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INTRODUCTION

This matter is an appeal from two quasi-judicial appellate decisions by the Thurston County Board of County Commissioners (BOCC) wherein they reversed two quasi-judicial trial decisions of their Hearing Examiner selected by them for his expertise. Two Superior Court judges sitting in appellate capacities have reversed the Thurston County Board of County Commissioners decisions and the Court of Appeal should do the same.

The chronological appellate decisions thus far rendered in this matter are as follows:

- A- Hearing Examiner Decision dated March 4, 2008. (RP 0084)
- B- BOCC Decision dated May 12, 2008. (RP 0060)
- C- Superior Court Appellate Decision dated September 23, 2008. (RP 121-125)
- D- Stientjes v Via, Court of Appeals decision dated October 12, 2009. (152 Wn. App. 616; 217 P.3d 379)
- E- Hearing Examiner Decision dated April 16, 2010. (RP 0040)
- F- BOCC Decision dated June 22, 2010. (RP 0001)
- G- Superior Court Appellate Decision dated June 13, 2011 (CP 187-198)

ASSIGNMENT OF ERROR

There are six primary errors before this Court:

1. The Respondents, Via and Via-Fourre, have been permitted by the BOCC to participate in this matter without standing to contest the Appellant's building permit within the meaning of LUPA.
2. The Vias did not timely appeal the building permit awarded to the Stientjes on July 11, 2007.
3. The Thurston County Planning staff and the BOCC did not have legal authority to issue a stop work order so as to allow them to re-examine compliance with the Critical Area Ordinance after issuance of the building permit, expiration of the LUPA appeal time and completion of the structure under the building permit.¹
4. The BOCC exceeded its authority in reversing the Hearing Examiner and

¹ Factually, the Thurston County Planning Department did re-

failed to specify the evidence they relied upon to reverse the Hearing Examiner.

5. The BOCC invalidated its authority by conducting an independent investigation into the facts outside the record and outside the Hearing Examiner Decision with an unannounced site inspection wherein all three of the commissioners attended and thereafter issued a ruling. *RCW 36.70C.120* makes their decision a nullity (just as a juror doing his or her own independent investigation would result in a mistrial.)
6. There was substantial evidence in the record to validate the findings of the Hearing Examiner contrary to the ruling of the BOCC.

examine the compliance during their alleged stop work order and found that the Appellants were in compliance.)

STATEMENT OF THE CASE

The salient facts are found in the two highly relevant and lucid rulings of the Hearing Examiner, as follows:

1. Everyone associated with these four years of litigation agrees that the building permit for the RV shed was issued by the Thurston County Development Services Department on July 11, 2007 (RP Exhibit N3, P. 278).
2. The appeal period for contesting that building permit under LUPA expired August 1, 2007. Page 9 first Hearing Examiner decision (RP Exhibit I) and *RCW 36.70C.040(2)*.
3. Any attack on the building permit in a related subsequent land-use decision (such as the stop work order involved in this action) would be an illegal and inappropriate collateral attack. Page 10 RP Exhibit I. *Habitat, infra*.
4. The Hearing Examiner made a specific

finding that "Appellants have made it clear that their appeal of the November 19, 2007 decision is actually an appeal of the July 11, 2007 building permit." Page 10 of First HE Decision (RP Exhibit I.)

5. 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... *RCW 36.70C.040(2)*. Page 10 of First HE Decision (RP Exhibit I).
6. The LUPA petition is timely if it is filed and served on all parties listed in subsection (2) of this section within 21 days of the issuance of the land-use decision. *RCW 36.70C.040(3)*. Page 10 of First HE Decision (RP Exhibit I).
7. The Washington Supreme Court has held that land-use decisions such as building permits are considered final for purposes of LUPA, due to expiration of the 21 day appeal period, may not be collaterally challenged through the

appeals of related, subsequent land-use decisions. *Habitat Watch vs Skagit County*, 155 Wn. 2d, 120 P3rd 56 (2005), at 410-11, citing *Wenatchee Sportsmen Association vs Chelan County*, 141 Wn2d 169, 176 (2000). Page 10 of First HE Decision (RP Exhibit I).

8. A stop work order emanated from Thurston County Planning Department on August 28, 2007 (27 days after the expiration of the building permit appeal deadline.) The stop work order was improperly issued as the Critical Area Ordinance issue was concluded at the prior issuance of the building permit. Hence, the Via challenge was a collateral attack on the building permit initiated without standing. The withdrawal of the illegal stop work order (in November of 2007) made it clear the building permit was back in full force and effect. The appeal period after the issuance of the building permit had lapsed approximately 4 months previously and the stop work

order did not restart the appeal period for the issuance of the building permit. Page 10 of First HE decision (RP Exhibit I). The Vias have neither cited any authority nor proven any facts, circumstances or law indicating any tolling of time occurred. The first Superior Court hearing the LUPA appeal (case #08-2-01096-9) found no standing and an untimely appeal. The second Superior Court held the stop work order was not a land use issue for LUPA purposes.

9. The verbatim record of the second appeal to the Board of County Commissioners has now been filed. The Commissioners prohibited oral argument, asked no questions, permitted no questions, and articulated nothing about the basis of their decision. No explanation of their decision was offered from their Bench by any of the County Commissioners. Counsel for the Stientjes attempted to make a record exception before the BOCC,

regarding their untimely, improper and unannounced site examination of some premises contrary to their statements that they relied only upon the record before the Hearing Examiner.² The BOCC scurried to adjourn the meeting so as to prohibit counsel from making a record and taking exception to their illegal, inappropriate and unannounced collection of independent evidence outside the record. However, they admitted their wrongdoing in their Transcript on file with this Court. The second BOCC Decision is a nullity due to their lack of proper substantive procedure. *RCW 36.70C .120, infra at page 10.*

² Commissioner Romero admitted the site visitation in the second BOCC decision at transcript page 3, line 7; Commissioner Wolfe admitted the site visitation in the second BOCC decision at transcript page 3, line 12; and Commissioner Valenzuela admitted the site visitation in the second BOCC decision at transcript page 3, line 14.

ARGUMENT

THIS ENTIRE CASE IS ABOUT THE VIAS' EFFORT
TO PROSECUTE AN IMPERMISSIBLE AND ILLEGAL
COLLATERAL ATTACK ON AN ISSUED BUILDING
PERMIT.

There are two preliminary and dispositive issues:

1. Did the Vias have standing to participate in the underlying proceeding before the County Staff or the Hearing Examiner?
2. Did the Vias timely file a LUPA appeal of the building permit of July 11, 2007?

If there is no standing or timely appeal, the case is over.

It may be helpful to lay out how LUPA protects the rights of the parties with standing. When an owner applies for a building permit, the county has the right under the ordinance to make specified requests for information before viewing

the Application as complete and ready for their action. *Thurston County Code (TCC) 14.48.010.*³ If the information presented is incomplete in any way important to the County planning and building experts, it is the responsibility of the County to perceive that deficiency and require the Applicant to satisfy the deficiency. After the Applicant has satisfied the County, the County then takes affirmative decisive action. If an applicant does not satisfy the County, a decisive negative action is taken.

Once the county issues a building permit, the burden shifts, and the building permit is a legal property right of the owner, subject to appeal rights by the county or any other person with

³ **14.48.010** - Application. Application for a building permit shall be made at the development services department.

14.48.020 - Development services department project review. The development services department will review the building permit application and site plan, as defined in Section 14.48.100. If the project requires no approvals or actions other than a building permit, the development services department will act on the building permit application pursuant to the provisions of Sections 14.48.080 and 14.48.090.

standing, within 21 days. Were it any other way, the owner could start the construction after the building permit appeal time expires and spend significant amounts of money only to have the county come forward later and say, "we made a clerical error and the building permit is revoked, sorry about all the money you wasted." (Such is the case with Stientjes if the Vias' position was adopted.)

After issuance of the building permit, the County no longer has a right to unilaterally change or revoke the building permit. They can issue stop work orders until building code deficiencies are remedied.⁴ Similar authority under the CAO does not exist! Therefore, the stop work order issued by the Thurston County Planning Staff was illegal and without authority (even though the County satisfied themselves that the Appellant was in compliance with the CAO. The stop work order now

⁴ Such a deficiency was included in the stop work order issued by Thurston County against the Petitioners as the petitioner's contractor had placed one of the vertical members in the ground approximately 3 feet closer to the front property line than allowed. That deficiency was quickly corrected and Thurston County removed the stop work order and permitted the building to be completed.

issued by the BOCC (RP Exhibit A, P. 001) is likewise without legal authority for this same reason and therefore a nullity. The County has to file a timely appeal under LUPA to change a building permit, ab initio. If Thurston County doesn't timely appeal when they find a deficiency or error in the building permit, they have to live with it. The rule may seem harsh but to accomplish the Purpose of the Land Use Petition Act as set forth in RCW 36.70C.010, it is necessary. The following is cited as legal authority cited by the Hearing Examiner for the propositions articulated:

1. *Habitat Watch v. Skagit County, supra*
2. *Wenatchee Sportsman's Association v. Chelan County, supra*
3. *Chelan County v. Nykreim, 146 Wn2d 904 (2002)*

Specific attention should be paid to the following Court statements and rules of law gleaned from the cited cases, all of which have applicability to the case before this Court on this appeal:

- A land-use decision becomes valid, even with alleged questionable lawfulness, if it is not challenged within the 21-day period specified by *RCW 36.70C.040* of LUPA.
- The purpose of the 21-day time limitation for seeking judicial review of a land-use decision is to provide consistent, predictable, and timely judicial review of land-use decisions and to ensure administrative finality.
- Under LUPA a land-use petition is barred unless it is timely filed, meaning within 21 days of the issuance of the land-use decision. Because *RCW 36.70C.040(2)* prevents a court from reviewing a petition that is untimely, approval of a land use becomes valid once the opportunity to challenge it passes. (This means the Stientjes' building permit could not be challenged by anyone after August 1, 2007.) It is too late to challenge a land-use decision if not challenged within the 21 days. If there is no timely challenge to the decision, the

decision is final and valid. Any subsequent challenge would be viewed as an improper and illegal collateral attack.

- A building permit is a "project permit" or "project permit application" and therefore a land-use decision as used in *RCW 36.70B.020(4)*.
- The Washington Supreme Court recognized a strong public policy supporting administrative finality in land-use decisions. In fact, that court has stated, "if there were not finality (in land-use decisions), no owner of land would ever be safe in proceeding with development of his property. To make an exception to this policy would completely defeat the purpose and policy of the law in making a definite time limit. *Neighbors and Friends vs Miller* 87 WnApp 361 (1997), *Deschenes vs King County*, 83 Wn2d 714 (1974), *Skamania vs Gorge Commission*, 144 Wn2d 30 (2001), *Samuels Furniture vs Department of Ecology*, 147 Wn2d 440 (2002), and *Summit-Waller Association vs*

Pierce County, 77 WnApp 384, (1995).

- Following this policy of finality of land-use decisions, the court held that an untimely petition under LUPA precluded collateral attack of the land-use decision and rendered the building permit valid.

The standard for review for any LUPA appeal, either Superior Court or the Court of Appeals, is set forth in *RCW 36.70C.120*, *infra*, Appendix, page 42.

Was the standard of review for the BOCC different from that required by the Superior Court or the Court of Appeals under LUPA? I think not. All three appellate venues have the same standard of review. State law under LUPA has set the uniform standard of review in land-use matters and any local jurisdiction must use those standards or their quasi-judicial appellate decisions will be defective and reversible. *RCW 36.70C.010*

Is the Superior Court or Court of Appeals reviewing what the BOCC did in their quasi-judicial decisions (RP Exhibits A and D) or is it reviewing the errors alleged by the Respondents to the two Hearing Examiner decisions (RP Exhibits C and I) i.e. a de novo review? Either review results in the upholding of the Hearing Examiner decisions and the striking down of the BOCC decisions. RCW 36.70C.130 (1) sets forth the standards for granting relief. The Superior Court or Court of Appeals must look at the BOCC decisions and the Hearing Examiner decisions to determine if the quasi-judicial body or hearing officer came to a reasonable conclusion. On issues of witness credibility, the determination of the Hearing Examiner is taken as fact. Conclusions of law are reviewed de novo with no presumption of correctness. The Superior Court and Court of Appeals actually have a better record for de novo review as they have transcripts of the proceedings and audio recordings. The BOCC was relying on audio recordings only. Neither the Superior Court nor the Court of Appeals has the inadmissible evidence outside the record as

acquired by members of the BOCC when they did a secret site inspection. This improper, untimely, deceitful independent investigation of the facts beyond the record undoubtedly negates the entire second appellate decision of the BOCC, consequently, the Superior Court and the Court of Appeals are looking at a de novo review of the Hearing Examiner decisions only. RCW 36.70C.130 (1) (a).

Due to the BOCC disqualifying itself for the improper behavior, the burden in this appeal is on the Respondents, contrary to General Order 1, as the Hearing Examiner Orders have not been effectively reversed by anyone.

In that review of the Hearing Examiner decisions, Stientjes would assert that the Hearing Examiner performed all of the standards set forth in RCW 36.70C.130 while the BOCC did not. This court should extend deference to that Hearing Examiner as set forth in RCW 36.70C.130(1) (b) as his expertise is obvious. The quality of the BOCC decisions compared to the quality of the Hearing

Examiner decisions in side-by-side comparisons make it clear where the standard has been met.

Stientjes herein advocates and supports the thorough, well-reasoned and understandable decisions of the Hearing Examiner (RP Exhibits C and I) who is an expert in land-use backed up by the experts in the Thurston County Planning Department (their full report is at RP 160.), each of whom held that the facts and law supported Stientjes. RCW 36.70C.130 (1) (b). The members of the BOCC have no expertise in either land-use or law.

Stop Work Authority

Where does the Thurston County Developmental Services staff or the BOCC get their authority to reopen an issued building permit on a critical area issue? There is nothing in the Thurston County ordinances that give that authority once it has been determined in the building permit

process. For them to revisit the issue they would have had to file a timely LUPA appeal on or before August 1, 2007.

Exceeding Authority

The standard of review in the law of the State of Washington is that the findings and conclusions of a factfinder that hears the evidence de novo can only be modified by a quasi-judicial or judicial review if the findings and conclusions of the factfinder are clearly erroneous. The BOCC or the Court has the authority to review the entire record and must uphold the decision and finding unless it is definitely and firmly convinced that a mistake has been made. It cannot change the underlying fact finding without meeting this standard.

Independent Investigation by BOCC

RCW 36.70C.120 Scope of review-- is set forth in the Appendix. Each of the members of the BOCC admit that they did independent evidentiary site inspections of the property, at some unknown time, with some unknown persons under conditions that

might be totally different from what occurred at the time of the hearing before the Hearing Examiner. This is a method of illegally and improperly supplementing evidence to a record in an unauthorized fashion in violation of RCW 36.70C.120. It is as simple as a jury going out and doing its own investigation during breaks. A mistrial is necessitated. In the case of an appeal to a BOCC, it simply makes the BOCC decision a nullity and the Court in this instance will have to replace BOCC ruling.

Substantial Evidence

The BOCC opined that the following "findings of fact and conclusions of the Hearing Examiner were not supported by substantial evidence in the record and/or the county code." The BOCC decision dated June 22, 2010.

BOCC Statements on Other Matters

Hereafter, each additional finding of fact or

conclusion cited by the BOCC is identified and the evidence from the record, as applicable, is cited with argument. However, an OVERVIEW of what is known as the 2:1 issue or setback issue surrounding TCC 17.15.620 (B) (2) is helpful as it is implicit in several of the assertions by the BOCC:

OVERVIEW

Stientjes would request that the Court review the testimony in the transcript of Kain (Transcript of Hearing Examiner Proceedings 55-75, 103-106) and Longanecker (Transcript of Hearing Examiner Proceedings 10-51) as so much of the remaining argument relates to their testimony.

TCC 17.15.620 (B) (2) provides:

2. The primary structure and its normal residential appurtenances shall be set back **from the top of the marine bluff** for a distance which is the greater of the following:
 - a. Not less than fifty feet landward **from the top of the marine bluff;** or
 - b. A point measured from the ordinary high water mark landward **at a slope** of 2:1 (horizontal to vertical) which intersects with the preexisting topography of the site. **Minor encroachment into the 2:1 setback may be permitted by the review**

authority where the structure foundation is set below the 2:1 slope line.

3. In those cases where the size, shape, topography, or existing development would preclude development on a preexisting lot, or where the geology of a bluff can safely accommodate development within the 2:1 slope, the review authority may reduce the marine bluff setback to the farthest practical point landward, as provided in TCC Sections 17.15.415 and 17.15.420.

The Thurston County staff and Hearing Examiner did exactly what the foregoing Ordinance requires. They measured the bluff to be approximately 100 feet and then measured up the "slope" landward 200 feet and the RV shed was code compliant with that measurement and methodology. The Hearing Examiner and Planning witnesses point out this has been a very accurate method of measurement and it is the best method available to the Thurston County staff. Professional surveys have not been required for this type of building in the past in Thurston County and there is no Ordinance that requires them. "To staff's knowledge this method has resulted in safe and appropriate setbacks in terms of

health, safety, protection of property and preservation of critical areas."

Longanecker testimony. Department of Planning Manager Mike Kain testified (Transcript of Hearing Examiner Proceedings, pages 53-75) he was working for Thurston County and assisted in the drafting of this Ordinance and has administered it since 1994. He testifies the Stientjes are clearly compliant with the Ordinance. The Hearing Examiner, Mike Kain and Scott Longanecker are the experts and entitled to deference. If the BOCC wants to change or clarify the methodology of the ordinance by requiring professional surveys on similar matters, they can do so but such an Ordinance would be a prospective legislative matter, not retroactive on permitted and completed projects such as Stientjes.

The BOCC gives no consideration to the *Thurston County Code 17.15.620* language regarding "minor encroachments" or whether

the land can "safely accommodate" the development.

The BOCC wants to ignore the language of the Ordinance and the experts. In fact, it is questionable that the BOCC ever really understood this issue as their Decision dated June 22, 2010, page 1, second paragraph, states:

"The fundamental issue in this case is interpreting TCC 17.15.620 (B) (2) which specifies how to measure the 2:1 marine bluff setback for residential appurtenances. County staff measured the 2:1 building setback by doubling the height of the marine bluff as measured from the ordinary high water mark (OHWM) on a horizontal plane. The Appellant's surveyor measured the 2:1 slope by beginning at the OHWM and going landward on a horizontal plane until the 2:1 slope line intersects with the pre-existing topography of the site. Appellant's method relies on the point of intersection with the existing topography to determine the building setback; the staff on the other hand relies on the height of the marine bluff multiplied by two to determine the setback."

Under the methodology attributed to the surveyor and approved by the BOCC, the horizontal line that went landward from the OHWL would never get above the OWHL and

would never intersect with the pre-existing topography that exists approximately 140 feet above that horizontal line. Under the methodology attributed to the County staff, the horizontal plane direction is unspecified. However, if you assume the BOCC would send the line landward on a horizontal plane, it will hit the pre-existing topography and the RV shed location will be code compliant.

The foregoing ordinance specifically provides that the Planning authority can make variations in the setback when there is evidence of stability. Such was the finding of the Hearing Examiner from the unrebutted geotechnical evidence presented at the hearing and the knowledge of the Planning staff. The BOCC would ignore their own Ordinance and require a methodology not specified in their Ordinance and never used by the Thurston County staff in 16 years. The BOCC ignores the other language of their Ordinance

requiring their review of "minor encroachments" and whether a site can "safely accommodate".

Additional discretionary power in the same ordinance deals with the situation where a foundation is below the slope line. There was evidence of that at this hearing by Surveyor Pantier. Again, the BOCC would have you ignore their own ordinances and impose their own unexplained and result driven irrational will.

"To the Extent"

The BOCC states in their decision (RP Exhibit A) that "certain findings of fact and conclusions of law of the Hearing Examiner are not supported by substantial evidence in the record and/or the county code." They go on to cite the findings of fact and conclusions of law that they challenge by using the curious language "to the extent." They simply state the fact or

conclusion they wish to be true and say contrary evidence is to be disregarded as unsubstantial. The Appellant would assert that the Hearing Examiner did an excellent job of stating why he was finding any particular fact or making any particular conclusion of law.

The following is offered to rebut the BOCC allegations in their Decision of lack of substantial evidence:

1. "Finding of fact 19 to the extent that it finds the Appellants' survey does not accurately reflect the condition of the Applicants property."

Response: The Stientjes' surveyor had all sorts of qualifications indicating how his survey may be inaccurate. In the opinion of the Hearing Examiner, the trial factfinder, note should be made of the differences between Figure 5 (In RP Exhibit N1, page 215) and the depiction by the surveyor. Figure 5 represents a flat intersecting surface and how you figure the setback when you have a flat surface on the

existing topography. The subject property does not have a flat surface; therefore interpretation of the Ordinance is necessary i.e. there has to be another method of figuring the slope. Thurston County staff's answer to this since 1994 has been to apply the test as they have explained in the Longanecker and Kain testimony and rely upon professional geotechnical engineers as they have found that these two methods result in safe marine bluffs.

2. "Finding of fact 21 to the extent that it finds that staff never required a survey for the RV shed. Staff initially directed the applicant to submit a survey if he believed that his RV shed was outside the marine bluff setback. See Exhibit 1, attachment v (staff letter to Mr. Steintjes (sic) dated September 14, 2007.)"

a. Response: The BOCC is in error. Scott Longanecker in his testimony says he made an option list that the Stientjes could provide a survey, apply for a variance or withdraw their application. The choice was totally optional. Thereafter, Thurston County changed its mind and verified the setback by their methodology of 16 years, disposing of

the need for a survey or any other option. What the BOCC does not seem to recognize but which was made clear by all four of the experts, this is not a battle of measurements or accuracy of measurements. It is an issue of methodology required by TCC 17.15.620. There is nothing in the Thurston County code requiring a survey and there was nothing in the evidence of a direction or requirement that the Stientjes provide a survey.

3. "Finding of fact No. 24 to the extent that it finds that the Appellant did not provide credible evidence that the *method* upon which the measurements were taken were in error."
 - a. Response: This finding of fact by the Hearing Examiner is 100% accurate. Again, the BOCC does not seem to grasp that this is not a controversy over measurements but interpretation of TCC 17.15.620, and the Ordinance does not require a survey. The Hearing Examiner is finding the method used by the County for 16 years is accurate, and the survey

evidence with all its qualifications did not show the counties method erroneous.

See testimony of Longanecker and Kain.

4. "Finding of fact number 27, 28 and 29 to the extent that the geotechnical reports submitted by Mr. Strong was *not* missing critical data. TCC 17.15.635 (E) (5) (b) (3) requires that the geotechnical report shall contain specific information on the [s]stability (sic) or instability of the site including past slope failures..." (sic) The record reflects that this site has experienced slope failures in 2005-06 and again in 2007. However the report fails to address these failures."

Response: TCC 17 .15 .635 provides:

"6. The review authority may waive the requirement for the report if there is adequate geological information available on the area proposed for development to determine the impacts of the proposed development and appropriate mitigating measures.

And

"7. This report shall be reviewed by the review authority and the Thurston County development services department.

The Hearing Examiner at finding of fact number 27, 28 and 29 thoroughly identifies the evidence and the law. The Ordinance specifically permits the review authority to allow development within the setback of the

marine bluff hazard area when the geological report can demonstrate conclusively that the hazards associated with the marine bluff can be overcome in such a manner as to prevent hazard to life, limb, or property, and/or the integrity of the marine bluff. The geologist report from David Strong (Strong Report, RP 252-253) was accepted, unrebutted, and found to be credible. The testimony of Scott Longanecker indicated that David Strong was known to him, that Longanecker was familiar with the Johnson Point area where the RV shed was to be built and was aware that the ground would certainly support a simple and light use such as this RV shed.

The only evidence of alleged slope failures was from the Vias. They provided no expert testimony that this would in any way create a safety or geological problem on the premises.

As is obvious from the quoted TCC sections above, the review authority did waive any further requirement for the report as there

was adequate geological information available on the area proposed for development to determine the impacts of the proposed development and appropriate mitigating measures, if any.

5. "Conclusion No. 5 to the extent that it finds no variance was needed because the RV shed was outside the marine bluff setback. As described above, the Hearing Examiner erroneously interpreted and applied TCC 17.15.620 (B) (2) to the facts of this case."
 - a. Response: A variance is not needed if the location of the RV shed is code compliant. Such is the legal conclusion of the Hearing Examiner based upon sound and thorough reasoning.
6. "Conclusion No.6 to the extent that it concludes that the Appellants relied on TCC 17.15 figure 5 to determine the slope. The Appellants relied on the language of TCC 17.15.620 (B) (2) (b) to determine the slope."
 - a. Response: the Hearing Examiner stated his findings of fact underlying his legal conclusion. The BOCC seems to ignore the facts and present the conclusion they desire. Conclusion No. 6 is self-explanatory and needs no

further explanation.

7. "Conclusion No. 7 and 8 to the extent that it concluded that staff correctly used alternative methods to determine the setback on the facts of this case. On those parcels where the marine bluff flattens out, staff's method of measuring the setback by doubling the height of the marine bluff as measured from the OHWM on a horizontal plane results in the same setback as the method dictated by the code-applying 2:1 angle beginning at the OHWM and ending where this line intersects with the existing topography. In these cases, staff's method is acceptable because you arrive at the same setback as if you use the method dictated by the code. However on those parcels where the topography continues to trend upward from the bluff instead of flattening out, staff's method results in a less conservative setback than the more conservative setback dictated by the code. In the situation, staff's method is in violation of TCC 15.17.620 (2)(B)."

- a. Response: the BOCC here recognizes there are alternative methods of making the measurements but they now dictate they want a "more conservative" method used although the Ordinance does not so require.

8. "Conclusion No. 9, 11, 12 to the extent that certain reports were not required because the RV shed was outside the marine bluff setback. Because the appellants' survey which used the methodology dictated by TCC 17.15.620 (2) shows the RV shed within the setback, these reports were required."

- a. Response: Such reports were waived.

Any such reports that were required, if any, would have been required before issuance of a building permit.

9. "Conclusion No. 9 and 17 to the extent that they find that Mr. Strong's report satisfied TCC 17.15.635 (E) and the conclusion that the site was stable. As discussed above, the report fails to discuss recent multiple landslides on the site, thus any conclusion about the stability is not conclusive."

- a. Response: Mr. Strong's geological report was unrebutted and its substance was known to be accurate by the Thurston County Planning Staff. The Vias could have presented rebuttal evidence if they believed in any way the Strong report was inaccurate. They did not.

Standing:

There are only two parties with standing on a building permit, the owner and the County. It is an administrative action by the County.

Longanecker testimony, page 18 of Transcript. A building permit is a matter of legal right. If

the owner meets the ordinance requirements as administered by the County, and agrees to build the building using the building code, that owner is entitled to a building permit. Public notice is not required for issuance of a building permit.

Friends, enemies and neighbors do not have standing and are not entitled to notice. 786 *Asche v. Bloomquist* 132 Wn. App. 784.

The Land Use Petition Act (*Chapter 36.70C RCW*) does not require a local jurisdiction to provide notice of a building permit to neighbors. An individual has a property right protected by the United States Constitution if the individual has a reasonable expectation of entitlement derived from existing rules that stem from an independent source, such as state law or a local ordinance. 786 *Asche v. Bloomquist* 132 Wn. App. 784

Part of the issue here comes from two conflicting definitions, one in the Thurston County Code and the other in the Revised Code of Washington. The Revised Code of Washington controls as uniformity is required. *RCW 36.70C .010.*

The Vias assert they have standing in the lower proceeding because the Thurston County Code defines "aggrieved person" (seemingly the closest definition to the principle of "standing") in the Thurston County Code at Section 17.15.200 and provides:

"Aggrieved person" means one who is directly affected by the approval, denial or conditioning of a development permit reviewed under this chapter; 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 Revised Code of Washington under LUPA defines "standing" and includes therein the mandatory definition of aggrieved person as follows:

RCW 36.70C.060 Standing.

Standing to bring a land use petition under this chapter is limited to the following persons:

(1) The applicant and the owner of property to which the land use decision is directed;

(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

(a) The land use decision has prejudiced or is likely to prejudice that person;

(b) That person's asserted interests

are among those that the local jurisdiction was required to consider when it made the land use decision;

(c) 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; and

(d) The Appellant has exhausted his or her administrative remedies to the extent required by law.

The two definitions are reconcilable as we are required to conclude "aggrieved person" under the Thurston County Code, has to take the definition of an "aggrieved person" under the "standing" statute, RCW 36.70C.060 (2).

The Vias assert that their protected interest is their already limited view that is partially blocked by the constructed RV shed. They have no legal right to the view. They have no asserted interest. They are not aggrieved persons. The Stientjes own all view rights. The County has no authority as a local jurisdiction to affect the Stientjes' view rights. Not only is the county not required to consider view rights of the Vias; they have no jurisdiction or authority to act using that criterion.

The Vias do not assert that they have a view easement, a common-law property view right, or any other property right to an unobstructed view

across the Applicant's property. *Asche v. Bloomquist*, 132 W. App. 784 (2006).

The Vias do not have standing to participate in the underlying Hearing Examiner proceeding. If they do not have standing there, they don't have standing to participate in this Land Use Petition.

The fact that they were permitted to participate in the underlying proceeding is part of what is challenged in this Land Use Petition.

Appellant would assert that the Vias are a party to this proceeding in this Court for the limited purpose of the Court declaring that they had no standing to participate in any of the underlying Thurston County proceeding, the issuance of the building permit, or these proceedings before the Court.

CONCLUSION AND REQUEST FOR RELIEF

The conclusion by the BOCC that the itemized findings of fact and conclusions of law of the Hearing Examiner were not supported by substantial

evidence is simply incredible. The decision of the Hearing Examiner shows a carefully conducted hearing, carefully found facts, carefully applied conclusions of law, acumen for the land-use law area, expertise, experience and intelligence. When viewed in light of the whole record before the court, this land use decision as rendered by the Hearing Examiner is supported by evidence that is substantial as required by *RCW 36.70C.130*.

It should be obvious, the Vias are dissatisfied with the Stientjes legal use of their property and have attempted to "throw the kitchen sink" at the problem to see if it would go away. This Court should sanction the Stientjes legal use as is advocated herein by the Stientjes and the relief requested by the Stientjes should be granted in total.

Stientjes request:

1. That the Court declare the Vias have not had standing since their participation and initiation of any of the underlying

proceedings,

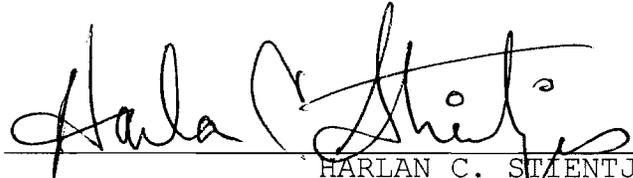
2. That the Court declare the Respondents Via did not timely file an appeal of the building permit from the Hearing Examiner decision dated March 4, 2008, as required by *RCW 36.70C.040*,
3. That the Court declare that the Via challenge was an impermissible and illegal collateral attack on an issued building permit,
4. That the Respondents each and every claim be dismissed,
5. That the two Hearing Examiner decisions be affirmed,
6. That the two BOCC decisions be overturned and the stop work order be negated, as the Hearing Examiner's findings of fact and conclusions of law were based on substantial evidence,
7. That the Court find that the BOCC doing an independent investigation was illegal under *RCW 36.70C.120 (a)* and requires the overturning of their decisions,
8. That Stientjes be awarded attorney's fees

and court costs for all underlying
proceedings.

AUG 25 PM 1:02

STATE OF WASHINGTON
BY _____
DEPUTY

DATED this August 24, 2011.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and accurate copy of the above-stated Appellants' Brief-LUPA 2 was mailed by first class mail, postage prepaid this August 24, 2011 and to the opposing parties as required by rule.

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Harlan C. Stientjes

Appendix

Legal References

General

RCW 36.70C.010

Purpose.

'The purpose of this chapter (Land Use Petition Act) is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.'

RCW 36.70C.120

Scope of review-Discovery.

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

(2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

(a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;

. . .

RCW 36.70C.130
Standards for Granting Relief

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless; (Issue Six)
- (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; (Issues Four and Five)
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; (Issue Five)
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief (Issues Three, Four and Five).

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages

or compensation.

- RCW 36.70C.140 Decision of the court.
- The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

RCW 36.70C.060

Standing.

Standing to bring a land use petition under this chapter is limited to the following persons:

(1) The applicant and the owner of property to which the land use decision is directed;

(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

(a) The land use decision has prejudiced or is likely to prejudice that person;

(b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

(c) 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; and

(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

[1995 c 347 § 707.]

RCW 36.70C.040
Commencement of review--Land use petition--
Procedure.

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(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:

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.