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Court of Appeals Cause No. 34418-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JEFF GRIFFIN

RESPONDENT/PETITIONER

v.

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

APPELLANTS,

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**PETITION FOR REVIEW**

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### **III. IDENTITY OF PETITIONER AND CITATION TO COURT OF APPEALS' DECISION**

Jeff Griffin petitions for review of the Court of Appeals' published decision reported at 137 Wn. App. 609, 154 P.3d 296 (March 20, 2007. Appendix G. The Court of Appeals denied Mr. Griffin's motion for reconsideration on May 2<sup>nd</sup>. Appendix H.

### **IV. ISSUES PRESENTED FOR REVIEW**

The Thurston County Sanitary Code, following minimum standards set by the Washington State Department of Health's on-site sewage regulations, requires septic permit applicants to meet various setback and other standards. However, the regulations also explicitly authorize permit applicants who meet specified conditions to utilize alternative, reduced setbacks and other standards. These regulations also require an applicant for a septic permit for a small lot to satisfy "all requirements of these regulations other than minimum land area."

1. Does a small-lot owner who utilizes the alternative setback and other standards as specifically authorized by the regulations satisfy "all requirements of these regulations?"

2. Did the Court of Appeals properly reject the small-lot owner's constitutional challenges to the denial of his septic permit based upon a "fact" never addressed by the finder of fact, and disputed by the small-lot owner?

3. Do the regulations, in obligating small-lot owners to meet "all requirements," provide constitutionally adequate notice that they are precluded from

using alternative setback and other requirements whose use is explicitly permitted by the regulations?

4. Does an administrative body's adoption of a rule of decision different from that which it had consistently applied violate the small-lot owner's constitutional right to have his application considered under the rules in effect when he submitted it?

5. Did the small-lot owner waive his right to challenge the administrative body's decision as violating his substantive due process rights by failing to raise this claim at a hearing that occurred before the administrative body had even made its decision?

6. Given the administrative body's explicit acceptance of his expert's opinion that the small-lot owner's proposed septic system would pose no risk of environmental harm, and given that its decision has prevented the small-lot owner from ever developing his property, was that body's decision to deny the small-lot owner his septic permit unduly oppressive, in violation of his substantive due process rights?

## V. STATEMENT OF THE CASE

A. **Statutory Background.** Thurston County's Sanitary Code governs the issuance of septic permits. Thurston County based its Sanitary Code on regulations published by the State Department of Health. Chapter 246-272 WAC.

The Sanitary Code contains standards and requirements that any applicant must meet in order to obtain a septic permit. The Code provides that the County "shall" issue

septic permits to applicants who meet these requirements. Sanitary Code, § 9.3. See also WAC 246-272A-0200(4).

On its face, the Sanitary Code frequently authorizes applicants to satisfy alternative standards or requirements. For example, the Code generally requires that drainfields be located at least 100 feet from open water. However, if the applicant proposes a septic system that provides for “enhanced treatment performance,” the Code explicitly authorizes<sup>1</sup> a reduced setback of 75 feet. Sanitary Code, § 10.3. See WAC 246-272A-0210(4). These alternative standards reflect a legislative judgment, made when the State Department of Health adopted its minimum standards, that compliance with either standard adequately protects public health and the environment.

In addition, the Sanitary Code authorizes any applicant to ask the County to waive compliance with any of the standards (including compliance of any of the alternative standards) provided for on the face of the Code. Article I, Section 13. See also WAC 246-272A-0420. The Code provides the County with discretion to grant or deny such a request. Id.

Finally, the Sanitary Code contains special requirements applicable only to small lots. In order to obtain a septic permit for a small lot, the applicant must show:

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

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<sup>1</sup> The Code states that the Health officer “may” authorize the use of reduced setbacks and other standards. However, the County has interpreted the word “may” in light of § 9.3’s overarching requirement that the County “shall” issue septic permits to those qualified for them. In other words, the County takes the position that it “shall” issue a septic permit whenever the Code states that it “may” do so. The Court of Appeals expressly so recognized. See 137 Wn. App. at 615, ¶ 6.

- 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.

Thurston County copied these requirements directly from the regulations promulgated by the State Department of Health. WAC 246-272-20501(5)(e).

**B. Mr. Griffin Applies For and Is Issued a Septic Permit.** In 2003, Jeff Griffin purchased a small undeveloped waterfront lot on Steamboat Island. Mr. Griffin purchased the lot intending to build a one-bedroom house on it into which he and his wife could retire. AR 355.

In 2004, Mr. Griffin submitted a septic application to the Thurston County Environmental Health Department. AR 14-16. Mr. Griffin did not ask the County for a discretionary waiver, pursuant to Article I, Section 13, of any of the standards articulated by its Code. However, Mr. Griffin's application did utilize alternative setbacks and other standards as explicitly authorized by the Code. To the extent Mr. Griffin did so, the Health Department determined that Mr. Griffin had met the specific conditions the Code required. *See* AR 339-41.

Because Mr. Griffin was applying for a septic permit for a small lot, the Health Department reviewed his application pursuant to § 21.4.5. The Department determined that: (1) Mr. Griffin's lot had been legally created before 1995; (2) the County had not designated Steamboat Island as an area of special concern; and (3) Mr. Griffin's

application met all requirements of the Sanitary Code other than minimum lot size. Therefore, the Department issued Mr. Griffin his permit. AR 16.

C. **Board of Health Appeal.** Bruce Carter, Mr. Griffin's neighbor, appealed. After an administrative process, the Thurston County Board of Health held a hearing at which it reviewed the permit decision *de novo*. AR 337-87.

At the hearing, Mr. Griffin submitted the report and testimony of his engineer, who testified that his proposed state-of-the-art septic system "posed no increased risk to public health." AR 121. Thurston County Environmental Health Department staff testified, without contradiction, that the County had consistently interpreted § 21.4.5.3 as requiring the County to issue permits to small-lot applicants who met all the requirements of the Sanitary Code, including small-lot owners who utilized alternative standards or requirements as expressly provided for by the Code. AR 8, 339-341. In addition, Health Department staff testified that Mr. Griffin would not be able to obtain a septic permit for his lot if the Board interpreted § 21.4.5.3 to preclude his utilization of these alternative standards. AR 12 (Thurston County Environmental Health Staff Report) ("If the applicant is required to meet all minimum requirements of Article IV without obtaining any waivers or setback reductions, it is unlikely that the health officer will be able to issue a sewage system permit for installation of a system on the Griffin property.") Nevertheless the Board, by a 2-1 vote, denied Mr. Griffin's permit. AR 1-4.

In its decision, the Board agreed that Mr. Griffin had satisfied the conditions articulated by the Code for utilizing various alternative setback and other standards.

AR 1-3 (Findings of Fact 5-9; Conclusion of Law 4) (“[T]he Griffins did what the Department required of them to obtain the waivers and modified setback required”). The Board further agreed that no one had presented evidence that Mr. Griffin’s proposed septic system threatened to cause environmental harm. AR 3 (Finding of Fact 15) (finding that Mr. Griffin had “presented wastewater flow report evidence and testimony from . . . a local and reputable soils engineering firm, as well as testimony from . . . and a report submitted by Pacific Soils and Water”); (Conclusion of Law 5) (concluding “[t]hat no scientific evidence has been submitted to refute the findings of the soils or wastewater flow reports submitted by Griffin”).

Instead, the Board held that the sole “issue for the Board to determine” was one of statutory construction: Whether Mr. Griffin’s “application has met all other requirements other than minimum land area as required by § 21.4.5.3.” *Id.* (Conclusion of Law 6). Two members of the Board voted to interpret § 21.4.5.3 as mandating a small-lot septic permit applicant to satisfy all the requirements of the Sanitary Code without having to resort to what these two members described as “waivers, setback adjustments, or other modification of the rules found within the Code.” *Id.* (Conclusion of Law 7).

#### **D. Superior Court**

Mr. Griffin appealed to Superior Court. In addition to challenging the Board’s interpretation of § 21.4.5.3, Mr. Griffin raised several constitutional challenges.

The Superior Court reversed the Board of Health decision. The Court held that:

I do not find that the term “all requirements” means requirements without waiver. A requirement is a specific standard, and often for

standards to apply there may be exceptions. A requirement or rule may still be met if there is an exception to the standard.

Report of Proceedings, at 5.

**E. Court of Appeals**

In a published decision, the Court of Appeals reversed the trial court. It reinstated the Board's decision denying Mr. Griffin his permit.

The Court of Appeals first addressed the Board's interpretation of § 21.4.5.3. Using reasoning that had not been adopted by the Board of Health, and that never had been articulated in any brief, the Court of Appeals held:

[T]he "all requirements" portion of the ordinance at issue here cannot include "requirements" that have been waived or set back. If "all requirements" included waivers and setbacks, the language would be meaningless and superfluous. Every OSS petitioner, regardless of lot size, is required to comply with the TCSC's provisions or else obtain waivers or set backs. Thus, the phrase is meaningful only if the application's sole deficiency is lot size.

137 Wn. App. at 618, ¶17.

The Court of Appeals also rejected Mr. Griffin's constitutional claims. Although the Board, in its decision, had made no finding to this effect, the Court of Appeals "found" that:

Before Griffin had purchased the property, his realtor warned him that the lot was too small for a septic tank permit and that Griffin would not be able to build a house on the property.

137 Wn. App. at 612, ¶2. Based on this "finding," the Court of Appeals peremptorily rejected each of Mr. Griffin's constitutional claims.

First, the Court of Appeals rejected Mr. Griffin's claim that the "all requirements" language was unconstitutionally vague:

[W]e note that Griffin's real estate agent told him that the property was too small to build on before he purchased it. Moreover, the provision "meets all requirements" allows a person of common intelligence to understand that a landowner cannot receive waivers and setbacks in lieu of satisfying all requirements other than lot size.

137 Wn. App. at 621, ¶ 23.

Second, the Court of Appeals rejected Mr. Griffin's claim that the Board had violated his right to have his application considered under the rule of decision in effect when he submitted it, reasoning:

[T]he vested rights doctrine relates to implementing new laws, not correcting a misinterpretation of existing law. *See Friends of the Law*, 123 Wn.2d at 522. . . . [S]ection 21.4.5.1 [sic] was not only in effect when Griffin submitted his land use application, it was in effect when he bought the property with notice that it was unbuildable.

Id., ¶ 24.

Finally, the Court of Appeals rejected Mr. Griffin's substantive due process claim. The Court of Appeals held that Mr. Griffin had waived the claim by not raising it before the Board:

An issue not raised in a contested case before the Board may not be raised for the first time on review of the Board's decision. *Buechel v. Dept. of Ecology*, 125 Wn.2d 196, 201 n.4, 884 P.2d 910 (1994).

137 Wn. App. at 622, ¶ 25. The Court of Appeals also suggested that the record was not sufficiently developed to permit it to consider this claim:

Griffin did not raise this issue before the Board and without a full factual development on the record we cannot fairly address this claim. *Accord Buechel*, 125 Wn.2d at 201, n.4.

Id.

## VI. ARGUMENT

The Supreme Court should accept review of the Court of Appeals' decision. The Court of Appeals wrongly decided several issues of substantial public interest. The Court of Appeals' decision is, on each issue described herein, in direct conflict with established Washington law. And, the Court of Appeals' decision presents substantial constitutional issues.

### A. The Supreme Court Should Review and Reverse the Court of Appeals' Erroneous Construction of the Sanitary Code.

First, this Court should accept review for the purpose of reversing the Court of Appeals' erroneous construction of the Department of Health's regulations, which have been incorporated in Thurston County's Sanitary Code.

The Court of Appeals' published decision presents a significant question of Washington State law. Section 21.4.5.3 incorporates, verbatim, the language of the on-site sewage system regulations promulgated by the Department of Health. WAC 246-272A-20501(5)(e)(iii). Identical language has been incorporated into the sanitary codes promulgated by local jurisdictions throughout the state.

Unless this Court accepts review, these jurisdictions will now find themselves compelled to adopt the Court of Appeals' erroneous construction of the identical

language in their own codes. They will be obligated to deny septic permits to small-lot owners who utilize even a single alternative setback or other standard provided for in their codes. Unless this Court accepts review, many small-lot owners will suddenly find, like Mr. Griffin, that they cannot obtain a septic permit for their property, and therefore cannot develop or make any use of it.

The Court of Appeals acted based on a fundamental misinterpretation of these regulations. The Court of Appeals assumed that an application is “deficient” or “non-compliant” if it utilizes alternative standards in the manner expressly authorized by the regulations. 137 Wn. App. at 618, ¶ 17 (“Every OSS petitioner, regardless of lot size, is required to **comply** with the TCSC’s provisions or else **obtain waivers or set backs**. Thus, the phrase is meaningful only if the application’s sole **deficiency** is lot size.”) (emphasis added).

This is simply wrong. The Department of Health made the legislative judgment, at the time it incorporated these alternative standards into its regulations, that compliance with any of its minimum standards adequately protects public health and the environment. The Board and the Court of Appeals were not, in this administrative proceeding, entitled to revisit that judgment. *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899 (1954).

Indeed, the Board and the Court of Appeals erred even in describing the Code’s alternative standards as “waivers.” A “waiver” is the intentional relinquishment of a known right. *Doe v. Gonzaga University*, 143 Wn.2d 687, 711, 24 P.3d 390 (2001).

The regulations generally permit applicants to utilize alternative standards as a matter of right. Therefore, in approving a septic permit application which utilizes such standards, the Board has not relinquished its “rights.” It has simply has authorized the applicant to do that which the regulations entitle the applicant to do. The County can properly be described as granting a “waiver” if, and only if, the County exercises its discretion to relieve an applicant from complying with any of the standards articulated in the Code pursuant to Article I, Section 13.

Moreover, the Court of Appeals plainly erred when it held that it had to so construe these regulations to give meaning to the phrase “all requirements.” 137 Wn. App. at 618, ¶ 17 (“Thus, the phrase is meaningful only if the application’s sole deficiency is lot size”). This rationale had not been adopted by the Board or articulated in any brief. Therefore, the Court of Appeals should not have employed it. RAP 12.1.

In fact, the Court of Appeals simply overlooked the phrase’s obvious independent meaning. The phrase precludes small-lot applicants from obtaining discretionary waivers under Article I, Section 13. But Mr. Griffin did not seek any such waiver here.

Finally, the Court of Appeals’ interpretation of the phrase “all requirements” directly conflicts with prior case law. The Court of Appeals should have given the phrase “all requirements” its plain meaning. See, e.g., Sleasman v. City of Lacey, 159 Wn.2d 639, 641, ¶ 7, 151 P.3d 990 (2007). Cases to this effect are legion.

The plain meaning of the word “all” is “any, whatsoever.” *Parkridge Associates, Ltd. v. Ledcor Industries, Inc.*, 113 Wn. App. 592, 602, 54 P.3d 225 (2002). Where the

Sanitary Code on its face provides for alternative standards, a small-lot applicant meets “all requirements” by meeting “any” of the alternative standards.

The Court of Appeals, in contrast, construed this phrase in a way that does not permit small-lot applicants to utilize “all” of the Code’s requirements. The Court of Appeals would require small-lot applicants to utilize only the most restrictive of the Code’s requirements. By restricting small-lot applicants to utilizing only “some” requirements, the Court of Appeals simply ignored the plain meaning of the word “all.”

The Court of Appeals’ interpretation of the Department of Health’s regulations, incorporated into the County’s Sanitary Code, presents a question of substantial public interest that should be decided by the Supreme Court. The Supreme Court should accept a review of and reverse this decision.

**B. Constitutional Issues.**

In addition, the Court of Appeals’ published decision wrongly decided several significant constitutional issues.

1. **The Court of Appeals Wrongly Purported To “Find Facts,” In Contravention of Its Constitutional Role As an Appellate Court.**

The Court of Appeals is an appellate court. *Wash. Const.*, Art. 4, Sec. 30. As an appellate court, the Court of Appeals should not make findings of fact. *City of Seatac v. Cassan*, 93 Wn. App. 357, 363, 967 P.2d 1274 (1998); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 543, 349 P.2d 183 (1954).

However, that is what the Court of Appeals improperly did. In the second paragraph of its decision, the Court purported to find that:

Before Griffin had purchased the property, his realtor warned him that the lot was too small for a septic tank permit and that Griffin would not be able to build a house on the property.

137 Wn. App. at 613, ¶ 2. The Court of Appeals erred in so finding:

- First, there is no evidence in the record to support this claim. The Court of Appeals did not specifically cite to any such evidence.<sup>2</sup>
- Second, no one made this claim at the *de novo* hearing before the Board of Health. Because no one made this claim, Mr. Griffin neither knew, nor had reason to know, that he should have put evidence in the record to respond to it.
- Third, this “fact” simply is not true. Mr. Griffin purchased his lot without ever having been told it was unbuildable. Appendix I. Mr. Griffin would have put this evidence into this record if had been put on notice that he needed to do so.
- Fourth, on this record, this “fact” was, at a minimum, disputed. Under the rule of decision in place at the time he purchased his lot and applied for his septic permit, Mr. Griffin’s lot was buildable. AR 8, 237-78, 341.

In any event, this “fact” is irrelevant. The Court was addressing the constitutionality of the Board’s actions. How could the “fact” that someone once allegedly suggested to Mr. Griffin that his lot might be unbuildable empower the Board thereafter to act unconstitutionally to make his lot unbuildable? The Court of Appeals should have judged the Board’s interpretation of the Sanitary Code on its own merits.

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<sup>2</sup> Apparently, the Court based its “finding” upon a document, dated June 2005, which Mr. Carter, Mr. Griffin’s neighbor, submitted into the Board of Health’s record as one of 25 exhibits just before the Board of Health Hearing. AR 195. In his testimony before the Board, Mr. Carter briefly mentioned this document, saying only that it was “from the real estate people” and that it was offered to prove only that Mr. Griffin’s lot was “not buildable for residential purposes at this time.” AR 369.

The Court of Appeals erred by resolving a disputed issue of fact that had not been addressed below against Mr. Griffin, and then using that “fact” to peremptorily reject his substantial constitutional claims. The Supreme Court should accept review of, and reverse, the Court of Appeals’ decision.

2. **The Court of Appeals Improperly Rejected Mr. Griffin’s Claim that the § 21.4.5.3 Is So Vague that the Board Could Not Constitutionally Apply It To Him.**

The Court of Appeals improperly rejected Mr. Griffin’s claim that the § 21.4.5.3 is so vague that the Board could not constitutionally apply it to him.

The due process clause of the federal and Washington State constitution requires that land use regulations not be “so vague that a person of common intelligence must guess at the law’s meaning and application.” *City of Seattle v. Crispin*, 149 Wn. 2d 896, 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).

Here, a person of common intelligence who looked at § 21.4.5.3 would not realize that it precludes the issuance of the permit to a small-lot owner whose septic system application utilizes equivalent setbacks and standards in the manner specifically contemplated by the Code. Indeed, Thurston County Environmental Health Department staff, who presumably are persons of at least common intelligence, had **never** so 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).

The County had always interpreted its Sanitary Code to allow small-lot owners to utilize the alternative setbacks and other standards. AR 8, 237-38, 341. If the County had intended to require small-lot owners to meet only the most restrictive requirements, the Code could have plainly said so.

Yet the Board, in response to Mr. Griffin's application, yet without in any way basing its decision on any fact associated with Mr. Griffin's application, articulated a new and wholly different rule of decision than had ever applied before, and applied it only to Mr. Griffin. Because Mr. Griffin had no reason to foresee the Board's new "interpretation" of its Code, the Board could not constitutionally apply it to him.

The Court of Appeals rejected Mr. Griffin's vagueness claim in reliance upon a single case which no one had cited to it. 137 Wn. App. at 620-21, ¶¶22-23 citing *Young v. Pierce County*, 120 Wn. App. 175, 84 P.3d 927 (2004). *Young* does not control.

Here, unlike in *Young*, the County had changed a long-standing interpretation of the Code only in response to Mr. Griffin's application. Therefore, the County could not constitutionally apply its new interpretation only to him. *Silverstreak, Inc. v. Dept. of Labor & Indus.*, \_\_\_ Wn.2d \_\_\_, ¶ 39, 154 P.3d 891 (2007).

The Court of Appeals plainly erred in rejecting Mr. Griffin's vagueness claim.

### 3. The Court Should Review of Mr. Griffin's Vested Rights Claim.

The Court of Appeals also wrongly rejected Mr. Griffin's claim that he was constitutionally entitled to have the Board apply to his application the rule of decision 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).

The Court of Appeals rejected Mr. Griffin's vested rights claim in exactly one sentence: "But the vested rights doctrine relates to implementing new laws, not

correcting a misinterpretation of existing law. See *Friends of the Law v. King Co.*, 123 Wn.2d [518,] at 522[, 869 P.2d 1056 (1994)].” 137 Wn. App. 621, ¶ 24.

Far from requiring dismissal of Mr. Griffin’s vested rights claim, *Friends* fully supports it. In *Friends*, this Court held that a landowner was entitled to rely on County staff’s consistent interpretation of County ordinances, the admittedly-contradictory plain language of the ordinance notwithstanding. 123 Wn.2d at 524.

Here, just like in *Friends*, County staff had consistently interpreted the Sanitary Code as permitting small-lot septic applicants to utilize any of the alternative setbacks or similar criteria explicitly provided for on the face of the Code, just like every other septic permit applicant is entitled to do. AR 8, 237-38, 340-41. Just like in *Friends*, Mr. Griffin purchased his lot and submitted his septic application in good faith reliance upon the County’s consistent interpretation of its ordinance. AR 355. Just like in *Friends*, a third party challenged the County’s decision to issue the permit, asserting that the Code had a meaning other than that which the County staff had consistently attributed to it. AR 62. But, just like in *Friends*, Mr. Griffin should have been entitled to rely on County staff’s consistent interpretation of the County’s Sanitary Code. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 641, ¶ 14, 151 P.3d 990 (2007).

The Court of Appeals plainly erred in rejecting Mr. Griffin’s substantial constitutional claim.

4. The Court Should Review Mr. Griffin's Substantive Due Process Claim.

Finally, the Court should accept review of, and reverse, the Court of Appeals peremptory rejection of Mr. Griffin's substantive due process claim.

The Court of Appeals held that Mr. Griffin had waived this claim by not raising it before the Board of Health. See 137 Wn. App. at 622, ¶ 25. On its face, this holding makes no sense.

How can any permit applicant be expected to raise a constitutional challenge to an administrative decision before the administrative body has even made it? Mr. Griffin could not know what challenges to raise in response to the Board's decision until the Board itself had ruled.

Moreover, as an administrative body, the Board had only those powers specifically conferred on it by the Sanitary Code. Even if Mr. Griffin had raised a substantive due process claim in advance of the Board's decision, the Board would have had no power to consider it. *Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-87 at ¶ 22, 113 P.3d 494 (2005).

Finally, Division II itself squarely held to the contrary in a case decided less than a year earlier:

The County responds that Peste's failure to raise these [substantive due process and takings challenges] before the Board when it heard Peste's rezone request precludes Peste from raising them on appeal. We disagree. RCW 36.70C.130(1)(f) expressly allows Peste to bring its constitutional takings and substantive due process claims in its LUPA petition. Moreover, RCW 34.05.570(3)(a) states that the reviewing court shall grant relief from an

adjudicative agency ruling if it determines that the statute or rule on which the decision was based is in violation of constitutional provisions either on its face or as applied. Additionally, RAP 2.5(a) allows parties to raise manifest errors affecting constitutional rights for the first time on appeal. And finally, although issues not raised before an agency generally may not be raised on appeal, we have inherent authority to consider all issues necessary to reach a proper decision. *Hertzke v. Dep't of Ret. Sys.*, 104 Wn. App. 920, 928, 18 P.3d 588 (2001). Thus, we reject the County's contention that Peste may not now raise constitutional arguments because it did not raise them before the Board.

*Peste v. Mason County*, 133 Wn. App. 456, 469-70 at ¶ 25, 136 P.3d 140 (2006).

The Court of Appeals relied upon *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201 n.4, 884 P.2d 910 (1994) to support its claim of waiver. But *Buechel* involved completely inapposite facts. In *Buechel*, this Court declined to consider a constitutional claim that had been raised for the first time only before it, and then only in an *amicus* brief. *Buechel* does not justify the Court of Appeals' decision.

The Court of Appeals also erred by suggesting the record was not sufficiently developed to permit the resolution of Mr. Griffin's substantive due process claim. A land use decision violates a landowner's substantive due process rights if it is "unduly oppressive" as applied to him. In making this determination, the Court should consider the following factors:

On the public's 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 v. Clark*, 121 Wn. 2d 586, 610, 854 P.2d 1 (1993), citing *Presbytery of Seattle v. King County*, 114 Wn. 2d 320, 331, 787 P.2d 907 (1990).

Here, Mr. Griffin established “undue oppression.” The Board, in acting on his permit, explicitly accepted his expert’s opinion that his proposed septic system would not pose any increased risk to public health. AR 3 (Finding of Fact 15; Conclusion of Law 5). The denial of Mr. Griffin’s septic permit will permanently prevent him from building a home on or otherwise developing his lot. AR 12. What more could any land use applicant possibly be expected to show?

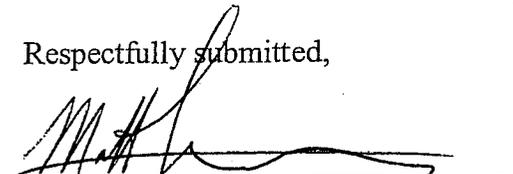
The Court of Appeals’ decision amounts to a *de facto* repudiation of the very concept of substantive due process in the land use context. The Court should accept review of this important constitutional issue, and reverse the Court of Appeals’ erroneous disposition of it.

## VII. CONCLUSION

The Supreme Court should accept review and reverse the decision of the Court of Appeals.

DATED this 1<sup>st</sup> day of June, 2007.

Respectfully submitted,

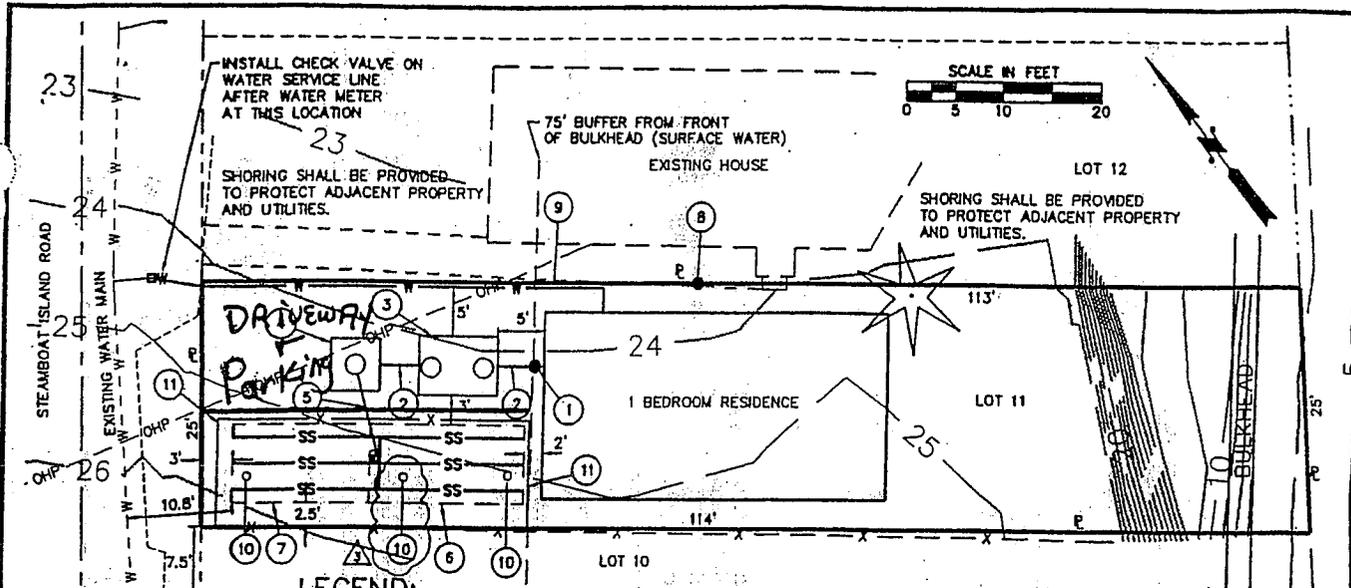


Matthew B. Edwards, WSBA #18332  
Attorney for Respondent Jeff Griffin

**APPENDICES**

- A** GRIFFIN SEPTIC PERMIT APPLICATION. AR 16.
- B** THURSTON COUNTY SANITARY CODE (select provisions)
  - Article I, Section 13
  - Article II, Section 9.3
  - Article II, Section 10 (excerpts);
  - Article II, Section 21.4.5
- C** CHAPTER 246-272A WAC, ON-SITE SEWAGE SYSTEMS (select provisions)
  - WAC 246-272A-0200(4)
  - WAC 246-272A-0210(1), (3), (4)
  - WAC 246-272A-0320(5)(e)
  - WAC 246-272A-0420
- D** TESTIMONY OF THURSTON COUNTY ENVIRONMENTAL HEALTH OFFICER STEVE PETERSON (AR 339-341)
- E** BOARD OF HEALTH DECISION (AR 1-4)
- F** TRIAL COURT DECISION
- G** COURT OF APPEALS' PUBLISHED DECISION
- H** ORDER DENYING MOTION FOR RECONSIDERATION
- I** DEPOSITION OF JEFF GRIFFIN (excerpts)

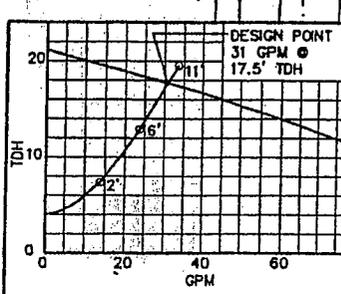




- LEGEND:**
- ① 4" SCH 40 P.V.C. CLEANOUT
  - ② 4" P.V.C. SCH 40 TIGHTLINE. MIN. S=0.02 FT/FT - USE FLEX COUPLINGS AT TANK CONNECTIONS (PER ASTM C 1173)
  - ③ NEW 1000-GAL. 2 CHAMBER WATERTIGHT CONC. SEPTIC TANK (H-20 LOADING) AND 750 GAL. PUMP CHAMBER. SEE DETAIL. WATER PROOF SURFACE BARRIER TO BE APPLIED TO TANK CONSISTANT WITH MANUAL OF CONCRETE PRACTICE ACI 515.1R. TANK TO BE LEAK TESTED PER ASTM C 1227.
  - ④ 750 GAL. CONC. PUMP CHAMBER (H-20 LOADING) WATER PROOFED AND TESTED AS NOTED ABOVE.
  - ⑤ 10 LF 1.5" PVC CL. 200 DELIVERY LINE. SEE NETWORK DETAIL.
  - ⑥ 8' x 15' PRIMARY SAND BED W/ PVC LINER TO 7' MIN. DEPTH
  - ⑦ 8' x 15' RESERVE SAND BED W/ PVC LINER TO 7' MIN. DEPTH
  - ⑧ T.B.M. ELEV. = 23.59 BAR & CAP
  - ⑨ WATER SERVICE LINE TO BE INSTALLED WITH 3" SCH. 40 PVC SLEEVE. WATER LINE TO BE UNIFORMLY SUPPORTED BY PRESSURE GROUTING ANNULAR SPACE WITH SAND GROUT OR BENTONITE

- ⑩ 4" P.V.C. MONITORING PORT. WRAPPED WITH "MIRAFI" 140N FILTER FABRIC. SEE MOUND DETAIL.
- ⑩ 4" P.V.C. MONITORING PORT. WRAPPED WITH "MIRAFI" 140N FILTER FABRIC. SEE MOUND DETAIL.
- ⑪ INSTALL TWO-TIER TEMPORARY RAILROAD TIE VEHICLE BARRIER BOLTED TOGETHER AT CORNERS. INSTALL ORANGE CONST. FENCE AT BACK OF TIES WITH SIGN STATING "DRAINFIELD AREA - DO NOT DISTURB" POSTED AT THE FRONT OF THE SITE. PERMANENT FENCING TO BE INSTALLED AT THE END OF CONSTRUCTION.

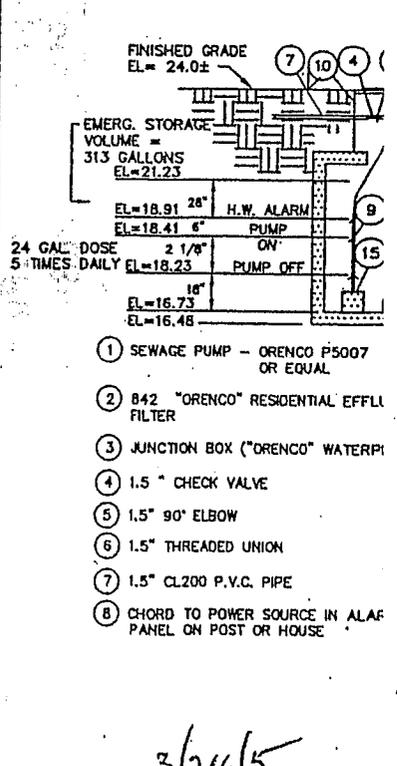
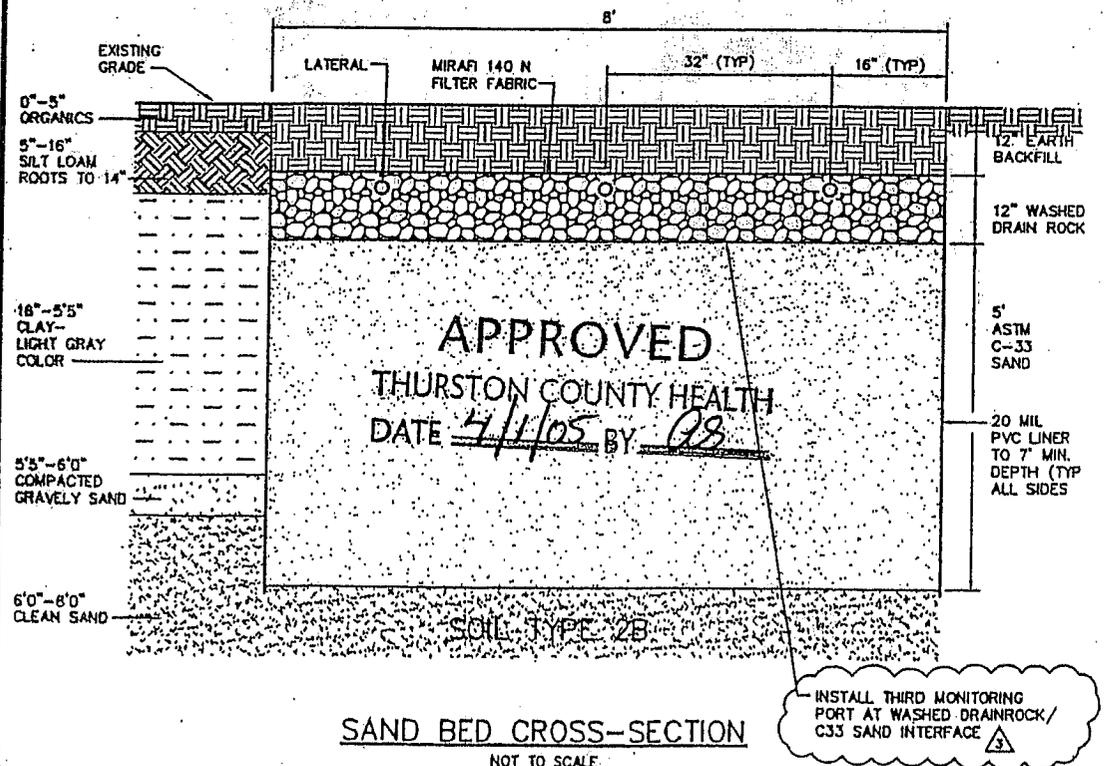
- NOTES:**
1. CONTRACTOR TO INCLUDE ALL ELECTRIC WIRING FOR CONTROL PANEL & POWER SERVICE FOR PUMPS IN BID. CONTRACTOR TO CONNECT POWER TO MAIN BREAKER BOX AT PROPOSED RESIDENCE.
  2. RESTORE ALL (LAWNS, DRIVEWAYS AND OTHER AREAS TO ORIGINAL CONDITION WITH LIKE MATERIAL.
  3. BOTH PRIMARY AND RESERVE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



**PUMP CURVE**

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

- SOIL A VARIAN REQUIR BOTH I
- \*1. HAZEN
  - \*2. LATERA
  - \*3. LATERA
  - \*4. PIPE S
  - \*5. NUMBEI
  - \*10. MANIFC
  - \*11. PIPE S
  - \*14. FORCE
  - \*15. PIPE S
  - \*16. FORCE
  - \*17. 90 DEG
  - \*21. CALCUL
  - \*22. DRAIN I
- SUM**
- RESIDUAL HEAD AT LAST ORIF (feet)
- 2.00
  - 3.00
  - 4.00
  - 5.00
  - 6.00
  - 7.00
  - 8.00
  - 9.00
  - 10.00
  - 11.00



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

CONTRACT NO.

3/24/5

5016 Lacey  
(360) 491

**ITEM CALCULATIONS**

FLOW RATE FOR TYPE 2B = 1.0 GAL/DAY/S.F.  
 SCHEDULED FOR 1 BEDROOM RESIDENCE WITH USE OF 120 GALLONS PER DAY  
 AREA = 120 GPD/1.0 GPD PER S.F. = **120 S.F.**  
 AND RESERVE AREAS TO BE INSTALLED DURING CONSTRUCTION

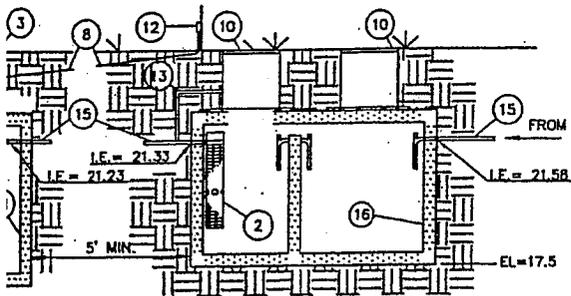
- RAMS C = 140
- === LATERAL DATA ===
- TH 15.0 feet
  - ANG 2.7 feet
  - E/CLASS 200
  - LATERALS 3
  - \*6. LATERAL DIAMETER 1.5 inch
  - \*7. ORIFICE SPACING 2 feet
  - \*8. ORIFICE DIAMETER 3/16 inch
  - 9. ORIFICES PER LATERAL 8
- === MANIFOLD DATA ===
- PTH 5.3 feet
  - E/CLASS 200
  - \*12. MANIFOLD DIAMETER 1.5 inch
  - 13. MANIFOLD TYPE END
- === FORCE MAIN DATA ===
- LENGTH 10.0 feet
  - E/CLASS 200
  - DIAMETER 1.5 inch
  - NDS 4
  - \*18. SWING CHECK VALVES 1
  - \*19. GATE VALVES 3
  - \*20. OTHER VEL. HEADS LOST 3

SYSTEM HEAD - FLOW DATA  
 VALUES OF PRESSURE AND FLOW AT THE PUMP USING  
 IM PRESSURE ON THE LAST ORIFICE AND INCREMENTING  
 PRESSURE ON THE LAST ORIFICE BY 1 FEET.  
 ELEVATION ABOVE PUMP = 5 FEET

**TABLE OF HEAD - DISCHARGE DATA**

VALVE	DELTA FLOW IN LATERAL (in)	HEAD AT DISTAL LATERAL (feet)	HEAD AT FORCE MAIN MAIN (feet)	DELTA HEAD IN MANIFOLD <10% ok	TOTAL SYSTEM FLOW (gal/min)	TOTAL SYSTEM HEAD (feet)
	0.2	2.01	1.97	-1.7	14.1	7.6
	0.2	3.01	2.96	-1.8	17.2	8.9
	0.2	4.02	3.95	-1.8	19.9	10.2
	0.2	5.02	4.93	-1.8	22.3	11.5
	0.1	6.03	5.92	-1.8	24.4	12.8
	0.1	7.03	6.90	-1.8	26.3	14.1
	0.1	8.03	7.89	-1.8	28.1	15.4
	0.1	9.04	8.87	-1.8	29.9	16.7
	0.1	10.04	9.86	-1.8	31.5	18.0
	0.1	11.04	10.84	-1.8	33.0	19.3

Pipe System Volume = 7.3 gallons



- (3) MERCURY FLOAT SWITCHES TO SECURED P.V.C. PIPE & SET FOR PUMP CYCLE
- (4) CONCRETE RISER W/ TRAFFIC RATED STEEL MANHOLE COVER (H-20 LOADING)
- (5) 750 GAL. WATERTIGHT CONCRETE PUMP CHAMBER WITH H-20 RATED LOADING, CONC. RISER AND TRAFFIC RATED STEEL MANHOLE COVER
- (6) DAILY DOSE VOLUME = 120 GAL @ 5 DOSES/DAY
- (7) SET TIMER AT 1.7 MIN. ON, 58.30 MIN. OFF
- (8) DOSE INTERVAL VOLUME = 72 GAL ±
- (9) CONTROL PANEL "ORENCO" WATER PROOF
- (10) 2" P.V.C. VENT PIPE TO RISER
- (11) "ORENCO" TANK ADAPTER SEALED TO TANK.
- (12) 4" SCH 40 PVC, 2% MIN. SLOPE TO SECURED P.V.C. PIPE (NOT SHOWN) USE FLEX COUPLINGS AT ALL TANK CONNECTIONS
- (13) 1000 GAL. 2 CHAMBER SEPTIC TANK H-20 RATED LOADING

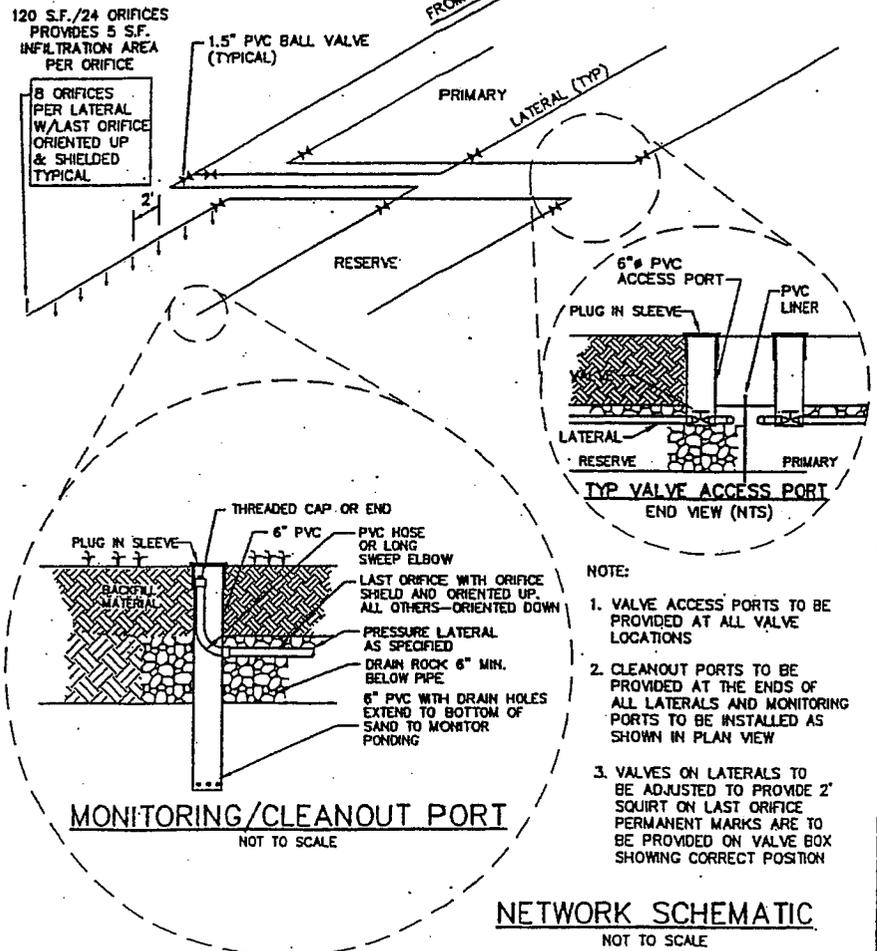
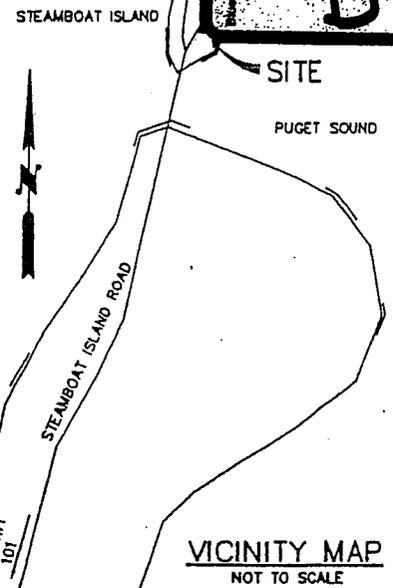
**INK DETAIL**  
 NOT TO SCALE

**PROJECT INFORMATION**

PARCEL #: 78200001100  
 OWNER: JEFF GRIFFIN  
 9612 MARINER DR NW  
 OLYMPIA, WA 98502  
 (360) 402-5207  
 DESIGNER: SKILLINGS-CONNOLLY, INC.  
 LANE SATER  
 5016 LACEY BLVD SE  
 LACEY, WA 98503  
 (360) 491-3399  
 DESIGN INFO.: DAILY FLOW: 120 GAL/DAY  
 LOT SIZE: 25'x114'

**SOIL LOG:**

TP #1 0'-5"	ORGANICS
5'-16"	SILT LOAM ROOTS TO 14"
16'-6'5"	CLAY-LIGHT GRAY COLOR
5'5"-6'0"	COMPACTED GRAVELY SAND
6'0"-8'0"	CLEAN SAND (SOIL TYPE 2B)



- NOTE:**
1. VALVE ACCESS PORTS TO BE PROVIDED AT ALL VALVE LOCATIONS
  2. CLEANOUT PORTS TO BE PROVIDED AT THE ENDS OF ALL LATERALS AND MONITORING PORTS TO BE INSTALLED AS SHOWN IN PLAN VIEW
  3. VALVES ON LATERALS TO BE ADJUSTED TO PROVIDE 2' SQUIRT ON LAST ORIFICE PERMANENT MARKS ARE TO BE PROVIDED ON VALVE BOX SHOWING CORRECT POSITION

THURSTON COUNTY RECEIVED

MAR 24 2005

DEVELOPMENT SERVICES

THE CONTRACTOR SHALL BE FULLY RESPONSIBLE FOR THE LOCATION AND PROTECTION OF ALL EXISTING UTILITIES. THE CONTRACTOR SHALL VERIFY ALL UTILITY LOCATIONS PRIOR TO CONSTRUCTION BY CALLING THE UNDERGROUND LOCATE LINE AT 1-800-424-5555 A MINIMUM OF 48 HOURS PRIOR TO ANY EXCAVATION. THE CONTRACTOR WILL ALSO BE RESPONSIBLE FOR MAINTAINING ALL LOCATE MARKS ONCE THE UTILITIES HAVE BEEN LOCATED.

**KILLINGS  
 ONNOLLY**

1000 SE, Lacey, Washington 98503  
 (800) 454-7545 Fax (360) 491-3857

**GRIFFIN  
 RESIDENCE**

THURSTON COUNTY WASHINGTON

**ON-SITE SEWAGE  
 DISPOSAL PLAN**

000010

APPENDIX A

JOB NUMBER

03061

SHEET

**SECTION 13 WAIVER OF CODE PROVISIONS.** Whenever a strict interpretation of this Code would result in significant hardship, a person may request a waiver of the provision causing hardship from the administrative hearing officer.

**13.1 Information Required for the Submission of a Request for Waiver of Code Provisions.** Any person filing a request for waiver of code provisions shall provide the following information:

- (a) requestor's name and mailing address;
- (b) permit applicant's name and mailing address;
- (c) property owner's name and mailing address;
- (d) code provision requested to be waived;
- (e) reasons that the code provision cannot be met;
- (f) permit type, permit number, parcel number or legal description if real property is involved;
- (g) a summary of the nature of the request;
- (h) a summary of the design alternatives that exist for this issue; and
- (i) a summary of how the specific proposal would mitigate health hazards or risks to the public health.

**13.2 Notification.**

13.2.1 Whenever a waiver of a provision of this Code involves a setback to 1) a neighbor's water source; or 2) a neighboring property, then all property owners whose property would be directly involved in such a setback requirement shall be notified of the request for waiver and be given an opportunity to comment and an opportunity to request an administrative hearing prior to a decision being made by the administrative hearing officer.

13.2.2 In cases of requests for waiver of solid waste disposal site

regulations, property owners within 1320 feet, (one quarter mile) of the subject property shall be notified.

13.2.3 Any person required to be notified by this Section may submit comments for consideration by presenting such comments in writing, to the health officer. Comments must be submitted within seven (7) calendar days of mailing the notice.

13.2.4 It shall be the responsibility of the person requesting a waiver, to provide the names and addresses of persons required to be notified in Sections 13.2.1 and 13.2.2, above.

13.2.5 Contents of Notification. The notification of waiver request shall contain the following information:

- (a) name and address of person requesting a waiver;
- (b) permit application number;
- (c) a brief description of the waiver request;
- (d) a statement that comments may be submitted;
- (e) a statement that an administrative hearing may be requested;  
and
- (f) a statement of where and when comments or an administrative hearing request must be received.

13.2.6 Notification shall be deemed complete when a written notice to the person's last known address has been deposited in the U.S. Mail or has been served on the person according to Section 7.2 of this Article.

**13.3 Administrative Hearings Regarding Waiver Requests.** Administrative hearings shall be conducted if requested by the person desiring the waiver or by the request of any person required to be notified of such a waiver request. An administrative hearing shall be conducted in accordance with Section 8 of this Article if the applicant or a notified person requests one. The administrative hearing shall be conducted within fifteen (15) calendar days of receipt of hearing request.

**13.4 Decisions Without a Hearing.** The administrative hearing officer may decide the issue without an administrative hearing if there is no response from notified parties within seven (7) calendar days of mailing the notification, or if written statements from the persons who should be notified, as in Section 13.2, above, are presented stating that they do not object to the waiver.

**13.5 Decisions.** The administrative hearing officer shall consider all evidence and testimony pertaining to the request for waiver. He or she may approve the waiver request, or a portion of the request, upon finding that 1) compliance with the Code provision(s) would result in significant hardship; 2) the approval is consistent with the intent of this code; and 3) the approval of the waiver would not result in a hazard to the public health nor significantly increase risk to the potentially affected persons. The administrative hearing officer may set conditions, limitations, and time limits as part of any waiver decision.

**13.6 Notice of Decision.** A copy of the decision shall be transmitted to the requestor of the waiver and to each party who has submitted comment or has requested a copy of the decision.

**13.7 Appeal.** Any person 1) who requested a waiver; or 2) who is entitled to notification as set forth in Section 13.2.1 and 13.2.2 of this Article and who submitted written comment on the waiver request; or 3) any person who is entitled to notification under Sections 13.2.1 and 13.2.2 of this Article and appeared to testify at an administrative hearing regarding a waiver request and who is aggrieved by the decision regarding the waiver request may appeal to the Board of Health according to the provisions of this Article. Such appeal must be in writing, and be presented to the health officer within ten (10) calendar days and as stated in Section 8.6 of this Article.

**13.8 Concurrence.** In the event the regulation or code provision to be waived is also a state law or regulation, the concurrence of the Secretary of the Washington State Department of Health or other responsible official must be obtained prior to the waiver being considered complete and in effect.

**13.9 Process for Solid Waste Permit Variance Request.** The foregoing process shall be supplemental to the variance guidelines for solid waste permit variances contained in WAC 173-304-700.

**SECTION 14 EQUIVALENCY.** Alternate methods, techniques and specifications which differ from those set forth in this Code may be allowed by the health officer if it can be demonstrated to the health officer's satisfaction that the alternative

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.

**SECTION 10 LOCATION.**

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

**TABLE I  
 MINIMUM HORIZONTAL SEPARATIONS**

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

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

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

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

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

- 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.

21.4 The health officer may:

- 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.

**Chapter 246-272A WAC  
ON-SITE SEWAGE SYSTEMS**

**SPECIFIC REQUIREMENTS**

**WAC 246-272A-0200 Permit requirements.**

(4) The local health officer shall:

(a) Respond to an application within thirty days as required in RCW 70.05.074.

(b) Permit only public domain technologies that have departmental RS&G. Permit only proprietary products that are registered by the department. During the period of transition from the list of approved systems and products to the registered list, the local health officer may permit products on the list of approved systems and products.

(c) Issue a permit when the information submitted under subsection (1) of this section meets the requirements contained in this chapter and in local regulations;

WAC 246-272A-0210 Location. (1) Persons shall design and install OSS to meet the minimum horizontal separations shown in Table IV, Minimum Horizontal Separations:

Table IV  
Minimum Horizontal Separations

Items Requiring Setback	From edge of soil dispersal component and reserve area	From sewage tank and distribution box	From building sewer, and nonperforated distribution pipe
Well or suction line	100 ft.	50 ft.	50 ft.
Public drinking water well	100 ft.	100 ft.	100 ft.
Public drinking water spring measured from the ordinary high-water mark	200 ft.	200 ft.	100 ft.
Spring or surface water used as drinking water source measured from the ordinary high-water mark <sup>1</sup>	100 ft.	50 ft.	50 ft.
Pressurized water supply line	10 ft.	10 ft.	10 ft.
Decommissioned well (decommissioned in accordance with chapter 173-160 WAC)	10 ft.	N/A	N/A
Surface water measured from the ordinary high-water mark	100 ft.	50 ft.	10 ft.
Building foundation/in-ground swimming pool	10 ft.	5 ft.	2 ft.
Property or easement line	5 ft.	5 ft.	N/A
Interceptor/curtain drains/foundation drains/drainage ditches			
Down-gradient <sup>2</sup> :	30 ft.	5 ft.	N/A
Up-gradient <sup>2</sup> :	10 ft.	N/A	N/A
Other site features that may allow effluent to surface			
Down-gradient <sup>2</sup> :	30 ft.	5 ft.	N/A
Up-gradient <sup>2</sup> :	10 ft.	N/A	N/A
Down-gradient cuts or banks with at least 5 ft. of original, undisturbed soil above a restrictive layer due to a structural or textural change	25 ft.	N/A	N/A
Down-gradient cuts or banks with less than 5 ft. of original, undisturbed soil above a restrictive layer due to a structural or textural change	50 ft.	N/A	N/A
Other adjacent soil dispersal components/subsurface storm water infiltration systems	10 ft.	N/A	N/A

- 1 If surface water is used as a public drinking water supply, the designer shall locate the OSS outside of the required source water protection area.
- 2 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.

(3) The local health officer may allow a reduced horizontal separation to not less than two feet where the property

line, easement line, in-ground swimming pool, or building foundation is up-gradient.

(4) The horizontal separation between an OSS dispersal component and an individual water well, individual spring, or surface water that is not a public water source can be reduced to a minimum of seventy-five feet, by the local health officer, and be described as a conforming system upon signed approval by the health officer if the applicant demonstrates:

(a) 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 potable water from the OSS treatment zone, excessive depth to ground water, down-gradient contaminant source, or outside the zone of influence; or

(b) 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 WAC 246-272A-0230 Table VI; or

(c) Evidence of protective conditions involving both (a) and (b) of this subsection.

**WAC 246-272A-0320 Developments, subdivisions,  
and minimum land area requirements.**

(5) The local health officer may:

(e) 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:

(i) The lot is registered as a legal lot of record created prior to the effective date of this chapter;

(ii) The lot is outside an area identified by the local plan developed under WAC 246-272A-0015 where minimum land area has been listed as a design parameter necessary for public health protection; and

(iii) The proposed system meets all requirements of these regulations other than minimum land area.

**WAC 246-272A-0420 Waiver of state regulations. (1)**

The local health officer may grant a waiver from specific requirements of this chapter if:

(a) The waiver request is evaluated by the local health officer on an individual, site-by-site basis;

(b) The local health officer determines that the waiver is consistent with the standards in, and the intent of, these rules;

(c) The local health officer submits quarterly reports to the department regarding any waivers approved or denied; and

(d) Based on review of the quarterly reports, if the department finds that the waivers previously granted have not been consistent with the standards in, and the intent of these rules, the department shall provide technical assistance to the local health officer to correct the inconsistency, and may notify the local and state boards of health of the department's concerns. If upon further review of the quarterly reports, the department finds that the inconsistency between the waivers granted and the state board of health standards has not been corrected, the department may suspend the authority of the local health officer to grant waivers under this section until such inconsistencies have been corrected.

(2) The department shall develop guidance to assist local health officers in the application of waivers.

*FUTTERMAN:* Okay. With that, I'll turn it over to Steve Peterson.

*PETERSON:* Good morning, my name's Steve Peterson. I'm with the Environmental Health Division and to the right is Mr. Randy Frebie, our technical lead in onsite program. We'll be reviewing the staff process and doing a quick summary for you based on the staff report that you have received with the associated exhibits.

*OBERQUELL:* Did- has everybody-did you receive a copy of the staff report? Okay, thank you. Heads are nodding at both ends of tables. Thank you.

(Mumbling)

*PETERSON:* A project was submitted by Mr. Jeff Griffin in November 2004. It was for an onsite sewage system proposal for the referenced property on Steamboat Island. In the exhibits, the application is listed as Exhibit A with the specific design the staff reviewed and approved listed as Exhibit B.

The property is located on the shore of Steamboat Island, the Thurston County Assessor's office has it listed as .07 acres, the design proposal lists it as 2,825 square feet approximately. As Jane had indicated, the minimum lot size for newly created lots with

this soil type are 2,000-exuse me-12,500 square feet. So staff considered it an existing lot of record as it was platted in approximately 1927.

The engineered sewage system proposal was for a 120 gallon per day flow, single bedroom, single family residence, consisting of two drainfields, installed at the same time, both the primary drainfield and the reserve drainfield. Staff reviewed this proposal as it historically is done with all existing lots of record. It's not unusual to go through some types of setback reductions on existing lots. In this particular case several setback reductions were granted under the Code, specifically the setback from the drainfield to the property line was reduced from five feet to two and a half feet. And again, that is specifically allowed under Thurston County Sanitary Code Article 4 Section 10. It specifies that if there's certain conditions met, the setback reductions can be reduced.

The same scenario for a reduction from the drainfield to the building foundation that was reduced from ten feet down to two feet. Setback to the surface water, Puget Sound, was reduced from 100 feet to 75 feet. Article 4, Section 10.3 indicates special criteria that need to be met to allow that reduction from 100 feet down to 75 feet. The conditions were met and staff allowed the reduction to 75 feet.

Two waivers were actually granted in the review of this project. The first waiver revolves around a winter water evaluation. What a winter water evaluation is, it's an evaluation of deep soils on the Island to determine if there is any restrictive layer or ground water in that sand. And basically what staff are looking for is, is it an appropriate material to go into with a drainfield. The applicant applied for a waiver against the Department's policy to hold it for a winter water evaluation, the documentation that was submitted included a soil scientist's report, and I believe the soil scientist just came in and is available for testimony. But basically it was determined staff observations during the winter and the soil scientist's report that the waiver was grantable.

For the record, the Department considered the winter water evaluation invalid because we didn't get enough rainfall or rainfall spread out over a long enough period to actually come to a determination on our own. That's when Mr. Griffin obtained a soil scientist, they submitted additional information, we concurred, granted the waiver.

The second waiver was granted on the property. It's referred to as a Class A Waiver, that's a designation that Washington State Department of Health gives that type of waiver, and basically what it is, it's if certain mitigating circumstances can be met on the site or via the design proposal, the waivers granted. Basically, the State has already set forth what the mitigation measures need to be to grant the waiver. The design incorporated those mitigation factors, and staff granted the waiver from that water supply line to the tanks from ten feet to five feet, and it's not the water supply line for the public water system. It's the water supply line that serves the proposed residence only.

A design flow reductions were also proposed in the design proposal. Article 4 states that the minimum design flow for a single family residence should be 240 gallons a day, unless other technical justification is provided for allowing smaller flows. The engineer

design basically provided technical justification that staff reviewed and concurred with. The justification was low flow fixtures in the residence. The drainfield flow is controlled by a timer device on the pump chamber. And what that is, its-kind of like a light timer. It controls when that pump comes on and off so it can be set in such a manner that a limited number of gallons are pumped out to the drainfield on a daily basis. If I understand the design correctly, the proposal is to limit the flow to the drainfield at 120 gallons per day. The design was not required to, but for various reasons the engineer proposed, alternating drainfields. That's the installation of both the primary drainfield with an in-use system and the reserve area. The proposal I believe was to alternate the drainfields at six months intervals, I believe.

All the setback reductions and the waivers are allowable under the Code, historically the Department has allowed those on existing lots of record. Staff then made the determination that it did meet the minimum requirements set forth in the regulations and made the determination to approve the design.

BEFORE THE BOARD OF HEALTH  
THURSTON COUNTY, WASHINGTON

AUG 16 2005

In Re the Matter of,  
Jeff Griffin

DECISION

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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APPENDIX E

- 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 15<sup>th</sup> day of August, 2005.

ATTEST:

Clerk of the Board

*P. Mansson*

BOARD OF HEALTH

Thurston County, Washington

*Diane Oberquell*  
Chairman Diane Oberquell

*Robert N. Macleod*  
Commissioner Robert N. Macleod

**Dissent**

I respectfully dissent.

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

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

*Cathy Wolfe*  
Commissioner Cathy Wolfe

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

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EXPEDITE  
 Hearing is set  
Date February 3, 2006  
Time 9 00 a m  
Judge/Calendar Gary Tabor

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SUPERIOR COURT  
THURSTON WASH  
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DEPUT.

SUPERIOR COURT OF WASHINGTON  
FOR THURSTON COUNTY  
JEFF GRIFFIN,  
Plaintiff,  
vs  
THURSTON COUNTY, AND ITS BOARD OF  
HEALTH,  
Defendant

NO 05-2-01587-7  
ORDER GRANTING JEFF GRIFFIN'S  
LUPA PETITION

This matter came on regularly for hearing on Friday, February 3, 2006 Plaintiff Jeff Griffin appeared by and through his counsel Matthew B Edwards of Owens Davies, P S Defendants Thurston County appeared by and through its counsel Allen Miller of the Thurston County Prosecuting Attorneys Office Bruce Carter appeared pro se

The Court considered the following pleadings

- 1 Opening Brief in Support of Jeff Griffin's Land Use Petition,
- 2 Thurston County's Brief in Opposition to Jeff Griffin's Land Use Petition, and
- 3 Additional Respondents' Brief in Opposition to Griffin Land Use Petition,
- 4 Reply Brief in Support of Jeff Griffin's LUPA Petition

In addition, the Court considered the 389 page Administrative Record, and the oral argument of counsel

ORDER GRANTING JEFF GRIFFIN S LUPA PETITION - 1  
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OWENS DAVIES P S  
926 24th Way SW P O Box 187  
Olympia Washington 98507  
Phone (360) 943-8320  
Facsimile (360) 943 6130

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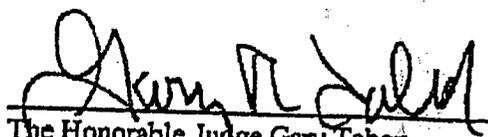
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Based on the foregoing, the Court finds as follows

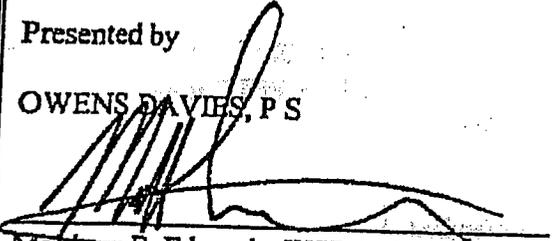
1 Jeff Griffin's LUPA petition is hereby GRANTED,

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

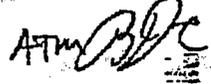
DATED this 3 day of February, 2006

  
The Honorable Judge Gary Tabor

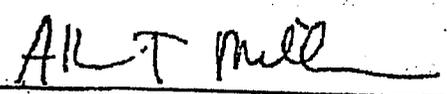
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OWENS DAVIES, P S



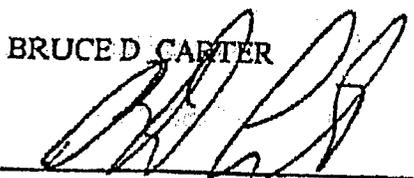
Matthew B. Edwards, WSBA No 18332  
Attorneys for Plaintiff

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

THURSTON COUNTY PROSECUTING  
ATTORNEYS OFFICE



Allen T. Miller, Jr  
Attorneys for Defendant

BRUCE D. CARTER  


Bruce D. Carter, WSBA No 2588  
Attorneys for Bruce Carter, et al

ORDER GRANTING JEFF GRIFFIN S LUPA PETITION - 2  
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SCANNED

CP 199

Griffin v. Thurston County  
Wash.App. Div. 2,2007.

Court of Appeals of Washington, Division 2.  
Jeff GRIFFIN, Petitioner,  
v.  
THURSTON COUNTY, and its Board of Health, Re-  
spondent.  
No. 34418-1-II.  
March 20, 2007.

**Background:** Owner of undersized island lot appealed decision of the county Board of Health to deny landowner a permit to build an on-site sewage system. The Superior Court, Thurston County, Gary R. Tabor, J., reversed, and county appealed.

**Holdings:** The Court of Appeals, Quinn-Brintnall, J., held that:

- (1) ordinance required that an undersized lot meet "all requirements" without waivers and setbacks;
- (2) owner received waivers and setbacks and thus did not meet requirement;
- (3) ordinance was not unconstitutionally vague as applied to owner; and
- (4) board's previous erroneous interpretation of ordinance did not give owner a vested right to a permit to construct on-site sewage system.

Reversed and remanded with instructions.

West Headnotes

[1] Zoning and Planning 414 ↪ 745.1

414 Zoning and Planning

414X Judicial Review or Relief

414X(E) Further Review

414k745 Scope and Extent of Review

414k745.1 k. In General. Most Cited

Cases

When reviewing a land use decision, the Court of Appeals stands in the same position as the Superior

Court and reviews the administrative record that was before the county board.

[2] Municipal Corporations 268 ↪ 710

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(B) Sewers, Drains, and Water Courses

268k710 k. Private Sewers and Drains.

Most Cited Cases

Ordinance which gave health officer the discretion to grant an on-site sewage system permit for a lot less than the minimum land size only if system met "all requirements" other than minimum land area required that an undersized lot meet "all requirements" without waivers and setbacks.

[3] Municipal Corporations 268 ↪ 710

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(B) Sewers, Drains, and Water Courses

268k710 k. Private Sewers and Drains.

Most Cited Cases

Owner of undersized lot received waivers and setbacks and thus did not meet on-site sewage system permit ordinance requirement which mandated that a lot meet "all requirements" in order to trigger health officer's authority to exercise discretion and grant a permit for an undersized lot; county department labeled owner's applications "Request for Waiver," case manager who reviewed applications filed a "Report Form for Waiver Request," and health officer referred to the department's actions as "waivers" and "setbacks."

[4] Zoning and Planning 414 ↪ 745.1

414 Zoning and Planning

414X Judicial Review or Relief

414X(E) Further Review

414k745 Scope and Extent of Review

414k745.1 k. In General. Most Cited

Cases

Court of Appeals reviews de novo the constitutional-

ity of a land use ordinance and decision. U.S.C.A. Const.Amend. 14; West's RCWA 36.70C.130(1)(D).

**[5] Municipal Corporations 268 ↪710**

**268 Municipal Corporations**

268XI Use and Regulation of Public Places, Property, and Works

268XI(B) Sewers, Drains, and Water Courses

268k710 k. Private Sewers and Drains.

Most Cited Cases

Ordinance which required lot owner to meet "all requirements" other than lot size in order to obtain on-site sewage system permit was not unconstitutionally vague as applied to owner; provision allowed a person of common intelligence to understand that a landowner who seeks a permit for an undersized lot cannot receive waivers and setbacks in lieu of satisfying all requirements other than lot size, and owner's real estate agent told him that the property was too small to build on before he purchased it. U.S.C.A. Const.Amend. 14.

**[9] Municipal Corporations 268 ↪710**

**268 Municipal Corporations**

268XI Use and Regulation of Public Places, Property, and Works

268XI(B) Sewers, Drains, and Water Courses

268k710 k. Private Sewers and Drains.

Most Cited Cases

County board's previous erroneous interpretation of land use ordinance did not give owner of undersized lot a vested right to a permit to construct on-site sewage system, as ordinance was in effect both when lot owner purchased his land with notice that it was unbuildable and also when lot owner submitted his land use application.

**[10] Zoning and Planning 414 ↪376**

**414 Zoning and Planning**

414VIII Permits, Certificates and Approvals

414VIII(A) In General

414k375 Right to Permission, and Discretion

414k376 k. Change of Regulations as Affecting Right. Most Cited Cases

"Vesting" refers generally to the notion that an

agency may only consider a land use application under the statutes and ordinances in effect when the applicant submitted his application.

**[11] Zoning and Planning 414 ↪376**

**414 Zoning and Planning**

414VIII Permits, Certificates and Approvals

414VIII(A) In General

414k375 Right to Permission, and Discretion

414k376 k. Change of Regulations as Affecting Right. Most Cited Cases

The vested rights doctrine relates to implementing new laws, not correcting a misinterpretation of existing law.

**[12] Municipal Corporations 268 ↪710**

**268 Municipal Corporations**

268XI Use and Regulation of Public Places, Property, and Works

268XI(B) Sewers, Drains, and Water Courses

268k710 k. Private Sewers and Drains.

Most Cited Cases

Lot owner's failure to claim before the county board of health that the board violated his substantive due process rights when it denied permit for on-site sewage system precluded a full factual development on the record and thus Court of Appeals would not consider the issue on appeal. U.S.C.A. Const.Amend. 14.

Allen T. Miller, Attorney at Law, Bruce Dennis Carter, Attorney at Law, Olympia, WA, for Respondent.

Matthew Bryan Edwards, Owens Davies PS, Olympia, WA, for Petitioner.

QUINN-BRINTNALL, J.

\*612 ¶ 1 The Thurston County Board of Health denied Jeff Griffin a permit to build an \*613 on-site sewage system (OSS) on his Steamboat Island lot. Griffin's lot is one-fourth the size normally required before the Thurston County Public Health and Social Services Department will grant an OSS permit. The Department may grant an OSS permit on an undersized lot if the petitioner meets three criteria, including that the petitioner "meets all requirements" in the

regulations other than the minimum lot size. Thurston County Sanitary Code (TCSC) 21.4.5.3. The Board denied Griffin's permit because he had received five waivers and setbacks. A superior court reversed. We hold that the "meets all requirements" provision governing the health officer's authority to issue an OSS permit to undersized lots excludes waivers and setbacks. Accordingly, we reverse the superior court's decision and remand with instructions that it reinstate the Board's denial of Griffin's permit.

#### FACTS

##### The Property

¶ 2 Griffin owns a waterfront lot on Steamboat Island, an eight-acre island in Thurston County that has about 42 existing homes on 126 lots. Griffin's lot is vacant and undeveloped but is zoned residential. It is 2,850 square feet, 25 feet wide and 114 feet deep. Before Griffin purchased the property, his realtor warned him that the lot was too small \*\*298 for a septic tank permit and that Griffin would not be able to build a house on the property. Nevertheless, Griffin purchased the lot, applied for an OSS permit, and planned to build a small house.

##### Health Officer

¶ 3 During his OSS permit application process, Griffin requested that he be relieved of the responsibility of complying with several setback and site requirements of the TCSC. Specifically he requested (1) a waiver of the winter water table evaluation; (2) a waiver reducing the separation between the septic tank and pump chamber from ten to five feet; (3) a horizontal setback between the disposal component\*614 and building foundation from ten to two feet; (4) a horizontal setback between the disposal component and adjacent property line from five feet; (5) a horizontal setback between the disposal component and the surface water from one hundred feet to seventy-five feet; and (6) a reduction in the minimum design flow for a single-family residence from 240 to 120 gallons per day. Citing TCSC article IV, section 21.4.5, the health officer granted Griffin's six requests. The health officer indicated his belief that if an application met the criteria under TCSC

section 21.4.5, FNI he was obligated to grant an OSS permit and he did so.

FNI TCSC article IV, section 21.4.5 provides that the health officer may:

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

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

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

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

Clerk's Papers (CP) at 120 (emphasis added).

##### Hearing Officer

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

##### \*615 Board

¶ 5 Griffin appealed to the Board. Thurston County opposed Griffin's motion and the Interested Parties cross-appealed.

¶ 6 The Board adopted the hearing officer's findings of fact, conclusions, and decision. But the Board apparently disagreed with the hearing officer's conclusion that the winter water study evaluation was erroneously waived. And the Board underlined the word

“may” when it reprinted the ordinance but it did not explicitly base its ruling on its discretionary authority to deny Griffin a permit under section 21.4.5. Instead, it held that the phrase “meets all requirements” in section 21.4.5.3 is not fulfilled if the petitioner is granted waivers and setbacks. It reasoned that the word “requirements,” construed conservatively in order to protect the public’s health, excludes waivers and setbacks.

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

#### Superior Court

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

I’m going to have to disagree with the County Commissioners or at least two of \*\*299 the three in this particular case. I do not find that that language, specifically the term “all requirements,” means requirements without waiver. A requirement is a specific standard, and often for standards to apply there may be exceptions. A requirement or rule may still be met if there is an exception to the standard.

Report of Proceedings at 5. Although the superior court reversed the Board’s decision, it found no merit in Griffin’s \*616 assertions that his constitutional rights were violated. Griffin appeals.

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

#### ANALYSIS

##### Standard of Review

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

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

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

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

RCW 36.70C.130(1).

\*617 ¶ 11 Standards (b) and (f) present questions of law that we review de novo. 7 Wash. State Bar Ass’n, Real Property DeskbookK § 111.4(9), at 111-25 (3d ed.1996) (citing Freeburg v. City of Seattle, 71 Wash.App. 367, 859 P.2d 610 (1993)). Standard (c) concerns a factual determination that we review for substantial evidence. 7 Wash. State Bar Ass’n, Real Property DeskbookK § 111.4(9), at 111-25.

¶ 12 “Substantial evidence” is evidence sufficient to convince an unprejudiced, rational person that a finding is true. Isla Verde Int’l Holdings, Inc. v. City of Canas, 146 Wash.2d 740, 751-52, 49 P.3d 867 (2002). On review, we weigh all inferences in a light most favorable to the party that prevailed in the highest forum that exercised fact-finding authority. Freeburg, 71 Wash.App. at 371-72, 859 P.2d 610 (citing State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wash.App. 614, 618, 829 P.2d

217, review denied, 120 Wash.2d 1008, 841 P.2d 47 (1992)). Thurston County prevailed at the Department hearing, the highest forum with fact-finding authority, and thus we view all evidence and reasonable inferences in its favor.

#### Construction of Ordinance

[2] ¶ 13 Under the ordinance here at issue, the health officer has discretion to permit an OSS installation *only* if three criteria are met. TCSC art. IV, § 21.4.5.1. Under the third criterion, the health officer has discretion to grant an OSS permit for a lot less than the minimum land size only if “[t]he proposed system meets all requirements of these regulations other than minimum land area.” Clerk’s Papers (CP) at 120. In reviewing this criterion, the Board excluded waivers and setbacks that landowners had received in evaluating whether small lots satisfied “all other requirements.” The Board was correct.

**\*\*300** ¶ 14 Section 21.4.5 of the TCSC provides that the health officer may:

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

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

**\*618** 21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and

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

CP at 120 (emphasis added).

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

¶ 16 When reviewing ordinances, we first attempt to give effect to the plain meaning of the words. If a provision’s meaning is plain on its face, there is no

need for interpretation and we give effect to the legislative body’s plain meaning. Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002). To ascertain a provision’s plain meaning, we examine the ordinance as well as other provisions in the same code. Sheehan v. Transit Auth., 155 Wash.2d 790, 797, 123 P.3d 88 (2005). Only when no plain, unambiguous meaning appears through this inquiry do we resort to aids of statutory construction. Campbell & Gwinn, 146 Wash.2d at 12, 43 P.3d 4.

¶ 17 We must give effect to all provisions of an ordinance and may not interpret an ordinance in a way that renders a portion meaningless or superfluous. Cobra Roofing v. Dep’t of Labor & Indus., 157 Wash.2d 90, 99, 135 P.3d 913 (2006). Under this principle, the “all requirements” portion of the ordinance at issue here cannot include “requirements” that have been waived or set back. If “all requirements” included waivers and setbacks, the language would be meaningless and superfluous. Every OSS petitioner, regardless of lot size, is required to comply with the TCSC’s provisions or else obtain waivers and setbacks. Thus, the phrase is meaningful only if the application’s sole deficiency is lot size. The Board properly construed the **\*619** ordinance to mean that an undersized lot must meet “all requirements” without waivers and setbacks in order to trigger the health officer’s authority to exercise discretion and grant an OSS permit to an undersized lot.

#### Substantial Evidence

[3] ¶ 18 We now review the finding that Griffin received waivers and setbacks for substantial evidence. Griffin asserts that the five variances that he received were not waivers but were, instead, “equivalent methods for achieving compliance with [the TCSC’s] requirements.” Br. of Resp’t at 32-33. If Griffin did not receive waivers, the Board could not properly deny Griffin an OSS permit on the ground that the ordinance’s “all requirements” provision was not fulfilled.

¶ 19 As used here, “waiver” is not a precise term of legal significance but, instead, is a term that the Department employs in common use. See Bryan A. Garner, *A Dictionary of Modern Legal Usage*, at 923 (2d ed.1995) (defining “waiver” as ordinarily mean-

ing “the relinquishment of a legal right” but emphasizing that the word is often used as “an imprecise and generic term”). The Department labeled Griffin’s applications “Thurston County On-Site Sewage-Systems Request for Waiver.” Administrative Record (AR) at 18. In reviewing Griffin’s applications, the case manager filed a “Report Form for Waiver Request.” AR at 22. And the health officer similarly referred to the Department’s actions as “waivers” and “setbacks.” This evidence is substantial and supports the Board’s finding that Griffin received waivers rather than meeting certain requirements. Thus, he did not fulfill the ordinance’s third criterion, that he satisfy all requirements other than lot size.

**\*\*301 ¶ 20** Griffin also mischaracterizes the TCSC as allowing a petitioner to satisfy TCSC requirements via one of several equivalent methods. Griffin requested and received an abdication of the Department’s authority to require him to submit a winter water study under TCSC section 11.4.1 as well as four reductions from the “minimum horizontal **\*620** separations” listed in TCSC section 10.1, table 1. The TCSC gives the Department discretion to waive these requirements, but it does not list equivalent methods of compliance. See TCSC § 10.1, table 1, and § 11.4.1. Because Griffin mischaracterizes the TCSC’s structure, his argument that waivers are alternate means of satisfying TCSC requirements fails. Griffin does not argue that he did not receive setbacks. He received both waivers and setbacks in lieu of satisfying TCSC requirements. Thus, the Board did not err when it concluded that the hearing officer lacked authority to grant Griffin an OSS permit for his undersized lot because Griffin did not satisfy all requirements except lot size. Because these issues are dispositive, we do not reach the remaining issues of whether the Board properly granted waivers and setbacks.

#### Constitutionality

[4] ¶ 21 Griffin cross-appeals and asserts three constitutional challenges to the TCSC under the doctrines of vagueness, vested rights, and substantive due process. We review de novo the constitutionality of a land use ordinance and decision. RCW 36.70C.130(1)(f); Freeburg, 71 Wash.App. at 376.

Griffin has not demonstrated that the TCSC is unconstitutional on its face or as applied.

#### Vagueness

[5] ¶ 22 Griffin first asserts that the TCSC is constitutionally vague. A land use ordinance that provides fair warning and allows a person of common intelligence to understand the law’s meaning does not violate a party’s constitutional rights. Young v. Pierce County, 120 Wash.App. 175, 182, 84 P.3d 927 (2004). Courts do not require an unreasonable standard of specificity and we judge the ordinance as applied, not for facial vagueness. Young, 120 Wash.App. at 182, 84 P.3d 927. A duly enacted ordinance is presumed constitutional, and the party challenging it must demonstrate that the ordinance is unconstitutional beyond a reasonable doubt. Kitsap County v. Mattress Outlet, 153 Wash.2d 506, 509, 104 P.3d 1280 (2005).

**\*621 ¶ 23** Griffin has not met his burden to prove that the TCSC, article IV, section 21.4.5.1 is unconstitutionally vague. He argues only that (1) he would interpret the ordinance differently; (2) the Board previously interpreted the ordinance differently; and (3) he invested a lot of money because he believed the Board would grant him a permit. Initially, we note that Griffin’s real estate agent told him that the property was too small to build on before he purchased it. Moreover, the provision “meets all requirements” allows a person of common intelligence to understand that a landowner who seeks an OSS permit for an undersized lot cannot receive waivers and setbacks in lieu of satisfying all requirements other than lot size. Young, 120 Wash.App. at 182, 84 P.3d 927. This reading of the plain language is consistent with longstanding principles of statutory construction. See Davis v. Dept of Licensing, 137 Wash.2d 957, 963-64, 977 P.2d 554 (1999). The ordinance is not vague.

#### Vested Rights

[9][10][11] ¶ 24 Griffin next challenges the ordinance’s application under the vested rights doctrine. “Vesting” refers generally to the notion that an agency may only consider a land use application un-

der the statutes and ordinances in effect when the applicant submitted his application. Friends of the Law v. King County, 123 Wash.2d 518, 522, 869 P.2d 1056 (1994). Griffin asserts that because the Board previously interpreted the TCSC, article IV, section 21.4.5.1 differently, he had a right to rely on its continued erroneous interpretation of the ordinance and that, therefore, the Board violated his vested rights. But the vested rights doctrine relates to implementing new laws, not correcting a misinterpretation of existing law. See Friends of the Law, 123 Wash.2d at 522, 869 P.2d 1056. TCSC, article IV, section 21.4.5.1 was not only in effect when Griffin submitted his \*\*302 land use application, it was in effect when he bought the property with notice that it was unbuildable. The vested rights doctrine does not apply in the manner Griffin suggests.

\*622 Substantive Due Process

[12] ¶ 25 Last, Griffin claims that the Board violated his substantive due process rights. Generally, an issue not raised in a contested case before the Board may not be raised for the first time on review of the Board's decision. Buechel v. Dep't of Ecology, 125 Wash.2d 196, 201 n. 4, 884 P.2d 910 (1994). Substantive due process analysis is highly fact specific. See Guimont v. Clarke, 121 Wash.2d 586, 608-09, 854 P.2d 1 (1993), cert. denied, 510 U.S. 1176 (1994). Griffin did not raise this issue before the Board and without a full factual development on the record we cannot fairly address this claim. Thus, Griffin waived this claim. Accord Buechel, 125 Wash.2d at 201 n. 4, 884 P.2d 910.

¶ 26 Reversed and remanded.

We concur: BRIDGEWATER, P.J., and PENOYAR, J.

Wash.App. Div. 2, 2007.

Griffin v. Thurston County

137 Wash.App. 609, 154 P.3d 296

END OF DOCUMENT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THURSTON COUNTY, and its  
BOARD OF HEALTH,

Appellants,

v.

JEFF GRIFFIN,

Respondent.

No. 34418-1-II

ORDER DENYING MOTION TO  
RECONSIDER

FILED  
COURT OF APPEALS  
ON MAY 27  
07 MAY -3 AM 8:00  
STATE OF WASHINGTON  
BY AMM  
DEPUTY

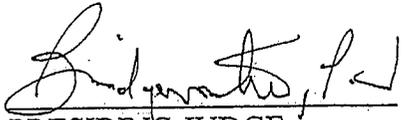
**RESPONDENT** moves for reconsideration of the court's decision terminating review, filed **March 20, 2007**. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Quinn-Brintnall, Bridgewater, Penoyar

**DATED** this 3<sup>rd</sup> day of May, 2007.

**FOR THE COURT:**

  
PRESIDING JUDGE

Bruce Dennis Carter  
Attorney at Law  
3012 W Eaton St  
Seattle, WA, 98199-4233

Matthew Bryan Edwards  
Owens Davies PS  
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2424 Evergreen Park Dr SW Ste 102  
Olympia, WA, 98502-6041

# RETURN COPY

EXPEDITE

Hearing is set

Date: December 16, 2005

Time: 9:00 a.m.

Judge/Calendar: Gary Tabor

DEC 9 2005

SUPERIOR COURT OF WASHINGTON  
FOR COUNTY

JEFF GRIFFIN,

Plaintiff,

NO. 05-2-01586-9

vs.

THURSTON COUNTY,

Defendant.

SUPPLEMENTAL DECLARATION  
OF MATTHEW B. EDWARDS IN  
SUPPORT OF JEFF GRIFFIN'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

1. My name is Matthew B. Edwards. I am over 18 years of age and competent to testify as to all matters set forth herein.

2. Attached to this declaration as Exhibit A is a true and correct copy of the cover page, and pages 17-28 of the deposition of Jeff Griffin. The relevant passages have been highlighted.

2. Attached to this declaration as Exhibit B is a portion of the transcript of the hearing that occurred before the County Health Department on May 5, 2004, a copy of which is included in the administrative record that has been filed in connection with Mr. Griffin's LUPA petition, at p. 213 et seq. The relevant passages have been highlighted.

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

SUPPLEMENTAL DECLARATION OF MATTHEW B. EDWARDS  
IN SUPPORT OF JEFF GRIFFIN'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 1

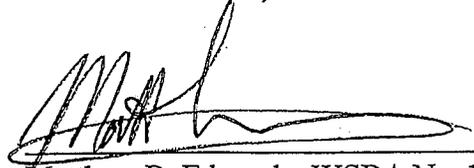
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OWENS DAVIES, P.S.  
926 - 24th Way SW • P. O. Box 187  
Olympia, Washington 98507  
Phone: (360) 943-8320  
Facsimile: (360) 943-6150

APPENDIX I

1 DATED this 9 day of December, 2005, at Olympia, Washington.

2 OWENS DAVIES, P.S.

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5 Matthew B. Edwards, WSBA No. 18332  
6 Attorneys for Jeff Griffin

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28 SUPPLEMENTAL DECLARATION OF MATTHEW B. EDWARDS  
IN SUPPORT OF JEFF GRIFFIN'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 2

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

JEFF GRIFFIN, )  
Plaintiff, )  
vs. ) NO. 05-2-01586-9  
THURSTON COUNTY, )  
Defendant. )

DEPOSITION UPON ORAL EXAMINATION OF

JEFF GRIFFIN

November 17, 2005  
Olympia, Washington

Kim L. Otis  
Certified Court Reporter  
Washington CCR No. 2342  
GENE BARKER & ASSOCIATES, INC.  
OLYMPIA COURT REPORTERS  
P.O. BOX 1126  
Olympia, Washington 98507-1126  
(360) 943-2693

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Examination

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By Mr. Miller

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Number

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16	5	Statutory Warranty Deed	4, 25
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APPEARANCES

A P P E A R A N C E S

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For the Plaintiff: MATTHEW B. EDWARDS  
Attorney at Law  
OWENS, DAVIES, PS  
926 24th Way S.W.  
Olympia, WA 98502  
  
For the Defendant: ALLEN T. MILLER, JR.  
Deputy Prosecuting Attorney  
THURSTON COUNTY  
2424 Evergreen Park Dr. S.W.  
Suite 102  
Olympia, WA 98502

JEFF GRIFFIN / BY MR. MILLER

BE IT REMEMBERED, that the Deposition Upon Oral Examination of JEFF GRIFFIN was taken in the above-entitled and numbered cause commencing at 10:35 a.m. in behalf of the Defendant on the 17th day of November, 2005, before Kim L. Otis, Certified Court Reporter and Notary Public in and for the State of Washington, at the law offices of Owens Davies, 926 24th Way S.W., Olympia, Washington.

WHEREUPON, the following proceedings were had and done and testimony taken, to wit:

(Exhibits 1 - 7 marked for identification.)

JEFF GRIFFIN, having been first duly sworn on oath or affirmed to tell the truth, the whole truth and nothing but the truth, testified as follows:

EXAMINATION

BY MR. MILLER:

Q Mr. Griffin, I am Allen Miller. Good morning.  
A Good morning.  
Q We are here for a deposition which I hope isn't going to last more than, say, an hour this morning.  
Have you ever had your deposition taken before?  
A Many, many years ago.  
Q Okay. Just once then?

JE RIFFIN / BY MR. MILLER

1 a subpoena doesn't lie with a party to a case, and, in  
 2 addition, we have only had a limited amount of time to  
 3 respond to the subpoena. I think we've identified all  
 4 responsive documents, but I want to make that objection  
 5 so as to preserve it on the record in case there's some  
 6 issue that should arise in that regard later on.  
 7 MR. MILLER: Thank you.  
 8 Q Does that appear to be the purchase and sale document  
 9 and addenda?  
 10 A Yes.  
 11 Q Okay. That's Exhibit 2. And then, in addition, I was  
 12 provided with Exhibit 3, which appears to be the  
 13 commitment for title insurance on the Lot 11 property.  
 14 Just go through that and make sure that appears to be  
 15 the document to your knowledge.  
 16 A Yes, it appears to be.  
 17 Q Okay. And then Exhibit 4 is the actual title insurance  
 18 policy that you would have received at closing?  
 19 A Yes.  
 20 Q Okay. Now, I recognize Matt's concern regarding the  
 21 shortness of time, but, to your knowledge, is there any  
 22 other document that relates to the purchase and sale of  
 23 Lot 11 that's not here?  
 24 A Not that I have available, because anything that I had  
 25 when the purchase fell through, I don't think I kept.

17

JEFF GRIFFIN / BY MR. MILLER

1 deposition, we need to wait for the end of the  
 2 question.  
 3 A Yes.  
 4 Q So the mid 50s you testified to. Who came up with that  
 5 figure?  
 6 A There was not a definite figure, that's where it fell  
 7 apart, but where it was indicated to me she was heading  
 8 was in the mid 50s.  
 9 Q And that was through Peggy Sangder?  
 10 A Yes.  
 11 Q Did you ever have any personal negotiation with either  
 12 Ms. Johnson or the Doyles?  
 13 A I did not.  
 14 Q Okay. Everything went through Ms. Sangder?  
 15 A Yes.  
 16 Q So tell me if this is a correct scenario. So Ms.  
 17 Sangder came to you and said we are looking like the  
 18 price range is going to be in the mid 50s, but  
 19 Mrs. Johnson has decided not to sell the property or --  
 20 A Mrs. Johnson went dead silent. Ms. Sangder indicated  
 21 to me that she assumed that that meant it was over.  
 22 Q Okay. And what time period was this?  
 23 A This was, I would say, in October, November of 2002.  
 24 Q And then what was the next thing that came up in regard  
 25 to Lot 11?

19

JEFF GRIFFIN / BY MR. MILLER

1 Q Okay.  
 2 A I don't remember anything, because in my memory, it was  
 3 primarily verbal.  
 4 Q And you are talking about the prior purchase when Mary  
 5 Ellen Johnson decided not to go through with the sale?  
 6 A Yes.  
 7 MR. EDWARDS: So the record is clear, as we  
 8 discussed before this deposition, there was one  
 9 additional document which was the closing statement,  
 10 copy of which was attached to the motion and which has  
 11 already been provided to counsel.  
 12 Q I appreciate that.  
 13 So, Mrs. Johnson decided not to sell the property.  
 14 What price were you guys talking about at that time?  
 15 A She was in the mid 50s.  
 16 Q So, 55,000?  
 17 A Well, no, because that's when she bailed at that point  
 18 of the --  
 19 Q So had you made an offer in the mid 50s?  
 20 A No, I asked her what she wanted for the property. Our  
 21 offer was -- no, sorry.  
 22 Q That's okay.  
 23 A Ask the question.  
 24 Q Wait for another question here. It's kind of hard  
 25 because we normally are conversing, but in a

18

JEFF GRIFFIN / BY MR. MILLER

1 A We told Ms. Sangder at that time that if Ms. Johnson  
 2 changed her mind and decided to sell at a future date,  
 3 we would love to hear from her first.  
 4 Q Okay. And what happened after that?  
 5 A It was in February of 2003, we heard from Ms. Sangder  
 6 that she would be interested in selling.  
 7 Q And when you say "she," Ms. Johnson was interested in  
 8 selling again?  
 9 A Yes.  
 10 Q Okay. And did you offer a price at that time?  
 11 A No, she did, she said she wanted \$59,000.  
 12 Q And so that was in February of 2003?  
 13 A Approximately.  
 14 Q Okay. And what did you instruct Ms. Sangder to do in  
 15 regard to that \$59,000 offer?  
 16 A I told her that I was very interested and I wanted to  
 17 make an offer.  
 18 Q And what offer did you make?  
 19 A The offer you see here.  
 20 Q So, you didn't negotiate the price, you just accepted  
 21 the \$59,000?  
 22 A Yes.  
 23 Q Okay. And your offer was encompassed in Exhibit 2  
 24 here, the purchase and sale --  
 25 A Yes. Is this Exhibit 2?

20

JE RIFFIN / BY MR. MILLER

JEFF GRIFFIN / BY MR. MILLER

1 Q And that appears to be dated March 24th, 2003?

2 A **Yes.**

3 Q Now, I see that under paragraph 16 there, excuse me,

4 17, the feasibility contingency expiration date, that

5 that box was Xed out and a "15 days after mutual

6 acceptance" was filled in there. Do you see that?

7 A **Okay.**

8 Q And that was part of your offer back to them?

9 A **I don't even know what that means.**

10 Q You don't know what that is. Was that something that

11 Ms. Sangder did?

12 A **I couldn't tell you.**

13 Q Okay. So do you recall anybody discussing that

14 paragraph 17 with you?

15 A **I don't recall.**

16 Q So, is it your testimony that you don't understand what

17 the feasibility contingency is?

18 A **No, my testimony is I don't remember what we discussed**

19 **about the feasibility contingency.**

20 Q And I guess on it looks like it's further into Exhibit

21 2 here, it's page 4 of 4 of the vacant land purchase

22 and sale agreement general terms, and looking at

23 paragraph U, and did you read that paragraph?

24 A **I'm sure I did at the time.**

25 Q Do you remember having any discussion with Ms. Sangder

1 were any moratoriums, any rules that were presently in

2 place that would stop me from developing this for my

3 retirement home.

4 Q And who did you talk to at the county health

5 department?

6 A **One of the health department desk people.**

7 Q Do you have a name of the person?

8 A **I do not.**

9 Q And when did you do that?

10 A **I did that before we bought the property, before we**

11 **attempted to buy the property the first time. It was**

12 **in the summer of 2002.**

13 Q But you don't have the name of the person you talked to

14 at the desk?

15 A **I don't.**

16 Q Okay. And did you do any further investigation besides

17 that conversation at the health department?

18 A **As part of that investigation, they gave me a list of**

19 **approved septic designers, engineers, for Thurston**

20 **County. I had to use one of those people to design my**

21 **system; otherwise, it could not be used.**

22 Q And what did you do with that list?

23 A **I went through the list and I contacted Skillings &**

24 **Connolly.**

25 Q And who did you contact at Skillings & Connolly?

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1 regarding what paragraph U meant?

2 A **I do not.**

3 Q And then on the following page after the page with

4 paragraph U on it, it's got an addendum/amendment, it's

5 MLS form number 34, and someone had written in

6 paragraph A there, "Buyer accepts the property as is

7 and has investigated to his satisfaction the

8 feasibility of use and development as described in Item

9 U of Form 25 of this agreement." And this is signed by

10 you, correct?

11 A **It's signed by me.**

12 Q And did anybody go over what that meant, or what does

13 that mean to you?

14 A **What it means to me is that I have investigated to my**

15 **satisfaction that the property is usable for what I**

16 **want.**

17 Q Okay.

18 A **That's what it means to me and that's what it meant to**

19 **me.**

20 Q And what sort of investigation did you do?

21 A **I went to the county health department.**

22 Q You personally went to the county health department?

23 A **I did.**

24 Q And what did you do at the county health department?

25 A **I asked them about developing this property, if there**

1 A **I talked to Bob Connolly.**

2 Q And what did Mr. Connolly tell you?

3 A **I hired Mr. Connolly to go to the county and confirm**

4 **what I had found out myself and to address the**

5 **feasibility of me being able to build a septic system**

6 **and build a home on that property.**

7 Q And did Mr. Connolly do that?

8 A **Yes, he did.**

9 Q And when did he do that?

10 A **I have a letter from him in the exhibits that we've**

11 **given to you and it's dated. I don't want to guess**

12 **what the date was. It says right on it what the date**

13 **is.**

14 Q Did you do any further investigation besides hire

15 Mr. Connolly?

16 A **No. On my own, you mean?**

17 Q Right. So, your conversation with someone at the desk

18 at the health department and Mr. Connolly's

19 conversation are what you consider constitute your

20 investigation; is that correct?

21 A **No, that is not what I said. I said that I talked to a**

22 **person, an agent with the health department in the**

23 **building, in the development department, and that's the**

24 **person that gave me the list of approved engineers for**

25 **septic. I intended to build it myself, so there was no**

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1 other information I needed from them.

2 Q Okay. And do you know who Mr. Connolly talked to?

3 A I don't. He just sent me the letter and the letter

4 speaks for itself.

5 Q Let's see, just to identify Exhibit 5 is what you found

6 at the auditor's office to be the deed to the property

7 signed by Ms. Johnson and Dennis Doyle and Gregory T.

8 Doyle on separate deeds. Is that your understanding,

9 your deed to the property?

10 A That is my understanding.

11 Q Okay. Showing you what's been marked for

12 identification for this deposition as Exhibit 6, it

13 appears to be an Olympia Multiple Listing Service

14 vacant land property description for Lot 11 and the

15 address is -- I guess I should just ask you, is the

16 address of your property on Steamboat Island, 2820

17 Steamboat Island Loop?

18 A That's not correct. It's 2820 Steamboat Island North

19 West is the correct address.

20 Q Okay. And have you ever seen this document before,

21 this Exhibit 6?

22 A No.

23 Q It appears to date back to April 27, 1998 and under the

24 remarks it states "Very unique island lot with SC

25 tidelands." Do you know what SC stands for in the

1 A I did.

2 Q Okay. And it's a letter dated June 29, 2003 to Beth

3 Davis, Broker and Ann Alvord, Salesperson and Peggy

4 Sangder, Salesperson at Coldwell Banker Evergreen

5 Olympic Realty in Olympia regarding your property. Why

6 don't you take a moment to read this letter or I guess

7 I should ask you, have you seen this letter before?

8 A I saw it when Mr. Carter appealed our septic approval.

9 It was part of his packet.

10 Q And I guess I just point out the last sentence of this

11 letter, "We remain willing to buy the listed property

12 at or above the listed price." Were you aware that he

13 made an offer for \$59,000 or more for the property?

14 A When?

15 Q Well, as of June 29th, 2003?

16 A No.

17 Q So, did Ms. Sangder not share this information with

18 you?

19 A I can't speak for Ms. Sangder, I can only reiterate the

20 first time I saw this was in Mr. Carter's appeal.

21 Q Which was after June 29, 2003?

22 A Yeah.

23 Q That was just this past year or earlier this year,

24 wasn't it?

25 A Yes.

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1 tidelands there, I don't know?

2 A I don't.

3 Q And then "Year-round recreational retreat. Septic not

4 available at this time. Community water. Moor or

5 anchor your boat. Own a little piece of Puget Sound."

6 You have never seen this document before?

7 A I have not.

8 Q Okay. Did you see anything similar to it in your

9 negotiations over Lot 11?

10 A I have not.

11 Q And I guess it does down below after directions it

12 says, "Owner Name: Doyle/Johnson" and then the agent is

13 Peggy Sangder and she was your agent; is that correct?

14 A She was my agent.

15 Q Okay. Coldwell Banker Evergreen. Were you aware that

16 she was involved in, appears to be, trying to sell this

17 property in 1998?

18 A I'm not aware of anything prior to me asking her about

19 that lot.

20 Q In 2002?

21 A Yes, and at that time, as I stated before, it was not

22 listed, there was no active listing.

23 Q Okay. And Exhibit 7, do you have that in front of you?

24 Exhibit 7 is a letter written by Bruce Carter who owns

25 property next to you. Have you met Mr. Carter?

1 Q The appeal.

2 A Yes.

3 Q In any of your other six purchases of property, had you

4 ever done a feasibility contingency before, to your

5 recollection?

6 A I cannot recall. I don't know.

7 Q Okay. That's all the questions I have for you,

8 Mr. Griffin.

9 MR. EDWARDS: I have no questions.

10 (Signature reserved.)

11 (Proceedings concluded at 11:05 a.m.)

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JEFF GRIFFIN,

Petitioner,

v.

THURSTON COUNTY, and its BOARD OF  
HEALTH,

Respondent.

No. 34418-1-II

PUBLISHED OPINION

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

## FACTS

### The Property

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

### Health Officer

During his OSS permit application process, Griffin requested that he be relieved of the responsibility of complying with several setback and site requirements of the TCSC. Specifically he requested (1) a waiver of the winter water table evaluation; (2) a waiver reducing the separation between the septic tank and pump chamber from ten to five feet; (3) a horizontal setback between the disposal component and building foundation from ten to two feet; (4) a horizontal setback between the disposal component and adjacent property line from five feet; (5) a horizontal setback between the disposal component and the surface water from one hundred feet to seventy-five feet; and (6) a reduction in the minimum design flow for a single-family residence from 240 to 120 gallons per day. Citing TCSC article IV, section 21.4.5, the health officer granted Griffin's six requests. The health officer indicated his belief that if an application

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met the criteria under TCSC section 21.4.5,<sup>1</sup> he was obligated to grant an OSS permit and he did so.

#### Hearing Officer

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

#### Board

Griffin appealed to the Board. Thurston County opposed Griffin's motion and the Interested Parties cross-appealed.

The Board adopted the hearing officer's findings of fact, conclusions, and decision. But the Board apparently disagreed with the hearing officer's conclusion that the winter water study evaluation was erroneously waived. And the Board underlined the word "may" when it reprinted

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

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

- 21.4.5.1 The lot is registered as a legal lot of record created prior to January 1, 1995; and
- 21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and
- 21.4.5.3 The proposed system meets all requirements of these regulations other than minimum land area.

Clerk's Papers (CP) at 120 (emphasis added).

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the ordinance but it did not explicitly base its ruling on its discretionary authority to deny Griffin a permit under section 21.4.5. Instead, it held that the phrase “meets all requirements” in section 21.4.5.3 is not fulfilled if the petitioner is granted waivers and setbacks. It reasoned that the word “requirements,” construed conservatively in order to protect the public’s health, excludes waivers and setbacks.

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

#### Superior Court

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

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

Report of Proceedings at 5. Although the superior court reversed the Board’s decision, it found no merit in Griffin’s assertions that his constitutional rights were violated. Griffin appeals.

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

ANALYSIS

Standard of Review

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

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

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

....

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

RCW 36.70C.130(1).

Standards (b) and (f) present questions of law that we review de novo. 7 Wash. State Bar Ass’n, Real Property Deskbook § 111.4(9), at 111-25 (3d ed. 1996) (citing *Freeburg v. City of Seattle*, 71 Wn. App. 367, 376, 859 P.2d 610 (1993)). Standard (c) concerns a factual determination that we review for substantial evidence. 7 Wash. State Bar Ass’n, Real Property Deskbook § 111.4(9), at 111-25.

“Substantial evidence” is evidence sufficient to convince an unprejudiced, rational person that a finding is true. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002). On review, we weigh all inferences in a light most favorable to the party that prevailed in the highest forum that exercised fact-finding authority. *Freeburg*, 71 Wn. App. at 371-72 (citing *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, *review denied*, 120 Wn.2d 1008 (1992)). Thurston County prevailed at the Department hearing, the highest forum with fact-finding authority, and thus we view all evidence and reasonable inferences in its favor.

#### Construction of Ordinance

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

Section 21.4.5 of the TCSC provides that the health officer may:

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

- 21.4.5.1 The lot is registered as a legal lot of record created prior to January 1, 1995; and
- 21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and
- 21.4.5.3 The proposed system meets all requirements of these regulations other than minimum land area.

CP at 120 (emphasis added).

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

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

We must give effect to all provisions of an ordinance and may not interpret an ordinance in a way that renders a portion meaningless or superfluous. *Cobra Roofing v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006). Under this principle, the "all requirements" portion of the ordinance at issue here cannot include "requirements" that have been waived or set back. If "all requirements" included waivers and setbacks, the language would be meaningless and superfluous. Every OSS petitioner, regardless of lot size, is required to comply with the TCSC's provisions or else obtain waivers and setbacks. Thus, the phrase is meaningful only if the application's sole deficiency is lot size. The Board properly construed the ordinance to mean that an undersized lot must meet "all requirements" without waivers and setbacks in order to trigger

the health officer's authority to exercise discretion and grant an OSS permit to an undersized lot.

#### Substantial Evidence

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

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

Griffin also mischaracterizes the TCSC as allowing a petitioner to satisfy TCSC requirements via one of several equivalent methods. Griffin requested and received an abdication of the Department's authority to require him to submit a winter water study under TCSC section 11.4.1 as well as four reductions from the "minimum horizontal separations" listed in TCSC

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

#### Constitutionality

Griffin cross-appeals and asserts three constitutional challenges to the TCSC under the doctrines of vagueness, vested rights, and substantive due process. We review *de novo* the constitutionality of a land use ordinance and decision. RCW 36.70C.130(1)(f); *Freeburg*, 71 Wn. App. at 376. Griffin has not demonstrated that the TCSC is unconstitutional on its face or as applied.

#### Vagueness

Griffin first asserts that the TCSC is unconstitutionally vague. A land use ordinance that provides fair warning and allows a person of common intelligence to understand the law's meaning does not violate a party's constitutional rights. *Young v. Pierce County*, 120 Wn. App. 175, 182, 84 P.3d 927 (2004). Courts do not require an unreasonable standard of specificity and we judge the ordinance as applied, not for facial vagueness. *Young*, 120 Wn. App. at 182. A duly enacted ordinance is presumed constitutional, and the party challenging it must demonstrate that

the ordinance is unconstitutional beyond a reasonable doubt. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005).

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

#### Vested Rights

Griffin next challenges the ordinance's application under the vested rights doctrine. "Vesting" refers generally to the notion that an agency may only consider a land use application under the statutes and ordinances in effect when the applicant submitted his application. *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994). Griffin asserts that because the Board previously interpreted the TCSC, article IV, section 21.4.5.1 differently, he had a right to rely on its continued erroneous interpretation of the ordinance and that, therefore, the Board violated his vested rights. But the vested rights doctrine relates to implementing new laws, not correcting a misinterpretation of existing law. See *Friends of the Law*, 123 Wn.2d at

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522. TCSC, article IV, section 21.4.5.1 was not only in effect when Griffin submitted his land use application, it was in effect when he bought the property with notice that it was unbuildable. The vested rights doctrine does not apply in the manner Griffin suggests.

Substantive Due Process

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

Reversed and remanded.

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QUINN-BRINTNALL, J.

We concur:

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BRIDGEWATER, P.J.

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PENOYAR, J.