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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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.

RESPONDENT'S OPENING BRIEF

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III. COUNTER-STATEMENT OF ISSUES PRESENTED

The Thurston County Sanitary Code provides that the County shall issue septic permits to permit applicants who submit applications that conform to the requirements of the Code. (See Appendix B – Excerpts of Sanitary Code). The Code frequently authorizes an applicant to meet one of two criteria, each of which provides full protection for the environment. Compliance with either of these criteria constitutes compliance with the Code.

The Code further authorizes the County to issue a septic permit to the owner of a small lot upon a showing that:

- 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.

In this case, Mr. Griffin purchased a waterfront lot on Steamboat Island that had been legally created prior to 1995 with the intention of constructing a one bedroom house into which he and his wife could retire. The County has not designated Steamboat Island as an area of special concern where a minimum land area is a design parameter necessary for

public health protection. Mr. Griffin applied for a permit to build a state-of-the-art, highly reliable, pressure distribution septic system providing several times the levels of treatment of effluent required.

Concluding that Mr. Griffin's proposed system met every specific requirement articulated in the Code, the Thurston County Environmental Health Department issued Mr. Griffin his permit. Mr. Carter, Mr. Griffin's neighbor, appealed.

Although it agreed that Mr. Griffin's application met the specific requirements of the Code, the Thurston County Board of Health voted 2-1 to deny Mr. Griffin his permit. (Appendix C). The two members of the Board who voted to deny Mr. Griffin his permit construed the language of § 21.4.5.3, requiring small lot owners to meet "all requirements" of the Code other than minimum land area, to require automatic denial of a permit if the small lot owner has utilized any of the equivalent standards provided by the Code. The denial, if sustained, would mean that Mr. Griffin is not able to develop his property.

Mr. Griffin appealed to Superior Court. The Superior Court reversed the decision of the Board of Health to deny Mr. Griffin his permit. (Appendix D).

1. Did the two members of the Board who voted to deny Mr. Griffin his septic permit properly construe the language of § 21.4.5.3, which requires Mr. Griffin to submit an application that met “all requirements of these regulations other than minimum land area,” to require automatic denial of a permit to any small lot owner who utilizes an equivalent standard specifically authorized by the Code?

2. Did the Board’s decision violate Mr. Griffin’s constitutional rights, because:

(a) the “other requirements” language is so vague that a person of common intelligence would not reasonably have understood it to have the meaning the two members of the Board attributed to it?

(b) the two Board members’ articulation of a new rule of decision violated Mr. Griffin’s right to have his septic application determined under the rules that had been in effect at the time he submitted it?

(c) the decision, which denies Mr. Griffin the right to develop his property while not serving to advance any real environmental interest, is unduly oppressive?

If the Court finds for Mr. Griffin with respect to **any one of these issues**, it should affirm the Superior Court’s decision that Mr. Griffin is entitled to his septic permit.

IV. FACTS

This case involves Mr. Griffin's application for permit to install a septic system to serve a one bedroom house on Steamboat Island, which is located in Puget Sound off of Carlyon Beach in northwest Thurston County.

Steamboat Island was platted into 126 lots in 1927. AR 47-48. Many of these lots have since been consolidated by common ownership. Id. There are approximately 40 residences that have been built on Steamboat Island, about 17 of which are occupied full-time. Id. Due to limited water availability, only one or two additional homes can ever be built on the island. AR 366.

A. Thurston County Zoning & Sanitary Code Provide for Development of Legal Lots.

Thurston County regulates the creation of lots and construction upon those lots through its Zoning Code, Title 20 of the Thurston County Code. AR 47-48, 60. The lots on Steamboat Island, whose creation the County approved in 1927, are smaller in size than what the Thurston County zoning code would require today. However, the Thurston County Zoning Code explicitly permits the owners of "small lots" that were legally created in the past to develop those lots:

Lots of record . . . may be developed for uses and in the manner permitted by this title and the amendments thereto even though the lot fails to meet lot area and width standards prescribed by this title for this lot.

Thurston County Code § 20.56.020 (Appendix A).

Thurston County regulates the construction of septic systems through its Sanitary Code, which it adopted in 1995. (Appendix B). Thurston County's Sanitary Code is based upon a model code promulgated by the Washington State Department of Health. See Chapter 246-272 WAC. Thurston County's Sanitary Code, in general, and the provisions pertaining to small lots in particular, were adopted substantially verbatim from the model code. WAC 246-272-20501(5)(e).

The Sanitary Code generally provides that the County "shall" issue an On-Site Sewage System Permit (hereinafter, "septic permit") to an applicant who submits an application and proposed septic system design that conforms to the specific requirements of the Code:

9.3. The Health Officer shall:

9.3.1. Issue a [septic permit] when the information submitted under subsection 9.1 meets the requirements contained in this article.

(Emphasis added)

The Sanitary Code frequently permits an applicant's proposed septic system to comply with either of two equivalent standards or criteria.

Of particular relevance to this case, the Sanitary Code:

- requires the applicant *either* to design a system for a minimum 240 gallon per day design flow *or* to provide technical justification to support calculations using lower design flow. § 12.2.3.1.
- requires an applicant *either* to conduct a winter water level evaluation *or* to provide other site and soil information that confirms there will be adequate separation between the soils into which effluent are discharged and the ground water. § 11.4. See also AR 19-20 (Thurston County Policy on Winter Water Table Evaluations).
- requires an applicant *either* to locate the sewer transport line at least 10 feet away from the residence's water supply line *or* construct it in accordance with the Washington State Department of Ecology's criteria for sewage works design. § 10.1, fn. 4;
- requires an applicant *either* to locate his drainfield 5 feet from the property line, easement line or building foundation *or* to locate it 2 feet away if the property line, easement line or building foundation is upgradient from the proposed drainfield. § 10.1, fn. 6;
- requires the applicant *either* to locate his proposed drainfield 100 feet from surface water *or* to locate it 75 feet away and to design his system to provide "enhanced treatment performance," § 10.3.

Like the Zoning Code, the Sanitary Code establishes a minimum lot size for newly created lots. However, like the Zoning Code, the

Sanitary Code provides that the County may issue owners of smaller lots a septic permit if the following three conditions are met:

21.4 The health officer may:

21.4.5 Permit the installation of a [septic system], 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.

(Emphasis added)

Prior to Mr. Griffin's case, the County had interpreted the "may" language of § 21.4.5 in conjunction with the "shall" language of § 9.3 as requiring the County to issue a septic permit whenever the Sanitary Code empowered it to do so. In other words, prior to Mr. Griffin's case, the County historically had issued septic permits to the owners of small, legally created lots which were not located in a designated area of special concern if the proposed septic system met any of the equivalent criteria set forth in the Code:

The Department historically has allowed issuance of sewage system permits on lots that do not meet the current minimum lot sizes providing the application meets the requirements stated in Article IV.

The Department has a written policy that allows staff to issue permits on existing lots of record [AR 17]. While the Griffin lot is smaller than the 12,500 square foot size required for new subdivisions, the applicant was able to develop a proposal that showed how the home, septic system and other improvements could fit on the lot in question once various setback reductions and waivers were approved.

AR 8 (staff report to Board of Health).

All the setback regulations and the waivers are allowable under the Code. **Historically, the Department has allowed those on existing lots of record.**

AR 341 (Testimony of Environmental Health Officer John Peterson).

(Emphasis added).

In sum, Thurston County's Zoning Code and Thurston County's Sanitary Code together explicitly provide that a person who, like Mr. Griffin, purchases a legally created lot, and who submits a septic system application and design that conforms to the specific criteria set forth in the Sanitary Code, is entitled, as a matter of right, to obtain from the County the permits necessary to develop and install a septic system upon that lot.

B. Mr. Griffin Submits a Permit Application that Complies with All Requirements of the Code.

In 2003, Jeff Griffin purchased lot 11 on Steamboat Island. AR 131. The lot which Mr. Griffin purchased is a long, narrow lot that borders Puget Sound on one end. AR 6. The lot is about 2,850 square feet in size. *Id.* Mr. Griffin purchased his lot with the intention of building a home in which he and his wife could live in their retirement. AR 355.

On November 19, 2004, Mr. Griffin filed an application with Thurston County for approval of the installation of a state-of-the-art pressure distribution system for a one bedroom house on his lot. AR 14-16. Robert Connolly of Skillings Connolly Engineers designed the system and completed the application which Mr. Griffin submitted to the County.

***Id.* Mr. Griffin's proposed septic system fully complied with every specific requirement of the Sanitary Code.** AR 3 (Conclusion No. 4); AR 10-11.

Mr. Griffin's engineer submitted a report describing the proposed septic system. AR 119, *et seq.* Mr. Griffin proposed a pressure distribution system, which is a highly reliable kind of system. AR 120-121. Mr. Griffin's system provided for almost three times the treatment of effluent required. AR 120. Mr. Griffin's proposed system "posed no increased risk to public health." AR 121.

In several instances, Mr. Griffin's system met Code requirements by utilizing equivalent criteria in the manner explicitly contemplated by the Sanitary Code. In each case, County staff found, and the Board of Health confirmed, that Mr. Griffin had done what the Code specifically required in order to achieve compliance.

1. Design Flow. Mr. Griffin proposed to construct a system that discharged no more than 120 gallons of effluent per day. As noted above, 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. Mr. Griffin proposed to construct a one bedroom residence that would employ only low flow fixtures, to install a large holding tank, and to incorporate a timer device in the pump chamber to ensure that no more than 120 gallons per day would be pumped into the drain field. 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).

County staff found that Mr. Griffin's technical justification supported his request to design a system that discharged only 120 gallons of effluent per day. *Id.* ("The design proposal did include technical justification"). The Board of Health agreed that Mr. Griffin's submitted adequate technical justification. AR 2-3 (Board of Health Findings 9 and Conclusion 4).

2. Water Table Evaluation. The Code requires septic permit applicants to perform a winter water table evaluation, or to provide other soil and site information to determine whether groundwater would rise, at its highest elevation during the winter, to the level at which effluent would be discharged. § 11.4; AR 19-20 (Thurston County Policy Re: Winter Water Table Evaluations). Mr. Griffin had his engineer attempt to conduct a winter water table evaluation on his property during the winter of 2003-2004. AR 75. However, low levels of rainfall that winter caused Thurston County to reject the results of the study. AR 79.

Mr. Griffin thereupon had a soils scientist conduct an investigation of the soils on his property. The soils scientist concluded that there was 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 need not complete the winter water table evaluation. AR 22-23. The Board of Health agreed that Mr. Griffin had, by submitting this soils report, adequately documented that there would be at least 6 feet of separation between the soils into which the affluent would be discharged and the highest ground water elevation. 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.").

3. Construction Setbacks. Mr. Griffin proposed to construct a sewer transport line that met the Washington State Department of Ecology's "criteria for sewage works design," such that he could locate the water line that would serve his one bedroom residence within 10 feet from his septic tank. § 10.1, fn. 4. Mr. Griffin's proposed sewer transport line met the Department of Ecology's criteria, because he proposed to use flexible couplings at the tank connections and to use a waterproof coating on his septic tank and pump chamber, AR 21, 29. As Thurston County Environmental Health Officer Steve Peterson testified:

One waiver was granted for the proposal. The one waiver was specifically a class-A waiver. A class-A waiver is a

waiver for which review criteria and mitigation matters have been pre-approved by the Washington State Department of Health on a state wide basis. In essence, it's basically a standard waiver. It can be readily granted by the local health jurisdiction if the listed mitigated factors are met on the design proposal and during the installation.

The specific waiver was to place tanks ten feet from a pressurized water supply line. The water supply line in question is the water supply line that serves the proposed residence that the Griffins were going to build. The design met all of the mitigating criteria listed by the Washington State Department of Health and included extra measures for the protection of the public health, specifically correct me if I am wrong, Mr. Connolly, there was a back flow prevention device on the water line.

Mr. Connolly: Correct.

Mr. Peterson: That was an extra mitigating factor.

AR 234-35 (testimony of Environmental Health Officer Steve Peterson at hearing of May 4, 2005 at pp. 22-23). See also AR 340 (testimony at June 21, 2005 hearing). The Board of Health agreed that Mr. Griffin's proposed design met the requirements of the Code. AR 1, 3 (Board of Health Finding 5, Conclusion 4) ("[T]he Griffins did what the Department required of them to obtain the waivers...").

Mr. Griffin also proposed to construct his drainfield just over 2 feet from the foundation of his residence. The Code requires a setback of only two feet where the building foundation is upgradient from the septic system:

The Health Officer may allow a reduced horizontal separation of not less than two feet where the property line, easement line, or building foundation is upgradient to it.

Sanitary Code, Art. IV, § 10.1, fn 6. Based on its inspection of the site, Thurston County Environmental staff determined that Mr. Griffin's foundation was upgradient from his septic system, and further noted that Mr. Griffin had proposed, in addition, to line the drainfield bed to prevent lateral movement of effluent from the drainfield bed to the building foundation. AR 16, 22. Therefore, staff concluded Mr. Griffin's application met this setback:

Another [reduction in setback allowable under Thurston County Sanitary Code, Article IV] was a 5-foot setback from [the] easement line from the disposal system. The reduction was down to, based on this document, 2.5 feet because the property line is upgradient of the sewage system disposal area. It is also lined with PVC-lined bed preventing any type of lateral movement in the upper horizon of the sewage system.

AR 235 (testimony of Environmental Health Officer Steve Peterson at May 4, 2005 hearing, p. 23). See also AR 340 (testimony of June 21, 2005 hearing). The Board of Health agreed that staff had properly determined that Mr. Griffin's proposal had met this requirement. AR 2-3 (Board of Health Findings 7-8, and Conclusion 4).

Mr. Griffin proposed to construct his drainfield so that its edge lay two and a half feet from his property boundary. AR 16. The Code

authorizes this if the property line is upgradient from the drainfield. § 10.1, fn. 6. Based on its inspection of the site, staff determined that the adjacent property line in fact was upgradient, noted that Mr. Griffin had proposed to PVC line his drainfield, and also noted that "no impervious layer was located below the disposal component" which might tend to direct effluent to the property line. AR 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).

4. Setback from Puget Sound. Finally, Mr. Griffin proposed to construct his septic system to provide for enhanced treatment performance beyond that accomplished by meeting the normal vertical separation and effluent distribution requirements, which permitted him to construct the drainfield more than 75, but less than 100, feet from Puget Sound. § 10.3. Because he proposed to construct a sand, lined bed system that utilized pressure distribution, County staff concluded that Mr. Griffin's proposed septic system would provide for enhanced treatment performance. AR 16, 22, 38. As the Environmental Health Officer testified:

That was reduced down as per the Code to 75 feet because the design proposal provides enhanced treatment of the sewage. They proposed a treatment standard 2 system that allows the Department to set a setback of 75 feet and not 100 feet from the surface water.

AR 235-36 (testimony of Environmental Health Officer Steve Petersen at May 4, 2005 hearing, pp. 23-24). See also 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 proposed system complied with all the specific requirements of the Code. AR 3 (Board's Conclusion No. 4); AR 10-11.

C. Issuance of the Permit, Appeals and Denial.

Based on his proposed system's compliance with all requirements of the Code, County staff issued Mr. Griffin a septic permit. AR 16.

Mr. Griffin's neighbor, Bruce Carter, filed an appeal on the staff's decision to issue the permit. AR 62. Mr. Carter owns property located adjacent to Mr. Griffin's property. There is an old septic system serving a three bedroom house located on Mr. Carter's property. *Id.*

A Thurston County Environmental Health employee, Arthur Starry, heard Mr. Carter's appeal. AR 213-336. Mr. Starry decided that Mr. Griffin was not entitled to the issuance of a septic system permit. AR 37-46.

Mr. Starry did not purport to find that there was anything unusual about Mr. Griffin's proposed septic design or the topography of his property that suggested that the proposed septic system would cause some particular or unusual risk of environmental contamination. Further, Mr. Starry did not dispute¹ that Mr. Griffin's septic application in fact **complied with every specific requirement of the Code:**

¹ Initially, Mr. Starry contended that the soils investigation report that Mr. Griffin submitted contained certain erroneous assumptions, and that Mr. Griffin's proposal did not satisfy the criteria pertinent to alternating drainfield systems. See AR 44 (Arthur Starry May 16, 2005 decision, Conclusions 7, 9). However, by the time of the June 21, 2005 hearing before the Board of Health, Mr. Starry acknowledged that he had misinterpreted the regulations pertaining to alternating drainfields, and that a supplemental report submitted by the soils scientist addressed and fully satisfied the concerns he had with the original report:

The applicant has provided an update to the soils report that was submitted in support of the winter water evaluation that addresses the erroneous assumptions in the original soil report. The Department's review of this report finds that it adequately addresses the concerns expressed by the Hearing Officer. In addition, as noted in the Hearing Officer analysis section of this report, the Griffin design proposal does satisfy criteria in the state guidance for alternating systems.

AR 11 (Environmental Health Division Report for June 21, 2005 hearing at p. 5). See also AR 2 (Board Finding 13) ("Other criteria cited by the Hearing Officer in his decision were shown to be corrected at the time of the Board of Health hearing.").

Phillips: Mr. Starry, do I understand you correctly, your testimony today is that all the Code provisions are met, and your concern is with 21.4.5.3?

Starry: Correct, that's the - the focus of my decision.

Phillips: Okay, so what you're urging the Board to do is that if an applicant submits for a permit, and meets all of the Code requirements, you would look at, or have them interpret 21.4.5.3, that if it's an undersized lot, despite meeting all the Code provisions, it should be rejected.

Starry: My decision in this case, with the facts presented at the hearing were yes, I would say a permit shouldn't be issued.

AR 351 (testimony of Art Starry at June 21, 2005, hearing).

Instead, Mr. Starry denied Mr. Griffin's permit simply because he disagreed with the provision of the Sanitary Code which allowed an applicant to reduce the setback between a drainfield and Puget Sound from 100 to 75 feet:

As noted above, the development of the subject lot can only occur if a substantial number of waiver requests in horizontal setback reductions are also approved. While the public health significance of some of these is debatable, others are clearly significant, such as the separation between the disposal component and surface waters. Sewage system permitting requirements in Washington have increased the horizontal separation between disposal components and marine waters from 50 feet to 100 feet since the time Steamboat Island was platted.

AR 43-44 (Art Starry's May 16, 2005 decision, pp. 7-8). See also AR 2 (Board Finding 13(c)).

Mr. Griffin appealed Mr. Starry's decision to the Thurston County Board of Health. AR 104. In preparation for the hearing, members of the Thurston County Health Department, including Mr. Starry, jointly authored a report. The report acknowledged that Mr. Griffin's application **met all the specific requirements of the Sanitary Code.** AR 10-11. Staff stated that the "key decision" the Board had to make is how to interpret the "other requirements" language of § 21.4.5.3:

The key decision that remains regarding this appeal, then, is how "other requirements" provision of Section 21.4.5.3 should be applied to a small-sized lot. If it is appropriate to approve the system design based on its meeting code requirements by obtaining waivers, setback reductions (including a setback reduction to Puget Sound) and a design flow reduced to 120 gallons, then the hearing officer's decision should be reversed and the design approved with minor modifications. Under this scenario, it is likely a suitable sewage system proposal can be developed and the health officer will be able to approve the Griffin proposal.

If, however, section 21.4.5.3 limits the health officer's authority to approve setbacks, reductions or waivers in order permit the installation of a sewage system on an undersized lot, the Board must decide whether too many setback reductions and waivers are required for the health officer to approve the Griffin design. If the applicant is required to meet all minimum requirements of Article IV without obtaining any waivers or setback reductions, it is unlikely the health officer will be able to issue a sewage system permit for installation of a system on the Griffin property...

AR 11-12.

The Board conducted a de novo hearing, AR 337-387, after which it orally announced its decision. AR 388-389. The Board then issued a written decision. AR 1-6. (Appendix C). In its written decision, two of the Board's three members concluded:

1) That Article IV, Section 21 of the Thurston County Sanitary Code covers [septic] 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 [a septic system] where minimum land area requirements or lot size is not met only when...

21.4.5.1 The lot is 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 Griffin.

6) That the issue before the Board is to determine if the application has met all 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 resort to waivers, setback adjustments or other modification of the rules found within the Code.**

AR 3 (emphasis added).

Board member Cathy Wolfe dissented from the Board's decision.

Board member Wolfe reasoned:

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 complied with 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.

AR 4.

V. STANDARD OF REVIEW

In this LUPA appeal, the Court engages in a multi-step process of review. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49

P.3d 860 (2002). First, the Court examines the Board's factual findings to determine whether they are supported by substantial evidence in the record. RCW 36.70C.130(c). Then, the Court reviews the Board's legal conclusions to determine if they are based on an erroneous interpretation of the law. RCW 36.70C.130(b). Finally, the Court must determine if the Board's decision violated the constitutional rights of the party seeking relief. RCW 36.70C.130(f).

Here, no one has formally challenged any of the factual findings made by the Board². Instead, Mr. Griffin challenges the Board's

² Without formally challenging the Board's findings, Bruce Carter challenges the substance of the Board's factual determination that Mr. Griffin demonstrated that he was eligible to use the setbacks pertaining to the foundation and property lines. Carter Brief, pp. 32-37. The Court should reject Mr. Carter's challenge.

First, Mr. Carter did not raise these issues in the materials he presented to the Board. AR 390 *et seq.* Moreover, the Board held Mr. Carter was not a party to the proceedings below. AR 337. And, as Mr. Carter himself acknowledged, did not timely file his own petition for review of the Board's decision. CP 37. Therefore, as the trial court ruled in dismissing Mr. Carter's "cross-petition," CP 132-33, Mr. Carter is not entitled to attack the Board's decision. RCW 37.70C.030; .040; *Lakeside Indust. Inc. v. Thurston County*, 119 Wn. App. 886, 900-901, 83 P.3d 433, *review denied*, 152 Wn.2d 1015 (2004).

Second, the factual findings that Mr. Carter attacks are supported by substantial evidence in the record. The information supporting the Board's findings include: (1) the septic application itself, AR 16; the engineer's written report (noting that "the plans show the property line is upgradient," and that plans called for sloping of ground away from foundation for 10 feet at face of building) AR 121; the staff report (noting foundation was "slightly upgradient," that "property line was upgradient") AR 54; the testimony of the Thurston County staff member who personally reviewed these materials and inspected Mr. Griffin's residence, AR 235-37, 340; and the engineer's testimony at the hearing AR 359-65.

Mr. Carter's challenge to the facts is based largely upon his (mis)characterization of the soils scientist's opinion. *See* Carter Brief, pp. 36. But as Mr. Carter himself notes elsewhere in his brief (p. 24), the soils scientist had not reviewed the specific septic

construction of the phrase “all requirements . . . other than minimum lot size.” § 21.4.5.3.

The Board itself characterized its decision as being one based on its construction of the language of the Code:

[T]he issue for the Board to determine [is] if the application has met all other requirements other than minimum land area as required by § 21.4.5.3!

[A] majority of the Board agrees with the hearings officer that the language in § 21.4.5.3 should be **construed** conservatively.

AR 3 (Board of Health Decision, Conclusion 7) (Emphasis added).

The Court reviews the Board’s construction of this language *de novo*. *McTavish v. City of Bellevue*, 89 Wn. App. 561, 564, 949 P.2d 837 (1998). This Court, rather than the Board, has the authority to determine the meaning of this language. *Postema v. Pollution Controls Hearings Board*, 142 Wn. 2d 68, 77, 11 P.3d 726 (2000).

In construing this language, the Court should apply the normal rules applicable to the construction of statutes, which apply equally to

proposal designed by Mr. Griffin’s engineer, and therefore specifically stated that she could not comment upon it. AR 108-109.

The Board’s factual findings that Mr. Griffin had done what was required to utilize the various equivalent standards are supported by substantial evidence in the record and, therefore, must be affirmed.

ordinances. *McTavish*, 89 Wn. App. at 564. The Court should construe the ordinance as a whole, in order to give force and effect to all of its parts. *Platt Electric Supply, Inc. v. City of Seattle*, 16 Wn. App. 265, 272-73, 555 P.2d 421, *review denied*, 89 Wn.2d 1004 (1977). The Court should give effect to the ordinance's plain meaning. *McGinnis v. State*, 152 Wn. 2d 639, 645, 99 P.3d 1240 (2004). The Court ascertain derive the plain meaning of the ordinance not only by looking the specific provision which the Board interpreted, but also by examining related provisions. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn. 2d 1, 11, 43 P.3d 4 (2002). In construing the ordinance, the Court should avoid a strained or absurd result. *Strain v. West Travel, Inc.*, 117 Wn. App. 251, 254, 70 P.3d 158 (2003), *review denied*, 150 Wn. 2d 1029 (2004).

If the Court finds the meaning of the statute to be plain, then the Court should not grant any deference to the interpretation placed upon it by the Board. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn. 2d 504, 507, 833 P.2d 381 (1992). Even if the Court finds the language of an ordinance to be ambiguous, the Court should grant the Board no deference because the Board is interpreting a model ordinance, the language of which was drafted by the Department of Health, and the

Board therefore lacks expertise with respect to its intended meaning. *Crescent Convalescent Ctr. v. Dept. of Social and Health Services*, 87 Wn. App. 353, 357-58, 942 P.2d 981 (1997); *Russell v. Department of Human Rights*, 70 Wn. App. 408, 412, 854 P.2d 1087 (1993), *review denied*, 123 Wn.2d 1011 (1994).

The Appellants attempt to characterize the Board of Health's decision as constituting an exercise of discretion, such that this Court's review would only be for abuse of discretion. The Court should reject this characterization. The Board did not purport to exercise discretion.

The Board did not base its decision on any fact or circumstance particular to Mr. Griffin's application. To the contrary, the Board expressly acknowledged that Mr. Griffin met every specific requirement of the Code:

[T]he Griffins did what was required of them to obtain the waivers and modified setback required.

[N]o scientific evidence has been submitted to refute the findings of the soils or waste water flow reports submitted by Griffin.

AR 3 (Conclusions No. 4, 5).

Rather than make a discretionary decision based on facts particular to Mr. Griffin's case,³ the two members of the Board who voted to deny the permit in fact articulated a broad new rule, applicable to all small lot owners, which required such lot owners to satisfy a specific subset of the Code's equivalent standards, rather than "all" of them:

[A]n application for a [septic system] on a too-small lot should satisfy all requirements related to permitting at the time of application without having to result [sic] to waivers, setback adjustments or other modification of the rules found within the Code.

AR 3 (Board of Health Conclusion No. 7).

The Board construed the language of its Code to create a new rule of decision applicable to all small lot owners, not just Mr. Griffin. The Board did not exercise discretion.

³As set forth herein, Mr. Griffin's proposed system met every specific requirement of the Code. Other than meeting these requirements, the County's regulations provide no standards to further guide the Board in the exercise of its alleged discretion. Therefore, even if the Court interprets the Board's decision as having somehow involved the exercise of discretion, the County has the burden of showing that it has exercised its discretion for legitimate and reasonable reasons. *Sunderland Family Treatment Services v. Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995) (where legislative body adopts regulation granting administrator right to exercise discretion, but fails to provide *specific* standards to guide the administrator in the exercise of that discretion, the burden shifts to the decision-maker to justify its decision.). See also *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 228-229, 622 P.2d 892 (1981). The County has not met that burden here.

VI. OBJECTION TO APPELLANTS' "FACTS"

Appellants in their briefs assert numerous "facts". The Board did not make any findings as to these "facts." The Board did not purport to base its decision upon them. Therefore, the Court should not consider them. And in any event, it should find that they are not supported by the record.

For example, the County asserts in its brief that the other homes on Steamboat Island have inadequate sewage systems. Thurston County Brief, p. 2. The County asserts this "fact," based on a 20 year old report in which the author simply expresses an opinion, without providing any evidence to support it. AR 98. However, the County ignores the evidence presented by Mr. Griffin's soils expert, whose report the Board accepted as "unrebutted," that Mr. Griffin's proposed system provided several times the level of treatment required by the Code and that the cumulative impact of all the septic systems on the island on the soils was "tiny." AR 357. See also AR 3 (Board Conclusion No. 5).

Similarly, the County in its brief points to "evidence" offered by Mr. Carter as to how other counties allegedly have interpreted their own regulations. Thurston County's brief, p. 3. But, at the hearing before the

Board, the County prosecutor herself pointed out the irrelevance of this “evidence.” AR 379-80.

Both the County and Mr. Carter also point to an undated listing as constituting “proof” that Mr. Griffin “knew” that his lot would not be approved for a septic system. County Brief, p. 11; Carter Brief, pp. 4. But there is no evidence in this record that the document was ever effectively communicated to Mr. Griffin. Even if the information contained in this document had been communicated to Mr. Griffin (and it was not), the most it can be said to have done is to put Mr. Griffin on notice that he needed to hire an engineer to make sure he could construct a septic system on the lot that fully complied with the Code – exactly as Mr. Griffin did.

In addition, Mr. Carter alleges:

During the past 20 years, no permits have been issued for new construction on the many vacant lots because of the usual negative advice from the Health Department about the availability of septic system permits. AR 81, ¶ 3; 184, ¶ 2.

Carter Brief, p. 3. But, the portions of the record to which Mr. Carter cites to prove this “fact” consist of his own declarations. In these declarations, Mr. Carter merely purports to describe “his understanding.” Mr. Carter’s “understanding” of a matter as to which he has no personal knowledge is not evidence of anything.

In fact, the Board has **not** designated Steamboat Island as an “area of special concern,” thereby precluding the issuance of septic permits to lot owners there. AR 3 (Board Conclusion 3). The County had consistently interpreted the Code as entitling small lot owners like Mr. Griffin to the issuance of a permit if they submitted an application conforming to the specific requirements of the Code. AR 8; 341. Mr. Carter is not entitled to put forward his self-serving, contrary “understanding” as “fact.”

Finally, Mr. Carter recites in his brief, as “fact,” testimony of various persons, who wrote documents Mr. Carter submitted into the record. See Carter Brief, p. 19-22. Again, the Board adopted none of these “facts.” Instead, the Board explicitly adopted the testimony of Mr. Griffin’s experts, finding that their conclusions had not been effectively rebutted. AR 3 (Conclusion of Law No. 5).

The only facts relevant to this appeal are the facts specifically found by the Board. Those facts have not been challenged. They are supported by substantial evidence. They are binding on appeal. The Court should refuse to consider the additional “facts” cited in the appellants’ briefs.

VII. ARGUMENT

The Board construed § 21.4.5.3 to require the County to automatically deny a septic permit application with respect to an undersized lot if the applicant sought to use the equivalent standards provided for by the Code (what the Board erroneously described as “waivers” or “modifications” of the rules). The Court should reverse the Board’s construction of this section. It is wrong, both as a matter of statutory construction and because it violates Mr. Griffin’s constitutional rights.

First, as both the Board and the trial court recognized, Mr. Griffin’s septic application fully complied with all the specific requirements of the Code. Therefore, Mr. Griffin did not seek to “modify the rules found within the Code.” Mr. Griffin fully complied with those rules.

The Board’s decision also violated Mr. Griffin’s constitutional rights. Specifically, the Board’s application of § 21.4.5.3 violated Mr. Griffin’s right to due process of law. The County’s decision violated Mr. Griffin’s right to have this septic application processed under the rules in effect at the time he submitted it. Finally, the Board’s new interpretation

of the Code effectively denied to Mr. Griffin any right to develop his property.

If the Court finds for Mr. Griffin on any of these issues, the Superior Court's decision should be affirmed.

A. The Board ignored the plain meaning of the Code when it construed § 21.4.5.3's reference to "all requirements" to mean only "some requirements."

First, the Board ignored the plain meaning of its Code when it construed § 21.4.5.3's reference to "all requirements" to mean only "some requirements."

Section 21.4.5.3 of the Sanitary Code provides for the issuance of a septic permit to a legally created, small lot provided that: "the proposed system meets all requirements of these regulations other than minimum land area." This conforms with the policy reflected in Thurston County's Zoning Code that while newly created lots should conform to current size requirements, the owners of smaller, older lots should be permitted to develop those lots. Zoning Code, § 20.56:020 (Appendix A).

The Sanitary Code does not define the meaning of the word "all." Therefore, the Court should construe that word to have its usual meaning. The usual meaning of the word "all" is "[b]eing or representing the entire or total number, amount or quantity," or "any, whatsoever." *Parkridge*

Associates, Ltd. v. Ledcor Industries, Inc., 113 Wn. App. 592, 602, 54 P.3d 225 (2002). Here, the Board did not construe the word “all” in accordance with its plain meaning.

Here, the Sanitary Code provides for equivalent methods for achieving compliance with its requirements. Thus, the Code states that an applicant may **either** complete a winter water study, **or** submit other soil and site information. §11.4.1-2. **Either** the applicant must propose a design flow of at least 240 gallons per day, **or** the applicant must provide technical justification to support calculations using a lower design flow. §12.2.3.1. **Either** the disposal component must be located ten feet from a pressurized water supply line, **or** a pressurized line must be built in conformance with Department of Ecology Criteria. § 10.1, fn.4. **Either** the disposal component must be located ten feet from the building foundation, **or** the disposal component must be located upgradient from the foundation. *Id.*, fn. 6. And **either** the septic system must provide for “enhanced treatment” of the effluent **or** the disposal component must be located 100 feet from open water. *Id.*, §10.3. Where the Sanitary Code provides for equivalent standards, **compliance with “any” of these standards is compliance with “all” the requirements of the Code.**

Two members of the Board took the position that, in utilizing the equivalent standards specifically provided for in the Code, Mr. Griffin somehow sought to “waive” or to “modify the rules.” See AR 3 (Board’s CoL 7) (characterizing Mr. Griffin’s proposal as requesting a “waiver” or “modification” of the rules found within the Code). This is incorrect.

The Code contains specific provisions that an applicant can use if the applicant wants to ask the County to “waive” Code requirements on account of special circumstances unique to his lot. Sanitary Code, Art. 1 (General Provisions), § 13. Mr. Griffin **did not** seek such a waiver here. He merely made use of equivalent standards in the manner for which the Code, on its face, expressly provides.

Mr. Griffin also did not seek to “modify the rules.” His proposed state-of-the-art pressure distribution septic system met every one of the standards actually articulated in the Code. AR 3 (Conclusion No. 4); AR 10-11. Mr. Griffin’s septic application fully complied with what the Code, as a whole, required.

To the contrary, it was the two members of the Board who voted to deny Mr. Griffin’s permit who “modified the rules.” They purported to deny Mr. Griffin’s application, even though it complied with “all the requirements of the Code other than minimum lot size,” simply because

Mr. Griffin had met standards which, although explicitly provided for by the Code, they did not think were "good enough." AR 388-89.

In sum, the Board's decision cannot be squared with the plain meaning of § 21.4.5.3's reference to "all requirements of these rules other than minimum land area." Because the Board's decision ignores the plain meaning of the phrase "all requirements," the Court should affirm the Superior Court's decision.

B The Board improperly revisited the legislative judgment it made when it adopted the Code that an applicant who meets either of its equivalent standards is entitled to a permit.

Moreover, the Board improperly revisited the legislative judgment it made when it adopted the Code that an applicant who met either one of its equivalent standards is entitled to a permit:

A building or use permit must issue as a matter of right upon compliance with the ordinance. 9 Am. Jur. 203, § 7. The discretion permissible in zoning matters is that which is exercised in *adopting* the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with the questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional.

State ex rel Ogden v. City of Bellevue, 45 Wn. 2d 492, 495, 275 P.2d 899 (1954) (emphasis in original).

Here, the Sanitary Code provides for equivalent standards. This reflects an underlying legislative judgment that compliance with either standard is sufficient to protect the public health, and to support the issuance of a septic permit. The Board was not, in this administrative proceeding, entitled to revisit the legislative determination that compliance with either standard is sufficient to protect the public health. But that is exactly what the Board did.

The Court should affirm the Superior Court's decision for this second, separate reason.

C The Board failed to construe its ordinance as a whole. In particular, it failed to consider the purpose and effect of § 21.4.5.2.

The Board also failed to construe the ordinance as a whole. In particular, it failed to consider the purpose and effect of § 21.4.5.2. Section 21.4.5.2, not § 21.4.5.3, provided the Board with the means to address any concern it might have arising out of the cumulative impact of the development of small lots.

Under the Code, a small lot owner is entitled to show three things to obtain a permit.

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

21.4.5.2 The lot is outside a special area of 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.

As this language shows, § 21.4.5.2 and § 21.4.5.3 are intended to provide the Board different tools for addressing different concerns. Where the Board feels that the public health might be threatened by the cumulative development of a number of small lots in a specific area, the Board may act to designate the area as being an "area of special concern" pursuant to § 21.4.5.2. By making such a designation, the Board would put property owners (and prospective purchasers) on clear notice that lots smaller than the designated size cannot be developed. The Board would also create a written standard that it could thereafter consistently apply to all septic system applicants.

Section 21.4.5.3, in contrast, permits the Board to deny a septic permit only for reasons unrelated to minimum lot size, i.e. for failing to meet any standard or criteria applicable to all lots, as set forth in the rest of the Code. That is exactly how the County itself interpreted § 21.4.5.3

when it adopted its written policy and procedure clarifying the effect of that section in June 1998:

The Health Officer may consider existing legal lots for single family dwelling purposes without considering the dwelling unit per acre issue.

AR 17. See also AR 341: (Environmental Health Officer confirms County had always issued permits to small lot applicants including those who used equivalent standards).

The Board's decision appears to have been principally motivated by the fact that Mr. Griffin's proposed septic system would be located more than 75, but less than 100, feet from Puget Sound. AR 2 (Board Finding 13(c)) ("The greatest concern of the setback reductions was the shortened distance between the system and surface waters. The current requirement is 100 feet.") But the Code, on its face, explicitly allows septic permit applicants who propose systems that provide enhanced treatment to reduce the setback to 75 feet. § 10.3.

Moreover, there is no nexus between these two issues. The risk that a septic system allegedly poses to Puget Sound has nothing whatsoever to do with the size of the lot upon which the system is placed. The Board certainly made no factual finding in this case that the size of

Mr. Griffin's lot in any way contributed to any alleged threat his proposed state-of-the-art septic system might cause to Puget Sound.

Under the Code, if the Board wants to preclude the construction of additional septic systems on small lots on Steamboat Island, it is entitled to do so. But it may do so only by designating Steamboat Island as an "area of special concern," § 21.4.5.2, and then applying that designation to permits requested after it has made that designation.

In sum, the Superior Court correctly determined that the two members of the Board who voted to deny Mr. Griffin his permit had erred in construing the Code. Under the plain meaning of the word "all," Mr. Griffin's proposed system satisfied "all requirements" of the Code other than minimum lot size.

D. Section 21.4.5.3 is too vague to permit the Board to constitutionally apply it so as to deny Mr. Griffin his septic permit.

As a matter of statutory construction, the Court should reverse the Board's decision. In the alternative, the Court should also find that the Board's decision to apply this section so as to deny Mr. Griffin his permit violated Mr. Griffin's constitutional rights.

First, § 21.4.5.3 is too vague to permit the Board to constitutionally apply it so as to deny Mr. Griffin his septic permit:

[T]he regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules 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, 905, 71 P.3d 208 (2003). See also *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988); *Myrek v. Bd. of Pierce County Comm'rs*, 102 Wn. 2d 698, 707, 677 P.2d 140, 687 P.2d 1152 (1984).

A person of common intelligence who looked at the language of §21.4.5.3 would read it to provide for, rather than preclude, the issuance of the permit to a person whose septic system design complies with any of the equivalent standards specifically provided for on the face of the Code. Indeed, the County itself had adopted a written policy confirming this language had this effect. AR 17. And this is how the County itself had always interpreted the Code:

All the setback reductions and the waivers are allowable under the Code. Historically, the Department has allowed those on existing lots of record.

AR 341 (Testimony of Environmental Health Officer Steve Peterson at June 21, 2005 hearing, p. 5). See also AR 237-38 (testimony of at May 4, 2005 hearing, pp. 25-26).

Mr. Griffin invested tens of thousands of dollars purchasing this lot and paying an engineer to design a state-of-the-art septic system for it. At

the time he did so, the Code did not provide him fair warning that the County would automatically deny his permit simply because he sought to utilize an equivalent standard specifically provided for and approved by the Code.

The other purpose of the vagueness doctrine is to limit arbitrary and discretionary enforcement of the law. Where an ordinance "leaves to the discretion of county officials the substance of determining what activities are prohibited," the ordinance is unconstitutionally vague. *Burien Bark Supply v. King County*, 106 Wn. 2d 868, 871, 725 P.2d 994 (1986) (Code which permitted use for retail services including manufacturing and processing "in limited degree" held unconstitutionally vague where code contained no standards to guide County's determination of what constitutes a "limited degree"). See also *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993); *Grant County v. Bohne*, 89 Wn. 2d 953, 577 P.2d 138 (1978).

Here, § 21.4.5 articulates exactly three criteria which a small lot owner has to meet in order to be issued a septic permit. Mr. Griffin met those criteria: he owned a legal lot of record created prior to January 1, 1995; the County had not acted to designate Steamboat Island an area of special concern where a specific minimum land area was necessary for

public health protection; and Mr. Griffin had submitted a septic design that met every specific requirement of the Sanitary Code.

The Board nevertheless denied the permit. To uphold the Board's denial would be to authorize the Board to grant or deny permits to small lot owners without reference to any standard whatsoever. This would constitute "the very epitome of discretionary, arbitrary enforcement of the law." *Anderson*, 70 Wn. App. at 78.

The fact that the Board singled out Mr. Griffin, and only Mr. Griffin, to be the subject of its new rule strongly suggest that the two members of the Board who voted to deny Mr. Griffin his permit were really only doing so in response to the community opinion which Mr. Carter had brought to bear upon them. "Community displeasure cannot be the basis for a permit denial." *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985; citing *Kenart & Assoc. v. Skagit County*, 37 Wn. App. 295, 303, 680 P.2d 439, *review denied*, 101 Wn. 2d 1021 (1984).

Finally, because the Board does not operate pursuant to the principal of *stare decisis*, does not publish its decisions, and does not maintain an index to them in any form which would permit future permit applicants to research them, the County's staff and its Board are perfectly

free to revert to the previous rule of decision with respect to future applicants. This clearly permits the Board to apply its new "rule of decision" to Mr. Griffin alone, in a way that the Constitution specifically prohibits.

In sum, the Board is required to operate pursuant to written rules that gave Mr. Griffin fair notice of what would and would not be prohibited. The Board did not follow its Code or written policy in this case. Instead, responding to community pressure, two members of the Board applied to Mr. Griffin, for the first and only time, a new, unwritten rule of decision. By doing so, the Board violated Mr. Griffin's right to due process of law.

E. The Board's decision to adopt a new rule applicable to small lots, and to apply it for the first time in Mr. Griffin's case, violated Mr. Griffin's right to have his application processed under the rules in effect at the time he submitted it.

In addition, the Board's decision to adopt a new rule applicable to small lots, and to apply it for the first time in Mr. Griffin's case violated his "vested rights," i.e., his right to have his application processed under the rules in effect at the time he submitted it.

Washington State has long recognized that an applicant for a land use permit has a right that vests upon his or her submission of a land use

application to have that application considered under the rules in effect at the time the application is submitted:

The purpose of the vesting doctrine is to allow developers to determine, or "fix" the rules that will govern their land development. See Comment, Washington's Zoning Vested Rights Doctrine, 57 Wash. L. Rev. 139, 147-50 (1981). The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the "fluctuating policy" of the legislature. The Federalist No. 44 at 301 (J. Madison) (J. Cooke ed. 1961). Persons should be able to plan their conduct with reasonable certainty as to the legal consequences. Hochman, The Supreme Court, and The Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.

West Maine Assocs. v. City of Bellevue, 106 Wn.2d 47, 50, 720 P.2d 782

(1986). The vested rights doctrine applies to an application for a permit to construct a septic system. *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).

Here, the Board did not respect Mr. Griffin's right to have his septic application processed under the rules in effect at the time he submitted it. Instead, the Board adopted and applied to Mr. Griffin a new and different rule of decision than had ever been applied to other permit applicants.

In the report it prepared for submission to the Board prior to the June 21, 2005 hearing, the Health Department squarely acknowledged that it had consistently issued permits to applicants in situations similar to Mr. Griffin's:

The Department historically has allowed issuance of sewage system permits on lots that do not meet the current minimum lot sizes providing the applicant meets the requirements stated in Article IV. The Department has a written policy that allows staff to issue permits on existing lots of record (Exhibit C). While the Griffin lot is smaller than the 12,500 square foot size required for new subdivisions, the applicant was able to develop a proposal that showed how the home, septic system and other improvements could fit on the lot in question once various setback reductions and waivers were approved.

AR 8 (Environmental Health Division Report, p. 2).

The Board did not purport to apply its existing rules, and its existing written policy, to Mr. Griffin's application. Instead, the Board articulated a broad new rule -- not grounded in any way on the facts of Mr. Griffin's particular application -- that, instead of authorizing the issuing of a permit, required the Health Officer not to issue a permit a small-lot applicant who sought any "waiver or setback reduction" whatsoever:

[A]n 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.

AR 3 (Board of Health Decision, Conclusion of Law 7).

Mr. Griffin had the right to have his septic permit application processed under the rule of decision which the County had formally adopted and consistently employed up to and through the time he submitted his application. The Board's decision to apply a different rule of decision squarely violated Mr. Griffin's right to have his application processed under the rules in effect at the time he submitted it. The Court should affirm the trial court's decision for this fifth separate reason.

F. The County's interpretation of its ordinance violates Mr. Griffin's substantive due process rights.

Finally, the County's decision has denied Mr. Griffin his right to substantive due process.

Under Washington law, the Court must apply a three-part analysis to determine whether the Board's application of its rules to Mr. Griffin violated his right to substantive due process. The Court must consider:

- whether the regulation is aimed at achieving a legitimate public purpose;
- whether it uses means that are reasonably necessary to achieve that purpose; and
- whether it is unduly oppressive on the landowner.

Guimont v. Clark, 121 Wn. 2d 586, 609, 854 P.2d 1 (1991), citing *Presbytery of Seattle v. King County*, 114 Wn. 2d 320, 330, 787 P.2d 907 *cert. denied*, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990). Here, the County's denial does not satisfy any of the *Guimont* factors.

As to the first factor, the County denied Mr. Griffin his permit because of its concern about the cumulative impact granting such permits would have on Steamboat Island. There was no factual basis for that concern in this case. Although Steamboat Island was originally platted into 126 separate lots, many of those lots are in common ownership, which means that they have been effectively combined into single lots for the purpose of further development. AR 47-48; Thurston County Zoning Code, § 20.56.020(2). And there are water rights available sufficient to provide for the development of only one or two additional houses. AR 366. There simply is not, in light of these facts, a legitimate basis for the Board to have adopted a new rule of decision intended to address the cumulative effects of additional development on Steamboat Island.

Moreover, under the second factor, the Board's action was not reasonably necessary to ensure that the public health was protected against the threat of overdevelopment. Here, the Board could have granted Mr. Griffin his permit, and then designated Steamboat Island an area of special

concern with respect to which the Board would require a specific minimum lot size. § 21.4.5.2. To the extent the Board had a legitimate concern about the cumulative impact of the development of small lots on Steamboat Island, this would have completely addressed that concern. And it would have done so without depriving Mr. Griffin of his investment backed expectation that he would be allowed to make use of his property.

Finally, the Board's action was unduly oppressive. In determining whether a land use ordinance, as applied to a particular homeowner, is unduly oppressive, the Court should consider the following factors:

On the public side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of the less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Guimont, 121 Wn. 2d at 610, citing *Presbytery of Seattle*, 114 Wn. 2d at 331.

Here, the County has caused immense harm to Mr. Griffin's ability to use his property.⁴ County staff squarely advised the Board that the impact of permit denial would be to prevent Mr. Griffin from developing his property. See AR 12 ("If the applicant is required to meet all minimum requirements of Article IV without obtaining any waivers or setback reductions, it is unlikely the Health Officer will be able to issue a sewage system permit for installation of a system on the Griffin property"). The members of the Board who voted to deny Mr. Griffin his permit acknowledged that the effect of their decision would be to deny Mr. Griffin the ability to develop his property. AR 389 (testimony of

⁴ The County asserts that Mr. Griffin has not incurred any "economic loss" because, long before the County acted to deny Mr. Griffin his permit, Mr. Carter once allegedly made an offer to purchase his property. That claim is not supported by any evidence in the record.

The County also wrongfully attempts to inject into this case the issue of whether its decision denied Mr. Griffin "all economically viable use" of his property. County Brief, p. 7, citing *Robinson v. City of Seattle*, 119 Wn. 2d 34, 830 P.2d 318 (1992).

The only issue presently before the Court is whether the County's decision imposes an unreasonable harm on Mr. Griffin, in light of the public benefit achieved. *Guimont v. Clark*, 121 Wn. 2d 586, 610, 854 P.2d 01 (1991). As set forth above, the County's decision imposes a substantial hardship upon Mr. Griffin by precluding any development of his property in order to achieve a non-existent public benefit. Therefore, the Court should invalidate the County's decision.

As part of this analysis, the Court need not reach the issue whether the County's decision to deny Mr. Griffin the ability to develop his property rises to the level of a denial of "all economically viable use." That issue will arise only if the County's decision is affirmed, and Mr. Griffin pursues his monetary claim (presently stayed) for a "taking" of his property.

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").

Pursuant to the County's decision, Mr. Griffin, who bought this property with the intention of constructing a home upon it, into which he would retire, will be denied the ability to do so. AR 355. Mr. Griffin would have little or no ability to use the property for any other purpose. See AR 93-94. (Under the County Zoning Code, illegal to park a recreational or other vehicle upon the property for more than 60 days a year). The Board's decision completely frustrates Mr. Griffin's legitimate, investment-backed expectation that he would be able to develop and use this property.

The Board's decision to deny Mr. Griffin his permit was unduly oppressive. Therefore, the Board's decision violates Mr. Griffin's substantive due process rights under *Guimont*. The Court should affirm the trial court's decision for this sixth separate, independent reason.

VIII. CONCLUSION

For any one of the six separate, independent reasons set forth herein, the Court should affirm the trial court's decision that Mr. Griffin is entitled to his septic permit.

DATED this 2nd day of August, 2006.

OWENS DAVIES, P.S.

A handwritten signature in black ink, appearing to read "Matt", written over a horizontal line.

Matthew B. Edwards, WSBA No. 18332
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A copy of this document was properly addressed and mailed, postage prepaid, to the following individuals on August 2, 2006.

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

Date: August 2, 2006

Juan A. Acker

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APPENDIX

A. Zoning Code § 20.56.020 A-1

B. Sanitary Code, Art. IV (excerpts).....B-1 to B-32

C. Board of Health Decision (AR 1-6)C-1 to C-6

D. Trial Court Order Granting Jeff Griffin's LUPA
Petition (CP 198-99).....D-1 to D-2

20.56.020 Nonconforming lots of record.

1. For a period of five years following the date of final plat approval, lots in a final plat filed for record, regardless of whether the lots are in single and separate or contiguous ownership, may be developed for uses and densities approved for the lot at the time of final plat approval. As to development regulations other than use and density, the lot must be developed pursuant to the standards contained in this title, unless the development services director finds that the application of a given standard would result in an extreme and unreasonable building design or configuration.

2. Lots of record not subject to the exception in subsection (1) and which are not contiguous to other lots in the same ownership may be developed for uses and in the manner permitted by this title and amendments thereto even though the lot fails to meet lot area and width standards prescribed by this title for the lot.



ARTICLE IV
RULES AND REGULATIONS OF THE
THURSTON COUNTY BOARD OF HEALTH
GOVERNING DISPOSAL OF SEWAGE

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- 8.7 Before a new LOSS is used:
- 8.7.1 An engineer shall stamp, sign, and submit a LOSS construction report to the health officer within sixty days following the completion of construction of the LOSS including:
 - 8.7.1.1 A completed form stating the LOSS was constructed in accordance with the health officer's approved plans and specifications; and
 - 8.7.1.2 An "as built" or "record" drawing.
 - 8.7.2 The health officer shall conduct a final inspection.
 - 8.7.3 The owner shall:
 - 8.7.3.1 Submit to the health officer for review and approval a final operation and maintenance manual, developed by an engineer, for the installed LOSS, containing any amendments to the draft manual submitted prior to approval; and
 - 8.7.3.2 Obtain a LOSS operating certificate from the department in accordance with the provisions of Section 16 of this article.
- 8.8 The owner of a LOSS that has been approved by the health officer or constructed after July 1, 1984, shall:
- 8.8.1 Obtain a LOSS operating certificate from the health officer; and
 - 8.8.2 Renew it annually.
- 8.9 The owner shall renew annually the LOSS operating certificate in accordance with the provisions of Section 16 of this article.

SECTION 9 OSS UNDER 3500 GALLONS PER DAY.

- 9.1 Prior to beginning the installation of an OSS or component thereof, a person proposing the installation, repair (excluding a minor repair), or modification to an OSS shall submit a complete OSSA to the health officer and obtain an OSSP. The OSSA shall contain the following, at a minimum:
- 9.1.1 General information including:
 - 9.1.1.1 Name and address of the property owner and the applicant, if different; and

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- 9.1.1.2 Parcel number, address, if available, and the legal description of the site; and
 - 9.1.1.3 Source of drinking water supply. If the source is a public water supply, the name and state identification number shall be included; and
 - 9.1.1.4 Identification if the property is within the boundaries of a recognized sewer utility; and
 - 9.1.1.5 Size of the parcel; and
 - 9.1.1.6 Type of approval for which application is being made, for example, new installation, expansion, repair, or modification; and
 - 9.1.1.7 Source of sewage, for example, residential, restaurant, or other type of business; and
 - 9.1.1.8 Location of utilities; and
 - 9.1.1.9 Name of the designer; and
 - 9.1.1.10 Date of application; and
 - 9.1.1.11 Signature of applicant.
- 9.1.2 The soil and site evaluation as specified under section 11.2 of this article.
- 9.1.3 A complete, detailed, and dimensional site plan including:
- 9.1.3.1 Designated areas for the proposed initial and reserve systems; and
 - 9.1.3.2 The location of all soil logs and other soil tests for the OSS; and
 - 9.1.3.3 General topography and/or slope of the site; and
 - 9.1.3.4 Site drainage characteristics; and
 - 9.1.3.5 The location of existing and proposed encumbrances affecting system placement, including legal easements and access documents if any component of the OSS is not on the lot where the sewage originates. Copies of easements and their recording numbers must be furnished when such

- easements are necessary for the health officer's approval of the disposal system; and
- 9.1.3.6 Location, size, shape and placement of all existing buildings on the site showing their relationship to the on-site sewage disposal systems, wells, underground and surface storage tanks, swimming pools, water supply lines, property lines and easements; and
- 9.1.3.7 The location of all wells on the subject property and on adjacent properties within one hundred (100) feet of the property lines; and
- 9.1.3.8 Any septic tank and drainfield locations on the subject property and also any on-site sewage disposal system location on adjacent property within one hundred (100) feet of any existing or proposed wells on the applicant's site; and
- 9.1.3.9 Direction of flow and discharge point of all surface and subsurface water interception drains and ditches; and
- 9.1.3.10 Location, size and shape of area in which on-site sewage disposal system is to be installed, distances from designated area to any cuts, banks, terraces, foundations, property lines, wells (including those on neighboring property), lakes, streams, swamps, marshes, salt water beaches, driveways, walkways, patios, water lines, drainage ditches or fills shall be indicated; and
- 9.1.3.11 Location of soil log holes or sieve sample holes shall be spaced uniformly over the proposed drainfield site and reserve area. The holes shall be identified by numbers. At least three (3) soil logs (2 in the proposed primary drainfield area and 1 in the proposed reserve area) shall be required for each lot. Additional soil logs may be required by the health officer as deemed necessary. The number of soil logs may be reduced if adequate soils information is available. Soil logs shall be provided in sufficient numbers or detail to allow the determination of any restrictive layer; and
- 9.1.3.12 If the property has been platted, the application shall contain the lot number and the short or large lot plat number or the plat name if a long plat. Additionally, if there have been any other land use actions pertaining to the lot, the appropriate land use action number shall be included; and

- 9.1.3.13 An arrow indicating north; and
- 9.1.3.14 Information required by other local agencies.
- 9.1.4 A detailed system design meeting the requirements under section 12 of this article including all of the following:
 - 9.1.4.1 A dimensional drawing showing the location of components of the proposed OSS, and for the reserve area if reserve site characteristics differ significantly from the initial area;
 - 9.1.4.2 Vertical cross-section drawings showing:
 - 9.1.4.2.1 The depth of the disposal component, the vertical separation, and depth of soil cover; and
 - 9.1.4.2.2 Other OSS components constructed at the site.
 - 9.1.4.3 Calculations and assumptions supporting the proposed design, including:
 - 9.1.4.3.1 Soil type; and
 - 9.1.4.3.2 Hydraulic loading rate in the disposal component; and
 - 9.1.4.3.3 System's maximum daily flow capacity.
- 9.1.5 Using a bench mark that will remain in place throughout the development of the project as the reference point, relative elevations of the plumbing stub-out, the finished ground elevation of the drainfield area and the corners of the subject property and elevation of the drainfield trenches.
- 9.1.6 Directions of surface drainage after final grading.
- 9.1.7 Results of all required soil logs and soil analysis.
- 9.1.8 Drawings that are to scale with dimensions indicated. Recommended scale is one (1) inch equals twenty (20) feet or one (1) inch equals thirty (30) feet. Other scales may be used as appropriate to the design and approved by the health officer. Accuracy in the design drawings shall be sufficient for review.
- 9.1.9 Indication that the drainfield laterals are staked in the field for inspection and review.

- 9.1.10 Such additional information as deemed necessary by the health officer.
- 9.2 For a "minor repair" no OSSA or OSSP is necessary.
- 9.3 The health officer shall:
- 9.3.1 Issue an OSSP when the information submitted under subsection 9.1 meets the requirements contained in this article.
- 9.3.2 Charge a fee for reviewing an OSSA and issuing an OSSP in accordance with the fee schedule contained in Appendix A of Article I.
- 9.3.3 Specify the expiration date on the OSSA:
- 9.3.3.1 For any proposal other than a repair, an OSSA shall expire one year after the date of application. This period may be extended for a single one year period without charge, if specifically requested by the applicant prior to the expiration date. (For an application approved prior to January 1, 1995 the conditions stated in section 4.4 shall apply).
- 9.3.3.2 For a proposal other than a repair, an OSSP shall expire three years after the date of design approval. If a building permit is obtained during the three year period of validity for the OSSP, the OSSP will be valid for three years or as long as the building permit is valid, whichever is greater. (For a permit approved prior to January 1, 1995 the conditions stated in section 4.4 shall apply).
- 9.3.3.3 An OSSP may be renewed after it has expired if all of the following conditions are met:
- a) The applicant pays the renewal fee as specified in Appendix A of article I; and
- b) The applicant demonstrates to the satisfaction of the health officer that there has been no change to the building site or development proposal which had been previously approved; and
- c) The health officer determines that the previous approval fully complies with all applicable laws in effect at the date of the application for renewal.

- 9.3.3.4 For a repair the OSSA and OSSP shall expire one year after the date of application. An extension of one year may be authorized by the health officer if there are extenuating circumstances, such as difficult site conditions, abnormal rainfall, or difficulty in developing an operation and maintenance manual. If an extension is granted, the requirements that applied at the time of the application will be the applicable standards.
- 9.3.4 Include a reminder on the OSSA of the applicant's right of appeal.
- 9.3.5 Within 20 working days after submittal of a complete OSSA, either issue an OSSP, disapprove the OSSA or inform the applicant or his/her representative in writing as to the status of the OSSA.
- 9.4 The health officer will allow a temporary repair to be made on a failing system without a repair OSSA and OSSP on those days when the health officer's office is closed and when such repair is essential to the continued use of the system. In such a case the owner of the OSS shall apply for a repair OSSA within five (5) working days after the temporary repair has been made. Such repairs will be subject to any additional requirements necessary to assure the repair meets the provisions of this article.
- 9.5 The health officer may revoke or deny an OSSA or OSSP for the installation of an OSS for due cause. Examples include, but are not limited to:
- 9.5.1 Exclusion, misrepresentation or concealment of material fact in information submitted to the health officer; or
- 9.5.2 Site conditions that have changed since the designer and/or health officer reviewed the site; or
- 9.5.3 Failure to meet conditions of the approval or this article.
- 9.6 Before the health officer issues an OSSP allowing the installation of an OSS to serve either structures on more than one lot or a structure or structures with multiple ownership, the applicant shall show:
- 9.6.1 An approved public entity owning or managing the OSS in perpetuity; or
- 9.6.2 An arrangement with a management entity acceptable to the health officer, recorded in covenant, lasting until the on-site system is no longer needed, and containing, but not limited to:
- 9.6.2.1 A legal easement allowing access for construction, operation and maintenance, and repair of the OSS; and

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 ^{2,3}	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 ³ 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.

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Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line ¹
Property or easement line ⁶	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.

- 3 Measured from the ordinary high-water mark.
- 4 The health officer may approve a sewer transport line within 10 feet of a water supply line if the sewer line is constructed in accordance with section 2.4 of the Washington state department of ecology's "Criteria For Sewage Works Design," revised October 1985, as thereafter updated, or equivalent.
- 5 Before any component can be placed within 100 feet of a well, the designer shall submit a "decommissioned water well report" provided by a licensed well driller, which verifies that appropriate decommissioning procedures noted in chapter 173-160 WAC were followed. Once the well is properly decommissioned, it no longer provides a potential conduit to groundwater, but septic tanks, pump chambers; containment vessels or distribution boxes should not be placed directly over the site.
- 6 The health officer may allow a reduced horizontal separation to not less than two feet where the property line, easement line, or building foundation is up-gradient.
- 7 The item is down-gradient when liquid will flow toward it upon encountering a water table or a restrictive layer. The item is up-gradient when liquid will flow away from it upon encountering a water table or restrictive layer.
- 8 This setback is unrelated to setbacks that are necessary for slope stability or other purposes.
- 10.2 Where any condition indicates a greater potential for contamination or pollution, the health officer may increase the minimum horizontal separations. Examples of such conditions include excessively permeable soils, unconfined aquifers, shallow or saturated soils, dug wells, and improperly abandoned wells.
- 10.3 The horizontal separation between an OSS disposal component and an individual water well, spring, or surface water can be reduced to a minimum of 75 feet, upon signed approval by the health officer if the applicant demonstrates:
- 10.3.1 Adequate protective site specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration. Examples of such conditions include evidence of confining layers and or aquatards separating any potable water from the OSS treatment zone or there is an excessive depth to groundwater; or
- 10.3.2 Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in Table IV in subsection 12.2.6 of this article; or

- 10.3.3 Evidence of protective conditions involving both subsections 10.3.1 and 10.3.2.
- 10.4 Persons shall design and/or install disposal components only where:
 - 10.4.1 The slope is less than forty-five percent (twenty-four degrees); and
 - 10.4.2 The area is not subject to any of the following:
 - 10.4.2.1 Encroachment by buildings or construction such as placement of swimming pools, power poles and underground utilities;
 - 10.4.2.2 Cover by impervious material;
 - 10.4.2.3 Vehicular traffic;
 - 10.4.2.4 Other activities adversely affecting the soil or the performance of the OSS; and
 - 10.4.3 Sufficient reserve area for replacement exists to treat and dispose 100% of the design flow; and
 - 10.4.4 The land is stable; and
 - 10.4.5 Surface drainage is directed away from the site.
- 10.5 Upon request and submission of an application on forms provided, the health officer may review:
 - 10.5.1 An individual lot to determine the lot's potential for the installation of an OSS. (On-site Evaluation Only).
 - 10.5.1.1 In addition to the application, the following shall be submitted:
 - 10.5.1.1.1 A site plan showing the lot's location and dimensions and the location of soil test pits. Soil test pits shall be dug as per subsections 9.1.3.11 and 11.3 of this article; and
 - 10.5.1.1.2 A fee as specified in Appendix A of article I.
 - 10.5.1.2 This application and review shall be completely separate from an OSSA process and shall constitute neither a valid application for purposes of future vesting nor permission from the health officer to install an OSS.

- 10.5.2 A proposed development, prior to the submittal of a formal landuse application, that proposes using OSS.
 - 10.5.2.1 In addition to the application, the following shall be submitted:
 - 10.5.2.1.1 A site plan showing the property's location and dimensions and the location of soil test pits. Soil test pits shall be dug as per subsections 9.1.3.11 and 11.3 of this article; and
 - 10.5.2.1.2 A fee as stated in Appendix A of article I.
 - 10.5.2.2 This application and review shall constitute neither a valid application for purposes of future vesting nor permission from the health officer to install an OSS.

SECTION 11 SOIL AND SITE EVALUATION.

- 11.1 The health officer shall permit only engineers, designers, registered sanitarians, and registered soil scientists (American registry of certified professionals in agronomy, crops, and soils) to perform soil and site evaluations. The health officer may also perform soil and site evaluations.
- 11.2 The person evaluating the soil and site shall:
 - 11.2.1 Record all of the following:
 - 11.2.1.1 Unless a reduced number of soil logs is authorized by the health officer, observed conditions in soil logs from at least:
 - 11.2.1.1.1 Two test pits in the initial disposal component; and
 - 11.2.1.1.2 One test pit in the reserve area.
 - 11.2.1.2 The ground water conditions, the date of the observation, and the probable maximum height;
 - 11.2.1.3 The topography of the site;
 - 11.2.1.4 The drainage characteristics of the site;
 - 11.2.1.5 The existence of structurally deficient soils subject to major wind or water erosion events such as slide zones and dunes;

- 11.2.1.6 The existence of designated flood plains;
- 11.2.1.7 The location of existing encumbrances affecting system placement, such as:
 - 11.2.1.7.1 Wells and suction lines;
 - 11.2.1.7.2 Water sources and supply lines;
 - 11.2.1.7.3 Surface water;
 - 11.2.1.7.4 Decommissioned/abandoned wells;
 - 11.2.1.7.5 Outcrops of bedrock and restrictive layers;
 - 11.2.1.7.6 Buildings;
 - 11.2.1.7.7 Property lines and lines of easement;
 - 11.2.1.7.8 Interceptors such as footing drains, curtain drains and drainage ditches;
 - 11.2.1.7.9 Cuts, banks, and fills;
 - 11.2.1.7.10 Driveways and parking areas;
 - 11.2.1.7.11 Existing OSS; and
 - 11.2.1.7.12 Underground utilities.
- 11.2.2 Use the soil and site evaluation procedures and terminology in accordance with chapter 3 and Appendix A of the "Design Manual: On-site Wastewater Treatment and Disposal Systems", United States Environmental Protection Agency, EPA-625/1-80-012, October, 1980, as thereafter updated (available upon written request to the secretary) except where modified by, or in conflict with, this article;
- 11.2.3 Use the soil names and particle size limits of the United States Department of Agriculture Soil Conservation Service classification system;
- 11.2.4 Determine texture, structure, compaction and other soil characteristics that affect the treatment and water movement potential of the soil by using normal field and/or laboratory procedures such as particle size analysis;
- 11.2.5 Classify the soil as in Table II, Soil Textural Classification:

**TABLE II
 SOIL TEXTURAL CLASSIFICATION**

Soil Type	Soil Textural Classifications
1A	Very gravelly ¹ coarse sands or coarser. All extremely gravelly ² soils.
1B	Very gravelly medium sand, very gravelly fine sand, very gravelly very fine sand, very gravelly loamy sands.
2A	Coarse sands (also includes ASTM C-33 sand).
2B	Medium sands.
3	Fine sands, loamy coarse sands, loamy medium sands.
4	Very fine sands, loamy fine sands, loamy very fine sands, sandy loams, loams.
5	Silt loams, that are porous and have well developed structure.
6	Other silt loams, sandy clay loams, clay loams, silty clay loams.
Unsuitable for treatment or disposal	Sandy clay, clay, silty clay, and strongly cemented or firm soils.

¹ Very Gravelly = >35% and <60% gravel and coarse fragments, by volume.

² Extremely Gravelly = >60% gravel and coarse fragments, by volume.

11.3 The owner of the property or his/her agent shall:

11.3.1 Prepare the soil log excavation to:

11.3.1.1 Allow examination of the soil profile in its original position by:

11.3.1.1.1 Excavating pits of sufficient dimensions to enable observation of soil characteristics by visual and tactile means to a depth three feet deeper than the anticipated bottom of the disposal component; or

11.3.1.1.2 Stopping at a shallower depth if a water table or restrictive layer is encountered; and

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

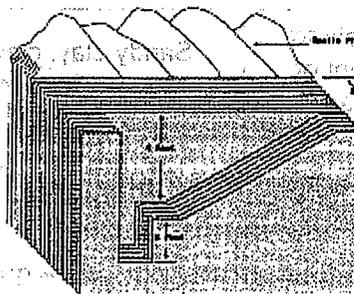
11.3.2 Assume responsibility for constructing and maintaining the soil log excavation in a manner to reduce potential for physical injury by:

11.3.2.1 Placing excavated soil no closer than 2 feet from the excavation; and

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

11.3.2.3 Provide a physical warning barrier around the excavation's perimeter; and

11.3.2.4 Fill the excavation upon completion of the soil log[PC2].



11.4 The health officer:

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

- 11.4.2 May require any other soil and site information affecting location, design, or installation;
- 11.4.3 May reduce the required number of soil logs for the OSS if adequate soils information has previously been developed.

SECTION 12 DESIGN.

- 12.1 The health officer shall require a design for all OSS and that the OSS be designed only by an engineer, registered sanitarian, or a designer certified as per subsection 23.1 of this article, except:
 - 12.1.1 Where at the discretion of the health officer a resident owner of a single family residence is allowed to design a system for that residence after passing a test to demonstrate competency and paying a fee for taking the test; or
 - 12.1.2 The health officer performs the soil and site evaluation and develops the design.
- 12.2 The health officer and the secretary shall require the following design criteria:
 - 12.2.1 All the sewage from the building served is directed to the OSS;
 - 12.2.2 Drainage from the surface, footing drains, roof drains, and other non-sewage drains is prevented from entering the OSS and the area where the OSS is located;
 - 12.2.3 The OSS is designed to treat and dispose of all sewage generated within the facility to be served by the OSS:
 - 12.2.3.1 For single family residences, the design flow for both the primary and reserve area shall be 120 gallons per bedroom per day with a minimum of 240 gallons per day, unless technical justification is provided to support calculations using a lower design flow.
 - 12.2.3.2 For other facilities, unless there is technical justification provided to support calculations using lower design flows, the design flows noted in "Design Manual: On-site Wastewater Treatment and Disposal Systems", United States Environmental Protection Agency, EPA-625/1-80-012, October, 1980, as thereafter updated, (available upon written request to the secretary) shall be used. If the type of facility is not listed in the EPA design manual, design flows from one of the following documents are to be used:

12.2.3.2.1 "Design Standards for Large On-site Sewage Systems," 1993, Washington state department of health, as thereafter updated (available upon request to the secretary); or

12.2.3.2.2 "Criteria for Sewage Works Design", revised October 1985, Washington state department of ecology, as thereafter updated (available upon written request to the department of ecology).

12.2.3.3 For non-residential development where a full set of water conservation methods for a facility can be documented, and where there is an adequate on-going guaranteed use of such methods, the health officer may permit a decreased flow with an associated decrease in OSS component sizing.

12.2.4 Septic tanks:

12.2.4.1 Are included on the approved list maintained by the secretary;

12.2.4.2 Have the following minimum liquid capacities:

12.2.4.2.1 For a single family residence use Table III, Required Minimum Liquid Volumes of Septic Tanks:

**TABLE III
 REQUIRED MINIMUM LIQUID VOLUMES OF SEPTIC TANKS**

Number of bedrooms	Required minimum liquid tank volume in gallons
#4	1000
Each additional bedroom	250

12.2.4.2.2 For facilities handling residential sewage, other than one single family residence, 1.5 times the daily design flow, with a minimum of 1000 gallons.

12.2.4.3 Have clean-out and inspection accesses within 12 inches of finished grade. If an effluent filter is installed at the

outlet of a septic tank, the clean-out and inspection access shall be at or above finished grade;

12.2.4.4 Are designed with protection against floatation, ground water intrusion, and surface water inflow in high ground water areas.

12.2.5 Pump chambers:

12.2.5.1 Are included on the approved list maintained by the secretary;

12.2.5.2 Have clean-out and inspection accesses at or above finished grade;

12.2.5.3 Are designed with protection against floatation, ground water intrusion, and surface water inflow in high ground water areas.

12.2.6 Methods for effluent distribution shall correlate to soil types 1A through soil type 6 as described by TABLE IV of this section:

**TABLE IV
 METHODS OF EFFLUENT DISTRIBUTION FOR SOIL TYPES AND DEPTHS**

SOIL TYPE	VERTICAL SEPARATION			
	< 1 foot	≥ 1 foot to < 2 feet	≥ 2 feet to < 3 feet	≥ 3 feet
1A	Not allowed	Pressure Distribution (see note) ^{1 & 2}	Pressure Distribution (see note) ¹	Pressure Distribution (see note) ¹
1B- 2A ³	Not allowed	Pressure Distribution (see note) ^{1 & 2}	Pressure Distribution	Pressure Distribution
2B - 6 ³	Not allowed	Pressure Distribution (see note) ^{1 & 2}	Pressure Distribution	Gravity Distribution

¹ System meeting Treatment Standard 2 required.

² Mound systems installed where the original, undisturbed, unsaturated soil depth is between 12 and 18 inches, require pretreatment by an intermittent sand filter.

3. When an OSS is proposed to be installed in soil types 1B or 2 through 4 that are included in the list of Category I soil series in Chapter 17.15 of the Thurston County Code (Critical Areas Ordinance) pressure distribution is required, at a minimum.

12.2.7 SSAS beds are only designed in soil types 2A, 2B or 3, with a width not exceeding 10 feet. Sand-lined beds meeting sand filter guidelines may be considered in soil types 1A & 1B.

12.2.8 Individual SSAS laterals greater than one hundred feet in length shall use pressure distribution.

12.2.9 Community on-site sewage systems:

12.2.9.1 Are located only in soil types 1 - 5;

12.2.9.2 Are located on slopes of less than thirty percent (17 degrees); and

12.2.9.3 Have pressure distribution.

12.2.10 Conventional gravity systems and conventional pressure distribution systems have:

12.2.10.1 The calculation of absorption area based upon the design flows in subsection 12.2.3 and loading rates equal to or less than those in Table V, Maximum Hydraulic Loading Rate for Residential Sewage, and applied only to the bottom of the trench of the excavation;

**TABLE V
 MAXIMUM HYDRAULIC LOADING RATE
 FOR RESIDENTIAL SEWAGE¹**

SOIL TYPE	SOIL TEXTURAL CLASSIFICATION DESCRIPTION	LOADING RATE gal./sq. ft./day
1A	Very gravelly ² coarse sands or coarser, extremely gravelly ³ soils.	Varies according to system selected to meet Treatment Standard 2 ⁴
1B	Very gravelly medium sands, very gravelly fine sands, very gravelly very fine sands, very gravelly loamy sands.	Varies according to soil type of the non-gravel portion ⁵
2A	Coarse sands (includes the ASTM C-33 sand).	1.2
2B	Medium sands.	1.0

SOIL TYPE	SOIL TEXTURAL CLASSIFICATION DESCRIPTION	LOADING RATE gal./sq. ft./day
3	Fine sands, loamy coarse sands, loamy medium sands.	0.8
4	Very fine sands, loamy fine sands, loamy very fine sands, sandy loams, loams.	0.6
5	Silt loams that are porous and have well developed structure.	0.45
6	Other silt loams, sandy clay loams, clay loams, silty clay loams.	0.2

- 1 Compacted soils, cemented soils, and/or poor soil structure may require a reduction of the loading rate or make the soil unsuitable for conventional OSS systems.
- 2 Very Gravelly = >35% and <60% gravel and coarse fragments, by volume.
- 3 Extremely Gravelly = >60% gravel and coarse fragments, by volume.
- 4 Due to the highly permeable nature of type 1A soil, only alternative systems which meet or exceed Treatment Standard 2 can be installed. The loading rate for these systems is provided in the appropriate guideline.
- 5 The maximum loading rate listed for the soil described as the non-gravel portion is to be used for calculating the absorption surface area required. The value is to be determined from this table.

- 12.2.10.2 The bottom of a SSAS shall not be deeper than three feet below the finished grade. This shall not preclude the use of deeper trenches that are designed as per guidelines published by the secretary. The depth of such a system shall not exceed ten feet from the finished grade;
- 12.2.10.3 The sidewall below the invert of the distribution pipe is located in original, undisturbed soil;
- 12.2.10.4 Clean gravel, covered with a geotextile;
- 12.2.10.5 A spacing center-to-center of three times the trench width; and
- 12.2.10.6 A cover of between twelve and twenty-four inches of mineral soil containing no greater than 10% organic content over the gravel to preclude accumulation of water over the drainfield.

- 12.2.11 Observation ports installed in each independent lateral of SSAS, in mounds, and in sand filters. The observation ports shall extend from the bottom of the gravel (also from the bottom of the sand in mounds and sand filters) to final grade and shall be adequately anchored.
- 12.2.12 For other features, conventional gravity systems shall conform with the "Design Manual: On-site Wastewater Treatment and Disposal Systems," United States Environmental Protection Agency, EPA-625/1-80-012, October, 1980 as thereafter updated (available upon written request to the secretary) except where modified by, or in conflict with this article or other local regulations.
- 12.3 The building sewer shall:
 - 12.3.1 Consist of pipe that is crush-proof or resistant, meets all standards of the Uniform Plumbing Code and is a minimum of three (3) inches in diameter;
 - 12.3.2 Be on a uniform, positive grade in conformance with the Uniform Plumbing Code;
 - 12.3.3 Have cleanouts installed per the Uniform Plumbing Code including at intervals of not more than 100 feet with a minimum of one between the structure and the septic tank.
- 12.4 All pipe in the OSS shall comply with standards specified in the Uniform Plumbing Code, guidelines for alternative systems, or other applicable standards.
- 12.5 When proposing the use of OSS for non-residential sewage, the designer shall provide to the health officer:
 - 12.5.1 Information to show the sewage is not industrial wastewater;
 - 12.5.2 Information to establish the sewage's strength and identify chemicals found in the sewage that are not found in residential sewage;
 - 12.5.3 A design providing treatment that will reduce the sewage waste strength to levels equivalent of residential sewage.
- 12.6 The health officer:
 - 12.6.1 Shall approve only OSS designs meeting the requirements of this article;

- 12.6.2 Shall only permit the use of septic tanks, pump chambers, and holding tanks on the approved list maintained by the secretary;
- 12.6.3 Shall not approve designs for:
 - 12.6.3.1 Cesspools;
 - 12.6.3.2 Seepage pits, except as allowed for repairs under section 17 of this article; or
 - 12.6.3.3 Conventional gravity systems or conventional pressure distribution systems in soil type 1A.
- 12.6.4 May approve a design for the reserve area different than the design approved for the initial OSS, if both designs meet the requirements of this article for new construction.

SECTION 13 HOLDING TANK SEWAGE SYSTEMS.

- 13.1 Persons shall not install or use holding tank sewage systems for residential uses or expansion of residences, whether seasonal or year-round, except as set forth under subsection 13.2 of this section.
- 13.2 The health officer may approve installation of holding tank sewage systems only:
 - 13.2.1 For permanent uses limited to controlled, part-time, commercial usage situations, such as, recreational vehicle parks and trailer dump stations; or
 - 13.2.2 For interim uses limited to handling of emergency situations; or
 - 13.2.3 For repairs as permitted under section 17 of this article.
- 13.3 A person proposing to use a holding tank sewage system shall:
 - 13.3.1 Follow established design criteria established by the secretary;
 - 13.3.2 Submit a management program to the health officer assuring ongoing operation and maintenance before the health officer issues approval. Unless on-going management or back-up will be provided by a public entity, the person shall demonstrate an adequate financial guarantee. The financial guarantee may include a bond, certificate of moneys on deposit, or other financial instrument acceptable to the health officer. The value of the financial guarantee shall cover the cost for operating and maintaining the system for the proposed life of the system or a period of not less than 12 months; and

- 17.5.3 Comply with all local and state requirements stipulated in the OSSP and the operational certificate issued for the system.

SECTION 18 EXPANSIONS.

The health officer shall require an on-site sewage system and a reserve area in full compliance with the new system construction standards specified in this article for an expansion of a residence or other facility.

SECTION 19 ABANDONMENT.

Persons permanently removing a septic tank, seepage pit, cesspool, or other sewage container from service shall:

- 19.1 Have the septage removed by a certified pumping firm;
- 19.2 Remove or destroy the lid; and
- 19.3 Fill the void with soil.

SECTION 20 SEPTAGE MANAGEMENT.

20.1 Only pumping firms certified by the health officer as per subsection 23.3 of this article shall remove septage from an OSS.

20.2 A pumping firm removing septage from an OSS shall:

- 20.2.1 Transport septage or sewage only in vehicles clearly identified with the name of the business and approved by the health officer;
- 20.2.2 Record and report septage removal to the health officer;
- 20.2.3 Dispose of septage, or apply septage biosolids to land only in a manner consistent with applicable laws.

SECTION 21 DEVELOPMENTS, SUBDIVISIONS, AND MINIMUM LAND AREA REQUIREMENTS.

21.1 A person proposing any development shall obtain approval from the health officer prior to any development where the use of OSS is proposed. Any new development proposing to use OSS shall be required to have an OSS which meets new construction standards.

21.2 The health officer shall require the following prior to approving any development:

- 21.2.1 Site evaluations as required under section 11 of this article. This may include information gained in a project review as noted in subsection 10.5 of this article;
- 21.2.2 Where a subdivision with individual wells is proposed:
 - 21.2.2.1 Configuration of each lot to allow a 100-foot radius water supply protection zone to fit within the lot lines; or
 - 21.2.2.2 Establishment, through protective or restrictive covenants, as appropriate, of a 100-foot protection zone around each existing and proposed well site. Such zones shall be shown on the final plat map.
- 21.2.3 Where a subdivision to be served by a community well or wells is proposed, all requirements of WAC 246-290 and WAC 246-291 shall be met. This will include wellhead protection when applicable.
- 21.2.4 Where preliminary approval of a subdivision is requested, provision of at least one soil log per proposed lot, unless the health officer determines existing soils information allows fewer soil logs;
- 21.2.5 Determination of the minimum lot size or minimum land area required for the development using Method I and/or Method II:
 - 21.2.5.1 **METHOD I.** Table VII, Single Family Residence Minimum Lot Size or Minimum Land Area Required Per Unit Volume of Sewage, shows the minimum lot size required per single family residence. For developments other than single family residences, the minimum land areas shown are required for each unit volume of sewage.

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

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

1 When an OSS is proposed to be installed in soil types 1B or 2 through 4 that are included in the list of Category I soil series in Chapter 17.15 of the Thurston County Code (Critical Areas Ordinance), pressure distribution is required, at a minimum. In addition, for those Category I soil series the minimum lot size restrictions found in Table 3 of Chapter 17.15 shall apply, and any lots less than 1 acre in size must be served by a public water system and an OSS meeting Treatment Standard 2.

2 Due to the highly permeable nature of type 1A soil, only alternative systems which meet or exceed Treatment Standard 2 can be installed.

21.2.5.2 **METHOD II.** A minimum land area proposal using Method II is acceptable only when the applicant:

21.2.5.2.1 Justifies the proposal through a written analysis of the:

21.2.5.2.1.1 Soil type and depth;

21.2.5.2.1.2 Area drainage, and/or lot drainage;

21.2.5.2.1.3 Public health impact on ground and surface water quality;

21.2.5.2.1.4 Setbacks from property lines, water supplies, etc;

21.2.5.2.1.5 Source of domestic water;

21.2.5.2.1.6 Topography, geology, and ground cover;

21.2.5.2.1.7 Climatic conditions;

21.2.5.2.1.8 Availability of public sewers;

21.2.5.2.1.9 Activity or land use, present, and anticipated;

21.2.5.2.1.10 Growth patterns;

21.2.5.2.1.11 Reserve areas for additional subsurface treatment and disposal;

21.2.5.2.1.12 Anticipated sewage volume;

21.2.5.2.1.13 Compliance with current planning and zoning requirements;

- 21.2.5.2.1.14 Possible use of alternative systems or designs;
- 21.2.5.2.1.15 Existing encumbrances, such as listed in subsections 9.1.3.5 and 11.2.1.7; and
- 21.2.5.2.1.16 Any other information required by the health officer.
- 21.2.5.2.2 Shows development with public water supplies having:
 - 21.2.5.2.2.1 At least 12,500 square feet lot sizes per single family residence; and
 - 21.2.5.2.2.2 No more than 3.5 unit volumes of sewage per day per acre for developments other than single family residences.
 - 21.2.5.2.3 Shows development with individual water supplies having at least one acre per unit volume of sewage; and
 - 21.2.5.2.4 Shows land area under surface water is not included in the minimum land area calculation.
- 21.2.6 Regardless of which method is used for determining required minimum lot sizes or minimum land area, the maximum density permitted is 3.5 single family residences or unit volumes per acre. The applicant or his/her representative shall submit to the health officer information consisting of field data, plans, and reports supporting a conclusion the land area provided is sufficient to:
 - 21.2.6.1 Install conforming OSS;
 - 21.2.6.2 Assure preservation of reserve areas for proposed and existing OSS;
 - 21.2.6.3 Properly treat and disposal of the sewage; and
 - 21.2.6.4 Minimize public health effects from the accumulation of contaminants in surface and ground water.
- 21.2.7 Evidence that a minimum of twenty-four (24) inches of original, undisturbed and unsaturated soil exists above the maximum

seasonal water table, a layer of creviced or porous bedrock, or any other restrictive layer. Certain climatic, soil permeability, slope and system configuration factors can exist which would indicate that the required depth may be increased or decreased. In order to decrease the depth, sufficient technical justification must be developed and submitted that will:

- 21.2.7.1 Allow installation of conforming OSS;
- 21.2.7.2 Assure preservation of reserve areas for all proposed and existing OSS;
- 21.2.7.3 Assure proper treatment and dispose of the sewage;
- 21.2.7.4 Assure preservation of sufficient areas with sufficient soil depths will exist in proposed drainfield and reserve areas, as well as areas immediately downslope, when the system is ready to be installed; and
- 21.2.7.5 Assure minimizing of adverse public health effects from the accumulation of contaminants in surface and ground water.

21.2.8 The proposal is consistent with requirements in city sewerage plans and/or the Thurston County Sewerage General Plan, depending on the project's location.

21.3 The health officer shall require lot areas of 12,500 square feet or larger except when a person proposes:

21.3.1 OSS within the boundaries of a recognized sewer utility having a finalized assessment roll; or

21.3.2 A planned unit development with:

- 21.3.2.1 A signed, notarized, and recorded deed covenant restricting any development of lots or parcels above the approved density with the density meeting the minimum land area requirements of subsection 21.2.5 of this article; and
- 21.3.2.2 A public entity responsible for operation and maintenance of all the OSS, or a single individual owning all the OSS; and
- 21.3.2.3 Management requirements under section 8 of this article when installing a LOSS; and

- 21.3.2.4 An overall density not greater than 3.5 single family residences or unit volumes per acre; and
- 21.3.2.5 Extinguishment of the deed covenant and higher density development allowed only when the development connects to public sewers.

21.4 The health officer may:

- 21.4.1 Allow inclusion of the area to the centerline of a road or street right-of-way in a Method II determination under subsection 21.2.5.2 of this article to be included in the minimum land area calculation if:
 - 21.4.1.1 The dedicated road or street right-of-ways are along the perimeter of the development; and
 - 21.4.1.2 The road or street right-of-ways are dedicated as part of the proposed development; and
 - 21.4.1.3 Lots are at least 12,500 square feet in size.
- 21.4.2 Require a preliminary design for one or more proposed lots prior to preliminary or final approval of subdivision proposals in order to verify that a proposed lot or lots can meet the requirements of this article. If a preliminary design is required, the following shall apply:
 - 21.4.2.1 At a minimum, the following is required:
 - 21.4.2.1.1 Lot corners shall be marked and shown on the preliminary design;
 - 21.4.2.1.2 Test pits shall be dug where the disposal component and the reserve area are proposed to be located on each lot for purposes of developing soil logs;
 - 21.4.2.1.3 After the soils investigation, the project designer shall submit a design to the health officer for each lot indicating the proposed locations of the disposal component and the reserve area and the specifications of the disposal component.
 - 21.4.2.2 Upon finding a preliminary design acceptable, the health officer shall approve the preliminary design. The approval of the preliminary design indicates that, for subdivision purposes, the proposed lot or lots can meet the

requirements of this article. It shall not be considered part of an OSSA and does not give authorization to obtain an OSSP or a building permit;

21.4.2.3 A preliminary design shall be considered valid for a period of three years from the date it was submitted regardless if it received preliminary approval;

21.4.2.4 A fee shall be charged that covers the cost of evaluating the proposed lots, soils, and preliminary design as per Appendix A of article I.

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

21.4.4 Prohibit development on individual lots within the boundaries of an approved subdivision if the proposed OSS design does not protect public health by meeting requirements of these regulations.

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

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

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

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

21.5 When a COSS or a LOSS will be used, the person responsible for the subdivision shall accomplish one of the following prior to final approval of the plat:

21.5.1 Install the COSS or LOSS and obtain approval by the appropriate agencies; or

21.5.2 Provide a bond in favor of the department and sign an agreement with the department. The bond and agreement shall guarantee that construction will be completed within one (1) year from the date of the approval of the agreement. The bond shall be from a reputable bonding company on a satisfactory form and in an amount based on an estimate prepared by an engineer or designer, plus thirty-five (35) percent (20% for a two-year inflationary period plus 10% for contract expenditures plus 5% for

administrative costs). The bond and agreement shall be to the satisfaction of the department and other applicable agencies and the department's legal counsel. The health officer may release a portion of the bond or surety when he/she is satisfied that a portion of the project is complete and has been certified by the appropriate agency or person. The portion(s) released shall not be in increments less than thirty-five (35) percent of the project cost.

SECTION 22 AREAS OF SPECIAL CONCERN.

- 22.1 The health officer may investigate and take appropriate action to minimize public health risk in formally designated areas such as:
 - 22.1.1 Shellfish protection districts or shellfish growing areas;
 - 22.1.2 Sole Source Aquifers designated by the U.S. Environmental Protection Agency;
 - 22.1.3 Areas with a critical recharging effect on aquifers used for potable water as designated under Chapter 17.15 of the Thurston County Code (Critical Areas Ordinance);
 - 22.1.4 Designated public water supply wellhead protection areas;
 - 22.1.5 Up-gradient areas directly influencing water recreation facilities designated for swimming in natural waters with artificial boundaries within the waters as described by the Water Recreation Facilities Act, chapter 70.90 RCW;
 - 22.1.6 Areas designated by the Washington state department of ecology as special protection areas under chapter 173-200-090 WAC, Water Quality Standards for Ground Waters of the State of Washington;
 - 22.1.7 Wetland areas under production of crops for human consumption;
 - 22.1.8 Frequently flooded areas delineated by the Federal Emergency Management Agency; and,
 - 22.1.9 Areas identified and delineated by the board of health in consultation with the secretary to address public health threats from on-site systems.
- 22.2 The board of health may impose more stringent requirements on new development and corrective measures to protect public health upon existing developments in areas of special concern, including:

- 22.2.1 Additional location, design, and/or performance standards for OSS;
- 22.2.2 Larger land areas for new development;
- 22.2.3 Prohibition of development;
- 22.2.4 Additional operation, maintenance, and monitoring of OSS performance;
- 22.2.5 Requirements to upgrade existing OSS;
- 22.2.6 Requirements to abandon existing OSS; and
- 22.2.7 Monitoring of ground water or surface water quality.
- 22.3 Within areas of special concern, to reduce risk of system failures, a certified monitoring firm shall:
 - 22.3.1 Inspect every OSS at least once every four years;
 - 22.3.2 Submit the following written information to both the department and the property owner within 30 days following the inspection:
 - 22.3.2.1 Location of the tank;
 - 22.3.2.2 Structural condition of the tank, including baffles;
 - 22.3.2.3 Depth of solids in the tank;
 - 22.3.2.4 Problems detected with any part of the system;
 - 22.3.2.5 Maintenance needed;
 - 22.3.2.6 Maintenance provided at time of inspection; and
 - 22.3.2.7 Other information as required by the department.
 - 22.3.3 Immediately report failures to the department.

SECTION 23. CERTIFICATION OF DESIGNERS, INSTALLERS, PUMPER, INSPECTORS, AND MAINTENANCE PERSONNEL.

[With the exception of subsections 23.1.1, 23.6.9, and 23.6.10 the requirements in this section shall not be applicable to engineers or registered sanitarians].

BEFORE THE BOARD OF HEALTH
THURSTON COUNTY, WASHINGTON

In Re the Matter of,
Jeff Griffin

DECISION

APR 16 2005
OWENS DAVIES, P.S.

THIS MATTER came before the Board of Health (Board) on or about June 21, 2005, as a result of an appeal by Jeff Griffin of the Hearing Officer's decision, dated May 16, 2005, which granted the appeal of Bruce Carter, denying the application for an on-site sewage system permit [OSS] by the Griffin's for an undersized lot on Tax Parcel #76200001100.

The Board has reviewed the decision of the hearing officer; all evidence presented to the Board, [Listed in Attachment A to this Decision] and heard the testimony and argument of Appellant Jeff Griffin and his witnesses, as well as the testimony and argument of Thurston County and its witnesses.

Based on the above record, a majority of the Board adopts the findings, facts, conclusions and decision of the Hearings Officer denying the issuance of an OSS to the Griffins'. [Cathy Wolfe of the Board of Health dissents, and her dissent follows herein.] This denial is based upon the following findings and conclusions:

a) Findings

A majority of the Board of Health finds as follows:

- 1) The Appellant Jeff Griffin applied for a permit to install an OSS to serve a home on Lot 11 of Steamboat Island.
- 2) Lot 11 is currently vacant, is approximately 2,850 square feet in size, and has dimensions of 114 feet by 25 feet.
- 3) There are approximately 42 existing homes on Steamboat Island, which is approximately 8 acres in size. Steamboat Island was platted in 1927, and 126 lots are shown on the recorded plat map.
- 4) The design proposal is for a sewage system that utilizes pressure distribution and a sand lined bed to treat the septic tank effluent before it flows into native sands found approximately five (5) feet below the ground surface.
- 5) Griffin requested and received approval for two waivers associated with the application:
 - a) Waiver of a winter water table evaluation, and
 - b) Waiver reducing the separation between the septic tank and pump chamber from ten (10) to five (5) feet.
- 6) The winter water table requirement was waived due to the conclusions of a soils report prepared by Pacific Rim Soil and Water, and the results of on-site evaluation performed by Griffin and an agent of the Health Officer. The tank and pump separation waiver was granted as the application complied with "mitigating measures" established by the Washington State Department of Health for this type of application.
- 7) Griffin requested and received approval for three setback reductions associated with the application:

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AR 1

- 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) Griffin 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 Griffin, 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 Griffin.
- 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 15th day of August, 2005.

ATTEST:

BOARD OF HEALTH

Thurston County, Washington

Clerk of the Board

P. Manson

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.¹

Cathy Wolfe
Commissioner Cathy Wolfe

¹ 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 Scenario prepared by Dennis Bickford dated 6/16/05
25. Verbatim Transcript of Recorded Hearing Appeal of Decision Regarding Griffin Property May 4th and 6th, 2005

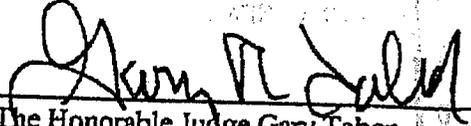
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Based on the foregoing, the Court finds as follows

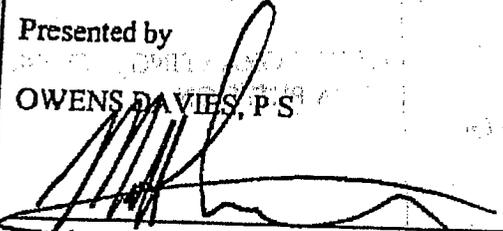
1 Jeff Griffin's LUPA petition is hereby GRANTED,

2 The Thurston County Board of Health's August 1, 2005 decision to deny Mr
Griffin a septic permit with respect to project No 2004105629 is REVERSED and Thurston
County is ORDERED to issue Jeff Griffin said permit forthwith

DATED this 3 day of February, 2006

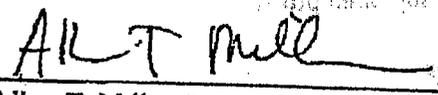

The Honorable Judge Gary Tabor

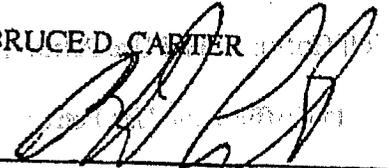
Presented by
OWENS DAVIES, P.S.


Matthew B. Edwards, WSBA No 18332
Attorneys for Plaintiff

Approved by, *As to form only ATMBDC*
Notice of Presentation Waived

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ORDER GRANTING JEFF GRIFFIN S LUPA PETITION - 2
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SCANNED

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