officer determines existing soils information allows fewer soil logs,
- 21 2 5 Determination of the minimum lot size or minimum land area required for the development using Method I and/or Method II
  - 21 2 5 1 **METHOD I** Table VII, Single Family Residence Minimum Lot Size or Minimum Land Area Required Per Unit Volume of Sewage, shows the minimum lot size required per single family residence For developments other than single family residences, the minimum land areas shown are required for each unit volume of sewage

**TABLE VII  
 MINIMUM LAND AREA REQUIREMENT  
 SINGLE FAMILY RESIDENCE OR UNIT VOLUME OF SEWAGE**

Type of Water Supply	Soil Type (defined by section 11 of this article) <sup>1</sup>					
	1A, 1B	2A, 2B	3	4	5	6
Public	0.5 acre <sup>2</sup>	12,500 sq ft	15,000 sq ft	18,000 sq ft	20,000 sq ft	22,000 sq ft
Individual, on or to each lot	1 acre <sup>2</sup>	1 acre	1 acre	1 acre	2 acres	2 acres

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- requirements of this article. It shall not be considered part of an OSSA and does not give authorization to obtain an OSSP or a building permit,
- 21 4 2 3 A preliminary design shall be considered valid for a period of three years from the date it was submitted regardless if it received preliminary approval,
- 21 4 2 4 A fee shall be charged that covers the cost of evaluating the proposed lots, soils, and preliminary design as per Appendix A of article i
- 21 4 3 Require larger land areas or lot sizes to achieve public health protection
- 21 4 4 Prohibit development on individual lots within the boundaries of an approved subdivision if the proposed OSS design does not protect public health by meeting requirements of these regulations
- 21 4 5 Permit the installation of an OSS, where the minimum land area requirements or lot sizes cannot be met, only when all of the following criteria are met
- 21 4 5 1 The lot is registered as a legal lot of record created prior to January 1, 1995, and
- 21 4 5 2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection, and
- 21 4 5 3 The proposed system meets all requirements of these regulations other than minimum land area
- 21 5 When a COSS or a LOSS will be used, the person responsible for the subdivision shall accomplish one of the following prior to final approval of the plat
- 21 5 1 Install the COSS or LOSS and obtain approval by the appropriate agencies, or
- 21 5 2 Provide a bond in favor of the department and sign an agreement with the department. The bond and agreement shall guarantee that construction will be completed within one (1) year from the date of the approval of the agreement. The bond shall be from a reputable bonding company on a satisfactory form and in an amount based on an estimate prepared by an engineer or designer, plus thirty-five (35) percent (20% for a two-year inflationary period plus 10% for contract expenditures plus 5% for

AMENDED June 1 1999

4-59

ATTACHMENT

Blumberg Inc.

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SCANNED

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