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DIVISION II

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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THURSTON COUNTY, and its BOARD OF HEALTH,

Appellants,

and

BRUCE CARTER, SHARI RICHARDSON, GEORGIA BICKFORD,
BARBARA BUSHNELL and JANE ELDER BOGLE,

Appellant Interested Parties,

v.

JEFF GRIFFIN,

Respondent.

REPLY BRIEF OF APPELLANT INTERESTED PARTIES

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I. INTRODUCTION

This case involves the issue of minimum lot size under Thurston County's regulations for private septic systems. Respondent applied for an on-site septic system permit for a waterfront lot only 23% of the usual minimum lot size. The restrictive regulation for such grandfathered too-small lots allows for no additional concessions, i.e., that applicant "meets all requirements other than minimum lot size." (Section 21.4.5.3, Article IV, Rules and Regulations of the Thurston County Board of Health Governing Disposal of Sewage, ["BoH Regs"]).¹ The Board of Health and Hearing Officer Art Starry both denied the permit within their discretionary authority over requests for reduced-size lots by means of a remedial conservative construction of section 21.4.5.3 BoH Regs. The Board ruled that the 21.4.5.3 condition that "the proposed system meets all requirements of these regulations other than minimum land area" barred requested additional "waivers, setback adjustments and modifications,"

¹ The Record on Review is also comprised of the Report of Proceedings ("RP"), the Clerk's Papers ("CP") and the Administrative Record of Adjudicative Proceedings ("AR"). An Amended Appendix was also filed by Appellant Interested Parties ("AIP"). Other references will be Board of Health ("BoH"), Respondent's Brief ("RB"), On-Site sewer system ("OSS") and attachments appended to this brief will be described as Exhibits ("Ex. __").

without regard to whether the concessions might be allowed for a standard size lot.

Most of respondent's arguments overlook the fact that minimum lot size is the "elephant in the case." Factual claims regarding equivalence, growth or community influence are unsupported by record citations. Instead, respondent urges the Court to ignore section 21.4.5.3, and refrain from deferring to the Board's specialized expertise in administering its regulations. Respondent suggests that the restrictive "meet all requirements" language of 21.4.5.3 be read as superfluous by allowing such too-small lot applicants every concession, waiver, reduction, or modification available in other provisions of the code. Such superfluous construction of 21.4.5.3 is barred under the case law.

The Board of Health's denial of Mr. Griffin's application for an on-site sewer system should be affirmed for three distinct reasons:

1. In light of the public health problems arising from too small lots, denial of the permit through remedial construction of 21.4.5.3 was an appropriate exercise of the Board of Health's discretionary authority for a lot 77% undersize.
2. Denial was an appropriate application of the plain language of section 21.4.5.3 and the Board's expertise in construing the regulatory language to require that the "proposed

system meets all requirements of these regulations other than minimum land area.” The Courts should defer to the agency’s wisdom and expertise in interpreting and administering the regulations, particularly where a different construction would impermissibly render the regulation superfluous.

3. The property does not factually qualify for two of the requested setback reductions based on the term “upgradient” defined by the admitted direction of the flow of the water table beneath the property.

II. PROCEDURAL BACKGROUND

The hearing officer’s denial of the permit was based on his conclusions that the tiny lot did not satisfy the public health concerns involving density and lot size, that a conservative construction of the “meets all requirements” language of 21.4.5.3 does not allow for the requested additional concessions and that respondent did not satisfy the requirements for certain requested concessions that might apply to standard lots. AR 43, para. 3-10.

When respondent appealed to the BoH, the prosecutor supported AIP’s request to participate. AR 401-403. The BoH, however, excluded AIP from presenting evidence, cross-examining and arguing before the

BoH. AR 404. No cited or known requirement precludes a prevailing party from participating in an appeal, though a commissioner said it was “too late.” AR 337.

The advocacy supporting denial before the BoH was limited because the prosecutor presented the matter without recommendation on the issue of interpreting 21.4.5.3. AR 3, para 13. Nonetheless, the BoH affirmed the denial of the permit under the conservative construction of 21.4.5.3,(AR 1-4) adopting the findings, facts conclusions and decision of the hearing officer, (AR 1) while noting that Griffin’s reports supported the contention that certain requested waivers and setbacks were plausible. AR 3, para. 15. Thus, the BoH resolved the case under 21.4 and 21.4.5.3, apparently finding it unnecessary to decide whether applicant would qualify for the requested waivers, setback reductions and modifications that might apply for a regular lot size.

The Superior Court, which reversed the BoH, erred in failing to recognize the BoH’s discretionary authority, in failing to consider that 21.4.5.3 is a restrictive condition on the undersize lot issue in light of the regulation as a whole, in failing to defer to the expertise of the BoH, and in rendering regulation 21.4.5.3 superfluous **in** its ruling. RP 3-5.

AIP here argues that the BoH decision should be affirmed because the well-justified denial was within its authority to apply and interpret its

rules. In the alternative, if the BoH is not affirmed, the matter should be remanded to the Board for further hearings in which AIP's should be allowed to present evidence, cross-examine witnesses and argue their case.

III. ARGUMENT

A. Statutory Framework, Burden Of Proof And Standards Of Review

The pertinent parts of the Land Use Petition Act [LUPA] provide as follows:

(1) . . . The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are: . . .

(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; . . .

(d) The land use decision is a clearly erroneous application of the law to the facts; . . . or

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

RCW 36.70C.130

Standard of Review

When reviewing a superior court's decision on a land use petition, we stand in the same position as the superior court. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998). A party who seeks relief under LUPA carries the burden of meeting one of the standards in RCW 36.70C.130 (1). *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

Under LUPA, we review the decision of the local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals. RCW 36.70C.020 (1); . . .

The relevant standards for granting relief are, therefore, whether the Board erroneously interpreted the law and whether the Board made a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(b), (d). Whether the Board erroneously interpreted the law is a question of law reviewed de novo. *Schofield*, 96 Wn. App. at 586. And the Board has made a clearly erroneous application of law to the facts if we are left with the definite and firm conviction that it committed a mistake. *Schofield*, 96 Wn. App. at 586.

Lakeside Industries, Inc. v Thurston County, 119 Wn. App. 886, 893-894, 83 P.3d 433, review denied (October 6, 2004).

Thus, respondent has the burden of proof under LUPA to show that he is entitled to relief from the Courts, by establishing the “definite and firm conviction that the [BoH] committed a mistake as the standard for the application of discretion and whether the Board erroneously interpreted its regulations 21.4 and 21.4.5.3.

In determining the sufficiency of the evidence, we view the record and the inferences in the light most favorable to the party that prevailed in the highest fact-finding forum. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d, 740, 751, 49 P.3d 867 (2002); *Lakeside*, 119 Wn. App. at 893, 83 P.3d 433. [emphasis added]

Henderson v Kittitas County., 124 Wn. App. 747, 752, 100 P.3d 842 (Div. III, 2004).

We also defer to a statutory interpretation of the administrative agency charged with administering and enforcing the statute. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975).

Lakeside, supra at 896-897

Thurston County's police power to regulate private sewage disposal springs from the Constitution.

Counties may, under their general police powers, "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." CONST. art. XI, § 11. Here, the County has direct legislative authority to regulate private sewage disposal systems. RCW 70.05.060; *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn. App. 709, 712, 558 P.2d 821 (1977).

Rental Owners v. Thurston County, 85 Wn. App. 171, 178, 931 P.2d 208 (Div. II, 1997), *rev. den.* 132 Wn. 2d 1010 (1997).

The State regulations set only minimum levels:

(3) This chapter is adopted by the state board of health in accordance with the authority granted in RCW 43.20.050 to establish minimum requirements for the department of health, and local boards of health whether or not they choose to adopt local regulations. [emphasis added]. WAC 246-272-00101(3) (Ex. A)

The principal regulation under review is Article IV, Section 21.4:

The health officer may: . . .

21.4.4 Require larger land areas or lot sizes to achieve public health protection. . . .

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

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

21.4.5.2 The lot is outside an area of special concern where minimum land area had 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] BoH Regs 21.4.5.3

The County's Environmental Health Department refined the minimum requirements in its June 12, 1998 guidance as follows:

1. The Health Officer may consider existing legal lots for single family dwelling purposes without considering the dwelling unit per acre issue. **The Health Officer may permit on-site sewage disposal on such lots if he/she finds that significant impact to ground and surface water or health hazards will not occur.** [emphasis added] AR. 17.

The guidance and the required finding were never addressed by staff in their case review. Respondent's reference to this administrative requirement is to misconstrue it by quoting from the first sentence and ignoring the operative second sentence. RB 37.

B. Respondent Does Not Dispute The Board Of Health's Discretionary Authority To Deny An OSS Permit For A Tiny Lot Under Section 21.4.

Section 21.4, granting discretionary authority to issue permits for undersize grandfathered lots, provides that “The health officer may:” Similar emphasis on discretion and the term “may” is reflected in the opinions of the Board of Health and the Hearing Officer. AR 3, Concl. 2), AR 43, Concl. 3, 4. AIP’s cited case law establishing the discretionary authority is not acknowledged or distinguished in respondent’s brief and should be considered as accepted. The exercise of that discretion is reflected in the respective health Department opinions. Hearing Officer’s Conclusion 3 (AR 3), adopted by BoH (AR 1); Board of Health Finding 13 a) AR 3.

The unchallenged findings reflect the importance of minimum lot size and density:

4. When looking at Section 21.4.5 and the permitting of on-site systems on undersized lots, it must be recognized that **minimum land area and density are significant public health issues. It is well recognized that even properly operating on-site systems discharge pollutants that can be detrimental to public health at some concentrations. . . . It seems logical then, that when considering undersized lots, the health officer should take a conservative position when considering how to apply Section 21.4.5.3.**

5. For the permit in question the applicant proposes to build a residence on a 2850 square foot lot.

This represents a density of approximately 15.2 units per acre, which is well in excess of the maximum of 3.5 units per acre allowed for new subdivisions. **This suggests that the other code provisions should be rigorously applied when minimum land area requirements are set aside.** [emphasis added]

Hearing Officer's Concl. 4, 5 at AR 43, adopted by BoH at AR 1.

Appellate courts should also view the record and the inferences in the light most favorable to the party that prevailed in the highest fact-finding forum. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002).

The importance of lot size is the dilution of pollutants by groundwater and rainfall.

For soil absorption systems in sands, **the only active natural mechanism for reducing nitrate concentration in wastewater is dilution with uncontaminated groundwater and rainfall additions on the property** (Walker et al. 1973). AR 161.

Mitigation of the nitrogen pollution of the groundwater with dilution will require lot sizes between .5 and 1 acre.

2002 Washington State Department of Health Research Report- "Lot Size (Minimum Land Area)." p.2, 5. AR 163-64.

Respondent contends at page 27 that Ms. Palazzi, whose Pacific Rim soils report accepted by the Board of Health (AR 3, para 5, AR 108-111) indicates "that Mr. Griffin's proposed system provided several times

the level of treatment required by the Code.” This is a misstatement of the Palazzi submission. Her accepted report explicitly excluded any opinion on site size and suitability:

Please note that the following discussion is limited to the site hydrology, not to the specific onsite soils, site or septic system design characteristics. . . . Neither do we comment on whether the site is large enough to support any particular system design. That part of the discussion should come from the system/site designer. [emphasis added] (AR 108-09)

Ms. Palazzi’s report was submitted to the staff in lieu of a winter water study like a “perc test” required under Section 11.4, BoH Regs., to establish the vertical distance between the bottom of the septic system and the groundwater, not the adequacy of the size of the site. AR 38 Para 5(a), AR 108-111. There is no suggestion in the record that the distance between the OSS and groundwater substitutes for the ground water dilution afforded by minimum lot size.

C. The Court Should Affirm The Board Of Health’s Remedial Interpretation Of The “Meets All Requirements” Language In 21.4.5.3.

This BoH interpretation is readily sustained as a remedy for exercise of its discretionary authority, under both the “plain meaning” analysis and as an application of the agency’s expertise in applying, administering and interpreting its regulations. Respondent’s construction, allowing all possible waivers, reductions and modifications in the rest of

the Code (RB 36) would render section 21.4.5.3 superfluous and meaningless.

LUPA requires deference to the BoH as an agency with expertise:

The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

...

(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;

RCW 36.70C.130 (1)

We review the Board's legal conclusions de novo, giving substantial weight to its interpretation of the statutes it administers. [citation omitted].

Manke Lumber Co. v. Cent. Puget Sound Gr. Mgmt. Hrgs. Bd., 113 Wn.App. 615, 622, 53 P.3d 1011. (Div. II, 2002).

The BoH ruled under 21.4.5.3 that other requested concessions, “waivers, setback reductions and modifications” available for regular lots under other sections of the code were impermissible.

In reviewing the regulation, the Court should consider the ordinance as a whole in order to give force and effect to all its parts. *Platt Electric Supply, Inc. v. City of Seattle*, 16 Wn. App. 265, 272-73, 555 P.2d 421, rev. denied, 89 Wn.2d 1004 (1977). The 21.4 provisions are intended

to disfavor too small lots, conferring discretion on the BoH “only” if all of the three restrictive conditions (21.4.5.1 – 3) are met.

The plain meaning test supports the Board because of the broad definition of the term “all.”

The dictionary defines the adjective “all” as meaning, variously, “being or representing the entire or total number, amount, or quantity,” “constituting, being, or representing the total extent or the whole,” “being the utmost possible of,” “every,” “any whatsoever,” and other, similarly comprehensive terms. (fn30) We do not read the word “all” or the phrase “of any kind” to imply an exception for equitable indemnity claims.

Parkridge Associates, Ltd. V. Ledcor Indus. Inc., 113 Wn. App. 592, 602 54 P.3d 225 (Div. I, 2002).

The concepts of “representing the total extent” “every” and “not . . . to imply an exception” support a reading to include every requirement without concession, exception or diminution.

Deference is particularly important if a regulation is considered ambiguous. The parties’ competing positions suggest that the phrase is ambiguous

A statute is ambiguous when it is amenable to two reasonable interpretations. *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 50 P.3d 256 (2002). If the statute is ambiguous, we construe it to give effect to legislative intent. *Whatcom County v. City of Bellingham*, 128 Wn 2d 537, 546, 909 P.2d 1303 (1996). We also defer to a statutory interpretation of the administrative agency charged with administering and enforcing the statute.

Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441,448, 536 P.2d 157 (1975).

Lakeside, *supra* at 896-97.

In several cases, the term “requirements” has been considered ambiguous and susceptible to construction. *Lohr v. Medtronics, Inc.*, 56 F.3d 1335, 1344 (11th Cir. 1995), *affirmed in pertinent part*, 518 U.S. 470 (1996), *William C. Atwater & Co. v. Terminal Coal Corp.*, 115 F.2d 887, 888-889 (D. Mass. 1940).

We may give an agency’s interpretation of an ambiguous statute “great weight” if the statute is within the agency’s special expertise. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). An agency has the requisite expertise if it is “the agency charged with administration of the relevant statutes.” *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998).

Citizens For Fair Share v. Department of Corrections, 117 Wn. App. 411, 422, 72 P.3d 206 (Div. II, 2003).

Respondent does not question the Board’s special expertise to administer the regulation. Instead, respondent argues, without authority, that the Board’s interpretation of 21.4 should be ignored because the regulations arise from the State Board of Health’s Rules. The state regulations are “adopted . . . to establish minimum requirements for the department of health and local boards of health . . .,” (WAC 246-272-00101(3) while administration is expressly delegated to the local health department. WAC 246-272-00501(1), [see Ex. A]. The Board’s

interpretation of its rules in this area of significant public health concern was appropriate in light of its expertise and the record before it.

Respondent ignores AIP's observation that respondent's proposed construction of the regulation to include all "waivers, setbacks, and other modifications" is against the rules of construction in a long line of cases because it would render section 21.4.5.3 superfluous and meaningless.

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)) (internal quotation omitted).

Rabanco Ltd. v. King County, 125 Wn. App. 794, 801, 106 P.3d 802 (Div. I, 2005).

If the restrictive language of 21.4.5.3 is read to allow all possible concessions, 21.4.5.3 becomes superfluous to 21.4.

Thus, the Board of Health's construction of the "all requirements" language should be upheld in light of the plain reading of the regulation, appropriate deference to the Board's specialized expertise in administering the regulations and consistent with the principle of statutory construction to avoid interpretation that renders a section superfluous.

D. Setback Reductions Erroneously Approved by Staff.

In granting setback reductions from the property line and the foundation, determined by the direction of ground water flow, the hapless

agency staff erroneously overlooked the respondent's experts' admissions that the water table flow was towards the water (southeast). AR 110, para 2, 365. Respondent's brief, and the cited conclusory staff testimony, contain no reference whatsoever to the controlling direction of the water table flow toward the water (southeast). RB 14.

Under Section 10.1 and footnotes 6 & 7 (See Ex. B) reduced horizontal separations between the disposal component and the building foundation and between the disposal component and the property line are only allowed under footnote 6 & 7 if the "property line . . . or building foundation is up-gradient." "The item is upgradient when liquid will flow away from it upon encountering the water table"

Since the site diagram (Ex. C) reflects that the building foundation is southeast (toward the water) of the disposal component and the water table flow and the downgradient direction are towards the water from the disposal component, the setback reduction does not apply because the foundation is not "upgradient" from the disposal component as required for the setback reduction, so the disposal component setback should be ten feet from the foundation.

Likewise, since the Bickford property, south of the Griffin's, is cross-gradient of the water table flow towards the southeast, it is not upgradient from the disposal component as required for the reduction and

the setback reduction from 5 feet to 2 & ½ feet from the property line should never have been allowed.

The Board of Health did not decide these questions, limiting its findings to the too-small lot issues under 21.4.

The issue may be decided by the Court as dispositive of the instant case. As a matter of applying the rules, it is apparent that a mistake was made by the staff in granting these setback reductions because the respondent did not qualify for the setback reductions from the foundation and from the property line to the disposal component since neither was upgradient in terms of water table flow as required in footnote 8.

E. Respondent's Other Arguments.

1. Equivalence: Respondent's argument that the requested OSS modifications are considered equivalent is unsupported in the regulations or the facts. The factual issue of equivalence should not be considered on appeal because it was not presented to the Board as a factual distinction and was implicitly rejected in the Decision. The argument (RB 32), highlighted by repetition and bold lettering, has no basis whatsoever in Article IV where one searches in vain for the term "either" or the term "equivalent" in any cited sections. A review of the regulatory language indicates that the secondary, usually discretionary, options are less stringent, not equivalent.

The absence of equivalence is particularly clear on the “upgradient” issue discussed above, and on the modification to reduce the capacity of the septic system from the usual 240 gallons per day to 120 gallons per day under BoH Regs 12.2.3. AR 38, para 7. Health Departments of the adjoining Puget Sound counties of Pierce, Kitsap and Mason do not allow such reductions in capacity below 240 gallons. AR 199-205. In originally granting the permit, agency staff relied on the respondent’s designation of a 140-square foot second floor bedroom adjacent to a bathroom as a “utility” room to allow the designation as a one-bedroom residence and chose to ignore the likely peak uses of such waterfront property by more than two residents. (Ex. D) [AR 61], 301-306. Undisputed capacity use calculations indicate that if four adults were making average use of the residence, the “high water” alarm on the system would sound on the first day, and continued average use would cause overflow on the third day. AR 209-211. Agency staff testified that residents should stop using the system when the alarm sounds. AR 320. The modification halving the capacity would be neither adequate for the likely uses of the property nor equivalent to the 240 capacity required by the regulation without modification. BoH Regs. 12.2.3.

2. **Compliance with Staff Requests was not a finding that respondent “met all other requirements” under 21.4.5.3.** The respondent repeatedly argues that the finding that the respondent complied with the staff’s requests (AR 4, conc. 3) was some kind of a staff construction of the “meets all requirements” language of 21.4.5.3.

First, this is a misconstruction of the finding because the language of compliance with staff requests is not synonymous with the “meet all requirements” in the decision, and the BoH decision language on 21.4.5.3 dispels any issue of the Board’s conclusion.

Second, agency staff did an abysmal job of processing the original permit application. They failed to make any discretionary assessment under 21.4, any evaluation of 21.4.5.3 compliance or address the required guidance finding of “significant impact to ground and surface water or health hazards” When agency staff presented the case to the Hearing Officer, he reviewed certain issues and concluded that the assessment was non-discretionary without mention of lot size, section 21.4, section 21.4.5.3 or the finding required by the guidance. AR 233-238. On cross-examination, when his attention was specifically directed to the term “may” in 21.4, he recognized that there was discretion under 21.4. AR 245. Thus, agency staff had overlooked the 21.4 too-small lot issues that both the Hearing Officer and the Board of Health found dispositive, so

compliance with staff requests was irrelevant to any interpretation of 21.4 or 21.4.5.3.

Third, the issue of whether respondent satisfied the waiver, setbacks and modifications available outside 21.4 was not litigated or decided by the BoH which concluded only that the “waivers and setbacks were plausible”. AR 3, conc.15. AIP, who litigated these issues before the hearing officer, were wrongfully excluded from participating on these issues before the BoH, a denial of due process rights. In the unlikely event that the Court agreed with respondent’s construction of 21.4.5.3, the case should be returned to the BoH for hearings on the merits of the other requested concessions with directions that the AIP’s be allowed to participate fully.

3. Change of Rule: There has been no change in the text of pertinent rules during the period respondent has owned the property, though this appeal was the Board’s first consideration of this issue. AR 382. The BoH Decision is important in recognizing and reversing staff’s error in overlooking 21.4, 21.4.5.3 and the guidance. The prior issuance of too small lot permits referred to by staff, presumably reflecting the same errors, constitute no precedent. Assuming that the present case changes the Thurston County staff’s handling of too-small lot permits so that they heed 21.4, 21.4.5.3 and the guidance, it should be considered a correction

of error rather than a change of a rule or precedent. Inconsistent prior staff administration is of no significance as a matter of estoppel or precedent.

The ... [Shorelines Hearings] Board concluded that past inconsistent administration never brought to the Board for review cannot alter the plain meaning of the Master Program as applied to the case before it.

[14] We agree. The proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property. No authority is cited for the proposition that the Board can be estopped from enforcing existing regulations by prior decisions not even even considered by the Board. In *Mercer Island v. Steinmann*, 9 Wn. App. 479, 783, 513 P.2d 80 (1973), the court stated that a municipality is not precluded from enforcing zoning regulations if its officers have failed to properly enforce zoning regulations. That court explained that the elements of estoppel are wanting. The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance; the public has an interest in zoning that cannot be destroyed. (fn43).

Buechel v. Ecology, 125 Wn.2d 196, 211 (1994); see also, *Ford v. Bellingham-Whatcom Cy. Dist. Bd. Of Health*, 16 Wn. App. 709, 716, n.1, 558 P.2d 821(1977); 3 Robert M. Anderson, *Zoning* 20.56, at 554-55(3d ed. 1986).

4. **Vagueness**: The pertinent sections of 21.4 are not unconstitutionally vague under the cited cases, and respondent's claim that the language has both plain meaning and "vagueness" is inconsistent. There is no reason to believe that the regulation has been or will be enforced in an arbitrary manner

5. **Substantive Due Process**: AIP suggest that this question should not be raised for the first time on appeal because it was not presented to the BoH for a full factual development on the record. *Buechel v. Ecology, supra*, at fn.4. The argument was explicitly rejected by the Superior Court. RP 6-7.

In any event, respondent has shown no “oppressive loss” flowing from the County’s conduct because he was on notice of the regulatory limitations when he purchased the property.

[12] To some extent the reasonable use of property depends on the expectations of the landowner at the time of purchase of the property. If existing land regulations limit the permissible uses of the property at the time of acquisition, a purchaser usually cannot reasonably expect to use the land for prohibited purposes. (fn39) . . . Although not necessarily determinative, courts may look to the zoning regulations in effect at the time of purchase as a factor to determine what is reasonable use of the land. Presumably regulations on use are reflected in the price a purchaser pays for a piece of property. This landowner knew when he purchased this lot that it did not satisfy either the minimum lot size or the setback requirements of the MCSMP. [emphasis added].

Buechel v. Ecology, supra, at 210-211.

At time of purchase, the realtor indicated the listing was under the following terms:

“lot is not buildable for residential purposes at this time per Thurston Co. Envior Health . . . recreational use only . . . Sold AS IS WHERE IS.” AR 195.

Similar concerns and an offer to buy for the price paid were in the neighbor's pre-purchase letter to the realtor. AR 88-92. If this information was not communicated to Mr. Griffin, his claim should be against the realtor rather than the county. However, the continuing \$59,000 offer suggests no "oppressive loss" to respondent because the lot is apparently still worth what he paid for it.

6. **Growth:** Respondent makes an unsupported claim that the permit was denied because of the "cumulative impact" of the growth on Steamboat Island. RB 46. The BoH decision did not turn on growth, though a building boom developing the tiny vacant lots of Steamboat is a foregone conclusion if the County starts issuing septic tank permits for nominal one-bedroom homes with half-size septic systems regardless of lot size. Any question of water availability is soluble by drilling yet another well.

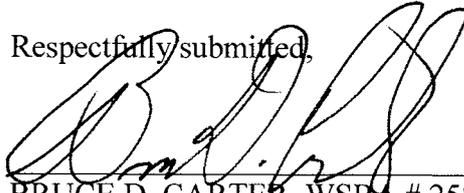
7. **Community Opinion:** Respondent's claim that the denial of the permit was based on community displeasure should be disregarded because it is unsupported in fact or in the record. There is no reason to suspect that the Board's reasons are other than those stated. *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 788, 129 P.3d 300 (2006).

IV. CONCLUSION

The Decision of the Board of Health denying respondent's application for an on-site septic tank system on his tiny lot should be affirmed. The Board of Health properly exercised its discretionary authority and expertise in the conservative interpretation of its regulations to deny Mr. Griffin's permit for his previously platted lot that is 77% smaller than the current minimum lot size. The Board of Health Decision should be affirmed and the Superior Court Orders denying the permit and granting costs should be vacated.

DATED this 23rd day of September, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bruce D. Carter', written over a horizontal line.

BRUCE D. CARTER, WSBA # 2588
Attorney for Appellant Interested Parties

Chapter 246-272 WAC

On-Site Sewage System Regulations

246-272-00101 Purpose, Objectives, and Authority.

- (1) **The purpose of this chapter is to protect the public health by minimizing:**
 - (a) **The potential for public exposure to sewage from on-site sewage systems; and**
 - (b) **Adverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters.**
- (2) **This chapter regulates the location, design, installation, operation, maintenance, and monitoring of on-site sewage systems to:**
 - (a) **Achieve long-term sewage treatment and effluent disposal; and**
 - (b) **Limit the discharge of contaminants to waters of the state.**
- (3) **This chapter is adopted by the State Board of Health in accordance with the authority granted in RCW 43.20.050 to establish minimum requirements for the department of health, and local boards of health whether or not they choose to adopt local regulations.**

246-272-00501 Administration.

- (1) **The local health officers and the department shall administer this chapter under the authority and requirements of chapters 70.05, 70.08, 70.46, and 43.70 RCW. Under chapter 70.05.060(7) RCW, fees may be charged for this administration.**

246-272-01001 Definitions.

Exhibit A

Thurston County Board of Health
 Rules and Regulations Governing Disposal of Sewage
 Article IV

9.6.2.2 Identification of an adequate financing mechanism to assure the funding of operation, maintenance, and repair of the OSS.

9.7 The health officer shall not delegate the authority to issue permits.

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

SECTION 10 LOCATION.

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

**TABLE I
 MINIMUM HORIZONTAL SEPARATIONS**

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

Thurston County Board of Health
 Rules and Regulations Governing Disposal of Sewage
 Article IV

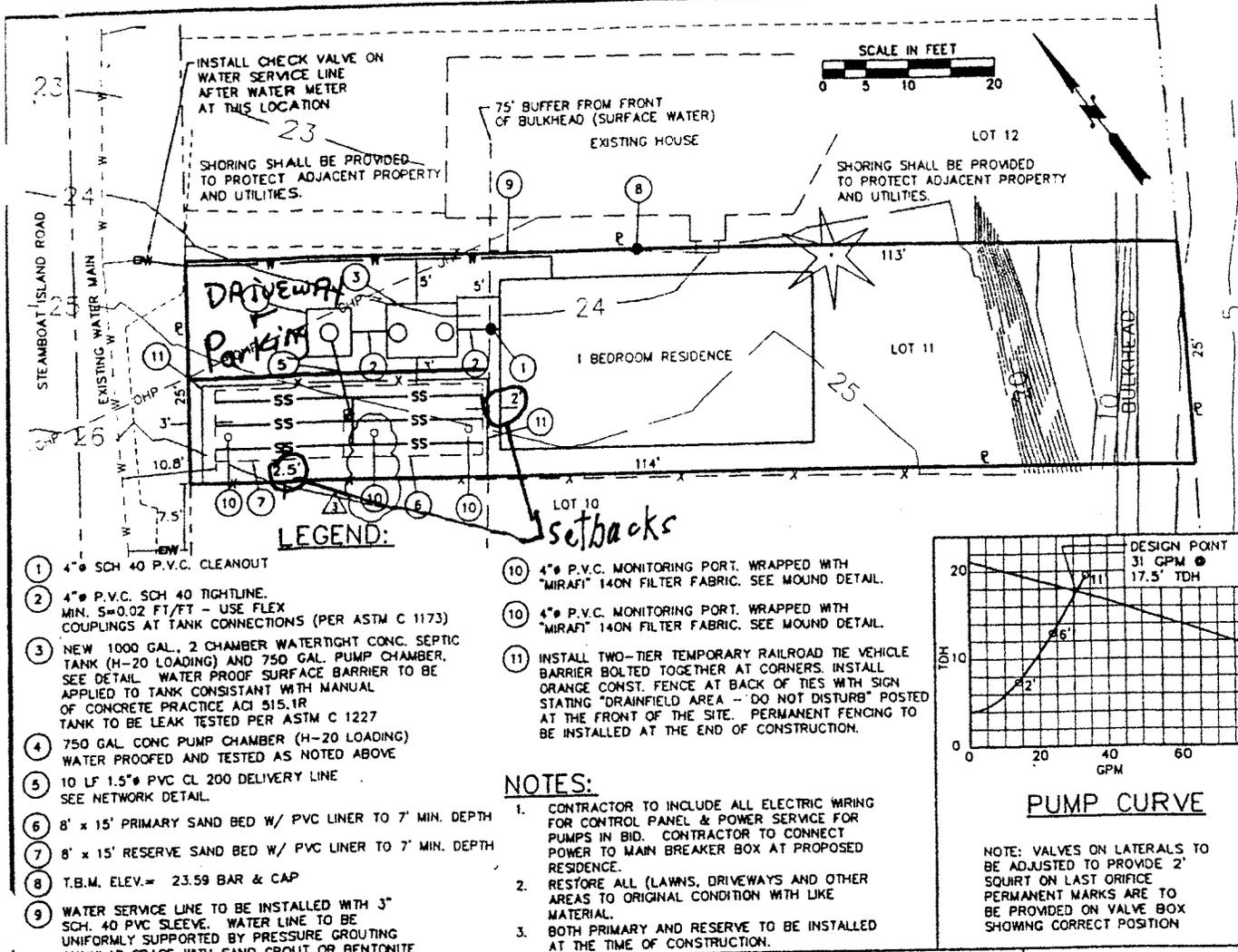
Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line ¹
Property or easement line ²	5 ft.	5 ft.	N/A
Interceptor / curtain drains/ drainage ditches, stormwater drywells Down-gradient ⁷ Up-gradient ⁷	30 ft. 10 ft.	5 ft. N/A	N/A N/A
Down-gradient cut or bank with at least 5 ft. of original, undisturbed soil showing above a restrictive layer due to a structural or textural change ^{7, 8}	25 ft.	N/A	N/A
Down-gradient cut or bank with less than 5 ft. of original, undisturbed, soil showing above a restrictive layer due to a structural or textural change ^{7, 8}	50 ft.	N/A	N/A
Downgradient cut or bank that extends vertically less than 5 feet from the toe of the slope to the top of the slope that doesn't have a restrictive layer showing ^{7, 8}	10 ft.		

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

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

Thurston County Board of Health
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Article IV

- 3 Measured from the ordinary high-water mark.
 - 4 The health officer may approve a sewer transport line within 10 feet of a water supply line if the sewer line is constructed in accordance with section 2.4 of the Washington state department of ecology's "Criteria For Sewage Works Design," revised October 1985, as thereafter updated, or equivalent.
 - 5 Before any component can be placed within 100 feet of a well, the designer shall submit a "decommissioned water well report" provided by a licensed well driller, which verifies that appropriate decommissioning procedures noted in chapter 173-180 WAC were followed. Once the well is properly decommissioned, it no longer provides a potential conduit to groundwater, but septic tanks, pump chambers, containment vessels or distribution boxes should not be placed directly over the site.
 - 6 The health officer may allow a reduced horizontal separation to not less than two feet where the property line, easement line, or building foundation is up-gradient.
 - 7 The item is down-gradient when liquid will flow toward it upon encountering a water table or a restrictive layer. The item is up-gradient when liquid will flow away from it upon encountering a water table or restrictive layer.
 - 8 This setback is unrelated to setbacks that are necessary for slope stability or other purposes.
- 10.2 Where any condition indicates a greater potential for contamination or pollution, the health officer may increase the minimum horizontal separations. Examples of such conditions include excessively permeable soils, unconfined aquifers, shallow or saturated soils, dug wells, and improperly abandoned wells.
- 10.3 The horizontal separation between an OSS disposal component and an individual water well, spring, or surface water can be reduced to a minimum of 75 feet, upon signed approval by the health officer if the applicant demonstrates:
- 10.3.1 Adequate protective site specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration. Examples of such conditions include evidence of confining layers and or aquatards separating any potable water from the OSS treatment zone or there is an excessive depth to groundwater; or
 - 10.3.2 Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in Table IV in subsection 12.2.6 of this article; or



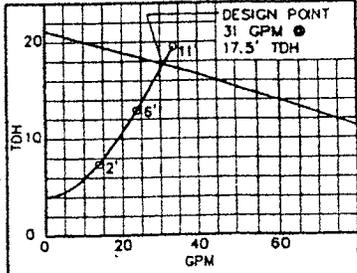
- SOIL APPLI
VARIANCE
REQUIRED I
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 - *17. 90 DEGREE
 - ==
 - *21. CALCULATE
 - 2 FOOT MI
 - THE MINIM
 - *22. DRAIN FIEL

LEGEND:

- ① 4" SCH 40 P.V.C. CLEANOUT
- ② 4" P.V.C. SCH 40 TIGHTLINE. MIN. 5=0.02 FT/FT - USE FLEX COUPLINGS AT TANK CONNECTIONS (PER ASTM C 1173)
- ③ NEW 1000 GAL., 2 CHAMBER WATER TIGHT CONC. SEPTIC TANK (H-20 LOADING) AND 750 GAL. PUMP CHAMBER. SEE DETAIL. WATER PROOF SURFACE BARRIER TO BE APPLIED TO TANK CONSISTANT WITH MANUAL OF CONCRETE PRACTICE ACI 515.1R. TANK TO BE LEAK TESTED PER ASTM C 1227
- ④ 750 GAL. CONC. PUMP CHAMBER (H-20 LOADING) WATER PROOFED AND TESTED AS NOTED ABOVE
- ⑤ 10 LF 1.5" PVC CL 200 DELIVERY LINE. SEE NETWORK DETAIL.
- ⑥ 8' x 15' PRIMARY SAND BED W/ PVC LINER TO 7' MIN. DEPTH
- ⑦ 8' x 15' RESERVE SAND BED W/ PVC LINER TO 7' MIN. DEPTH
- ⑧ T.B.M. ELEV.= 23.59 BAR & CAP
- ⑨ WATER SERVICE LINE TO BE INSTALLED WITH 3" SCH. 40 PVC SLEEVE. WATER LINE TO BE UNIFORMLY SUPPORTED BY PRESSURE GROUTING ANNULAR SPACE WITH SAND GROUT OR BENTONITE
- ⑩ 4" P.V.C. MONITORING PORT. WRAPPED WITH "MIRAFI" 140N FILTER FABRIC. SEE MOUND DETAIL.
- ⑪ 4" P.V.C. MONITORING PORT. WRAPPED WITH "MIRAFI" 140N FILTER FABRIC. SEE MOUND DETAIL.
- ⑫ INSTALL TWO-TIER TEMPORARY RAILROAD TIE VEHICLE BARRIER BOLTED TOGETHER AT CORNERS. INSTALL ORANGE CONST. FENCE AT BACK OF TIES WITH SIGN STATING "DRAINFIELD AREA - DO NOT DISTURB" POSTED AT THE FRONT OF THE SITE. PERMANENT FENCING TO BE INSTALLED AT THE END OF CONSTRUCTION.

NOTES:

1. CONTRACTOR TO INCLUDE ALL ELECTRIC WIRING FOR CONTROL PANEL & POWER SERVICE FOR PUMPS IN BID. CONTRACTOR TO CONNECT POWER TO MAIN BREAKER BOX AT PROPOSED RESIDENCE.
2. RESTORE ALL (LAWNS, DRIVEWAYS AND OTHER AREAS TO ORIGINAL CONDITION WITH LIKE MATERIAL.
3. BOTH PRIMARY AND RESERVE TO BE INSTALLED AT THE TIME OF CONSTRUCTION.



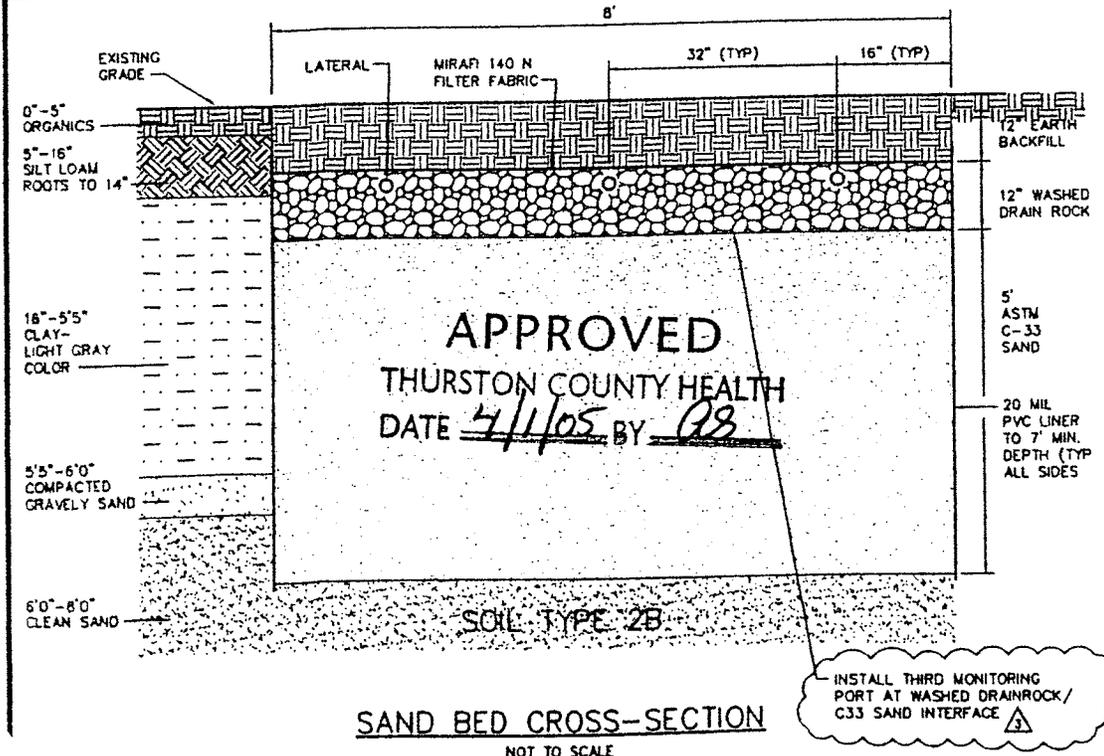
PUMP CURVE

NOTE: VALVES ON LATERALS TO BE ADJUSTED TO PROVIDE 2" SQUIRT ON LAST ORIFICE. PERMANENT MARKS ARE TO BE PROVIDED ON VALVE BOX SHOWING CORRECT POSITION

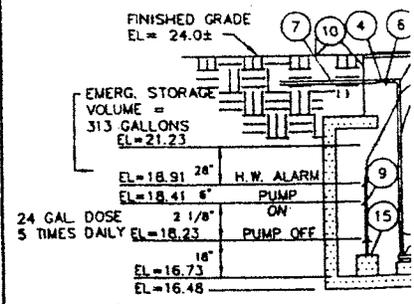
SUMM

RESIDUAL HEAD AT LAST ORIF L. (feet) (c)

2.00
3.00
4.00
5.00
6.00
7.00
8.00
9.00
10.00
11.00



SAND BED CROSS-SECTION
NOT TO SCALE



- ① SEWAGE PUMP - ORENCO P5007 OR EQUAL
- ② #42 "ORENCO" RESIDENTIAL EFFLUENT FILTER
- ③ JUNCTION BOX ("ORENCO" WATERPROOF)
- ④ 1.5" CHECK VALVE
- ⑤ 1.5" 90° ELBOW
- ⑥ 1.5" THREADED UNION
- ⑦ 1.5" CL200 P.V.C. PIPE
- ⑧ CHORD TO POWER SOURCE IN ALARM PANEL ON POST OR HOUSE

		DATE	REVISIONS	
DESIGNED BY:	L. SATER	11/11/4	NO.	DATE
ENTERED BY:	L. SATER	11/11/4	1	12/23/4
CHECKED BY:			2	3/10/5
PROJ. ENGR.:	B. MATTHEWS	11/11/4	3	3/23/5
				REVISED PER COUNTY COMMENTS
				REVISED PER COUNTY COMMENTS
				REVISED PER COUNTY COMMENTS

CONTRACT NO.

3/24/5

5016 Lac
(360) 49-

Exhibit C [AR 16]

Iffin Residence
 Steamboat Island Rd. NW
 #76200001100
 11
 ton County

Blumberg No. 6
I-5

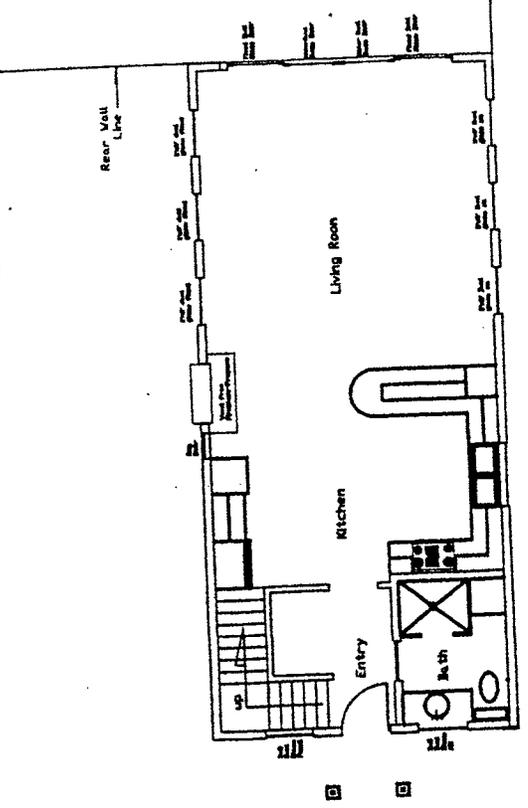
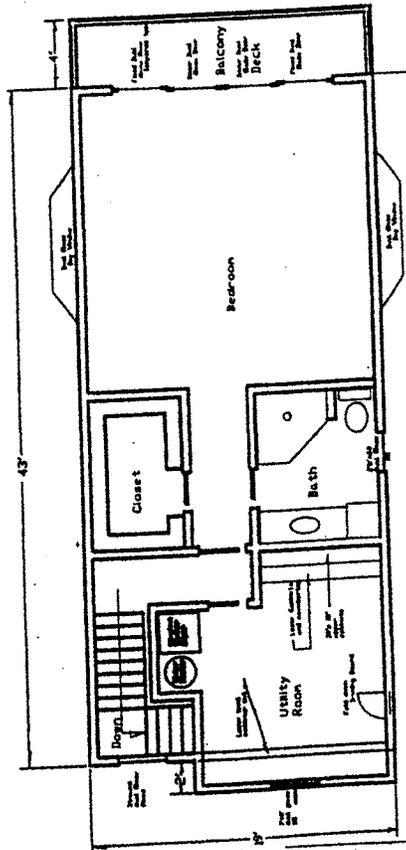
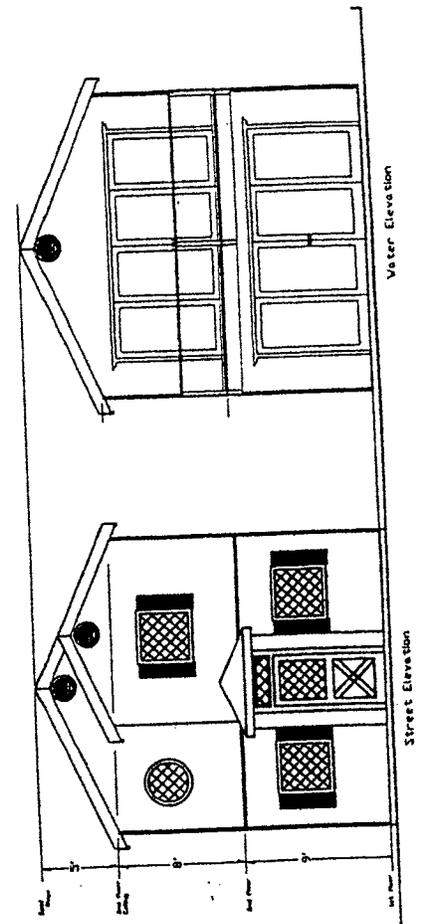
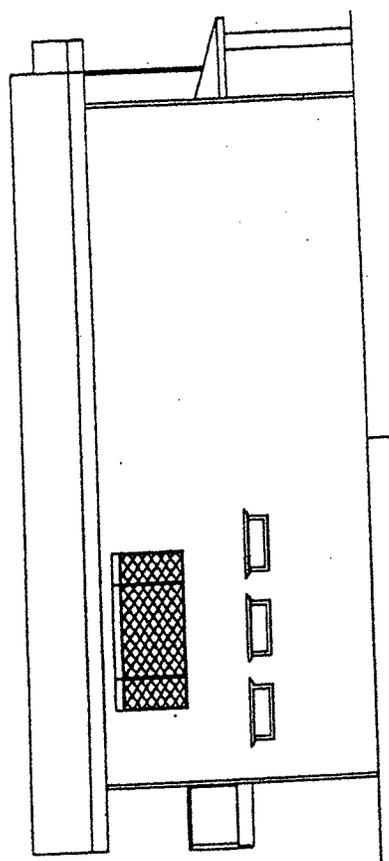
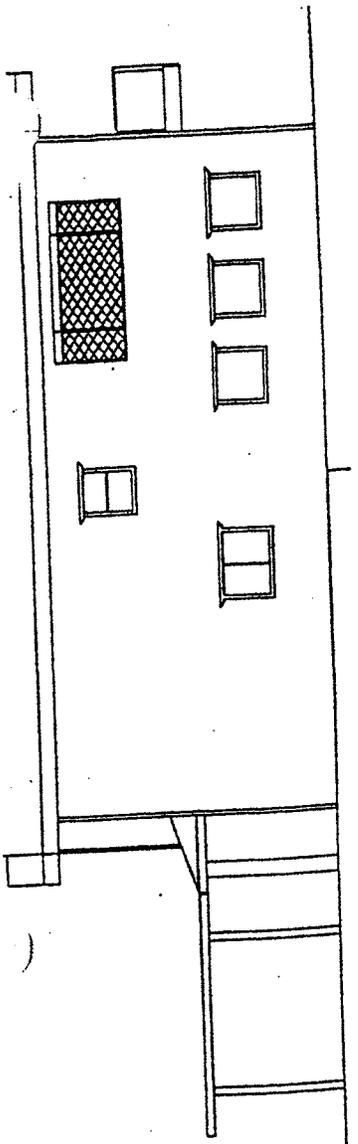


Exhibit D

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the attached Reply Brief of Appellant Interest Parties was served on September 23, 2006 on the following individuals by depositing the same in the United States Mail with postage paid addressed to the following:

1. Allen Miller
Prosecuting Attorney's Office, Civil Division
2424 Evergreen Park Dr. S.W., Suite 102
Olympia, WA 98502
2. Matthew B. Edwards
Owens Davies, P.S.
P.O. Box 187
926 24th Way SW
Olympia, WA 98507

FILED
COURT OF APPEALS
06 SEP 25 PM 2:41
SEATTLE
BY [Signature]
STATE OF WASHINGTON
DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 23rd day of September, 2006, at Seattle, Washington.


Bruce D. Carter, WSBA #2588