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No. 80214-9

SUPREME COURT
OF THE
STATE OF WASHINGTON

FILED
SEP - 7 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON

JEFF GRIFFIN,

PETITIONER,

v.

**THURSTON COUNTY
AND ITS BOARD OF HEALTH
BRUCE CARTER, SHARI RICHARDSON,
GEORGIA BICKFORD, BARBARA BUSHNELL
and JANE ELDER BOGLE,**

RESPONDENTS.

CLERK
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**PETITIONER JEFF GRIFFIN'S
REPLY IN SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

In its July 16, 2007 order, the Court authorized Jeff Griffin to file a Reply Brief in Support of his Petition for Review. Mr. Griffin files this Reply in conformance with the Court's order.

This case raises multiple issues of substantial public interest that should be determined by the Supreme Court:

- Do the septic regulations promulgated by the Department of Health permit small-lot owners to utilize any of the standards and setbacks, including the alternative standards and setbacks, explicitly articulated in those regulations?
- Did the Court of Appeals overstep its role as an appellate court by finding facts as to matters never addressed below?
- Does the interpretation of the phrase "all requirements" as meaning "the most restrictive requirements" violate a landowner's constitutional right to fair notice of the requirements with which he must comply?
- Does the Board's new "interpretation" of this language to create a new rule of decision violate the landowner's constitutional right to have his application considered under the rule of decision in effect when he submitted the application?
- Does a landowner "waive" his due process rights by failing to raise his due process challenge at a hearing that occurred before the decision had been made? Does the Constitution really only protect mind readers?
- Given that the Board explicitly accepted expert testimony that the proposed septic system posed no risk of environmental harm, and given that the Board's decision to

deny the small-lot owner a septic permit will prevent the landowner from ever developing his property, does the Board's denial of any septic permit "unduly oppress" the landowner?" If not, what else can a landowner possibly be expected to show?

The Court of Appeals' decision addresses each of these six separate, important issues of Washington law. On each issue, the Court of Appeals made its decision based on "facts" that had not been found below, or legal theories and case authority that had not been cited or argued below.

As a result, the Court of Appeals, in its published decision, got each of these issues wrong. The Supreme Court should accept review of and reverse the Court of Appeals' decision.

II. ISSUES OF STATUTORY CONSTRUCTION

A. Mr. Griffin's Septic Application Met the Requirements Set Forth On the Face of the Code. Mr. Griffin Did Not Seek To Modify or Relax the Code's Requirements

In its 2:1 decision, the Thurston County Board of Health treated this case as solely presenting an issue of statutory construction. The Board's decision addressed how to interpret Art. IV, § 21.4.5.3's requirement that a proposed septic system meet "all requirements of these regulations other than minimum land area." AR 3 (CoL 6) (Appendix E).

The Board interpreted this language as requiring the owner of a small lot to satisfy:

[A]ll requirements related to permitting at the time of the application without having to result to **waivers, setback adjustments, or other modification of the rules** found within the Code.

Id. (CoL 7) (emphasis added).

In the emphasized portion of its decision, the Board simply got it wrong. Mr. Griffin's septic application met the requirements set forth on the face of the Code. **Mr. Griffin did not ask the County to modify, relax or waive its rules.**

1. **Design Flow.** Mr. Griffin proposed to construct a system that discharged no more than 120 gallons of effluent per day. The Sanitary Code explicitly permits design for such flows when technical justification is provided:

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

§ 12.2.3.1

Mr. Griffin provided technical justification to support his request to design a system discharging only 120 gallons of effluent per day. AR 236-38 (Testimony of Thurston County Environmental Health Officer

Steve Peterson at May 4, 2005 hearing, pp. 24-26); AR 340-41 (testimony at June 21, 2005 hearing, pp. 4-5). The Board of Health agreed that Mr. Griffin's submitted adequate technical justification. AR 2-3 (Board of Health Finding 9 and Conclusion 4).

In designing a septic system utilizing a 120-gallon per day flow, Mr. Griffin did not ask the County to "modify" or "waive" its rules. Mr. Griffin complied with what the Code, on its face, required.

2. Water Table Evaluation. The Sanitary Code requires septic permit applicants to perform a winter water table evaluation or to provide other soil and site information to permit the County to determine whether groundwater would rise, at its highest elevation during the winter, to the level at which effluent would be discharged:

The Health Officer:

§ 11.4.1 may require water table measurements to be recorded during months of probable high-water table conditions, if insufficient information is available to determine the highest seasonal water table. If this is required, the Health Officer shall render a decision on the height of the water table within 12 months of receiving the application if precipitation conditions are typical for the region;

§ 11.4.2 may require any other soil and site information affecting location, design, or installation;

Art. IV, § 11.4; See also AR 19-20 (Thurston County Policy Re: Winter Water Table Evaluations). Although Mr. Griffin attempted to conduct a winter water table evaluation during the winter of 2003-2004, there was not enough rain to complete the study. AR 79. Mr. Griffin therefore had a soils scientist investigate the soils on his property, and the soils scientist concluded that there was at least 8-9 feet of separation between the sandy soils into which effluent would be discharged and the highest ground water elevation. AR 108-114 (report of Pacific Rim Soils and Water), AR 357 (Lisa Palazzi testimony).

Based on that study, staff concluded that Mr. Griffin had provided adequate soil and site information to permit them to make the water table evaluation. AR 22-23. The Board of Health agreed. AR 1, 3 (Board of Health Findings 5-6, Conclusion 5) ("[N]o scientific evidence has been submitted to refute the findings of the soils ... reports submitted by Griffin").

Again, Mr. Griffin's application fully complied with what the Code, on its face, required. Mr. Griffin complied with the rules. Mr. Griffin did not ask the county to "modify" or "waive" its rules.

3. **Construction Setbacks.** The Septic Code, on its face, explicitly authorizes the construction of a sewer transport lines within ten

feet of a water supply line if the sewer transport line meets the Washington State Department of Ecology's "Criteria for Sewage Works Design."

The Health Officer may approve a sewer transport line within ten feet of the water supply line if the sewer line is constructed in accordance with § 2.4 of the Washington State Department of Ecology's "Criteria for Sewage Works Design," revised October 1985, as thereafter updated, or equivalent.

Art. IV, § 10.1, fn. 4. Mr. Griffin's proposed sewer transport line met the Department of Ecology's criteria. AR 21, 29. See also AR 234-35 (testimony of Environmental Health Officer Steve Peterson at hearing of May 4, 2005 at pp. 22-23); AR 340 (testimony at June 21, 2005 hearing). The Board of Health agreed that Mr. Griffin's proposed design met this requirement of the Code. AR 1, 3 (Board of Health Finding 5, Conclusion 4) ("[T]he Griffins did what the Department required of them..."). Mr. Griffin's application complied with what the Code, on its face, required.

Mr. Griffin also proposed to construct his drainfield just over two feet from the foundation of his residence. The Code, on its face, permits a two foot separation between a drainfield and a building foundation if the building foundation is upgradient from the drain field:

The Health Officer may allow a reduced horizontal separation of not less than 2 feet where the property line, easement line, or building foundation is up-gradient.

Art. IV, § 10.1, fn 6.

Mr. Griffin's foundation was upgradient from his septic system. AR 16, 22. See also AR 235 (testimony of Environmental Health Officer Steve Peterson at May 4, 2005 hearing, p. 23); AR 340 (testimony of June 21, 2005 hearing). The Board of Health agreed that Mr. Griffin's proposal met this requirement. AR 2-3 (Board of Health Findings 7-8, and Conclusion 4). Again, Mr. Griffin's proposed septic system complied with what the Code, on its face, required.

The Code also explicitly authorizes the construction of drainfield 2-1/2 feet from a property line if the property line is upgradient from the drainfield. § 10.1, fn. 6. Mr. Griffin's property line was located up-gradient from his proposed drainfield. AR 16, 22, 38. See also AR 235-36 (Testimony of Environmental Health Officer Steve Peterson at May 4, 2005 hearing, pp. 23-24); AR 340 (testimony at June 21, 2005 hearing). Again, the Board agreed that Mr. Griffin did what the Code required. AR 1-3 (Board of Health Findings 7-8, Conclusion 4).

With respect to each of these issues, Mr. Griffin's proposed septic system complied with the Code. Mr. Griffin did not *not* ask the County, in any respect, to modify, relax, or waive its rules for him.

4. **Setback from Puget Sound.** Finally, the Code permits the construction of a septic system seventy-five (75) feet from open water if the system provides for enhanced treatment performance:

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:

§ 10.3.2 Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and the effluent distribution requirements described in Table IV in subsection 12.2.6 of this article....

Art. IV, § 10.3.

Mr. Griffin's proposed septic system provided for enhanced treatment performance. AR 16, 22, 38. See also AR 235-36 (testimony of Environmental Health Officer Steve Petersen at May 4, 2005 hearing, pp. 23-24); AR 340 (testimony of June 21, 2005 hearing). The Board agreed that Mr. Griffin had proposed an enhanced treatment system, thereby qualifying him to use the 75 foot setback. AR 1-3 (Board of

Health Decision Findings 7-8, Conclusion 4) (Board concurs that Griffin proposed to do what Department had required to qualify to use 75 foot setback).

In sum, Mr. Griffin's septic application fully complied with all the requirements of the Code. Mr. Griffin did not ask the County to modify, relax, or waive full compliance with what the Code, on its face, requires. The Board of Health's conclusion that Mr. Griffin had done so was simply wrong.

In its response to the Petition for Review, the County asserts that Mr. Griffin asked the County for "waivers" under Art. IV, § 24. See County's Response, p. 2. The County flagrantly misrepresents the record.

The County does not, because it cannot, point to even a single instance in this record where anyone even discussed the possibility of a "waiver" of the Code's rules under Art. IV, § 24. The County does not, because it cannot, point to a single instance in which that section invoked by Mr. Griffin.

Mr. Griffin did **not** ask the County to modify, relax, or waive the rules set forth on the face of the Code. Mr. Griffin conformed to what the Code, on its face, requires. Instead, as the trial court recognized in reversing the Board's decision, it was the Board which "changed the

rules” by suddenly requiring Mr. Griffin’s proposed system to meet the most stringent of any of the alternative standards articulated on the face of the Code, rather than permitting Mr. Griffin to satisfy “all requirements” of the Code as Art. IV, § 21.4.5.3 expressly provides.

The Supreme Court should accept review of this issue. It should hold that the Department of Health’s model rules mean what they actually say--that Mr. Griffin, and any other small lot owner, is entitled to be issued a permit for a proposed septic system if the proposed system meets “all requirements” of the Code, including any alternative standard whose use is expressly authorized on the face of the Code. The Board’s decision to the contrary, as affirmed by the Court of Appeals, should be reversed.

B. Thurston County Has Interpreted Its Septic Code as Conferring No Discretion Upon Its Health Officer. The Court of Appeals Explicitly Acknowledged This In Its Decision.

In an effort to divert the Court from the issue of statutory construction actually presented by this case, Respondents assert that the Code gave the health officer discretion to deny Mr. Griffin the right to utilize the alternative setback and other standards provided for on the face of the Code. This is incorrect. Both the Board of Health and the Court of Appeals **squarely rejected** this claim.

The Code provides that the health officer “shall” issue a septic permit whenever an applicant submits an application meets the specific requirements articulated in the Code. Art. IV, § 9.1. The Code then goes on to provide that the health officer “may” permit an applicant to utilize various alternative standards, if the applicant meets specific criteria. See, e.g., Art. IV, § 10.1 fn 4, § 10.1 fn 6, § 10.3, and § 11.4. The County has consistently interpreted these related provisions as requiring that the health officer “shall” issue a septic permit to an applicant whenever the regulations authorize the health officer to do so. AR 8, 341¹.

The Board of Health agreed. The Board explicitly found that “the Griffins did what the Department required of them to obtain the waivers and modified setback required.” AR 3 (Conclusion of Law No. 4). The two members of the Board who voted to deny Mr. Griffin his permit did not purport to justify this decision based on any supposed discretion allegedly granted to the health officer.

The Court of Appeals also agreed. The Court of Appeals explicitly recognized that the Board had *not* interpreted the word “may” as purporting to provide the health officer with any discretionary authority.

¹ Because the code does not contain any standards describing how the health officer should exercise any alleged discretion granted to him, any other construction of the code would render it unconstitutional. *Sunderland Services v. City of Pasco*, 127 Wn.2d 782, 797, 903 P2d 986 (1995) (legislative body must provide at least general standards to guide the exercise of an administrator’s discretionary authority).

137 Wn.App. at 615 ¶ 6. (“[T]he Board did not explicitly base its ruling on [any alleged] discretionary authority”). Like the Board, the Court of Appeals treated this case as solely presenting an issue of statutory construction.

The Code does not vest the Health Officer with an unguided discretion to grant or deny permits. Neither the Board, nor the Court of Appeals, purported to justify the denial of Mr. Griffin’s permit on the basis that of any such discretion. By raising this issue the Respondents have served up a red herring.

III. CONSTITUTIONAL CLAIMS

A. The Court of Appeals Wrongly Purported to “Find Facts.” The Board Did Not Find, and the Record Does Not Show, That Mr. Griffin Was “On Notice” That He Could Not Obtain a Septic Permit for His Lot.

In addition to wrongly affirming the Board’s erroneous construction of the Department of Health’s model regulations, the Court of Appeals also erred in purporting to base its decision on “facts” that had not been found by the Board.

Although the Board of Health made no finding to this effect, the Court of Appeals stated that “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 the house on the property.” 137 Wn.App. at 613, ¶2. The Court of Appeals emphasized this supposed “fact” in addressing each of Mr. Griffin’s constitutional arguments. 137 Wn.App. at 621, ¶23, ¶24; 137 Wn.App. at 622, ¶25.

As an appellate court, the Court of Appeals should have confined its review to determining if the findings actually made by the Board were supported by substantial evidence, and then determining whether those findings supported the Board’s conclusions of law. *City of Seatac v. Cassan*, 93 Wn.App. 357, 363, 967 P.2d 1274 (1998). The Court of Appeals plainly erred in basing its decision upon supposed “facts” that no fact finder had ever actually found below.

In its response brief, Thurston County asserts that the Court of Appeals was entitled to review the record and all reasonable inferences thereof in the light most favorable to the County. Thurston County’s Response Brief at p. 11, citing *Cingular v. Thurston County*, 131 Wn.App. 756, 768, ¶ 25, 129 P.3d 300 (2006). In fact, the court in *Cingular* actually held only that an appellate court should “defer to factual determinations made by the highest forum below that exercises fact-finding authority.” 131 Wn.App. at 768, ¶ 26. *Cingular* does not stand

for the proposition that an appellate court is entitled to “find facts” that were never addressed below.

The Court of Appeals plainly overstepped its constitutional boundaries by purporting to “find facts” as to an issue that had not been addressed below. The Court’s decision to do this denied Mr. Griffin his due process rights to present evidence on this issue. This Court should accept review of and reverse the Court of Appeals decision for this reason alone.

B. The Court of Appeals Misapplied the Vagueness Doctrine.

In addition, the Court of Appeals misapplied the vagueness doctrine.

Under the vagueness doctrine, a land use regulation must not be “so vague that a person of common intelligence must guess at the law’s meaning and application.” *City of Seattle v. Crispin*, 149 Wn.2d 896, 906, 71 P.3d 208 (2003). Respondents do not contest that this is the applicable standard.

Here, the County’s ordinance required Mr. Griffin to meet “all requirements” of the Code other than minimum lot size. As set forth above, Mr. Griffin’s application utilized, and met, “all requirements” as

articulated on the face of the Code. That is why Health Department staff originally issued Mr. Griffin his septic permit.

At the time Mr. Griffin submitted his application, no one—not Mr. Griffin, not his engineer, not even Thurston County Environmental Health Department staff—knew that the Board would change the County’s settled interpretation of its Code, and construe its Code as requiring small lot owners to meet the most restrictive set of requirements set forth in the Code, rather than allowing the small lot owner to utilize “all requirements” as Art IV, § 21.4.5.3 expressly provides. The Board’s arbitrary decision to articulate a new rule of decision, and to apply its new rule only to Mr. Griffin, violated his constitutional right to fair notice of what the Code did or did not allow.

The Court should accept review of this issue.

C. **The Court of Appeals Misapplied the Vested Rights Doctrine.**

The Court of Appeals also misapplied the vested rights doctrine.

The vested rights doctrine required the Board to apply to Mr. Griffin’s septic application the law in effect at the time he submitted it. *Thurston County Rental Owners Ass’n v. Thurston County,*

85 Wn.App. 171, 182, 931 P.2d 208, *review denied*, 132 Wn.2d 1010 (1997).

However, the two members of the Board of Health who voted to deny Mr. Griffin his permit did not apply the County's settled interpretation of its Code to Mr. Griffin's proposed system. Without in any way basing their actions upon any fact particular to Mr. Griffin's proposed system, these two Board members simply articulated a new and different rule of decision than the County had ever applied before, and then proceeded to apply that new rule only to Mr. Griffin.

The Court of Appeals rejected Mr. Griffin's vested rights claim based on *Friends of the Law v. King County*, 123 Wn.2d 518, 869 P.2d 1056 (1994), a case which had never been cited to it. But in *Friends*, the Court actually held that the landowner was entitled to rely on the County's consistent interpretation of its own code. This Court itself recently reaffirmed this principle in *Sleasman v. City of Lacey*, 157 Wn.2d 639, 641, ¶14, 151 P.3d 998 (2007), a case which the respondents ignore.

The Supreme Court should accept review of the Court of Appeals' decision on this important constitutional issue.

D. The Court of Appeals Improperly Rejected Mr. Griffin's Substantive Due Process Claim.

Finally, the Court of Appeals improperly rejected Mr. Griffin's substantive due process claim.

The Court of Appeals purported to reject Mr. Griffin's substantive due process claims on the grounds that he had waived it by not raising it before the Board of Health. 137 Wn.App. at 622, ¶25. As Mr. Griffin noted in his Petition for Review, in so holding, the Court of Appeals both: (1) purported to require Mr. Griffin to raise his constitutional challenge to the Board's decision before the Board had even made that decision; and (2) imposed this requirement upon Mr. Griffin in direct contravention of its own recent decision in *Peste v. Mason County*, 133 Wn.App. 456, 469-70, ¶25, 136 P.3d 140 (2006).

Neither Respondent addresses or purports to defend this aspect of the Court of Appeals' decision. The Court of Appeals has plainly issued a published decision in which it got this important issue dead wrong! The Supreme Court should accept review of the Court of Appeals' decision, and reverse it on this issue.

Moreover, Mr. Griffin in fact established the elements of undue oppression. See *Guimont v. Clark*, 121 Wn.2d 586, 610, 854 P.2d 1

(1993). First, Mr. Griffin established that the board's decision to deny his permit did not operate to address any real public health problem. The Board of Health explicitly accepted Mr. Griffin's expert's opinion that his proposed septic system would not cause any increased risk to public health. AR 3 (Finding of Fact 15; Conclusion of Law 5).

Second, Mr. Griffin established that the denial of his septic permit denied him all reasonable use of his property. Mr. Griffin paid \$59,000 for his 2,850 square foot lot, or over \$20 per square foot--a price consistent only with the expectation that he could develop his lot. Mr. Griffin had no reason to believe this lot was unbuildable. Based on the County's then-settled interpretation of its code, County staff actually issued Mr. Griffin his permit.

Moreover, County staff had explicitly advised the Board, before the Board voted to deny Mr. Griffin his permit, that if they denied the permit, Mr. Griffin could never build a septic system upon his property:

If the applicant is required to meet all minimum requirements of Article 4 without obtaining any waivers or setback reductions, it is unlikely Health Officer will be able to issue a sewage system permit for installation of a system on the Griffin property.

AR 12. One of the two members of the Board who voted to deny Mr. Griffin his permit explicitly acknowledged that the effect of her

decision would be to deny Mr. Griffin any ability to make use of his property. AR 389 (Testimony of Board of Health member Oberquell) (“I do applaud County staff by trying to make it possible for people to be able to use their property”).

What more could any landowner be expected to show?

Instead of defending Mr. Griffin’s substantive due process claim on its merits, Respondents criticize Mr. Griffin for failing to further develop the record before the trial court. But neither the Court of Appeals nor the Respondents explain why the Board’s decision to deny Mr. Griffin any ability to develop his property, coupled with the complete lack of evidence that the Board’s action was needed to address any real environmental harm, does not in itself establish exactly the kind of “undue oppression” which this Court has held to be sufficient to invalidate the Board’s action.

Finally, Mr. Griffin **prevailed** before the trial court on the statutory construction issue. Therefore, even if the Court of Appeals were somehow correct in holding that the record was not yet sufficiently developed to permit Mr. Griffin to assert his substantive due process claim, Mr. Griffin has yet to have his day before a finder of fact. The Court of Appeals should have remanded in order to give Mr. Griffin an

opportunity to present his claim. The Court of Appeals plainly erred in holding that Mr. Griffin had somehow "waived" this claim.

In sum, Mr. Griffin established that there was no evidence in the record to suggest that his proposed septic system threatened to cause any actual environmental harm whatsoever. He also established that the County's decision to deny him a septic permit deprived him of substantially all ability to develop and make use of his property. Under *Guimont*, that was all that Mr. Griffin, or any landowner, could reasonably be expected to show.

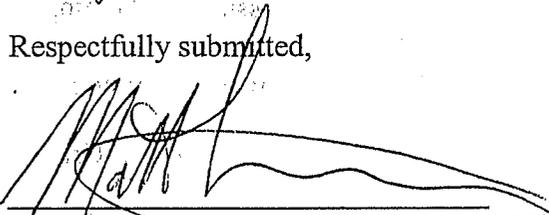
The Supreme Court should accept review of, and reverse, the Court of Appeals published decision on the substantive due process claim.

IV. CONCLUSION

This Court should accept review of, and reverse, the Court of Appeals published decision.

DATED this 6 day of September, 2007.

Respectfully submitted,



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Attorney for Respondent Jeff Griffin

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6 IN THE SUPREME COURT OF THE STATE OF WASHINGTON

7 JEFF GRIFFIN,

NO. 80214-9

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9 Respondent/Petitioner,

DECLARATION OF SERVICE

10
11 v.

12 THURSTON COUNTY AND ITS BOARD OF
13 HEALTH BRUCE CARTER, SHARI
14 RICHARDSON, GEORGIA BICKFORD,
15 BARBARA BUSHNELL and JANE ELDER
16 BOGLE,

Appellants.

17
18 On September 6, 2007, I deposited in the United States Mail, First Class, postage prepaid
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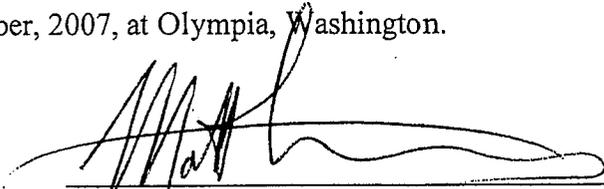
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1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 DATED this 6th day of September, 2007, at Olympia, Washington.

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5 
6 Matthew B. Edwards

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