

No. 38427-2-II

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

HARLAN CLARIE STIENTJES FAMILY TRUST

and

MARY JO STIENTJES,

Respondents

v.

THURSTON COUNTY,

Defendant

and

LARESSA VIA-FOURRE and CHARLES VIA,

Appellants

BRIEF OF APPELLANTS

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A. INTRODUCTION

This is an appeal of a superior court final judgment that granted Respondents' LUPA petition. That judgment set aside a decision of the Thurston County Board of County Commissioners who had remanded the Appellants' appeal of a land use decision back to the county Hearing Examiner for a decision on the merits after the Hearing Examiner had dismissed the appeal on a jurisdictional issue.

Thurston County Department of Development Services (DSD), issued a building permit for a recreational vehicle (RV) shed on the Respondents' (hereinafter Stientjes) property to Stientjes based on an incomplete and misleading application. DSD subsequently suspended the permit, but then reinstated it after approving a revised site plan. This approval included administrative decisions relating to the determination of a critical area boundary, the lack of need for a variance, and the lifting of a stop work order (SWO). Appellants (hereinafter Via-Fourre), neighbors on an adjoining property aggrieved by these administrative decisions, appealed to the Hearing Examiner who found he did not have jurisdiction to decide their appeal. Via-Fourre then appealed the Hearing Examiner's decision to the Thurston County Board of County Commissioners (hereinafter BOCC) who reversed and remanded the case back to the Hearing Examiner for a

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2 decision on the merits. Before the Hearing Examiner issued a decision on
3 the merits, Stientjes filed the LUPA petition in Superior Court. The trial
4 court denied Via-Fourre's motions to dismiss the petition for lack of
5 subject matter jurisdiction, and after briefing and argument, granted the
6 petition, reversed the BOCC, and reinstated the Hearing Examiner's
7 dismissal. Via-Fourre appeal.
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10 **B. ASSIGNMENTS OF ERROR AND THE ISSUES PERTAINING**
11 **THERETO**

12
13 1. Contrary to its ruling on Via-Fourre's motion at the initial hearing, the
14 Superior Court lacked subject matter jurisdiction to decide the LUPA
15 petition because the BOCC's decision ordering remand to the Hearing
16 Examiner is not a land use decision as defined at RCW 36.70C.020(1).
17 (Initial Hearing Order, Ruling 1, at Clerk's Papers (CP) 95.) The order of
18 remand is an interlocutory decision, that if not overturned by the Superior
19 Court, would have resulted in a final land use decision by the Hearing
20 Examiner. This is argued at Section E.1 below.
21

22 2. Contrary to its ruling on Via-Fourre's motion at the initial hearing, the
23 Superior Court lacked subject matter jurisdiction because petitioners the
24 Stientjes had not exhausted their administrative remedies before filing the
25 LUPA petition. (Initial Hearing Order, Ruling 2, at CP 95.) The Hearing
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Examiner never issued a decision on the merits of the Via-Fourre appeal, and therefore there was no land use decision for the Superior Court to review, only an interlocutory procedural decision not ripe for review. This is argued at Section E.2 below.

3. The Superior Court erred when it found that Via-Fourre did not have standing to appeal the administrative decisions of the Development Services Department (DSD) to the Hearing Examiner. (Final Judgment for Petitioners, Finding 3, at CP 193.) DSD, the county agency tasked with enforcing the county law at issue here, found that Via-Fourre’s appeal to the Hearing Examiner was timely and properly made. The agency only disputed Via-Fourre before the Hearing Examiner on technical questions of land surveying that have not to date been decided. This is argued at Section E.3 below.

4. The Superior Court erred when it found that Appellants were not aggrieved parties pursuant to RCW 36.70C.060(2). (Final Judgment for Petitioners, Finding 3, at CP 193.) Via-Fourre are aggrieved parties under LUPA, where they are indeed necessary parties, and under Thurston County Code (TCC) 17.15.410. As owners of adjoining property, with an imperiled dominant easement over the Stientjes property, they are aggrieved by damage to their property, its value, and to their use and enjoyment thereof. This is argued at Section E.3 below.

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5. The Superior Court erred when it found that the Appellants' appeal to the Hearing Examiner was a collateral attack on the building permit. (Final Judgment for Petitioners, Finding 2, at CP 193.) The attack is a direct attack. A building permit does not vest, only the right to have an application for it considered under the regulations existing on the date it was applied for. The responsibility to comply with then existing codes and regulations belongs to the applicant, at the time of the application and continuing afterward. This is argued at Sections E.4 and E.5 below.

6. The Superior Court erred in finding that Via-Fourre's only method of appeal of the issuance of the building permit was by a LUPA petition made within 21 day of its issuance on July 11, 2007. (Final Judgment for Petitioners, Finding 4, at CP 193.) This initial issuance was based on incomplete and misleading information supplied by the applicant Stientjes. The DSD, the county agency with the responsibility to enforce building codes and issue permits, stated the building permit was not issued until November 19, 2007, when DSD approved the site plan and building permit. The approval on November 19 included certain administrative decisions that Via-Fourre had a right to appeal under county law, as the BOCC correctly found. Any LUPA petition by Via-Fourre would have been premature and subject to dismissal. This is argued at Sections E.4 and E.5 below.

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7. The Superior Court erred when it failed to show the required deference to the construction of local law by the BOCC and the DSD, both of which found that Appellants’ initial appeal to the Hearing Examiner was timely and in accord with county law. (Final Judgment for Petitioners, Findings 3, 4, and 5 at CP 193; August 29, 2008 Record of Proceedings (RP) at p. 30, line 7 ff.) This is argued at Section E.6 below.

C. STATEMENT OF THE CASE

1. On July 11, 2007, a building permit to construct a shed for a recreational vehicle (RV) was issued by the Thurston County Permit Assistance Center (PAC) “over-the-counter” to Stientjes, neighbors on land adjoining that of Via-Fourre. As stated in the Thurston County Development Services Planning & Environmental Section Report, (Exhibit 1 before the Hearing Examiner, hereinafter Staff Report):

The application and site plan were not routed to the Development Services, Planning and Environmental Section (Planning) for a field visit, because the Applicant had failed to provide topographical information, and location and setback from the marine bluff on the initial site plan. Therefore, the initial approval by PAC staff was at least partially based upon insufficient information supplied by the Applicant.

(Administrative Record (AR) at 49. The Administrative Record is indexed at CP 99.)

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2. Following complaints from Via-Fourre relating to their concerns with violations of the front-yard setback and the Critical Areas Ordinance (CAO) marine bluff setback, the initial date of which there is conflicting testimony below, DSD staff visited the building site on August 28 and 29, 2007, and took measurements pertaining to both setbacks. A Stop Work Order (SWO) was posted on August 28 to “address the front yard setback violation and to address the potential intrusion into the marine bluff hazard area setback.” (AR at 50.) (The violation of the front yard setback requirement was later corrected by Stientjes and is not an issue here or below.)

3. DSD staff wrote Stientjes on September 6, 2007 informing them that

Land use approval of your site plan is suspended at this time pursuant to R105.6 of the International Residential Code for the following reasons. (1) The application which was submitted for the proposed RV cover was not complete because the application and site plan did not show critical areas or their buffers. (2) The project application did not answer questions relating to steep slopes listed under “Property Information” on page 2 of the application.

DSD Staff suggested three options to cure the marine bluff setback violation: 1) withdraw the building permit application; 2) supply a survey showing the shed was outside of the marine bluff setback; or 3) apply for a variance to allow encroachment into the bluff setback. (AR at 50 and 155.)

4. After submitting a letter from a professional surveyor that DSD staff found inadequate because it “was not stamped, nor was an actual survey

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map provided,” (AR at 158) Stientjes applied for an administrative variance. This application was denied by staff for failing to meet variance-approval criteria set out in TCC 17.15.420 and 20.07.050. DSD staff found, with particular regard to the Via-Fourre property, that

The granting of the variance would be injurious to other land or improvements in the vicinity and neighborhood. The shoreline views of the neighboring residence immediately east [sic] (upland) of the subject property would suffer substantially if the variance were granted. [Criteria 5]

The proposal for a recreational vehicle cover would have a substantially greater negative impact to the neighboring property to the east [sic] (upland) and cause greater harm in terms of property value by diminishing the existing view than the harm caused to the applicant from denying the variance ... [Criteria 7] (AR 50 and 137.)

5. Upon denial of the variance, *Stientjes* appealed this administrative decision to the Hearing Examiner. But before the hearing was held, DSD changed its mind and decided that the RV shed was *outside* of the marine bluff setback and a variance was *not* needed. The SWO, in effect since August 28, was then lifted. This was communicated to Stientjes and to the project file by a DSD letter dated November 19, 2007, which included instructions and forms for taking an administrative appeal. (AR at 51.) Stientjes then withdrew their appeal.

6. Upon becoming aware of the November 19, 2007 administrative decisions 1) to lift the SWO, 2) to declare the RV shed outside of the marine bluff setback and 3) finding a variance was not required, Via-

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Fourre appealed these decisions in the manner the DSD letter of November 19 instructed. As stated in the first sentence of the Staff Report's Description of Appeal (AR at 49):

On November 30, 2007, the Appellants [Via-Fourre] submitted a *timely* appeal regarding Thurston County *approval of a building permit* and site plan approval for the construction of an RV shed located at 9840 Johnson Point Road, Olympia WA, Parcel 56550105400. [Emphasis added.]

Via-Fourres' notice of appeal below, found at Attachment b of the Staff Report, states that it relates to "Variance Request Marine Bluff/Landslide Hazard Areas." (AR at 61.)

7. On December 18, 2007, a Pre-Hearing Conference was held before the Hearing Examiner at which Via-Fourre moved for an order reimposing the SWO until such time as their appeal was decided. (AR at 70.) The Hearing Examiner ruled that he lacked jurisdiction to reimpose the SWO. A Pre-Hearing Order issued setting the Hearing for February 4, 2008. (AR at 68.)

8. The hearing was held, lay and expert testimony taken, including testimony by a professional land surveyor hired by Via-Fourre to do an actual on-the-ground survey, argument was had, and on March 4, 2008, the Hearing Examiner issued his decision finding that 1) he lacked jurisdiction to decide the appeal, 2) he was barred from reaching the merits of the appeal, and 3) the appeal should have brought in Superior

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Court under LUPA within 21 days of the original building-permit issuance on July 11, 2007. (AR at 17.)

9. Via-Fourre timely appealed the Hearing Examiner's denial to the Thurston County Board of County Commissioner. (AR at 1.) The issues were fully briefed by Stientjes and Via-Fourre. The Board of County Commissioners (BOCC) moved and unanimously approved a resolution at their April 30, 2008 meeting finding Via-Fourre's initial appeal was proper and timely, and remanding the matter back to the Hearing Examiner for a decision on the record created at the February 4, 2008 hearing. (Verbatim Transcript of BOCC Recorded Proceedings at Page 10.)

10. On May 7, 2008, Stientjes filed a LUPA petition asking the BOCC order of remand be vacated. (CP at 7.)

11. On May 12, 2008, the BOCC issued their written decision based on the April 30, 2008 resolution. (AR at 249.) It finds that:

The hearing examiner's focus on the building permit in this appeal is misplaced. Under the CAO, a single family residence or appurtenant structure that that is within a marine bluff is (1) subject to review under the CAO and (2) only allowed if it is in compliance with the requirements of the CAO. TCC 17.15.305 and Table 5 No. 39. Furthermore, the performance standards and other requirements of the CAO shall be applied to residential and appurtenant structures through any permit review, i.e., building permit, required by county ordinances. In addition, the County may approve, approve with conditions, or deny any permit application for a residential structure within the marine bluff in order for the

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structure to comply with the CAO. TCC 17.15.310D. Finally, TCC 17.15.410 specifically authorizes an “aggrieved person” to file an appeal of “an administrative decision” made under the CAO to the hearing examiner. Such appeals are governed by TCC 20.60.060, and thus must be filed within 14 days of the administrative decision.

The hearing examiner erred, to the extent his decision suggests that Via Fourre did not timely file challenge the critical area determinations made by Mr. Longanecker. There is no dispute Via Fourre filed their appeal with fourteen days. Therefore, pursuant to TCC 17.15.410, Via Fourre filed a timely appeal of Mr. Longanecker’s decision regarding the marine bluff, and the hearing examiner had jurisdiction under the CAO to consider these issues.

A copy of the BOCC Decision is attached to this brief as an appendix.

12. The Initial Hearing on the LUPA petition was held on June 17, 2008, before the Honorable Katherine M. Stolz of Pierce County Superior Court, sitting as visiting judge after all Thurston County Superior Court Judges recused themselves because a practicing Thurston County attorney had an interest in the case. (Report of Proceeding (RP) of June 17, 2008.)

13. At the June 17, 2008 Initial Hearing, Stientjes moved, *inter alia*, to dismiss Via-Fourre based on a lack of standing (CP at 30). The trial court reserved on this motion to allow Via-Fourre time for additional briefing. (June 17 RP at p. 18.) Via-Fourre cross-moved to dismiss the petition based on the court’s lack of subject matter jurisdiction since (1) the BOCC decision to remand was not a land use decision, and (2) Stientjes had not

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exhausted their administrative remedies. (CP at 72.) The court denied Via-Fourre's cross-motions. (CP at 95.)¹

14. After full briefing, including on the issue of Via-Fourre's standing to participate in the LUPA action (CP at 114), a hearing was held on the Stientjes petition on August 29, 2008. The petition was granted, the BOCC decision of May 12, 2008 was vacated, and the Hearing Examiner's March 4, 2008 decision dismissing Via-Fourre's original appeal based on a lack of jurisdiction was reinstated.

15. Via-Fourre timely appealed to this Court.

D. SUMMARY OF ARGUMENT

The Superior Court did not have subject matter jurisdiction to decide the LUPA petition because the BOCC decision appealed from is not a land use decision, it is an order of remand that, if it is allowed to stand, would lead to an appealable land use decision. Further, Stientjes by circumventing a decision on the merits by the Hearing Examiner by the premature filing of a LUPA petition, failed to exhaust available administrative remedies.

¹ Thurston County, although a named party in the LUPA proceeding and here, did not participate in the LUPA litigation in Superior Court.

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Due to an incomplete building permit application, the Stientjes site plan, a part of the building permit application, was not approved until November 19, 2008. That approval included administrative decisions that were timely and properly appealed by Via-Fourre to the county Hearing Examiner. Via-Fourre had standing to bring the administrative appeal below, and they had standing to defend the Board of County Commissioners' order of remand in Superior Court, where, as parties specifically named in the BOCC decision and order, they were necessary parties.

This case is distinguishable from those relied on by Stientjes in prior briefing below, the Hearing Examiner, and the trial court in that the cause of the delay in approval of the Stientjes permit was due Stientjes' own actions and omissions, not through fault of the local jurisdiction. It is further distinguished by the fact that the site plan for a building permit is not a second permit, beyond the building permit, but rather it is a required part of the initial building permit application. Even if a building permit is improvidently granted, nothing "vests" but the right to have the permit application considered under the then existing regulations. The responsibility of complying with those regulations is and remains that of the permittee.

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LUPA specifically requires deference be afforded the construction of a law by the local jurisdiction with expertise. Here the Superior Court paid no such deference. Although the county DSD, which enforces the law in question, and the BOCC, which body enacted the law in question, both found Via-Fourre's appeal timely and proper, the Superior Court concluded that theirs' was an erroneous construction of the law. However, the Superior Court does not explain why it is an erroneous construction, certainly the most minimal indicia of deference.

The July 31, 2008 decision and plurality opinion in *Futurewise v. Western Washington Growth Management Hearings Board* does not affect this case as those portions of the Thurston County Critical Areas Ordinance at issue here predate ESHB 1933. Further, alternative relief is afforded Via-Fourre by the Shoreline Master Program for the Thurston Region.

E. ARGUMENT

1. THE STIENTJES LUPA PETITION ASKS FOR JUDICIAL REVIEW OF A DECISION THAT IS NOT A "LAND USE DECISION" AND THEREFORE THE SUPERIOR COURT SHOULD HAVE DISMISSED THE PETITION

The Land Use Petition Act has as its purpose "to reform the process for judicial review of land use decisions made by local jurisdictions ..."

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(RCW 36.70C.010). Section .020 of LUPA, at subsection 1, defines a land use decision as:

- (1) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:
 - (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;
 - (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
 - (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

The decision Stientjes appealed below, an order of remand from the BOCC, the body with the highest level of authority to make land-use determinations in Thurston County (TCC 2.06.070), to the Hearing Examiner for a decision on the merits of the case, meets none of these definitional categories. It is not a final determination on "[a]n application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or

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used ...” It is not a final determination on “[a]n interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property ...” Nor is it a final determination on “[t]he enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property.” Rather, it is only an order of remand, which if allowed to stand will eventually result in a land use decision.

To give effect to the purpose of LUPA, the meaning of “final determination” must be narrowly construed to eliminate the risk of premature judicial intrusion into the complex field of land use decisions. *Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 101, 38 P.3d 1040 (2002). The court in *Sheng-Yen Lu*, at 100, observes:

This legislative choice of words must mean something. We conclude that the most reasonable meaning to give to this legislative choice is to conclude that courts should generally defer review of decisions involving the use of land until such decisions are final-that is when the highest body or officer has finally acted.

In Thurston County, the highest body with authority to act on land use decisions is the BOCC. By remanding to the Hearing Examiner for a decision on the merits, the BOCC could not have intended their order of March 12, 2008 itself to be a final determination that put to rest the cause

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2 of action, leaving nothing open to further dispute. *Samuel's Furniture, Inc.*
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4 *v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002).

5 This Court in *Pacific Rock Environmental Enhancement Group v.*
6 *Clark County*, 92 Wn. App. 777, 781, 964 P.2d 1211 (1998), considering a
7 LUPA appeal of a hearing examiner's discovery order, found the
8 Legislature's language to be unambiguous, stating

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10 Interlocutory procedural decisions do not fall under any of these
11 definitions of "land use decision": (a) this order was not a
12 determination on an application for government approval of land use;
13 (b) this order was not an "interpretative or declaratory decision
14 regarding the application"; (c) this order was not an "enforcement by a
15 local jurisdiction of ordinances regulating the ... use of real property."
16 RCW 36.70C.020(1)(b), (c). Because the Legislature explicitly
17 excluded certain means of review from the scope of LUPA, and
18 included only certain kinds of decisions, it is clear that if the
19 Legislature had intended to provide review of pretrial procedural
20 decisions within the act, it would have done so.

21
22 The same can be said for orders of remand. The Legislature omitted
23 them from LUPA's definition of land use decisions. As with the
24 discovery order in *Pacific Rock*, the remand order here is an interlocutory
25 procedural order, not a land use decision.

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27 *WCHS, Inc. v. City of Lynwood*, 120 Wn. App. 668, 680, 86 P.3d 1169
28 (2004), citing *Pacific Rock*, in considering the question of what constitutes
"a final determination by a local jurisdiction's body or officer with the
highest level of authority to make the determination, including those with
authority to hear appeals ...", states that "the dispute here is not about a

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2 'final' decision. It is about an interim decision made in the process of, but
3 prior to, reaching a final decision on a permit. LUPA does not apply to
4 interlocutory decisions.”

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6 LUPA does not grant the Superior Court jurisdiction to review the
7 BOCC's order remanding Via-Fourre's appeal to the Hearing Examiner
8 and therefore the petition should have been dismissed for lack of subject
9 matter jurisdiction. A court's subject-matter jurisdiction over a cause or
10 proceeding is a question of law that is reviewed *de novo*. *Mendoza v.*
11 *Neudorfer Engineers, Inc.*, 145 Wn. App. 146, 149, 185 P.3d 1204 (2008),
12 citing *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003).

14 **2. WHILE ATTEMPTING TO APPEAL A DECISION THAT WAS NOT**
15 **APPEALABLE UNDER LUPA, STIENTJES FAILED TO EXHAUST**
16 **ADMINISTRATIVE REMEDIES**

17 Pursuant to RCW 36.70C.060(2)(d), before filing a LUPA petition,
18 parties must exhaust their administrative remedies (see, e.g., *Ward v.*
19 *Board of County Com'rs, Skagit County*, 86 Wn. App. 266, 936 P.2d 42
20 (1997)). Stientjes have failed to do that.

21 Stientjes are attempting to interrupt the administrative process. But
22 LUPA's finality requirement is intended to discourage parties from
23 ignoring administrative procedures by resorting to the courts prematurely.
24 *Phillips v. King County*, 87 Wn. App. 468, 480, 943 P.2d 306 (1997).

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Stientjes eventually had their site plan approved and a building permit issued on November 19, 2007. (AR at 49; as quoted at ¶ 6 of the Statement of the Case above.) Via-Fourre, as aggrieved parties, appealed that decision to the Hearing Examiner. The remand from the BOCC simply orders the Hearing Examiner to decide the appeal on the merits, it does not determine how the examiner will rule on the merits. Only if the Hearing Examiner finds for Via-Fourre, and rescinds the building permit, will Stientjes be injured-in-fact. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52 P.3d 522, *amended on denial of reconsideration, rev. denied* 149 Wn.2d 1013, 69 P.3d 875 (2002).

At this point in the proceedings below, the only “injury” to Stientjes is that the BOCC vindicated Via-Fourre’s right to be heard and have their appeal decided. And while the phrase “person aggrieved or adversely affected by the land use decision” appears only in subsection 2 of RCW 36.70C.060, that subsection pertaining to parties *other* than the applicant and owner of the property, by the same logic that the court in *Ward* found that applicants and owners are required to exhaust their administrative remedies (a requirement that also appears only in subsection 2), those who would bring a petition must actually have suffered an injury-in-fact by the decision they appeal. This is a basic tenet of administrative law that was not abrogated by LUPA. Therefore, Stientjes did not have standing to

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bring the LUPA petition and the Superior Court lacked subject matter jurisdiction to decide it. Subject matter jurisdiction is a question of law that is reviewed *de novo*. *Mendoza*, 145 Wn. App. at 149.

3. VIA-FOURRE HAVE STANDING UNDER THURSTON COUNTY'S CRITICAL AREA ORDINANCE AND THEY HAD STANDING BEFORE THE SUPERIOR COURT AS REQUIRED PARTIES UNDER LUPA

Contrary to the Superior Court's finding that Via-Fourre lacked standing before it (August 29 RP, page 36, line 14), the RCW 36.70C.040(2) states:

- (2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on *the following persons who shall be parties* to the review of the land use petition ...
- (d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered ... [Emphasis added.]

Via-Fourre filed an appeal with the Hearing Examiner challenging certain administrative decisions made in the course of granting Stientjes a building permit for a RV shed. When the Hearing Examiner declined to decide their appeal on the merits, Via-Fourre appealed to the BOCC who remanded the matter to the Hearing Examiner, directing him to decide the initial appeal. Via-Fouree are named in both written decisions, and it is the decision on their appeal to the BOCC that Stientjes petitioned against in

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Superior Court. (BOCC Decision of May 12, 2008, AR at 250; attached here as an appendix.)

Via-Fourre were proper and necessary parties. Without their presence, the petition would need to have been dismissed as they have never abandoned their appeal. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 965 P.2d 636 (1998).

The November 19, 2007 letter of DSD staff member Scott Longanecker to Stientjes (AR at 132) sets forth appealable administrative decisions. One is the determination of the location of the marine bluff setback and another the concomitant finding that Stientjes' RV shed is outside of the setback.

TCC 17.15.410(A)²:states:

Any aggrieved person may appeal an administrative decision made under this title, including a decision by the health officer, to the hearing examiner. Such appeals are governed by TCC Section 20.60.060. Appeals of the location of a critical area boundary or of a wetland rating shall be supported by technical evidence. [Emphasis added.]

The County's decision relating to the location of the marine bluff setback, as defined at TCC 17.15.620(B)(2)(b)³, and the decision that the RV shed is outside of the marine-bluff critical area

² TCC 17.15.410 amendments: Ord. 12032 § 10, 1999; Ord. 11398 § 8 (part), 1997; Ord. 11200 § 9, 1996; Ord. 10528 § 1 (part), 1994.

³ TCC 17.15.620 amendments: Ord. 11200 § 27, 1996; Ord. 10528 § 1 (part), 1994.

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boundary are thus appealable to the Hearing Examiner by Via-Fourre as aggrieved persons, the latter defined at TCC 17.15.200⁴:

“Aggrieved person” means one who is directly affected by the *approval*, denial or conditioning of a development permit reviewed under this chapter (such as the applicant); but who is not the owner, agent, tenant, operator, lessor or other person with a financial interest in the property upon which the development permit is requested. [Emphasis added.]

The building permit, and its site plan, is a development permit that DSD reviewed under Chapter 17.15, Critical Areas, of the county code.

The letter of November 19, 2007, also reports a third administrative decision, that is, the building of the RV shed does not require a variance. This decision directly affected Via-Fourre by removing the requirement for the application of the variance criteria pursuant to TCC 17.15.420⁵ and 20.07.050. When DSD previously had applied these criteria, the variance was denied specifically due to the impacts on Via-Fourres’ shoreline views and the effect of the low-value shed on their property value. As explained in the Staff Report: “[t]he granting of the variance would be injurious to other land or improvements in the vicinity and neighborhood.”

(See ¶ 4 of the Statement of the Case; also see photographs of the then-

⁴ TCC 17.15.200 amendments: Ord. 12463 §§ 2, 3, 2001; Ord. 12155 § 2, 2000; Ord. 12032 §§ 1, 2, 1999; Ord. 11590 § 1, 1997; Ord. 11398 § 8 (part), 1997; Ord. 11200 § 2, 1996; Ord. 10528 § 1 (part), 1994.

⁵ TCC 17.15.420 amendments: Ord. 11398 § 8 (part), 1997; Ord. 11200 § 11, 1996; Ord. 10528 § 1 (part), 1994.

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2 unfinished shed taken by county staff, Ex. 1(t) before the Hearing
3 Examiner, at AR 152 and 153.)
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5 Table 1A: Permit Review Matrix: Thurston County Critical Areas
6 Ordinance, at Chapter 17.15, Part 300, lists administrative variances and
7 marine bluff reviews as items subject to appeal to the Hearing Examiner.
8 Likewise, TCC 20.60.060, referenced by 17.15.410(A), governing appeals
9 under Chapter 17.15, refers to Table 2: Permit Review Matrix: Thurston
10 County Zoning Ordinance at 20.60.020, where “[o]ther administrative
11 decisions/code interpretations” are listed as appealable to the Hearing
12 Examiner.
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14 Based on the deficiency of the initial application, under *Mission*
15 *Springs v. City of Spokane*, 134 Wn.2d 947, 952, 954 P.2d 250 (1998), the
16 County was within its rights to stop the construction, investigate the
17 situation, and attach conditions to the permit, including the requirement
18 for a variance. “In the eyes of the law the applicant for a grading permit,
19 like a building permit, is entitled to its immediate issuance *upon*
20 *satisfaction of relevant ordinance criteria ...*” (*Id.* at 960; emphasis
21 added.) Thus the right to the issuance of a building permit depends on the
22 satisfaction of the relevant ordinance criteria. Stientjes did not satisfy
23 those criteria as their application omitted information about the marine
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2 bluff critical area on their property, as well as other topographic
3 information.
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5 When the County reversed itself, approved the site plan and decided a
6 variance was not required, Via-Fourre became aggrieved parties with a
7 right to appeal the administrative decisions by the County that the shed
8 was outside of the marine bluff setback, a variance was not required, and
9 their interests would not be considered by the County. Before that time,
10 the County had been addressing their interests by its issuance of the SWO
11 and the administrative review of the site plan. The Hearing Examiner's
12 decision that Via-Fourre's only right of appeal was to the Superior Court
13 by August 1, that is 21 days after the initial issuance of the building permit
14 on July 11, besides being wrong on the law, is a slippery slope that calls
15 into question a county's right to condition a permit following an
16 incomplete and misleading application.
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19 Via-Fourre are owners of a beach-access easement along the north
20 boundary of the Stientjes property, running from their parcel to the
21 shoreline. (Ex. 1(f) before the Hearing Examiner, AR at 102.) Any
22 development within the marine bluff setback area has the potential to
23 further harm their shoreline access by increasing the risk of landslides on
24 the bluffs, thereby further harming Via-Fourre's beach-access easement.
25 This section of shoreline has already been the site of significant
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landsliding. (Staff Report, AR at 50.) Therefore, Via-Fourre again meet the test enunciated in *Thornton Creek Legal Defense Fund*, 113 Wn. App. at 48: to wit, in order to satisfy the standing requirement under LUPA of being "aggrieved or adversely affected by the land use decision," objectors must allege facts showing that they would suffer an "injury-in-fact" as a result of the land use decision; in other words, objectors must show they personally will be specifically and perceptibly harmed by the proposed action.

RCW 36.70C.60(2)(b) states that to be an aggrieved party under LUPA, an adjoining property owner must be a person whose "asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision." When the DSD found that a variance was needed, it particularly referenced the impact of the shed on Via-Fourre property as its reason for denying the variance. Additionally, the marine bluff critical area and its buffer exist "[t]o minimize damage to personal health and property due to landslide, seismic, volcanic, or other naturally occurring events ..." TCC 17.15.600(A)⁶. Due to the Via-Fourre's possessing the aforementioned access easement, it is their property and health the county is obliged to consider and protect, and

⁶ TCC 17.15.600 amendments: Ord. 11200 § 23, 1996: Ord. 10528 § 1 (part), 1994.

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hence, theirs are among the interests the county was required to consider when it made the land use decision.

RCW 36.70C.60(2)(c) requires that “[a] judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision ...” If the Superior Court had denied the petition, the Hearing Examiner would have decided the merits of their original appeal. A favorable decision on the merits would preclude Stientjes from placing the shed where it will devalue and endanger Via-Fourre’s property.

The BOCC concluded, after a complete review of the administrative record before the Hearing Examiner, that Via-Fourre were aggrieved persons with a right of appeal. Even the Hearing Examiner’s decision incorrectly finding that he lacked jurisdiction to decide the appeal, did not anywhere call into question the fact that Via-Fourre were, and remain, aggrieved persons. As the court in *Ward*, 86 Wn. App. at 271 observed:

The Legislature sensibly confined the category of non-owners eligible to seek judicial review of such decisions to those who participated in the administrative process to the extent allowed. This approach vests greatest discretion in local decisionmakers, and is thus consistent with the Legislature's policy to accord deference to local government and allow only limited judicial interference. RCW 36.70C.130.

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In a recent LUPA decision, this Court stated that it reviewed questions of law *de novo*. *Sylvester v. Pierce County*, 2009 WL 313752 (Wn. App. Div. 2), citing *Pincrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). Via-Fourre believe that all questions presented in this appeal are questions of law since what was appealed to Superior Court was the BOCC decision to remand the case to the Hearing Examiner. If this Court were to determine that the question of Via-Fourre's status as aggrieved persons was an issue that it must decide, in spite of the BOCC conclusion on the issue, then Via-Fourre argue that there is substantial evidence, specifically cited above, evidence admitted by the Hearing Examiner and in the Administrative Record, to make the same finding anew.

4. BOCC AND DSD BOTH FOUND THAT THE BUILDING PERMIT APPLICATION WAS NOT COMPLETE UNTIL NOVEMBER 19, 2007, AND THEREFORE VIA-FOURRE'S ADMINISTRATIVE APPEAL ON NOVEMBER 30, 2007 WAS TIMELY

Under TCC 14.48.100(B)(4), an application for building permit is required to be accompanied by a “[s]ite plan, which shall include or show

- k. The location of any existing critical areas or buffers affecting the site, both on-site and on adjacent properties, including, but not limited to, shorelines, wetlands, streams, steep slopes and special habitats. Off-site information obtained from available county mapping is sufficient,

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l. If the project site is within a shoreline designation or has critical areas on-site, all existing vegetation proposed to remain and all proposed landscaping, including location and type,
m. Topographic information for the entire subject parcel or parcels and a minimum of fifty feet onto adjacent parcels, based on available county two-foot contour maps ...”

A permit issued in violation of these requirements is an invalid permit subject to revocation or suspension. Section R105.4 of the International Residential Code⁷ states in its entirety:

The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or *of any other ordinance of the jurisdiction*. Permits presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid. The issuance of a permit based on construction documents and other data [e.g., a site plan] shall not prevent the building official from requiring the correction of errors in the construction documents and other data. The building official is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this jurisdiction. [Emphasis added.]

If the applicant fails to provide the required information, the County is authorized, pursuant to Section R105.6, “to suspend or revoke a permit issued under the provisions of this code wherever the permit is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any of the provisions of this code.”

⁷ Pursuant to state law (RCW 19.27.031), Thurston County has adopted the IRC as its building code for construction of residential buildings, including the type of structure at issue here. A copy of the IRC is attached to the Via-Fourre brief at CP 114.

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Therefore, when a site visit by DSD staff revealed violation of the front-yard setback and possible violation of the marine bluff critical area buffer, as well as showing the incompleteness and inadequacy of the site plan, the County was within its authority under the IRC to suspend the (invalid) permit, post a stop work order, and require further review of the site plan. In fact, the site plan and building permit were not approved until November 19, 2007, when DSD claimed new air photos assisted it in determining that the shed was outside of the buffer. (AR at 101; note stamp in lower left corner. The original site plan is at AR 80; and an earlier revision, still incomplete, is at AR 88.) Pursuant to the IRC and TCC 14.48.100, it was only then that a putatively *valid* permit could be issued.⁸

The site plan is not a subsequent permit but rather it is part of the building permit application. The site plan for a building permit on a parcel containing a critical area, such as Stientjes' that was almost entirely within a marine bluff hazard area setback when they purchased it in May of 2007 (June 17 RP at page 4, line 19) and whose existing structures are "nonconforming" (AR at 102 and 156), must show the critical area. When,

⁸ The correctness of the approved site plan was the major issue before the Hearing Examiner. Since the Hearing Examiner's decision did not reach that issue, and that issue is not implicated in the BOCC decision appealed to the Superior Court, Via-Fourre do not raise it before this Court.

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as here, a critical area is involved, TCC 17.15.310⁹ requires that the review of the applied for permit be coordinated with a critical area review. (TCC 17.15, Table 5, No. 39, applies this requirement to construction of buildings appurtenant to single family residences.) The failure of Stientjes to include the required information circumvented this required review.

In *Mission Springs*, 134 Wn.2d at 952, the court was faced with the question of “whether a municipality may withhold a ministerial land use permit for reasons extraneous to the satisfaction of the lawful ordinance and/or statutory criteria.” It found a municipality may not, for “[i]n the eyes of the law the applicant for a grading permit, like a building permit, is entitled to its immediate issuance *upon satisfaction of relevant ordinance criteria ...*” (*Id.* at 960; emphasis added.) Stientjes did *not* satisfy the

⁹ TCC 17.15.310 states in relevant part: Review standards--Coordination with other permit reviews.

A. This chapter does not require any permit in addition to those otherwise required by county ordinances.

B. The performance standards and other requirements of this chapter shall be applied to uses and activities as shown in Tables 2 and 5 [No. 39, which lists single family residences and appurtenant structures] through any permit review or approval process otherwise required by county ordinances.

D. Thurston County may approve, approve with conditions, or deny any permit application for a use or activity listed in Tables 2 and 5 in order to comply with the requirements of this chapter. (Ord. 11398 § 8 (part), 1997: Ord. 10528 § 1 (part), 1994) [Table 5 was amended in February 2003, and then only with respect to wireless communication facilities.]

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2 relevant ordinance criteria on their application for a building permit and
3 thus not entitled to the protection afforded by *Mission Springs*.
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5 Just because a building permit was improvidently granted upon an
6 incomplete and misleading application, this does not mean that the
7 beneficiary of such a permit has a right to not comply with existing codes
8 and ordinances. In *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759
9 P.2d 447 (1988), the court held that “[t]he duty to ensure compliance rests
10 with individual permit applicants, builders and developers.” Further, the
11 court in *Taylor* found, overruling *J & B Dev. Co. v. King County*, 100
12 Wn.2d 299, 669 P.2d 468 (1983) that:
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15 the issuance of a building permit is an official action by which a local
16 government implicitly approves a builder's plans to erect a structure of
17 the type and at the place approved. Issuance of a building permit does
18 not implicitly imply that the plans submitted are in compliance with all
19 applicable codes. Nor do periodic building code inspections implicitly
20 imply that the construction is in compliance with all applicable codes.
21 Building permits and building code inspections only authorize
22 construction to proceed; they do not guarantee that all provisions of all
23 applicable codes have been complied with.

24 (*Id.* at 167.)

25 Any argument that the Stientjes had a “vested right” to proceed with
26 their project unaffected by any later determinations by the DSD or the
27 Hearing Examiner, is simply not in keeping with the rule in *Taylor*. In a
28 recent case decided in Division I, *Heller Building, LLC v. City of Bellevue*,

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147 Wn. App. 46, 194 P.3d 264 (2008), the court in dispatching an argument that an issued building permit created a vested right, described the argument as a “red herring.” (*Id.* at 60.) “The vested rights doctrine merely gives permit applicants a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application.” (*Id.* at 60, citing *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 16, 959 P.2d 1024 (1998).)

Here, DSD had the right to suspend the permit and make administrative determinations before reinstating the permit on November 19, 2007. And as the DSD and BOCC determined, Via-Fourre had the right to appeal those administrative determination to the Hearing Examiner within 14 days of their issuance, which they did.

5. THIS CASE IS DISTINGUISHED FROM THE *WENATCHEE SPORTSMEN, NYKREIM AND HABITAT WATCH* LINE OF CASES BY THE FACT THAT THE ERROR HERE WAS THE DOING OF STIENTJES, WHO MISLED COUNTY STAFF ABOUT IMPORTANT SITE CHARACTERISTICS

In *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) the court found that the petitioner, a citizens’ group opposing a special use permit issued for a golf course, was precluded by LUPA’s 21 day filing limitation from challenging extensions of the permit. However, nowhere in the opinion is there any indication that the permittee had failed

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2 to provide correct information or had failed to abide by all requirements to
3 obtain and extend the permit. (See, *id.*, footnote 7 at 409, where the court
4 implicitly acknowledges that under the Skagit County code a permit could
5 be revoked for violation of a condition.) Rather, the *county* failed to give
6 the required public notice of the extension hearings.
7

8 Habitat Watch, a citizens group comprised of property owners
9 neighboring the proposed golf course site, opposed the project.
10 Habitat Watch was a party in public hearings that were held prior
11 to the issuance of the initial permit and prior to the first permit
12 extension. Although notice and a hearing were provided for the
13 initial permit decision and the first extension, the county
14 mistakenly failed to provide notice or a public hearing for the
15 second and third permit extensions.

16 (*Id.* at 400.)

17 When Habitat Watch did become aware of the extensions, it filed a
18 LUPA petition and a complaint for declaratory and injunctive relief in
19 superior court challenging the validity of the last two special use permit
20 extensions, as well as a subsequent grading permit. *Id.* at 404. The Court
21 found that the attack on the grading permit was collateral to Habitat
22 Watch's attack on the special use permit and, therefore, was impermissible
23 under the rule of *Wenatchee Sportsmen Ass'n v. Chelan County*, 141
24 Wn.2d 169, 176, 4 P.3d 123 (2000). Here, Via-Fourre's challenge to the
25 site plan is not a collateral attack on the building permit, for the site plan is
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2 a necessary part of the application for a building permit. The site plan and
3 building permit exist together, neither taking precedence in time.
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5 In *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), the
6 Court rebuffed a challenge brought by the county itself to a boundary line
7 adjustment (BLA), approved by the county planning director, for failure to
8 comply with LUPA's 21-day filing requirement. While acknowledging
9 that the planning director misinterpreted county law in his approval (*id.* at
10 939) nowhere is there any indication that the information supplied by the
11 applicants for the BLA was materially incorrect, incomplete, or
12 misleading.¹⁰ The error was made by the county's agent while he
13 possessed full information about the parcels at issue. The court in *Nykreim*
14 notes
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17 As *amici curiae* point out, if this court allows local government to
18 rescind a previous land use approval without concern of finality,
19 *innocent* property owners relying on a county's land use decision
20 will be subject to change in policy whenever a new County

21 ¹⁰ Although petitioners' application for the BLA showed three existing parcels, with
22 legal descriptions, the court noted "there was no indication of record that the property
23 had been previously divided as they asserted ..." (*id.* at 910.) However, the planning
24 director did not rely on the described, pre-existing parcels for his decision, but rather
25 relied on "Section 200 of the Chelan County Subdivision Resolution in approving
26 Petitioners' BLA application, concluding that the original parcel was divided into three
27 existing legal lots because the location of the creek and road created separate legal lots."
28 (*id.* at 911.) So while the three "old" parcels identified in the application were not
properly recorded, the county did not rely on this information in reaching its decision.
Nor is there any indication in the opinion that the three "old" lots did not in fact exist,
only that they were not properly recorded.

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Planning Director disagrees with a decision of the predecessor director. FN121 [FN121. Br. of *Amici Curiae* of Building Industry Association of Washington, Washington Land Title Association, Washington Association of Realtors, and Washington State Farm Bureau ...] (*Id.* at 933; emphasis added.)

Stientjes here are not “innocent property owners” in that they failed to supply the information required to legitimately obtain a valid building permit, something they were required to do under the International Residential Code and TCC 14.48.100. Having failed to supply this information, they should not now be allowed to rely on prior decisions where the permit applicants *were* innocent and the mistake was solely that of the government entity.

As with the grading permit in *Habitat Watch*, in *Wenatchee Sportsmen* it is a follow-on permit that was at issue, particularly a challenge to a project development permit after failing to bring a LUPA challenge against the preceding site-specific rezone that allowed for the project. (*Id.* at 177.) Thus, appeal of the project development permit *was* a collateral attack on the rezone. As the court states

However, the issue of whether the RR-1 zoning allows for urban growth outside of an IUGA [interim urban growth area] should have been raised in a timely LUPA challenge to the *rezone*, not in the later challenge to the plat.

(*Id.* at 181; emphasis in original.)

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2 The court in *Wenatchee Sportsmen* makes no mention of any
3 omissions or errors in the application for the rezone, and it is hard to
4 imagine that there were any material ones. Therefore, *Wenatchee*
5 *Sportsmen* stands for the proposition that follow-on permits cannot be an
6 opportunity to collaterally attack a prior land use decision. In the case at
7 bar the site plan is part of the building permit application, not a second
8 permit. Therefore, a challenge to the site plan is not a collateral attack on
9 the building permit, rather is a direct attack.
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12 **6. THE SUPERIOR COURT FAILED TO SHOW THE DEFERENCE REQUIRED**
13 **BY LUPA TO THURSTON COUNTY'S EXPERTISE IN UNDERSTANDING AND**
14 **ENFORCING ITS OWN LAWS**

15 While the Superior Court's review of law with respect to the April 30,
16 2008 BOCC decision and order was *de novo*, that review was constrained
17 in two important ways. First, the BOCC ordered the Hearing Examiner to
18 reach the merits of the appeal, something the Hearing Examiner did not do
19 in his decision of March 4, 2008. (AR at 17.) That decision was limited to
20 the issue of what he perceived to be his lawful jurisdiction. Therefore, this
21 was a review of questions of law, as the real factual disputes between Via-
22 Fourre, Thurston County and Stientjes were not before the Superior Court.
23 Examining the record that was before the Superior Court, one finds that
24 there really were few, if any, material facts that were in dispute and what
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2 remained was a dispute over the application of county law to well
3 established procedural facts such as filing dates.
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5 Second, the Superior Court's review was constrained by RCW
6 36.70C.130(1), which sets the standards for granting relief.¹¹ Subsection 1
7 states, in relevant part:

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

11 (a) The body or officer that made the land use decision engaged
12 in unlawful procedure or failed to follow a prescribed process,
13 unless the error was harmless;

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

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

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

20 (e) The land use decision is outside the authority or jurisdiction
21 of the body or officer making the decision; or

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

24 Nowhere in the record is there any assertions that the BOCC employed
25 unlawful procedure or departed from prescribed process. The BOCC is

26 _____
27 ¹¹ *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000).
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2 authorized by TCC 2.06.070 to hear appeals of the decisions of the
3 Hearing Examiner. And while oral argument is not prohibited before the
4 BOCC, it is not guaranteed (TCC 2.06.070(F)). Both Stientjes and Via-
5 Fourre were heard through their briefs, with the board members choosing
6 to direct their questions to their own experienced counsel.
7

8 Subsections 1(b) and 1(d) are the key standards under which the
9 Superior Court was called on to make its decision. Did the BOCC
10 correctly interpret county law and did they correctly apply that law to the
11 facts -- facts not materially in dispute? Subsection 1(b) particularly
12 requires the reviewing court to pay “such deference as is due the
13 construction of a law by a local jurisdiction with expertise ...” (*Habitat*
14 *Watch* at 412. Local jurisdictions with expertise in land use decisions are
15 afforded an appropriate level of deference in interpretations of law under
16 LUPA. RCW 36.70C.130.)
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19 Under a well-established principle of administrative law, agencies
20 tasked by a legislative authority with enforcing a body of law are
21 considered experts in that law and courts typically and appropriately defer
22 to the agency’s opinion unless its interpretation is clearly erroneous. Here
23 DSD, interpreting county law, has consistently held that Via-Fourre have
24 the right to have their appeal heard on the merits, something the BOCC
25 found as well.
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The Superior Court simply concluded that the DSD and BOCC were wrong, without specifically addressing the specific points raised in the BOCC memorandum decision. In its Final Judgment for Petitioners (CP at 193), the court found that “[t]he decision of the Hearing Examiner was based upon the appellate court’s holdings for strict compliance with all time limits. Such compliance has been strictly construed with no exceptions.” (Finding 1.) While doubtless speaking of the LUPA 21-day limitation, there is no place in the judgment where the court engages the findings of the BOCC decision that instructed the Hearing Examiner on the rights afforded Via-Fourre under the county CAO. This was a key issue in the argument below and all the Superior Court says on point is “[t]he Thurston County Board of County Commissioners’ decision of May 12, 2008, is an erroneous interpretation of the law.” (Finding 5.) The judgment does assert that Via-Fourre were not aggrieved persons, that they have no protected interests, that they should have filed a LUPA petition within 21 days of the initial, improvident issuance of the building permit -- presumably because that is what appellate courts have found in different cases with different facts -- but the Superior Court does not say *why* the BOCC, whose decision was on appeal before it, their wrong to find the opposite on each of these points.

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In *Batchelder v. Seattle*, 77 Wn. App. 154, 158, 890 P.2d 25 (1995)

the court states:

On matters of law the agency can only be overturned if the agency "has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; . . . [or] [t]he agency has erroneously interpreted or applied the law". RCW 34.05.570(3)(c), (d).

An agency action is clearly erroneous if it leaves the reviewing authority with "the definite and firm conviction that a mistake has been committed." *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 894, 83 P.3d 433 (2004); see also *Ecology v. PUDI*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993). If the DSD, and later the BOCC who agreed with the DSD, made such manifest errors in their interpretations of their own law, one would expect the Superior Court to point to them. Instead Via-Fourre barely avoided being thrown out of court at the initial hearing for a lack of standing, although they were necessary parties in an action brought by another (June 17 RP at page 18). They then received a final judgment that consists of conclusory assertions.

7. THE RECENT SUPREME COURT DECISION IN *FUTUREWISE V. W. WASH. GROWTH MGMT. HEARINGS BD.* CONCERNING SHORELINE CRITICAL AREAS IS NOT DETERMINATIVE HERE AS THURSTON COUNTY'S CAO PREDATES THE ENACTMENT OF ESHB 1933

On July 31, 2008, our Supreme Court issued a decision in the case *Futurewise v. Western Washington Growth Management Hearings Board*,

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164 Wn.2d 242, 189 P.3d 161 (2008). A five to four decision, it upheld a decision by the WWGMHB that had been reversed by the Thurston County Superior Court. The issue on appeal was the validity of critical areas ordinances in the shoreline zone given the 2003 enactment of Engrossed Substitute House Bill 1933, 58th Leg. Sess. (Wash. 2003)¹². ESHB 1933 established that critical areas in the shoreline are to be regulated under the Shoreline Management Act, not the Growth Management Act.

At the time of the filing of this brief, the Supreme Court had: 1) received a motion for reconsideration by the involved state agencies; 2) requested and received a response to that motion; and 3) neither granted the motion nor issued its mandate.

The decision in *Futurewise* did not enjoy a majority opinion: four Justices signed the plurality opinion, four signed the dissenting opinion. Justice Madsen voted to uphold the WWGMHB decision, but joined only in the result, not the opinion. The opinions include much learned debate about statutory construction, in particular when did ESHB 1933 become effective. The plurality argues for a retroactive effect, i.e., that critical areas in the shoreline should always have been regulated under the SMA.

¹² ESHB 1933 is available at <http://apps.leg.wa.gov/documents/billdocs/2003-04/Pdf/Bills/Session%20Law%202003/1933-S.SL.pdf>

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The dissent argues that this transfer of authority is intended to occur only when a local jurisdiction’s Shoreline Master Program (SMP) is updated (the opinion of the trial court that reversed the WWGMHB). Justice Madsen did not write a concurring opinion. Division One discusses a similar situation in *Wolfe v. Legg*, 60 Wn. App. 245, 249 (fn 1), 803 P.2d 804 (1991).

However, [*Bruce v. Byrne-Stevens & Assocs. Engrs, Inc.*, 113 Wn.2d 123, 776 P.2d 666 (1989)] was the result of a plurality decision with the fifth vote, concurring in the result only, being unaccompanied by an opinion. We therefore do not find it possible to assess the correct holding of the case. See *In re Jeffries*, 114 Wn.2d 485, 499-500, 789 P.2d 731 (1990) (Brachtenbach, J., concurring in part, dissenting in part).

Furthermore, “[a] plurality opinion has limited precedential value and is not binding on the courts.” *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Likewise, “[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). Because Justice Madsen did not write, the narrowest grounds for the decision in *Futurewise* is that adopted by the Hearings Board itself: existing shoreline CAOs are valid until the jurisdiction’s next SMP update, but after July 27, 2003, the effective date of ESHB 1933, they may not be amended under the GMA. Any such amendments shall be as amendments to the SMP under the provisions of

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the SMA. This resulted in the Board invalidating certain post-2003 CAO amendments of the City of Anacortes until they are reviewed by the Department of Ecology pursuant to the SMA. As expressed by the Board it is Final Decision and Order:

While we agree that critical areas within the shorelines of the state are not stripped by ESHB 1933 of protections given to them by existing critical areas regulations, we do not agree that ESHB 1933 allows amendments to those regulations to continue to be governed by the GMA.

[*Evergreen Islands v. City of Anacortes*, No. 05-2-0016 (West. Wash. Growth Mgmt. Hr'gs Bd. Dec. 27, 2005) at 27.¹³]

Indeed, § 3 of ESHB 1933 amends RCW 90.58.090 to allow for piecemeal amendments to shoreline master programs. (*Evergreen Islands* at 29.)

None of the Thurston County Critical Area Ordinances (TCC 17.15) at issue here were enacted or amended after July 27, 2003. Therefore, under the recent decision in *Futurewise*, they remain good law. This particularly includes TCC 17.15.620, which relates to marine bluff setbacks, and that was last amended in 1996 by Ord. 11200 § 27.

When Thurston County's critical area ordinances were first cited above, the date of last amendment was given for the convenience of the

¹³ The Final Decision and Order is available at <http://www.gmhb.wa.gov/western/decisions/2005/05-2-0016EvergreenIslandsFDO12-27-05.pdf>

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Court if these dates become significant between now and the decision on this appeal.

8. THURSTON COUNTY'S SHORELINE MASTER PLAN AFFORDS PROTECTIONS TO VIA-FOURRE.

Due to the uncertainty in the law created by the July 31, 2007 decision in *Futurewise*, Via-Fourre argue here, as they did before the Superior Court, that the Shoreline Master Program for the Thurston Region (Master Program)¹⁴, which applies to all cities, towns and unincorporated areas of Thurston County, affords them alternative protection from the building of a low-value RV shed immediately in front of their picture window.

On page 9 of the Staff Report (AR at 56) it is stated:

Staff concurs that there likely will be a deleterious impact to the Appellants [Via-Fourre] relating to the blockage of the view caused by the new RV shed. However, staff is unaware of any specific County Codes which protect upland property owners from view blockages created by shoreline property owners.

In claiming that no specific County Codes protect property owners from view blockages along the shoreline when a variance is not at issue, DSD failed to consider that Thurston County is subject to the Master Program, the local implementation of the Shoreline Management Act (RCW 90.58). Through its SWO and initial refusal of Stientjes' request for

¹⁴ The Shoreline Master Program for the Thurston Region is available at <http://www.trpc.org/programs/environment/water/shoreline+master+program+for+the+thurston+region.htm>

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2 a variance, DSD steered Via-Fourre into an administrative procedure
3 which, though they argue is still good law, the *Futurewise* decision could
4 easily be misread to call into question.
5

6 Even when a permit under the Master Program is not required, the
7 regulations and policies of the program apply to all development activity
8 within the shoreline jurisdiction. Section One, Part 1, of the Master
9 Program explains:
10

11 The Act provides for regulation of shoreline development and use
12 in two principal ways. First, it requires that each local Shoreline
13 Master Program contain policies and regulations which define
14 permitted uses and activities. All development activity within
15 shoreline jurisdiction must be consistent with the Master Program,
16 and hence these policies and regulations. In one respect, the Master
17 Program is like a comprehensive plan for shorelines because it
18 contains policies, and in another respect it is similar to a zoning
19 code which contains specific performance standards and
20 regulations. (The relationship between local zoning code and the
21 Master Program is discussed in a following Section IV.B (refer to
22 page - 4 -).

23 The second way the Act regulates shoreline activities is by
24 requiring permits for certain types of development or use.
25 Compliance with the permit requirements is in addition to the need
26 to comply with the program regulations. Thus, even if a person
27 does not have to obtain a [Master Program] permit for a project, it
28 still must comply with the regulations. [Emphasis in the original.]

Both the Via-Fourre property and the Stientjes property are designated
shoreline properties by the County Assessor. Further, the Shoreline
Master Program – Thurston Region Map shows both properties to be
within the rural shoreline protection zone (AR at 189).

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2 While RCW 90.58.030(2)(f) states that "Shorelands' or 'shoreland
3 areas' means those lands extending landward for two hundred feet in all
4 directions as measured on a horizontal plane from the ordinary high water
5 mark...", the Master Program is intended to protect *both* shorelines and
6 adjacent properties. As explained in Section One, Part IV(C), entitled
7 Lands Adjacent to Shorelines:
8

9 The Shoreline Management Act expressly contemplates that the use
10 and development of land adjacent to shorelines complement the policy
11 of the Act and Master Program.

12 Therefore, even if the RV shed lies outside of the 200 foot shoreland
13 area, this would only mean that this development does not require a
14 Substantial Development Permit under the Master Program. Particularly,
15 Section One, Part IV(C)(2) states:
16

17 Part of the property is in the shorelines, part lies outside, and all
18 the "development" is outside the shoreline. As in the prior situation
19 (a), no shoreline permit may be required because all of the
20 "development" lies outside the shoreline, and this remains true
21 even though a portion of the land lies within the shorelines.
22 "Development" refers to development for which a shoreline permit
23 would otherwise be required (e.g., development with a fair market
24 value of \$1,000 or more). However, use and actions within the
25 shoreline, even though they do not constitute "development," must
26 be consistent with the regulations of the Act and shoreline
27 program. Furthermore, as is the case with property lying
28 completely outside the shoreline, development of the property
lying outside the shoreline should be reviewed for consistency with
the Act and shoreline program when other review or permit
processes are followed.

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The “prior situation” referenced in C(2) is where *all* of the property lies outside of the shorelines (C(1)). While not true here, the language is instructive and demonstrates the reach of the Master Program.

No shoreline permit is required when development is to occur on property lying wholly outside the shoreline area, even though the development may have an impact in the shoreline. However, because the Shoreline Management Act and other laws require all developments to take into account the Shoreline Management Act and Master Program when reviewing the proposed development pursuant to other laws (such as zoning site plan review or subdivision review), *the development can and should be affected (i.e., conditioned or, in appropriate circumstances, denied) in order to promote shoreline policy.* [Emphasis added.]

The RV shed is a residential development subject to the Master Program. Section Three, Part XVI, Residential Development, at Subsection A of the Master Program, defines residential development as:

Activity associated with provision of human dwelling facilities, including subdivision of property, *accessory buildings common to residential structures* and individual utility services to residential units. [Emphasis added.]

Therefore, the RV shed at issue here is an accessory building on a property of which at least a portion is indisputably within the shoreline zone, and this development is therefore subject to the Master Program. As such it is subject to the Policies (Section 3, Part XVI(B)) and General Regulations (Section 3, Part XVI(C)) of this Part of the Master Program.

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Policy 1 states that “Residential development on shorelines and wetlands should be planned with minimum adverse environmental and visual impact.”

Policy 10 states:

Residential structures should be located to minimize obstruction of views of the water from upland areas. The intent of this policy is to encourage the retention of views in and through new residential developments. This policy is not intended to prohibit the development of individual shoreline lots simply because it may minimize or eliminate views from upland properties. [Emphasis added.]

General Regulation 4 states:

Residential development shall be arranged and designed to protect views, vistas, aesthetic values to protect the character of the shoreline environment and the views of neighboring property owners.

Once DSD decided on November 19, 2007 that the Stientjes RV shed was not subject to the marine bluff setback requirements, they completely failed to consider the above Master Program policies and regulations with respect to the visual and aesthetic impacts of the structure. That these regulations and policies are properly included in Master Program is due to the requirement of RCW 90.58.100(2)(f):

(2) The master programs shall include, when appropriate, the following: (f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection; ...

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The DSD's failure to consider the visual impact of the RV shed on an adjoining property is a fatal omission that alone requires the approval be overturned, even though the County required Via-Fourre to exhaust their administrative remedies under the CAO.

Via-Fourre recognize that the above-quoted policies do not categorically prohibit all development on the Stientjes property, nor is that their goal. These policies and regulation simply demand that the protections the Master Program affords them be enforced by the County, for just as they must bear the burdens of this regulatory apparatus, they are entitled to enjoy its benefits. The Stientjes have sufficient space on their property to build a RV shed that does not visually impact Via-Fourre. (See AR at 196 and 197, photographic overview of the Petitioners' property.) Off-site storage is another option available to Stientjes.

E. CONCLUSION

Appellants Via-Fourre request that the Court enter judgment:

1. Granting their appeal;
2. Vacating the Superior Court's Final Judgment for Petitioners of September 23, 2008 and dismissing the Petition;

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3. Upholding the May 12, 2008 Decision of the Thurston County Board of County Commissioner that remands the case to the Thurston County Hearing Examiner for a decision on the merits;
4. Awarding them their statutory costs;
5. Ordering the statutory costs they paid over in the Superior Court action be returned to them; and
6. Granting such other and further relief as the Court finds just and proper.

Dated: March 6, 2009



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BEFORE THE BOARD OF COUNTY COMMISSIONERS
THURSTON COUNTY, WASHINGTON

In Re the Matter of,

Laressa Via-Fourre & Charles Via

No. 2007103972, Sequence No. 08-103017

DECISION

THIS MATTER came before the Board of County Commissioners (Board) on April 30, 2008 as a result of an appeal by Laressa Via-Fourre & Charles Via (collectively Via-Fourre) of the Hearing Examiner's decision dated March 4, 2008. After a full evidentiary hearing on the appeal, the hearing examiner determined that he did not have jurisdiction to consider the Via-Fourre's appeal of an administrative decision issued by Scott Longanecker on November 19, 2007, and therefore dismissed the appeal.

The administrative decision at issue in this case, when viewed in context of the record, reflects that Mr. Longanecker (1) made a determination under the Critical Area Ordinance (CAO) that Harlan Stientjes' newly constructed recreational vehicle shed on his property was **not** within the marine bluff, in contrast to an earlier determination; and as a consequence of this new determination about the marine bluff (2) reinstated Mr. Stientjes' *site plan* for the shed that had been suspended on September 6, 2008, pursuant to the authority in the International Residential Code, section R105.6. See Exhibit 1, attachment u1; and (3) added a grading condition. At the conclusion of his decision, Mr. Longanecker advised that his decision could be appealed if an appeal was filed by 12/3/07.

On November 30, 2007, Via-Fourre filed an appeal of Mr. Longanecker's decision. Their appeal among other things, challenges Mr. Longanecker's determination regarding the marine bluff, and his decision regarding the grading condition.

The hearing examiner denied the appeal because he concluded Via Fourre "failed to comply with the LUPA deadline for appealing the building permit." The hearing examiner erroneously concluded the building permit was issued on 7/11/07, and Via Fourre's appeal dated 11/30/07 was not timely. However, by various actions of the county staff, this building permit was officially suspended on September 6, 2007, due to non-compliance with the CAO and not reinstated until 11/19/07.

1 Mr. Longanecker's 9/6/07 letter to Mr. Steintjes provides:

Land use approval of your site plan is **suspended** at this time pursuant to R105.6 of the International Residential Code for the following reasons. (1) The application which was submitted for the proposed RV cover was not complete because the application and site plan did not show critical areas or their buffers. (2) The project application did not answer questions relating to steep slopes listed under "Property Information" on page 2 of the application.

Emphasis supplied.

The hearing examiner's focus on the building permit in this appeal is misplaced. Under the CAO, a single family residence or appurtenant structure that is within a marine bluff is (1) subject to review under the CAO and (2) only allowed if it is in compliance with the requirements of the CAO. TCC 17.15.305 and Table 5 No. 39. Furthermore, the performance standards and other requirements of the CAO shall be applied to residential and appurtenant structures through any permit review, i.e. building permit, required by county ordinances. In addition, the County may approve, approve with conditions, or deny any permit application for a residential structure within a marine bluff in order for the structure to comply with the CAO. TCC 17.15.310 D. Finally, TCC 17.15.410 specifically authorizes an "aggrieved person" to file an appeal of "an administrative decision" made under the CAO to the hearing examiner. Such appeals are governed by TCC 20.60.060, and thus must be filed within 14 days of the administrative decision.

The hearing examiner erred, to the extent his decision suggests that Via Fourre did not timely challenge the critical area determinations made by Mr. Longanecker. There is no dispute Via Fourre filed their appeal within fourteen days. Therefore, pursuant to TCC 17.15.410, Via Fourre filed a timely appeal of Mr. Longanecker's decision regarding the marine bluff, and the hearing examiner had jurisdiction under the CAO to consider these issues.

IT IS HEREBY ORDERED AS FOLLOWS:

This matter is remanded to the hearing examiner, so that he may make a decision on the critical area issues regarding marine bluff and grading, timely appealed by Via Fourre in their 11/30/07 appeal. The hearing examiner shall *not* conduct a new hearing, but instead is directed to make his decision based on the record created during the February 4, 2008 hearing on this matter.

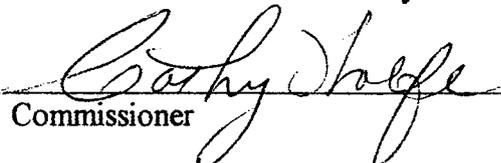
Dated: May 12, 2008

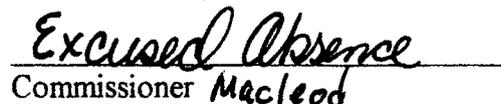
ATTEST:


Clerk of the Board

BOARD OF COUNTY COMMISSIONERS
Thurston County, Washington


Chairman


Commissioner


Commissioner Macleod

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STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

Harlan Clarie Stientjes Family Trust and
Mary Jo Stientjes

Respondents

v.

Thurston County

Defendant

and

Laressa Via-Fourre and Charles Via

Appellants

Court of Appeals No. 38427-2-II

**CERTIFICATE OF SERVICE:
BRIEF OF APPELLANTS**

I certify that I mailed a copy of Brief of Appellants, dated March 6, 2009, to:
Harlan C. Stientjes, Attorney for Respondents, at 9840 Johnson Point Road NE,
Olympia WA 98516; and
Jeffrey G. Fancher, Attorney for Thurston County, at Office of the Prosecuting
Attorney, 2424 Evergreen Park Dr SW, Ste 102, Olympia WA 98502-6041;
postage prepaid, on November 18, 2008.

Dated: March 6, 2009



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Certificate of Service: Brief - 1
Stientjes v. Via-Fourre
38427-2-II

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