

No. 39272-1-II

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

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DANIEL O. GLENN and CARLEEN L. GLENN, husband and wife,  
Appellants,

v.

THURSTON COUNTY BOARD OF HEALTH, and DIANE  
OBERQUELL, CATHY WOLFE, and ROBERT MACLEOD, in their  
representative capacities as members of the BOARD OF HEALTH,  
Respondents.

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**THURSTON COUNTY BOARD OF HEALTH, et al,  
RESPONSE BRIEF**

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EDWARD G. HOLM  
PROSECUTING ATTORNEY

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STATE OF WASHINGTON  
DIVISION II  
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## I. INTRODUCTION

Daniel O. Glenn and Calreen L. Glenn (Glenns) appeal the dismissal of their petition under the Land Use Petition Act (LUPA)<sup>1</sup> for failing to name a necessary party. LUPA required the Glenns to properly serve and name the local jurisdiction in this action. RCW 36.70C.040(2). The Glenns' failure to name Thurston County compels dismissal. The Glenns do not brief, address, or argue LUPA in its opening brief to this Court. Instead the Glenns' fundamental argument on appeal is that RCW 70.05.060 and RCW 43.20.050 authorize a board of health to "enforce" its regulations. This argument fails to address the explicit requirements under LUPA that the County be named in the land use petition. This Court should affirm the trial court's dismissal of the Glenns' land use petition and award attorney fees for this frivolous appeal.

## II. RESTATEMENT OF ISSUES

1. Whether the court has jurisdiction to review a land use petition filed under ch. 36.70C RCW when a necessary party, i.e., Thurston County, is not named on the face or in the body of the petition.
2. Whether the Thurston County Board of Health created pursuant to ch. 70.05 RCW has the legal capacity to be sued under the Land Use Petition Act, ch. 36.70C RCW.
3. Whether the Appellants abandoned their appeal under the Land Use Petition Act, ch. 36.70C RCW, when they failed to brief, address or argue any of the LUPA provisions.

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<sup>1</sup> Chapter 36.70C RCW.

4. Whether the Respondents are entitled to attorney fees under RAP 18.9(a).

### **III. STATEMENT OF THE CASE**

The Thurston County Board of Health (BOH) denied Daniel O. Glenn and Carleen L. Glenn's (Glenns) challenge to a notice of violation issued by the health officer. CP 121. The BOH found that the evidence submitted over several days of hearings established that the Glenns' on-site septic system was failing, and ordered the Glenns to evaluate their system by November 15, 2008 and follow up with an appropriate repair. *Id.*

On October 6, 2008, the Glenns filed a "Land Use Petition & Appeal of Administrative Decision" (Petition) pursuant to the Land Use Petition Act, chapter 36.70C RCW (LUPA). The Petition designates the "Thurston County Board of Health" (Board of Health) and "Diane Oberquell, Kathy (sp) Wolfe, and Robert McCloud (sp), in their representative capacities as members of the Board of Health" as Defendants. CP 5-9. A copy of the Petition is attached as Appendix A. No other Defendants or parties are named or identified on the face or in the body of the Petition. *Id.*

On October 23, 2008, Respondents BOH and the individual board members filed a motion to dismiss because the individual board members

had not been properly served, and the BOH was not the proper party in a LUPA action. CP 89. On March 19, 2009, the trial court granted the Respondents' motion to dismiss because (1) the individual board members had not been properly served, CP 131, and (2) in a LUPA action the proper party is Thurston County, and not the BOH. CP 132. Thurston County was never named in the petition initially or by amendment. *See* Appendix A. CP 5-9. The trial court subsequently denied a motion for reconsideration, CP 68-69, and the Glenns timely filed a Notice of Appeal. CP 70-71

#### IV. ARGUMENT

##### A. Standard of Review

Abuse of discretion is the appropriate standard of review for a trial court's dismissal for failure to name a necessary party. *Quality Rock v. Thurston County*, 126 Wn. App. 250, 260, ¶ 21, 108 P.3d 805 (2005); *See Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, ¶ 16, 145 P.3d 1196 (2006) (abuse of discretion is the appropriate standard for failure to join an indispensable party under CR 19). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Id.* at ¶ 17. An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal

standard or bases its ruling on an erroneous view of the law. *Id.*

B. Glens' Failure To Name Thurston County As A Party Compels Dismissal Under LUPA.

LUPA governs reviews of land use decisions made by local governments. LUPA explicitly replaced the writ of certiorari for appealing land use decisions, becoming the “exclusive means of judicial review of land use decisions” with certain enumerated exceptions.<sup>2</sup> RCW 36.70C.030(1). LUPA specifies procedural requirements which invoke the superior court’s jurisdiction. RCW 36.70C.040; *Overhulse Neighborhood Association v. Thurston County*, 94 Wn. App. 593, 597, 972 P.2d 470 (1999). Under LUPA, a superior court may not grant review unless a land use petition is timely filed and timely served on the necessary parties. RCW 36.70C.040(2). A land use petition is barred unless it is timely filed

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<sup>2</sup> RCW 36.70C.030(1) enumerates the following exceptions:  
“(a) Judicial review of:

- (i) Land use decisions made by bodies that are not part of a local jurisdiction;
- (ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board;
- (b) Judicial review of applications for a writ of mandamus or prohibition; or
- (c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.”

and served on the following persons **who shall be parties** to the review of the land use petition:

The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department.

RCW 36.70C.040(2)(a). A local jurisdiction is further defined as “a county, city, or incorporated town.” RCW 36.70C.020(2). A land use petition is properly dismissed if the appellant fails to name a necessary party in the body of the petition within the filing period. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 820, 965 P.2d 636 (1998); *Quality Rock v. Thurston County* 126 Wn. App. 250, 267, ¶ 44, 108 P.3d 805 (2005) (failure to name a necessary party in the caption is not fatal if the necessary party is named in the body of the petition).

In certain situations, an appellant may be able to cure a defective petition that does not name a necessary party by moving to amend his petition under CR 15(c). *Suquamish* at 823. However, under LUPA the doctrine of inexcusable neglect will bar a CR 15(c) amendment to name a necessary party in most situations because “LUPA gives clear instruction as to the identity of necessary parties.” *Id.* at 825. In *Suquamish*, the court found that the petitioner's failure to timely name a party in the petition's body is inexcusable neglect and the court does not need to consider any potential prejudice to the nonmoving party. *Id.* at 825.

In this case on the face of their petition, the Glenns named the “Thurston County Board of Health” as Defendant, along with the three board members. CP 5. In the body of the Petition, the Glenns identified the parties as “The Defendant, BOARD OF HEALTH, COUNTY OF THURSTON, is an agency of the COUNTY OF THURSTON.” CP 6. The Glenns did not name Thurston County as a party in either the caption of the petition or in the body of the petition. CP 5-9. The only reference to Thurston County the Glenns made in their petition was to clarify that the Board of Health was an agency of Thurston County. During oral argument before the trial court, counsel for the Defendants suggested that the Glenns could “remedy” their error by moving to amend their petition and name the County. VRP<sup>3</sup> 28:14-22. The Glenns never attempted to name the County as a party. Instead they clung to their position that the Board of Health was the appropriate party to be named in its LUPA petition.

The only argument the Glenns offered for this position was that the Board of Health was the named party in *Griffin v. Bd. Of Health*, 137 Wn. App. 609, 154 P.3d 296 (2007), *affirmed*, 165 Wn.2d 50, 196 P.3d 141

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<sup>3</sup> Verbatim Report of Proceedings (“VPR”).

(2008), another LUPA action<sup>4</sup>. While the Board of Health was one of the named parties in *Griffin*, Thurston County was also named in the petition. See Published Opinion attached as Appendix B and Land Use Petition filed in *Griffin v. Thurston County, et al.*, Thurston County Superior Court No. 05-2-01587-7 attached as Exhibit C. Therefore, in *Griffin*, the petitioner properly named the County as a necessary party as required by RCW 36.70C.040(2)(a). Unlike *Griffin*, the Glens failed to name Thurston County in its land use petition either initially or by amendment. Thus *Griffin* provides no support whatsoever to Glens' argument that they did not need to name the County.

Glens' failure to name Thurston County in its petition compels dismissal. *Suquamish Indian Tribe*, 92 Wn. App. at 820. The trial court properly dismissed the Glens' land use petition because it failed to name Thurston County; a necessary party under LUPA.

C. Glens Waived Their Appeal Under LUPA.

An appellate court is divested of jurisdiction to consider a land use decision that is subject to review under LUPA if the petitioner abandons the right to appeal under the act. *Holder v. City of Vancouver*, 136 Wn.

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<sup>4</sup> The Glens also cite *Parkland Light & Water Company, et al. v. Tacoma-Pierce County Bd. of Health, et al.*, 151 Wn.2d 428, 90 P.3d 37 (2004). However, the *Parkland* case is distinguishable because it did not involve a LUPA proceeding, and LUPA gives clear instruction as to the identity of necessary parties.

App. 104, 107 ¶ 8, 147 P.3d 641 (2006), *review denied*, 162 Wn.2d 1011, 175 P.3d 1094 (2008). By abandoning the exclusive means for judicial review of the land use decision, the petitioner forfeits the right of appeal and the appellate court is consequently divested of jurisdiction to consider the decision. *Id.*

A party abandons an issue by neglecting to pursue it on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument. *Id.* at ¶ 2 (citations omitted) (holding that it was evident the appellant had abandoned his LUPA claim because he made a solitary reference to LUPA at the trial court, failed to brief the issue in his appellate briefs, and abandoned the appeal at oral argument). Here, the facts are similar to *Holder*, where the appellant made one reference to an issue at the superior court and did not brief or argue any LUPA issues in the opening brief.

In this case, the Glenns abandoned their LUPA claim on appeal because they failed to brief the issue in their opening brief on appeal despite the trial court's reliance on LUPA in its decision, *see* CP 132-134, and the defendants repeated references to LUPA at the trial level<sup>5</sup>. VRP 18:12 – 19:25. LUPA itself identifies that the proper party to be sued is

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<sup>5</sup> The Glenns made one reference to a LUPA provision, RCW 36.70C.040(2)(a), in their Assignments of Error. However they failed to brief or argue this LUPA provision, or any other LUPA provision, in their brief.

the county itself. VRP 23:16 – 24:5; RCW 36.70C.040(2).

D. A Board Of Health Created Pursuant to ch. 70.05 RCW Is Not A Corporate Entity Capable of Being Sued.

Even if LUPA did not require that Thurston County be named in the Glenns' land use petition, the trial court also properly dismissed this case because the Thurston County Board of Health is not a corporate entity capable of being sued. *Foothills Dev. Co. v. Clark County Board of Cy. Commissioners*, 46 Wn. App. 369, 376, 730 P.2d 1369 (1986), *review denied*, 108 Wn.2d 1004 (1987).

In order to ascertain whether the Board of Health is a separate entity that has the capacity to be sued, the courts look to the enactment providing for the Board of Health's establishment. *Id.* In *Foothills*, a developer filed an action against the board of county commissioners claiming that they acted arbitrarily and capriciously in modifying the developer's preliminary plat. The trial court dismissed the case because the board was not a legal entity that could be sued. On appeal, the court described the appropriate analysis to determine whether or not the board of county commissioners was a separate legal entity:

In order to determine whether the Board of County Commissioners is a separate legal entity, this court must examine the enactment providing for the establishment of the Board. [citations omitted]. RCW 36.32 is the legislative enactment establishing county commissioners. Under RCW 36.32.120(6), county commissioners "shall *in*

*the name of the county* prosecute and defend all actions for and against the county. . . (Italics ours.) This section does not give the Board the authority to prosecute and defend all actions in its own name. If the Legislature had intended to give the Board of County Commissioners this authority, it could have included such authority in this provision.

By contrast, the Legislature has specifically provided that counties have capacity to sue and be sued. Former RCW 36.01.010 provides:

The several counties in this state shall have capacity as bodies corporate, to sue and be sued in the manner proscribed by law; to purchase and hold lands within their own limits; . . .

*Foothills* at 376-77.

RCW 70.05.030 is the legislative enactment establishing the local board of health, which is to be comprised of the same people that make up the board of county commissioners. RCW 70.05.060 addresses the powers and duties of the board of health. Significantly, neither statute expressly authorizes a local board of health to prosecute and defend actions as a separate entity. Furthermore, the board of county commissioners are *not* authorized to prosecute and defend actions as a separate entity. *Foothills*, 46 Wn. App. at 377; See also *Roth v. Drainage Improvement Dist. No. 5*, 64 Wn.2d 586, 392 P.2d 1012 (1964) (drainage district did not have capacity to be sued.). Instead, under RCW 36.32.120(6), county commissioners “shall . . . *in the name of the county*

prosecute and defend all actions for and against the county. . .”.

[Emphasis supplied.] As the court in *Foothills* noted, “[t]his section does not give the Board the authority to prosecute and defend all actions in its own name.” If the Legislature had intended to give the Board of County Commissioners this authority, it could have included such authority in this provision. *Id.*

Likewise, if the Legislature had intended to give the local boards of health the authority to prosecute and defend actions in its own name, it could have included such authority in RCW 70.05.030 or 060. The Glens’ Petition fails to cite to any authority which might support an argument that the Board of Health has the capacity to be sued.

Significantly, a board of county commissioners, like a board of health, also has authority to “enforce” all “police and sanitary regulations.” RCW 36.32.120(7). However, this authority to enforce does not “give the Board the authority to prosecute and defend actions in its own name.” *Foothills* at 377. Instead, the Legislature must specifically provide that a local board of health has certain corporate powers, such as the capacity to sue and be sued, to purchase and hold lands, and to enter into contracts. *Id.*

A review of chapter 70.05 RCW makes it clear that the Legislature did not grant any corporate powers to the Thurston County Board of Health. For example, and germane to this case, the Legislature

did not give local boards of health the specific authority to sue and be sued. *See* RCW 70.05.060.

As the *Foothills* court noted, if the Legislature had intended to give a board of health this authority, the Legislature knows how to do so, and has done so for other boards and districts. For example, the Legislature bestowed this corporate power to sue and be sued to drainage districts created under chapter 85.05 RCW. In contrast, the Legislature declined to impart the power to sue and be sued to drainage districts created under chapter 85.08 RCW. *See Roth v. Drainage Improvement Dist. No. 5*, 64 Wn. 2d 586, 392 P.2d 1012 (1964).

Similarly, when the Legislature intends to empower local boards or districts with other types of corporate powers, such as the ability to acquire and dispose of property, or enter into contracts, it knows how to do so. For example, the Legislature granted local health districts created under chapter 70.46 RCW the specific power to acquire or dispose of property and enter into contracts to carry out its purposes. *See* RCW 70.46.100. However, the Legislature declined to grant these similar powers to local boards of health created under chapter 70.05 RCW<sup>6</sup>.

The Glenns illogically argue that the trial court's decision has the

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<sup>6</sup> The legislature did authorize counties and "local health departments" (not local boards of health) to enter into contracts for the limited purpose of purchasing or selling health services. *See* RCW 70.05.150.

effect of prohibiting a local board of health from taking any enforcement action under its own sanitary regulations. The very posture of this case demonstrates that a board of health has the ability, through its health officer, to issue notices of violation to people, such as Petitioners, who have a failing septic system. The trial court's decision does not take away the health officer's authority to issue notices of violation in the future. Furthermore, the trial court's order does not intrude upon a board of health's administrative authority to enforce the health officer's notices of violation. In short, the trial court's decision does not interfere with a board of health's administrative authority to enforce its sanitary regulations as required by RCW 70.05.060 and RCW 43.20.050.

#### **V. ATTORNEY FEES**

Pursuant to RAP 18.9(a) attorney fees may be awarded as a sanction for filing a frivolous appeal. Under RAP 18.9(a) “[a]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal.” *State ex rel, Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998).

There is no debatable issue that the Glenns' failure to name Thurston County as a necessary party compels dismissal. *Suquamish*, 92 Wn. App. at. 820. Furthermore, despite Respondents' recommendation

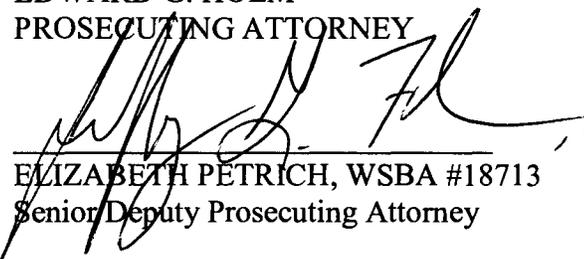
during oral argument before the trial court that the Glens could remedy this fatal error by amending their Petition, VRP at 28:14-22; 30:15-20, the Glens neglected to do so. Finally, the Glens have waived their right of appeal under LUPA by failing to argue any of its provisions. For all these reasons, Respondents respectfully request that attorney fees be awarded pursuant to RAP 18.9(a).

### VI. CONCLUSION

For the reasons stated above, Respondents request this Court affirm the trial court's order dismissing the LUPA petition.

DATED this 8<sup>th</sup> day of January, 2010.

EDWARD G. HOLM  
PROSECUTING ATTORNEY

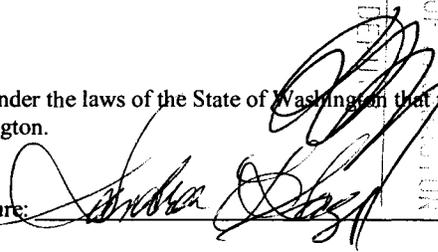
  
for: ELIZABETH PETRICH, WSBA #18713  
Senior Deputy Prosecuting Attorney, WSBA # 22550

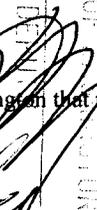
I delivered a copy of this document to the following individual(s) on January 8, 2010.

Daniel O. Glenn  
Glenn & Associates, P.S.  
2424 Evergreen Park Dr SW  
Olympia, WA 98507-0049  
*Attorney for Appellants*

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: January 8, 2010

Signature: 

STATE OF WASHINGTON  
BY:   
10 JAN - 8 PM 3:41  
COURT APPELLANTS  
9/18/2010

## APPENDIX

- A. Land Use Petition & Appeal of Administrative Decision,  
*Glenn v. Board of Health, et al., Thurston County Superior Court,*  
*No. 09-2-02294-1*
- B. *Griffin v. Bd. Of Health*, 137 Wn. App. 609, 154 P.3d 296 (2007),  
*affirmed* 165 Wn.2d 50, 196 P.3d 141 (2008)
- C. Land Use Petition filed in *Griffin v. Thurston County, et al.*,  
Thurston County Superior Court No. 05-2-01587-7

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THURSTON COUNTY, WASH.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON **08-2-02294-1**

DANIEL O. GLENN and CARLEEN  
L. GLENN, husband and wife,  
  
Appellants,  
  
vs.  
  
THURSTON COUNTY BOARD OF  
HEALTH, and DIANE OBERQUELL,  
KATHY WOLFE, and ROBERT  
McCLOUD, in their  
representative capacities  
as members of the BOARD OF  
HEALTH,  
  
Defendants.

NO.  
  
LAND USE PETITION &  
APPEAL OF ADMINISTRATIVE  
DECISION

LAND USE PETITION &  
APPEAL OF ADMINISTRATIVE  
DECISION - 1

GLENN & ASSOCIATES, P.S.  
2424 EVERGREEN PARK DRIVE S.W.  
P. O. BOX 49  
OLYMPIA, WA 98507-0049  
(360)943-7700

1 COME NOW the Plaintiffs/Petitioners, DANIEL O. GLENN  
2 and CARLEEN L. GLENN, and pursuant to the provisions of RCW  
3 36.70C and in support of the appeal of the decision issued by the  
4 BOARD OF HEALTH, by and through its three members, aver and  
5 allege as follows:

6 I.

7 **PARTIES.**

8 1.1. CARLEEN L. GLENN and DANIEL O. GLENN have been at  
9 all times material hereto residents of the County of Thurston,  
10 State of Washington. They are the owners of certain property  
11 having a common street address of 2622 Lovejoy Court NE, Olympia,  
12 Washington 98506. That is also their address.

13 1.2. The name and address of the Petitioners' attorney  
14 is DANIEL O. GLENN. For purposes of this Petition, his  
15 professional mailing address is P. O. Box 49, Olympia, Washington  
16 98507, and professional physical address is 2424 Evergreen Park  
17 Drive SW, Olympia, Washington.

18 1.3. The Defendant, BOARD OF HEALTH, COUNTY OF  
19 THURSTON, is an agency of the COUNTY OF THURSTON. It is the  
20 agency the decision of which is the subject matter of this  
21 appeal. Its address is Thurston County, 2000 Lakeridge Drive SW,  
22 Olympia, Washington 98502. Its counsel was Ms. Elizabeth

23  
24 **LAND USE PETITION &**  
25 **APPEAL OF ADMINISTRATIVE**  
**DECISION - 2**

**GLENN & ASSOCIATES, P.S.**  
**2424 EVERGREEN PARK DRIVE S.W.**  
**P. O. BOX 49**  
**OLYMPIA, WA 98507-0049**  
**(360)943-7700**

1 Petrich, Deputy Prosecuting Attorney, Thurston County Prosecuting  
2 Attorney's Office, 2424 Evergreen Park Drive SW, Olympia,  
3 Washington 98502.

4 1.4. DIANE OBERQUELL, KATHY WOLFE, and ROBERT McCLOUD  
5 are named in their official capacities as members of the BOARD OF  
6 HEALTH who made the decision which is the subject matter of this  
7 appeal. There official address is Thurston County, 2000  
8 Lakeridge Drive SW, Olympia, Washington 98502.

9 1.5. No other persons are within the provisions of RCW  
10 36.70C.040(2)(b).

11 **II.**

12 **ALLEGATIONS**

13 2.1. On September 15, 2008, the Defendants, OBERQUELL,  
14 WOLFE, and McCLOUD, acting as the BOARD OF HEALTH, issued a  
15 written decision denying the appeal of the Plaintiffs from an  
16 administrative decision of the Director of the DEPARTMENT OF  
17 HEALTH. A copy of the referenced decision which is the subject  
18 of this appeal is attached as Exhibit Number 1.

19 2.2. The Court has jurisdiction in this matter  
20 pursuant to the applicable provisions of State law, as well as  
21 the ordinances, rules and regulations of the THURSTON COUNTY  
22 BOARD OF HEALTH.

23  
24 **LAND USE PETITION &**  
25 **APPEAL OF ADMINISTRATIVE**  
**DECISION - 3**

**GLENN & ASSOCIATES, P.S.**  
**2424 EVERGREEN PARK DRIVE S.W.**  
**P. O. BOX 49**  
**OLYMPIA, WA 98507-0049**  
**(360)943-7700**

1           2.3. Petitioners have standing to bring this action  
2 for the following reasons:

3           A. As owners and residents of the property upon which  
4 the septic system is located.

5           B. As individuals mandated to take action pursuant to  
6 the order, whose right and ability to reside upon the property  
7 are affected if the order is not reversed, and upon whom the  
8 order has major fiscal impacts.

9           2.4. The decision was erroneous in a number of  
10 respects, including, but not limited to, the following:

11           A. Various of the Findings of Fact are not supported  
12 by the testimony submitted in the hearing.

13           B. The Board has erroneously interpreted or applied  
14 the applicable law, rule or regulation, including through the  
15 application of the definition of the term "failure", as applied  
16 to the factual situation present in this matter and thus is  
17 arbitrary and capricious, as well as otherwise erroneous.

18           C. Based upon a comment of the Chair as to contact  
19 with a particular individual, the Board or its representatives  
20 failed to follow its prescribed procedures as to ex parte  
21 contact.

22  
23

24 **LAND USE PETITION &**  
25 **APPEAL OF ADMINISTRATIVE**  
**DECISION - 4**

**GLENN & ASSOCIATES, P.S.**  
**2424 EVERGREEN PARK DRIVE S.W.**  
**P. O. BOX 48**  
**OLYMPIA, WA 98507-0049**  
**(360)943-7700**

1 D. The order is not supported by evidence that is  
2 substantial when viewed in light of the entire record before the  
3 Board.

4 **III.**

5 **RELIEF SOUGHT**

6 The Petitioners request the following relief:

- 7 1. The decision of the BOARD be reversed.  
8 2. That Plaintiffs receive their statutory attorneys'  
9 fees and costs.

10 DATED this 10th day of October, 2008.

11 GLENN & ASSOCIATES, P.S.

12  
13 By   
14 DANIEL O. GLENN, of  
15 Attorneys for Plaintiffs  
WSBA #4800

16 I CERTIFY UNDER PENALTY OF PERJURY, UNDER THE LAWS OF  
17 THE STATE OF WASHINGTON, PURSUANT TO RCW 9A.72, THAT THE  
18 FOREGOING IS TRUE AND CORRECT.

19 10/20/08 Olympia WA   
20 DATE & PLACE DANIEL O. GLENN  
WSBA #4800

21  
22  
23  
24 LAND USE PETITION &  
25 APPEAL OF ADMINISTRATIVE  
DECISION - 5

GLENN & ASSOCIATES, P.S.  
2424 EVERGREEN PARK DRIVE S.W.  
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OLYMPIA, WA 98507-0049  
(360)943-7700

9

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WASH.

08 OCT -6 PM 3:06

BETTY J. GOULD, CLERK

BY PO  
DEPUTY

BEFORE THE BOARD OF HEALTH  
THURSTON COUNTY, WASHINGTON

In Re the Matter of,

Daniel Glenn  
Parcel #59800400000

08-2-2294-1  
FINAL DECISION

THIS MATTER originally came before the Board of Health (Board) on January 7, 2008, February 4, 2008 and March 31, 2008, as a result of an appeal by Daniel Glenn of the hearing officer's decision, dated October 18, 2007. The hearing officer's decision affirmed a Notice of Violation, dated May 30, 2007, and filed against Mr. Glenn's property at 2622 Lovejoy Court N.E. Olympia, WA for a failing septic system.

On April 7, 2008, the Board issued a decision remanding this matter back to the Environmental Health Department (Department) for additional evidence. Staff was directed to conduct dye tracing evaluations on the adjacent properties (Stull and Pierce properties) and to include sample site #3 in their studies. The dye test for the Glenn system commenced on April 23, 2007. The dye test for the Stull property commenced on February 24, 2008, and on April 15, 2008 for the Pierce property. After the dye tracing evaluations were complete, this matter was rescheduled before the Board on August 29, 2008 to consider the additional evidence and to make a final determination on whether Mr. Glenn's septic system is in failure. On September 15, 2008, the Board issued its oral decision.

Present at the hearing on August 29, 2008, were Daniel Glenn and Dick Yunker, for the appellant; Sue Davis, Cathy Hansen, and Jane Futterman representing the Department. A list of the exhibits that were submitted in the August 29, 2008 hearing and considered for this decision is listed in Attachment A. The Board also considered the evidence and testimony submitted in the prior hearings, and a list of the exhibits from these prior hearings is listed in Attachment B.

Findings.

1. From April 23, 2007 to May 14, 2007, the Department conducted a dye trace evaluation on the on-site sewage system that serves Mr. Glenn's home on Lovejoy Court. The evaluation was done as part of the requirements for the Henderson Watershed Protection Area.
2. Charcoal packets were placed at four locations as part of the dye trace procedure. All four locations were pipes or drainages on the shoreline north of Mr. Glenn's residence. Dye was recovered from the packets placed at sample locations 1 and 3 after they were retrieved one and two weeks after

EXHIBIT "1"

it was flushed into the septic system. Dye was not present in the background samples that were taken before it was introduced into the septic system and sink at the house. The dye recovered from sample site #3, after the first week, was 54100 ppb fluorescein. A dye recovery ten times the background level is considered a positive dye result.

3. Water samples taken one week after dye was flushed into the septic system were analyzed for the presence of fecal coliform bacteria. The sample from site 1 had a fecal coliform concentration of 10/100ml and the sample from site 3 had 1,300/100ml.
4. Because the dye concentration and fecal coliform concentrations exceeded the applicable standards, the Department concluded that the septic system for the Glenn house was failing and in violation of Section 4.10 of Article IV of the Thurston County Sanitary Code (Article IV).
5. The results of the sanitary survey were sent to Mr. Glenn on May 21, 2007, and a Notice of Violation (NOV) was sent to him on May 30, 2007.
6. The NOV required Mr. Glenn to apply for a sewage system repair permit by August 31, 2007 and that the failing sewage system be repaired by December 31, 2007. The NOV included provisions for diagnosing sewage system problems as part of the repair process. Diagnostic work is encouraged early on in the repair process because a check of the components of the system may identify that the reason for failure is something simple that can be repaired easily and inexpensively.
7. To date, Mr. Glenn has not performed any diagnostic work on his system.
8. Mr. Glenn filed an appeal of the NOV on June 7, 2007.
9. An administrative hearing was held on October, 2, 2007, and the N.O.V. was upheld.
10. Mr. Glenn filed an appeal of the hearing officer's decision to the Board of Health on June 7, 2007.
11. On January 7, 2008, February 4, 2008 and March 31, 2008, the Board heard testimony from Sue Davis, Cathy Hansen, Tom Aley, Dick Yunker and Dan Glenn. In addition, the Board reviewed numerous exhibits identified in Attachment B.
12. The Department submitted numerous exhibits and testimony that show how the Glenn sewage system was evaluated, the results of the evaluation, and the policies, procedures and regulations that govern dye traces of on-site sewage systems.

13. The Dye Trace Chronology, associated exhibits, and hearing testimony confirm that the county policies and procedures, (ONST.06.TSK.836 (1), (2), (3), (4) and (5), all approved 12/29/06), were followed.
14. The county dye trace procedures are consistent with *On-site Sewage System Evaluation Using Dye Tracer's in Thurston County, January 1996*, by Vasey Engineering. Appendix B of the report is the procedure that is the basis for the current county policies and procedures, and is endorsed by the report authors.
15. As explained by Mr. Aley, the dye testing establishes two things: (1) the dye identifies that the water from the sink and toilet is flowing from point A to point B. In other words it answers the questions of where does the water go. Secondly the dye test reflects the degree to which the pathway is absorbing contaminants. In other words, it answers the question of how rapidly the water is moving through the soil. A dye detected within seven days, and in large quantities reflects a septic system with a high preferential flow. A system with a high preferential flow is not effectively treating the sewage because the sewage is going through some type of pipeline through the soil without treatment, as opposed to sewage migrating through absorptive soil. Testimony of Tom Aley on 2/4/08.
16. The Vasey report states in the *Recommended Fecal Coliform Sampling Protocol* section of *DISCUSSION AND RECOMMENDATIONS* chapter that a single sample with fecal coliform concentrations greater than 132/100ml is sufficient to show a sewage system is failing if a dye trace shows a hydraulic linkage between the sewage system and a particular sampling location.
17. In this case the testimony by Sue Davis, Cathy Hansen and Tom Aley conclusively established that a positive fluorescein dye result was obtained from seepage beneath the bulkhead, 8 feet east of the concrete stairs to the beach (sampling site # 3). The dye recovered from site # 3/week 1 was 5410 ppb fluorescein. To be a positive dye trace, the dye recovery needs to be 10 times stronger than the background packet. In this case the dye recovery was several thousand times stronger than the background sample.
18. This testimony also conclusively established that a bacteria count of 1300 colonies per 100 ml of fecal coliform was retrieved from the same site. By comparison, the state water quality standard for marine water is 14 organisms/100ml and the freshwater standard is 50. The fecal coliform bacteria standard in the Article IV "failure" definitions is 200 organisms/100ml of water in combination with dye recovery.
19. The definition of failure in section 3, Article IV is supported by the technical study "On-site Sewage System Evaluation Using Dye Tracer's in Thurston County," January 1996, by Vasey Engineering. The study concluded that the fecal coliform criterion of 200 organisms/100ml in

combination with dye recovery provides 97 percent confidence that a system is in failure, and fecal coliform criterion of 1000 organisms/100ml provides a 99 percent confidence that a system is in failure. In this case, there was both a very strong recovery of the dye flushed into the Glenn on-site sewage system and a very high fecal coliform bacteria result of 1300. In other words, these results provide a 99% confidence that the Glenn system is in failure.

20. Despite the strong recovery of dye and high concentration of fecal coliform from site 3, on Mr. Glenn's property, the Board, *initially*, was uncertain as to whether or not Mr. Glenn's system was in failure due to the following facts:
  - a. The adjacent properties (Stull and Pierce) had not yet been dye tested by the Environmental Health Division;
  - b. Charcoal packets were placed at four locations on Mr. Glenn's property, as part of the dye trace procedure. Three of the charcoal packets were wired into the end of three separate black pipes located solely on Mr. Glenn's property, and a fourth packet was wired to a rock on the beach. Exhibit 7.
  - c. The charcoal packets wired to the pipes did not have a positive dye trace result and a corresponding bacteria count. Only the site on the beach, sample site #3, tested positive for both dye and bacteria. Testimony of Cathy Hansen.
  - d. If the discharge from the pipes had tested positive for dye and bacteria, the link between the contamination and the septic system on Mr. Glenn's property would be conclusive. Testimony of Mr. Yunker.
21. The Board's April 7, 2008 decision remanded this case back to the Department for additional testing.
22. As a result of subsequent testing done by the Department pursuant to the Board's April 7, 2008 decision, it was determined that the Stull septic system south east of the Glenn property was not in failure. However, the Pierce septic system northwest of the Glenn property was in failure because of a positive dye test and fecal coliform bacteria sample recovered from sample site #3. This was the same sample site #3 used during the Glenn testing.
23. As a result of this subsequent testing, staff *also* discovered, that the discharge of water from sample site #3 was in fact from a pipe originating on Mr. Glenn's property. In other words, the water discharging at sample site #3 was not some random seepage onto the beach. Instead the seepage of water was from a pipe originating on Mr. Glenn's property. According to Mr. Glenn's own expert, Dick Yunker, since the discharge (which tested positive for dye and bacteria) was from a pipe originating on Mr. Glenn's property, the link between the contamination and the septic system on Mr. Glenn's property is conclusive. The discovery of a pipe also supports Mr. Aley's testimony that the high dye recovery on the Glenn property is a result of a preferential flow system, i.e. pipeline carrying untreated sewage to the beach.

### **Legal Standards**

1. **Article IV, section 3** defines a failure as follows:

“Failure” means a condition of an on-site sewage system that threatens the public health by inadequately treating sewage or by creating a potential for direct or indirect contact between sewage and the public. Examples of failure include:

...  
(e) Inadequately treated effluent contaminating ground water or surface water. This may be demonstrated upon testing by currently adopted sanitary survey procedures, where the following occurs: (1) positive tracing dye results and (2) a fecal coliform count of at least 200 organisms per 100 milliliters OR above established background concentrations at a sampling point (pipe, drainage channel, seep ) from which a direct discharge to surface or ground water or to the surface of the ground occurs; . . .

2. **Article section 4.10** provides:

Sewage from any on-site sewage system or any other source shall not be discharged to surface water, upon the surface of the ground, or managed in any manner so as to constitute a failure as defined by this article.

### **Conclusion**

1. The sewage system at 2622 Lovejoy Court (Glenn property) is failing as defined in section 3, Article IV of the Thurston County Sanitary Code. The positive dye trace evaluation of the sewage system showed that sewage with a fecal coliform concentration of 1,300/100ml was discharged to the beach at a site that was hydraulically linked to the on-site sewage system.
2. The Glenn sewage system is in violation of Section 4.10 of Article IV because it is failing and discharging sewage to surface water and the surface of the ground.

**Decision:**

The appeal is **denied**. In order to abate the health hazard, Mr. Glenn is required to take the following actions:

1. Diagnose the sewage system by November 15, 2008. All diagnostic work must be approved by the environmental health department. It must be demonstrated that a component defect was a significant cause of or contributor to the system failure and that repairing the defect will result in a properly operating system. All systems having component repairs must be retested this coming wet weather season.
2. The approved on-site sewage system must be installed according to the requirements of the Sanitary Code for Thurston County, including obtaining all required inspections.

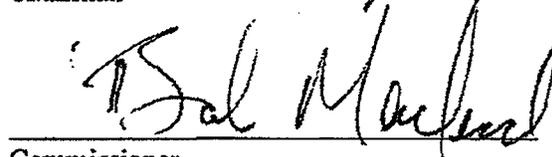
DATED this 16 day of September 16, 2008.

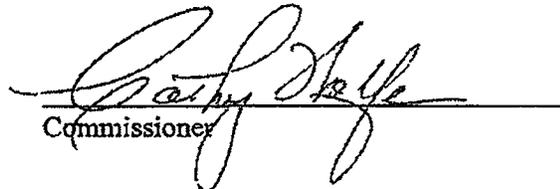
ATTEST:

BOARD OF COUNTY COMMISSIONERS  
Thurston County, Washington

  
Clerk of the Board

  
Chairman

  
Commissioner

  
Commissioner

**ATTACHMENT A**  
**List of Exhibits Submitted for 08/29/08 Glenn Hearing**

- Exhibit 26: Aerial photo showing test sites for the Stull, Glenn, and Pierce septic system dye test evaluations
- Exhibit 27: Stull (3626 Lovejoy Ct NE) septic system dye test evaluation documents
- Exhibit 28: Pierce (3616 Lovejoy Ct NE) septic system dye test evaluation documents
- Exhibit 29: Summary table of 2007 Glenn (3622 Lovejoy Ct NE) septic system dye test evaluation and Additional 2008 Information
- Exhibit 30: Sketch of Glenn/Pierce beach stairs in relation to test sites

ATTACHMENT **B**

EXHIBIT LIST

Number of Exhibit	Title or Name of Exhibit
DEPARTMENT EXHIBITS	
Exhibit 1	Notice of Violation Letter
Exhibit 2	Request for Appeal of the Notice of Violation dated June 7, 2007
Exhibit 3	Administrative Hearing Decision Letter
Exhibit 4	Request for Appeal of the Administrative Hearing Decision dated October 26, 2007
Exhibit 5	Dye Test Results Letter
Exhibit 6	Thurston County Dye Test Procedures
Exhibit 7	Field Site Map for Dye Test
Exhibit 8	Glenn Sanitary Survey Form
Exhibit 9	Bacteriological Water Sample Result for Sites #1 and #3
Exhibit 10	Glenn Dye Trace Results Sheet
Exhibit 11	Glenn Analytical Report from Ozark Underground Laboratory
Exhibit 12	Memo from Tom Aley, Ozark Underground Laboratory, regarding footnote on lab report
Exhibit 13	Ordinance No. H-3-2005
Exhibit 14	Charcoal packet
Exhibit 15	1996 Standard Methods for On-site Sewage System Evaluation Using Dye Traces
Exhibit 16	Department of Health water quality standards
Exhibit 17	Certificate of Analysis
Exhibit 18	Topographic Map
APPELLANT'S EXHIBITS	
Exhibit 19	Michael P. Doyle & Marilyn C. Brickson, <i>Closing the Door on the Fecal Coliform Assay</i> , Microbe, 2006, p. 162-163, Vol. 1, No. 4
Exhibit 20	Orin C. Shanks, et al., <i>Basin-Wide Analysis of the Dynamics of Fecal Contamination and Fecal Source Identification in Tillamook Bay, Oregon</i> , Applied and Environmental Microbiology, August 2006, p. 5537-5546, Vol. 72 No. 8

Number of Exhibit	Title or Name of Exhibit
Exhibit 21	Glenn Photo: West Drain (under steps)
Exhibit 22	Glenn Photo: Middle Drain
Exhibit 23	Glenn Photo: Middle Drain
Exhibit 24	Glenn Photo: East Drain
Exhibit 24.2	Glenn Photo: East Drain
Exhibit 25	Dick Yunker, Jim Hunter And Associates, <u>As built On-Site Sewage System</u> , January 7, 2008

opportunity to litigate the citation fully. Thus, even under the reasoning in *Buckley*, Washington Cedar was not prejudiced and would not be entitled to relief.

¶38 But we decline to follow the *Buckley* court's interpretation in this case. The *Buckley* court was concerned that an employee might deceive a corporation by covering up a citation. *Buckley*, 507 F.2d at 80-81. Here, there was no reasonable possibility that the yard manager was going to cover up the citation. The Department was not going to forget about a penalty, and such a cover up would have inevitably failed. Eventually, the Department would have contacted someone about the citation. So long as Washington Cedar was allowed to contest the citation, as it was here, the service on the yard manager was sufficient.

¶39 The *Buckley* court also wished to promote abatement of dangerous conditions. *Buckley*, 507 F.2d at 80. This goal is adequately served by giving the citation to the person in charge of safety at the specific work site or, in this case, the regional distribution center. Service on a corporate officer, if anything, adds another layer for people to contact before the unsafe condition might be redressed.

¶40 We also expressly reject Washington Cedar's proposed interpretation applying CR 4's rules. Washington Cedar relies on WAC 263-12-125, which provides that proceedings before the Board of Industrial Insurance Appeals are governed by the statutes and rules governing civil cases in superior courts. WAC 263-12-125. A citation issued by the Department is not a proceeding before the board. If a citation is not appealed to the board, it becomes a final agency action not subject to review by any court or agency. RCW 49.17.140(1). Moreover, as discussed above, the WISHA statutes contain their own notice provisions for citations. And specific provisions control over general regulations. *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 102, 758 P.2d 480 (1988). Therefore, the notice required in this case was notice via certified mail to the employer. There was no error.

¶41 Affirmed in part, reversed in part.

¶42 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ARMSTRONG and QUINN-BRINTNALL, JJ., concur.

[No. 34418-1-II. Division Two. March 20, 2007.]

JEFF GRIFFIN, *Appellant*, v. THE THURSTON COUNTY BOARD OF HEALTH, *Respondent*.

- [1] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Applicability — In General.** The Land Use Petition Act (chapter 36.70C RCW) governs judicial review of local land use decisions.
- [2] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Role of Appellate Court.** An appellate court reviewing a local land use decision that a superior court has reviewed under the Land Use Petition Act (chapter 36.70C RCW) sits in the same position as the superior court and applies the review standards of RCW 36.70C.130 directly to the administrative record.
- [3] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Error of Law — Standard of Review.** Whether a local land use decision involves an erroneous interpretation of the law, warranting relief under RCW 36.70C.130(1)(b), is a question of law that an appellate court reviews de novo.
- [4] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Constitutional Rights — Standard of Review.** Whether a local land use decision violates a constitutional right, warranting relief under RCW 36.70C.130(1)(f), is a question of law that an appellate court reviews de novo.
- [5] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Findings of Fact — Standard of Review.** Under RCW 36.70C.130(1)(c) of the Land Use Petition Act, findings of fact

entered by a local adjudicator in a land use proceeding are reviewed by an appellate court under the substantial evidence standard. Substantial evidence is evidence sufficient to convince an unprejudiced, rational person that the finding is true.

- [6] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Findings of Fact — Scope of Review — In General.** Under the substantial evidence standard of RCW 36.70C.130(1)(c) of the Land Use Petition Act for reviewing findings of fact entered by a local decision maker in a land use case, the reviewing court views the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.
- [7] **Municipal Corporations — Ordinances — Construction — Legislative Intent — Plain Meaning.** When construing a municipal ordinance, a court first attempts to give effect to the plain meaning of the words used in the ordinance. If the provision's meaning is plain on its face, there is no need for interpretation and effect will be given to the legislative body's plain meaning. To ascertain a provision's plain meaning, a court considers the ordinance as well as other provisions in the same code. Only when no plain, unambiguous meaning appears through this inquiry does the court resort to aids of statutory construction.
- [8] **Municipal Corporations — Ordinances — Construction — Superfluous Provisions.** Municipal ordinances must be interpreted so that all the language used is given effect, with no portion rendered meaningless or superfluous.
- [9] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Waivers and Setbacks — Effect.** A municipal ordinance that conditions the issuance of a building permit on the property owner's meeting "all requirements" delineated in the ordinance cannot be satisfied by a property owner for whom certain such requirements have been waived or set back when otherwise interpreting "meets all requirements" would render the phrase superfluous.
- [10] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Waivers and Setbacks — Proof — Sufficiency.** In the absence of a definition of the term "waiver" in the code at issue, evidence that a property owner submitted an application for relief from certain land development requirements that the receiving agency labeled a "request for waiver," that the request was processed by a case manager who filed a "report form for waiver request" in support thereof, and that the request was granted by a decision maker who identified the application as one for "waivers" and "setbacks" is sufficient to support a finding that such requirements were waived.

- [11] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Waivers and Setbacks — Alternate Means of Satisfying Requirements — Validity.** For purposes of a municipal ordinance that conditions the issuance of a building permit on the property owner's meeting "all requirements" delineated in the ordinance, a waiver or setback of a requirement does not constitute an alternate means of satisfying the requirement if the ordinance does not provide for alternate means.
- [12] **Building Regulations — Land Use Regulations — Validity — Review — Standard of Review.** The constitutionality of a land use ordinance and the application of the ordinance in a particular case are reviewed de novo by an appellate court.
- [13] **Building Regulations — Land Use Regulations — Vagueness — Test — In General.** A land use ordinance that provides fair warning and allows a person of common intelligence to understand its meaning is not unconstitutionally vague. The ordinance need not meet unreasonable standards of specificity to satisfy constitutional requirements.
- [14] **Building Regulations — Land Use Regulations — Vagueness — Test — Particular Conduct.** In evaluating a vagueness challenge to a land use ordinance, a court analyzes the ordinance as applied to the particular facts of the case, not for facial vagueness.
- [15] **Municipal Corporations — Ordinances — Validity — Presumption — Burden of Proof — Degree of Proof.** A duly enacted municipal ordinance is presumed to be constitutional and will not be invalidated unless the party making the challenge proves the ordinance to be unconstitutional beyond a reasonable doubt.
- [16] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Vagueness — As Applied to Property Owner Who Received Waivers and Setbacks.** A municipal ordinance that conditions the issuance of a building permit on the property owner's meeting "all requirements" delineated in the ordinance is not unconstitutionally vague as applied to a property owner who has received waivers and setbacks in lieu of satisfying all requirements.
- [17] **Building Regulations — Land Use Regulations — Vested Rights — Effect.** Under the doctrine of vested rights, a land use application is considered under the land use statutes and ordinances in effect at the time the application was submitted.
- [18] **Building Regulations — Land Use Regulations — Vested Rights — Scope — Erroneous Interpretation of Law.** The vested rights doctrine does not permit a land use application to be considered according to a prior erroneous interpretation of a statute or ordinance in effect at the time the application was submitted.

[19] **Administrative Law — Judicial Review — Issues Not Presented to Agency — In General.** In general, a court reviewing an administrative decision will decline to consider issues not raised in the administrative proceeding, particularly with regard to issues involving highly fact-specific inquiries.

**Nature of Action:** A property owner sought judicial review under the Land Use Petition Act of a county board of health's denial of the owner's petition for a permit to build a sewage system on his property. Under county ordinances, the owner's lot is one-fourth the size normally required before the county will grant a permit and the county may grant a permit on an undersized lot only if the petitioner meets three criteria, including meeting "all requirements" other than the minimum lot size delineated in the ordinance. The board denied the owner's application for permit because he had received five waivers and setbacks with respect to certain requirements.

**Superior Court:** The Superior Court for Thurston County, No. 05-2-01587-7, Gary Tabor, J., on February 3, 2006, entered a judgment reversing the board's decision.

**Court of Appeals:** Holding that the ordinance does not allow the board to grant a permit on an undersized lot where the petitioner has received waivers and setbacks of applicable requirements and that the ordinance is not unconstitutional, the court *reverses* the judgment and *remands* the case for reinstatement of the board's denial of the application for a permit.

*Allen T. Miller and Bruce D. Carter*, for appellant.

*Matthew B. Edwards (Owens Davies, PS)*, for respondent.

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**LEXIS Publishing™ Research References**

2007 Wash. App. LEXIS 479

Annotated Revised Code of Washington by LexisNexis

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¶1 QUINN-BRINTNALL, J. — The Thurston County Board of Health (Board) denied Jeff Griffin a permit to build an

on-site sewage system (OSS) on his Steamboat Island lot. Griffin's lot is one-fourth the size normally required before the Thurston County Public Health and Social Services Department (Department) will grant an OSS permit. The Department may grant an OSS permit on an undersized lot if the petitioner meets three criteria, including that the petitioner "meets all requirements" in the regulations other than the minimum lot size. THURSTON COUNTY SANITARY CODE (TCSC) art. IV, § 21.4.5.3. The Board denied Griffin's permit because he had received five waivers and setbacks. A superior court reversed. We hold that the "meets all requirements" provision governing the health officer's authority to issue an OSS permit to undersized lots excludes waivers and setbacks. Accordingly, we reverse the superior court's decision and remand with instructions that it reinstate the Board's denial of Griffin's permit.

## FACTS

### THE PROPERTY

¶2 Griffin owns a waterfront lot on Steamboat Island, an eight-acre island in Thurston County that has about 42 existing homes on 126 lots. Griffin's lot is vacant and undeveloped but is zoned residential. It is 2,850 square feet: 25 feet wide and 114 feet deep. Before Griffin purchased the property, his realtor warned him that the lot was too small for a septic tank permit and that Griffin would not be able to build a house on the property. Nevertheless, Griffin purchased the lot, applied for an OSS permit, and planned to build a small house.

### HEALTH OFFICER

¶3 During his OSS permit application process, Griffin requested that he be relieved of the responsibility of complying with several setback and site requirements of the TCSC. Specifically, he requested (1) a waiver of the winter water table evaluation, (2) a waiver reducing the separation between the septic tank and pump chamber from 10 to 5 feet, (3) a horizontal setback between the disposal compo-

ment and building foundation from 10 to 2 feet, (4) a horizontal setback between the disposal component and adjacent property line from 5 feet, (5) a horizontal setback between the disposal component and the surface water from 100 feet to 75 feet, and (6) a reduction in the minimum design flow for a single-family residence from 240 to 120 gallons per day. Citing TCSC article IV, section 21.4.5, the health officer granted Griffin's six requests. The health officer indicated his belief that if an application met the criteria under TCSC article IV, section 21.4.5,<sup>1</sup> he was obligated to grant an OSS permit and he did so.

#### HEARING OFFICER

¶4 Several of Griffin's neighbors appealed the decision to the Department. The hearing officer held that section 21.4.5 was a *discretionary* provision and the health officer should not have granted a permit to Griffin because (1) minimum land area and density are significant health issues; (2) Griffin's lot is much smaller and more dense than the typical lot size and density; (3) the waivers and setbacks that Griffin received increased the health concern; and (4) thus, it is proper to take a conservative position on whether to exercise discretion and grant a waiver. The hearing officer also found that the health officer should not have waived the winter water study. The Department's hearing officer denied Griffin's permit.

<sup>1</sup> TCSC article IV, section 21.4.5 provides that the health officer may:

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.

Clerk's Papers at 120 (emphasis added).

#### BOARD

¶5 Griffin appealed to the Board. Thurston County opposed Griffin's motion, and the interested parties cross-appealed.

¶6 The Board adopted the hearing officer's findings of fact, conclusions, and decision. But the Board apparently disagreed with the hearing officer's conclusion that the winter water study evaluation was erroneously waived. And the Board underlined the word "may" when it reprinted the ordinance, but it did not explicitly base its ruling on its discretionary authority to deny Griffin a permit under article IV, section 21.4.5. Instead, it held that the phrase "meets all requirements" in article IV, section 21.4.5.3 is not fulfilled if the petitioner is granted waivers and setbacks. It reasoned that the word "requirements," construed conservatively in order to protect the public's health, excludes waivers and setbacks.

¶7 One Board member dissented, saying that the phrase "all requirements" is ambiguous and that the Board should construe the statute in Griffin's favor because he complied with the health officer's requests. Through the other two votes, the Board affirmed the Department's permit denial.

#### SUPERIOR COURT

¶8 Griffin then appealed to superior court. He argued that the Board erred in its decision and that the ordinance is unconstitutionally vague and violated his vested and substantive due process rights. The superior court ruled orally:

I'm going to have to disagree with the County Commissioners or at least two of the three in this particular case. I do not find that that language, specifically the term "all requirements," means requirements without waiver. A requirement is a specific standard, and often for standards to apply there may be exceptions. A requirement or rule may still be met if there is an exception to the standard.

Report of Proceedings at 5. Although the superior court reversed the Board's decision, it found no merit in Griffin's

assertions that his constitutional rights were violated. Griffin appeals.

¶9 This appeal, filed under the Land Use Petition Act (LUPA), chapter 36.70C RCW, requires that we answer two questions: (1) does the plain language of the TCSC, article IV, section 21.4.5.1, allow the Board to grant an OSS permit on an undersized lot when the petitioner has received waivers and setbacks and (2) is the ordinance unconstitutional?

### ANALYSIS

#### STANDARD OF REVIEW

[1, 2] ¶10 LUPA governs judicial review of land use decisions. RCW 36.70C.030. As all parties agree, at issue here is a “land use decision” governed by LUPA because Griffin appeals his “application for a project permit . . . required by law before [his] real property may be improved, developed, modified, sold, transferred, or used.” RCW 36.70C.020(1)(a). When reviewing a land use decision, we stand in the same position as the superior court and review the administrative record that was before the Board. *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004); *Citizens for Responsible & Organized Planning v. Chelan County*, 105 Wn. App. 753, 758, 21 P.3d 304 (2001). LUPA requires reversal of the Board’s land use decision if the party seeking relief shows that:

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; [or]

....

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

[3-6] ¶11 Standards (b) and (f) present questions of law that we review de novo. 7 WASH. STATE BAR ASS’N, WASHINGTON REAL PROPERTY DESKBOOK § 111.4(9), at 111-25 (3d ed. 1996). Standard (c) concerns a factual determination that we review for substantial evidence. 7 WASHINGTON REAL PROPERTY DESKBOOK § 111.4(9), at 111-25.

¶12 “Substantial evidence” is evidence sufficient to convince an unprejudiced, rational person that a finding is true. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002). On review, we weigh all inferences in a light most favorable to the party that prevailed in the highest forum that exercised fact-finding authority. Thurston County prevailed at the Department hearing, the highest forum with fact-finding authority, and thus we view all evidence and reasonable inferences in its favor.

#### CONSTRUCTION OF ORDINANCE

[7-9] ¶13 Under the ordinance here at issue, the health officer has discretion to permit an OSS installation *only* if three criteria are met. TCSC art. IV, § 21.4.5.1. Under the third criterion, the health officer has discretion to grant an OSS permit for a lot less than the minimum land size only if “[t]he proposed system meets all requirements of these regulations other than minimum land area.” Clerk’s Papers (CP) at 120. In reviewing this criterion, the Board excluded waivers and setbacks that landowners had received in evaluating whether small lots satisfied “all other requirements.” The Board was correct.

¶14 Article IV, section 21.4.5 of the TCSC provides that the health officer may:

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.

CP at 120 (emphasis added).

¶15 Because Griffin's property was one-fourth of the minimum lot size required for the health officer to grant an OSS permit, the health officer could grant the permit *only* if the criteria in article IV, sections 21.4.5.1, 21.4.5.2, and 21.4.5.3 were satisfied. *See* TCSC, art. IV, § 21 tbl. VII at 4-58 (setting minimum lot size at 12,500 square feet, where Griffin's lot is 2,850 square feet).

¶16 When reviewing ordinances, we first attempt to give effect to the plain meaning of the words. If a provision's meaning is plain on its face, there is no need for interpretation and we give effect to the legislative body's plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To ascertain a provision's plain meaning, we examine the ordinance as well as other provisions in the same code. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). Only when no plain, unambiguous meaning appears through this inquiry do we resort to aids of statutory construction. *Campbell & Gwinn*, 146 Wn.2d at 12.

¶17 We must give effect to all provisions of an ordinance and may not interpret an ordinance in a way that renders a portion meaningless or superfluous. *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006). Under this principle, the "all requirements" portion of the ordinance at issue here cannot include "requirements" that have been waived or set back. If "all requirements" included waivers and setbacks, the language would be meaningless and superfluous. Every OSS petitioner, regardless of lot size, is required to comply with the TCSC's provisions or else obtain waivers and setbacks. Thus, the phrase is meaningful only if the application's sole deficiency is lot size. The Board properly construed the

ordinance to mean that an undersized lot must meet "all requirements" without waivers and setbacks in order to trigger the health officer's authority to exercise discretion and grant an OSS permit to an undersized lot.

#### SUBSTANTIAL EVIDENCE

[10] ¶18 We now review the finding that Griffin received waivers and setbacks for substantial evidence. Griffin asserts that the five variances that he received were not waivers but were, instead, "equivalent methods for achieving compliance with [the TCSC's] requirements." Br. of Resp't at 32-33. If Griffin did not receive waivers, the Board could not properly deny Griffin an OSS permit on the ground that the ordinance's "all requirements" provision was not fulfilled.

¶19 As used here, "waiver" is not a precise term of legal significance but, instead, is a term that the Department employs in common use. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 923 (2d ed. 1995) (defining "waiver" as ordinarily meaning "the relinquishment of a legal right" but emphasizing that the word is often used as "an imprecise and generic term"). The Department labeled Griffin's applications "Thurston County On-Site Sewage-Systems Request for Waiver." Administrative R. (AR) at 18. In reviewing Griffin's applications, the case manager filed a "Report Form for Waiver Request." AR at 22. And the health officer similarly referred to the Department's actions as "waivers" and "setbacks." This evidence is substantial and supports the Board's finding that Griffin received waivers rather than meeting certain requirements. Thus, he did not fulfill the ordinance's third criterion: that he satisfy all requirements other than lot size.

[11] ¶20 Griffin also mischaracterizes the TCSC as allowing a petitioner to satisfy TCSC requirements via one of several equivalent methods. Griffin requested and received an abdication of the Department's authority to require him to submit a winter water study under TCSC article IV, section 11.4.1 as well as four reductions from the "minimum horizon-

tal separations” listed in TCSC article IV, section 10.1, table 1. The TCSC gives the Department discretion to waive these requirements, but it does not list equivalent methods of compliance. See TCSC art. IV, § 10.1, tbl. 1, § 11.4.1. Because Griffin mischaracterizes the TCSC’s structure, his argument that waivers are alternate means of satisfying TCSC requirements fails. Griffin does not argue that he did not receive setbacks. He received both waivers and setbacks in lieu of satisfying TCSC requirements. Thus, the Board did not err when it concluded that the hearing officer lacked authority to grant Griffin an OSS permit for his undersized lot because Griffin did not satisfy all requirements except lot size. Because these issues are dispositive, we do not reach the remaining issues of whether the Board properly granted waivers and setbacks.

#### CONSTITUTIONALITY

[12] ¶21 Griffin cross-appeals and asserts three constitutional challenges to the TCSC under the doctrines of vagueness, vested rights, and substantive due process. We review de novo the constitutionality of a land use ordinance and decision. RCW 36.70C.130(1)(f). Griffin has not demonstrated that the TCSC is unconstitutional on its face or as applied.

#### VAGUENESS

[13-15] ¶22 Griffin first asserts that the TCSC is unconstitutionally vague. A land use ordinance that provides fair warning and allows a person of common intelligence to understand the law’s meaning does not violate a party’s constitutional rights. *Young v. Pierce County*, 120 Wn. App. 175, 182, 84 P.3d 927 (2004). Courts do not require an unreasonable standard of specificity, and we judge the ordinance as applied, not for facial vagueness. *Young*, 120 Wn. App. at 182. A duly enacted ordinance is presumed constitutional, and the party challenging it must demonstrate that the ordinance is unconstitutional beyond a reasonable doubt. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005).

[16] ¶23 Griffin has not met his burden to prove that the TCSC, article IV, section 21.4.5.1, is unconstitutionally vague. He argues only that (1) he would interpret the ordinance differently, (2) the Board previously interpreted the ordinance differently, and (3) he invested a lot of money because he believed the Board would grant him a permit. Initially, we note that Griffin’s real estate agent told him that the property was too small to build on before he purchased it. Moreover, the provision “meets all requirements” allows a person of common intelligence to understand that a landowner who seeks an OSS permit for an undersized lot cannot receive waivers and setbacks in lieu of satisfying all requirements other than lot size. *Young*, 120 Wn. App. at 182. This reading of the plain language is consistent with long-standing principles of statutory construction. See *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999). The ordinance is not vague.

#### VESTED RIGHTS

[17, 18] ¶24 Griffin next challenges the ordinance’s application under the vested rights doctrine. “Vesting” refers generally to the notion that an agency may consider a land use application only under the statutes and ordinances in effect when the applicant submitted his application. *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994). Griffin asserts that because the Board previously interpreted the TCSC, article IV, section 21.4.5.1, differently, he had a right to rely on its continued erroneous interpretation of the ordinance and that, therefore, the Board violated his vested rights. But the vested rights doctrine relates to implementing new laws, not correcting a misinterpretation of existing law. See *Friends of the Law*, 123 Wn.2d at 522. TCSC article IV, section 21.4.5.1 was not only in effect when Griffin submitted his land use application, it was in effect when he bought the property with notice that it was unbuildable. The vested rights doctrine does not apply in the manner Griffin suggests.

## SUBSTANTIVE DUE PROCESS

[19] ¶25 Last, Griffin claims that the Board violated his substantive due process rights. Generally, an issue not raised in a contested case before the Board may not be raised for the first time on review of the Board's decision. *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201 n.4, 884 P.2d 910 (1994). Substantive due process analysis is highly fact specific. *See Guimont v. Clarke*, 121 Wn.2d 586, 608-09, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176 (1994). Griffin did not raise this issue before the Board, and without a full factual development on the record, we cannot fairly address this claim. Thus, Griffin waived this claim. *Accord Buechel*, 125 Wn.2d at 201 n.4.

¶26 Reversed and remanded.

BRIDGEWATER and PENOYAR, JJ., concur.

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[No. 34529-3-II. Division Two. March 20, 2007.]

THE STATE OF WASHINGTON, *Respondent*, v. B.J.S.,  
*Appellant*.

The opinion in the above captioned case, which appeared in the advance sheets at 137 Wn. App. 622-33, has not been published in this permanent bound volume pursuant to an order of the Court of Appeals dated August 7, 2007 withdrawing the opinion, denying reconsideration, and substituting a new opinion. See 140 Wn. App. 91.

THE NEXT PAGE IS NUMBERED 633.

[Nos. 24464-4-III; 24800-3-III; Division Three. March 22, 2007.]  
24613-2-III.

JEFF LASCHEID, *Respondent*, v. THE CITY OF KENNEWICK,  
*Appellant*.

[1] **Trial — Taking Case From Jury — Sufficiency of Evidence — Judgment as a Matter of Law — Review — Standard of Review.** The propriety of a trial court's denial of a motion for judgment as a matter of law is a question of law that is reviewed de novo.

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

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BETTY J. BOULDER CLERK  
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DEPUTY

SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY

JEFF GRIFFIN,

Plaintiff,

NO.

05-2-01587-7

vs.

LAND USE PETITION

THURSTON COUNTY, AND ITS BOARD OF  
HEALTH

Defendants.

Comes now the petitioner, Jeff Griffin, by and through his counsel Matthew B Edwards  
of Owens Davies, P.S., and pleads the following in order to assert a claim for relief under the Land  
Use Petition Act, Chapter 36.70C RCW:

1. Petitioner.

Name and mailing address of the petitioner is:

Jeff Griffin  
9612 Mariner Drive NW  
Olympia, WA 98502

2. Petitioner's Attorney:

Name and Mailing address of the petitioner's attorney:

Matthew B. Edwards  
Owens Davies, P.S.  
PO Box 187  
Olympia, WA 98507

OWENS DAVIES, P S  
926 - 24th  
Olympia  
Pho: APPENDIX C-1  
Facs: 11

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1 Mr. Bruce D. Carter  
2 2822 Steamboat Island Lp NW  
3 Olympia, WA 98502

4 Mr. Bruce D. Carter  
5 3012 West Eaton Street  
6 Seattle, WA 98199-4233

7 Ms. Shari Richardson  
8 3720 91<sup>st</sup> Street SE  
9 Everett, WA 98208-3621

10 Ms. Shari Richardson  
11 3012 West Eaton Street  
12 Seattle, WA 98199-4233

13 Ms. Shari Richardson  
14 2822 Steamboat Island Lp NW  
15 Olympia, WA 98502

16 6. Facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060.

17 Petitioner Jeff Griffin is the owner of the property and the applicant for the septic system  
18 approval which the Thurston County Board of County Commissioners, acting as the Board of  
19 Health, denied. RCW 36.70C 060(1).

20 7. A separate and concise statement of each error alleged to have been committed.

21 Thurston County Board of County Commissioners, acting as the Board of Health, erred  
22 in entering conclusion of law number 7, as set forth on page 3 of the decision attached as Exhibit  
23 A, and denying the permit based on the reasoning contained therein.

24 8. A concise statement of the facts upon which the petitioner relies to sustain the statement of error.

25 Article IV, Section 21.4.5 of the Thurston County Sanitary Code provides as follows:

26 The health officer may

27 ...

1 Permit the installation of an OSS, where the minimum land area requirements or  
2 lot sizes cannot be met, only when all of the following criteria are met

3 21.4.5.1 The lot is registered as a legal lot of record created prior to  
4 January 1, 1995; and

5 21.4.5.2 The lot is outside an area of special concern where  
6 minimum land area has been listed as a design parameter  
7 necessary for public health protection; and

8 21.4.5.3 The proposed system meets *all requirements* of these  
9 regulations other than minimum land area.

10 (Italicization added)

11 As County personnel explicitly testified at the hearings conducted in this matter, the  
12 County has routinely issued on-site sewage permits to persons proposing to develop lots of less  
13 than 12,500 square feet, the minimum size specified in the County's on-site sewage regulations.  
14 Permits have consistently been issued to property owners of lots of less than 12,500 square feet  
15 who had requested and had approved alternative methods, waivers, setback diminutions, and the  
16 like. The Thurston County Sanitary Code explicitly authorizes the County to provide such waivers,  
17 setback reductions, or the like in such cases in which the property owner/applicant demonstrates  
18 that his or her specific proposal is so configured as to achieve equivalent levels of protection.  
19 Despite the foregoing, the Thurston County Board of County Commissioners, acting as the Board  
20 of Health, for the first time in this case interpreted the italicized phrase as to require compliance  
21 with all setbacks and similar requirements without reduction or waiver.

22  
23 The Thurston County Board of Health erred in so interpreting Article IV, § 21.4.5.3. The  
24 Board's interpretation is not a reasonable interpretation of the italicized language. It is  
25 inconsistent with the Sanitary Code's explicit acceptance of equivalent methods, techniques and  
26 specifications, so long as they provide equivalent levels of protection. Finally, the Board's new  
27

1 interpretation would deny Mr. Griffin (and indeed, if consistently applied, all owners of lots of less  
2 than 12,500 square feet) of the right to develop and make reasonable use of develop their property,  
3 in violation of Mr Griffin's (and such other lot owners) substantive due process rights.

4  
5 9. Request for relief, specifying the type and extent of relief requested.

6 Petitioner requests that the Court enter an order reversing the decision and remanding this  
7 matter with instructions that Mr. Griffin's permit be issued.

8 In addition, petitioner Jeff Griffin requests that the Superior Court provide him with such  
9 other and further relief consistent with the authority granted the Court under the Land Use Petition  
10 Act as the Court deems just and equitable.

11 DATED this 12 day of August, 2005.

12  
13 OWENS DAVIES, P/S

14  
15 

16 Matthew B. Edwards, WSBA No 18332  
17 Attorneys for Petitioner Jeff Griffin



- a) Horizontal setback between disposal component and building foundation from ten (10) feet to two (2) feet,
  - b) Horizontal setback between disposal component and adjacent property line from five (5) feet, and
  - c) Horizontal setback between disposal component and surface water from one hundred (100) feet to seventy-five feet (75).
- 8) The rationale for granting the building foundation setback used by the Department was that the foundation would be slightly uphill of the disposal component and that the drain field bed would be lined with plastic to prevent lateral movement of the effluent from the drain field to the foundation. The rationale for granting the building foundation setback used by the Department was that the adjacent property line was "up gradient", the plastic liner for the drain field, and that "no impervious layer was located below the disposal component." The rationale for granting the building foundation setback used by the Department was that "the enhanced effluent treatment would be provided by the sand lined bed system that utilizes pressure distribution."
- 9) Griffin requested and received from the Department a reduction in the minimum design flow from 240 to 120 gallons per day for a single-family residence. The reduction was granted as the application shows a one-bedroom floor plan, pump timers that will limit discharge from the system to 120 gallons per day, the plan has a primary and reserve system to handle "overflow" capacity, and the installation of low flow fixtures to reduce wastewater production.
- 10) Griffin requested and received from the department to install an OSS on a lot that did not meet the minimum land area requirements stated in Article IV of the Sanitary Code Article IV, Section 21.4.5.3 allows for construction of an OSS on a too-small lot if "all (other) requirements" are met. The Department determined that with the waivers and setbacks that were allowed based upon Griffin's actions, the "all (other) requirements" provision had been met, and the application was granted
- 11) Bruce Carter, who with his sister owns an adjacent parcel and appealed the issuance of the permit claiming that they would be adversely affected if the approved system failed.
- 12) The appeal went to the Hearing Officer. The Hearing Officer granted the appeal and denied the issuance of the permit to the Griffins.
- 13) The Hearing Officer cited the following relevant criteria that were considered in denying the permit [other criteria cited by the Hearing Officer in his decision were shown to be corrected at the time of the Board of Health hearing]:
- a) The Hearing Officer first determined that the minimum land area requirements and density are significant public health issues when considering the permitting of OSS on undersized lots, and that the Health Officer or their designee should "take a conservative position when considering how to apply Section 21.4.5.3".
  - b) That the only way for the lot to be developed was to allow a "substantial number" of waivers and horizontal setback reductions.
  - c) The greatest concern of the setback reductions was the shortened distance between the system and surface waters. The current requirement is 100 feet.

- 14) At the public hearing, Thurston County presented the facts and evidence underlying the Health Officers position, testimony provided by Art Starry, as well as why the County originally approved the application, testimony provided by Steve Peterson. The County did not make a recommendation to the Board; instead, it asked the Board to focus on the term "all (other) requirements" found in Article IV, Section 21.4.5.3 and asked the Board to interpret the meaning of this language in relation to small-lot OSS applications.
- 15) Gnffin presented wastewater flow report evidence and testimony from Robert G. Connolly, P.E. of Skillings-Connolly, a local and reputable soils engineering firm, as well as testimony from Lisa Palazzi, CPSS and the previous report submitted by Pacific Rim Soil and Water. These reports supported Griffin's contention that the waivers and setbacks were plausible considering the makeup of the soils underlying the subject parcel. Griffin also solicited testimony from Doug DeForrest and Bruce Carter.
- 16) The BOH considered evidence submitted by Gnffin, Carter, and the County.

**b) Conclusions**

Based upon the above findings, a majority of the Board of Health Concludes as follows:

- 1) That Article IV, Section 21 of the Thurston County Sanitary Code covers OSS permits for too-small lots.
- 2) That Article IV, section 21.4 5 states that the Health Officer may (emphasis added) permit the installation of an OSS where minimum land area requirements or lot sizes only when...
  - 21.4.5.1 The lot is registered as a legal lot of record created prior to Jan 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. (Emphasis added)
- 3) That there is no issue in front of the Board concerning 21.4.5.1 or 21.4.5.2.
- 4) That the Griffins did what the Department required of them to obtain the waivers and modified setback required.
- 5) That no scientific evidence has been submitted to refute the findings of the soils or wastewater flow reports submitted by Gnffin.
- 6) That the issue for the Board is to determine if the application has met all other requirements other than minimum land area as required by 21.4.5.3.
- 7) That a majority of the Board agrees with the Hearings Officer in that the language in 21.4.5.3 should be construed conservatively. "All (other) requirements" means that an application for an OSS on a too-small lot should satisfy all requirements related to permitting at the time of application without having to result to waivers, setback adjustments or other modification of the rules found within the Code.

Based upon the above findings and conclusions, IT IS HEREBY ORDERED AS FOLLOWS:

(1) The Griffin's appeal is denied. The hearing officer's decision is affirmed.

DATED this 15 day of August, 2005.

BOARD OF HEALTH

Thurston County, Washington

ATTEST:

Clerk of the Board

*Prattman*

*Diane Oberquell*  
Chairman Diane Oberquell

*Robert N. Macleod*  
Commissioner Robert N. Macleod

Dissent

I respectfully dissent.

I agree with the findings of the Board and the Conclusions except for Conclusion No. 7. To me, the meaning of the term "all (other) requirements" is ambiguous and unclear. Therefore, I chose to err on the side of the applicant who has completed all of the requirements placed upon him by county staff.

The findings of the soils report and the wastewater flow report is undisputed. While I appreciate the concerns of the Hearings Officer, the evidence before the Board would indicate that permitting this OSS would not present a health problem to the neighbors or citizens of Thurston County. Therefore, I would vote to overturn the decision of the Hearing Officer and issue the permit to the Griffins.<sup>1</sup>

*Cathy Wolfe*  
Commissioner Cathy Wolfe

<sup>1</sup> It is not my preference to allow septic systems on undersized lots, and I agree that close scrutiny should be given to this type of application. However, due to the ambiguity I see, I feel that I have no choice in this situation. I would like to see the Department act quickly to amend the language of 21.4.5.3 so that this type of problem does not occur in the future.

**ATTACHMENT A**  
**LIST OF EXHIBITS**

**Exhibit A: Material submitted by the Department:**

- Environmental Health Division Report (BOH 6/21/05)
- Exhibit A Application for an On-Site Sewage System Permit
- Exhibit B On-Site Sewage System Design Proposal
- Exhibit C Department Policy on Minimum Lot Size
- Exhibit D Request for Waiver of Winter Water Evaluation
- Exhibit E Department Policy on Winter Water Evaluations
- Exhibit F Request for Waiver of Setback to Water Line
- Exhibit G WA State Dept of Health Document – Alternating Drainfields
- Exhibit H Administrative Hearing Decision
- Exhibit I Documents Submitted in Administrative Hearing as follows:
  - Exhibit I-1 Appellants' Memorandum
  - Exhibit I-2 Griffin Residence On-Site Disposal Plan
  - Exhibit I-3 3/21/2005 Case Handler Report and Approval
  - Exhibit I-4 Plat of Steamboat Island
  - Exhibit I-5 Diagram of Proposed Griffin Residence
  - Exhibit I-6 Certificate of Service and Notice of Appeal
  - Exhibit I-7 Request for Public Documents
  - Exhibit I-8 Onsite Wastewater Treatment Systems Manual (excerpts)
  - Exhibit I-9 10/24/03 Soils Analysis Letter of Alan Schmidt
  - Exhibit I-10 4/21/04 Winter Water Study
  - Exhibit I-11 8/31/04 Pacific Rim Soil and Water, Inc. Letter
  - Exhibit I-12 10/25/04 Schmidt Case Handler Report
  - Exhibit I-13 Declaration of Dennis Bickford
  - Exhibit I-14 Declaration of Shari Richardson
  - Exhibit I-15 Declaration of Bruce Carter with Attachments
  - Exhibit I-16 Totten Inlet Report (excerpts)
  - Exhibit I-17 On-Site Sewage System Usage Scenario (5/6/05)
  - Exhibit I-18 (Omitted)
  - Exhibit I-19 Thurston County Policy for Sand-Lined Trench Systems

**Exhibit B: Material submitted by appellant:**

- Owens Davies, PS letter dated 6/16/05
- Pacific Rim Soil & Water Inc. letter to Jeff Griffin dated 5/26/05
- Skilling Connolly letter to Owens Davies, PS dated 5/26/05
- Skilling Connolly letter to Owens Davies, PS dated 6/8/05

**Exhibit C: Material submitted by Mr. Carter:**

- Carter Cross-Appellant's Memorandum and Supporting Statements and Documentation:
- Appellants listing of documents
- 1. Memorandum in Support of Appeal of Health Officer Decision
- 2. Griffin Residence – Onsite Sewage Disposal Plan
- 3. Case Handler Report Form for Waiver Request dated 3/21/05
- 4. Plat of Steamboat Island drawing
- 5. Griffin Residence floor plan

6. WA DOH Alternating Drainfields Recommended Standards and Guidance for Performance, Application, Design and Operation and Maintenance (effective 4/5/1999)
7. WA DOH Rules Development Committee Issue Research Report completed 8/2002
8. EPA Onsite Wastewater Treatment Systems Manual
9. Department Letter to Skillings & Connolly dated 10/24/03
10. Skillings Connolly letter to Department dated 4/21/04
11. Pacific Rim Soil & Water, Inc letter to Jeff Griffin dated 8/31/04
12. Case Handler Report Form for Waiver Request dated 10/25/04
13. Declaration of Dennis W. Bickford Relating to Appeal of Griffin Onsite Sewer Application for 2828 Steamboat Island, N.W., Tax Parcel #76200001100,04-118273 HD dated 4/30/05
14. Declaration of Shari Richardson Relating to Appeal of Griffin OSS Application for 2820 Steamboat Island, N.W. dated 4/28/05
15. Declaration of Bruce D. Carter Relating to Appeal of Griffin OSS Application for 2820 Steamboat Island, N.W. dated 5/4/05
16. Totten Inlet and Watershed – A Bacteriological Water Quality Investigation Report dated 4/1986
17. Vacant Land Agent/Tax Summary Report
18. R.W. Beck letter to the BOH dated 6/13/05
19. Kitsap Health District letter to Mr. Bruce Carter dated 6/10/05
20. Dennis Tone with Tacoma-Pierce County Health Department email to Bruce Carter dated 6/15/05
21. Mason County Department of Health Services letter to Bruce Carter dated 6/2/04
22. Taylor Shellfish letter to the BOH dated 6/14/05
23. People for Puget Sound letter to the BOH dated 6/15/05
24. On-Site Sewage System Usage Scenano prepared by Dennis Bickford dated 6/16/05
25. Verbatim Transcript of Recorded Hearing Appeal of Decision Regarding Griffin Property May 4<sup>th</sup> and 6<sup>th</sup>, 2005