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DIVISION II

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No. 47836-6-II
STATE OF WASHINGTON
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COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

RORY HIGHAM, Appellant

vs.

PIERCE COUNTY, Respondents

OPENING BRIEF OF APPELLANT RORY HIGHAM

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. INTRODUCTION / SUMMARY..... 1

II. APPELLANT’S STATEMENT OF FACTS 4

III. STANDING..... 7

IV. STANDARD OF REVIEW – LUPA APPEAL. 8

V. CONCISE STATEMENT OF ERRORS COMMITTED..... 9

VI. AUTHORITY & ARGUMENT 11

VII. CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Anderson v. Pierce County, 86 Wn. App. 290, 302, 936 P.2d 432 (1987) 9

Asche v. Bloomquist (2006) 133 P.3d 475..... 17

August v. U.S. Bancorp, 190 P.3d 86 Wash.App.Div.3,2008... 14, 24

Callecod v. Washington State Patrol, 84 Wn. App. 663, 673, 929 P.2d 510, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997)..... 9

Chelan County v. Nykreim, 146 Wn.2d 904, 931, 52 P.3d 1 (2002)17

City of Arlington v. Central Puget Sound Growth Management Hearings Bd., 193 P.3d 1077 Wash.,200813, 21

City of Redmond v. Central Puget Sound Growth Management Hearings Bd., 136 Wn.2d 38, 959 P.2d 1091 (1998)..... 9

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340-41, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958) 23

Clark v. Baines, 84 P.3d 245, Wash., 2004..... 16, 25

Habitat Watch v. Skagit County, 155 Wash.2d 397, 120 P.3d 56 (2005) 17

Hisle v. Todd Pacific Shipyards Corp., 93 P.3d 108 Wash., 2004 . 13

In re Marriage of Mudgett, 704 P.2d 169 Wash.App.Div.1, 1985. 12, 21

Loveridge v. Fred Meyer, Inc., 887 P.2d 898 Wash., 1995 22

Matter of Pearsall-Stipek, 136 Wash.2d 255, 961 P.2d 343 Wash., 1998..... 22

Morris v. McNicol, 83 Wash.2d 491, 497, 519 P.2d 7 (1974)14, 21

Rains v. State, 100 Wash.2d at 664, 674 P.2d 165..... 22

Samuel's Furniture, Inc. v. Dep't. of Ecology, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002)..... 17

Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc., 108 P.3d 1247 Wash.App.Div.2, 2005..... 14, 24

Shuman v. Dep't of Licensing, 108 Wn. App. 673, 678, 32 P.3d 1011 (2001).....11, 14, 21

Skamania County v. Columbia River Gorge Comm'n, 144 Wn.2d 30, 49, 26 P.3d 241 (2001) 17

Snyder v. Munro, 106 Wash.2d 380, 383-84, 721 P.2d 962 (1986) 22

State v. Dupard, 609 P.2d 961 Wash., 1980 13

Thompson v. Dept. of Licensing, Wn.2d 783, 982 P.2d 601 (1999)12

STATUTES

RCW 36.70C.010	17
RCW 36.70C.020(1)	7
RCW 36.70C.060	7
RCW 36.70C.060(2)(b)	7
RCW 36.70C.060(2)(d)	7
RCW 36.70C.130 (a)-(f)	33
RCW 36.70C.130 (d)	10, 34
RCW 36.70C.130 (f)	11, 34
RCW 36.70C.130(1)	8
RCW 36.70C.130(a)	10
RCW 36.70C.130(c)	10
RCW 36.70C.1301(a)-(f)	8
PCC 18E.10.070.C.2.a	15
PCC 18E.10.070.G.1	15, 16
PCC 18E.10.070D	15
PCC 18E.30.060	3, 27
PCC 18E.40.060	3

OTHER AUTHORITIES

7 Wash. State Bar Ass'n, Real Property Deskbook § 111.49, at 111-25	8
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APPELLANT'S STATEMENT OF ISSUES &
ASIGNMENTS OF ERROR

1. Is the County/ Deputy Examiner collaterally estopped from changing the required wetland buffer dimensions when buffer had been previously adjudicated between the parties and resolved? **YES.**
2. Is the County/Deputy HE collaterally estopped from denying access to the site along the County approved & BLA-established driveway access route? **YES.**
3. Did County/Deputy HE erred in finding the site has a pre-existing driveway access to the home site, when that access is insufficient to support both the existing ADU and the proposed, primary single family residence? **YES.**
4. Did the County/Deputy HE err in not recognizing the on-going agricultural use of the site? **YES.**
5. Did the County/Deputy HE err in not granting the Variance, when all Criteria Is Met? **YES.**
6. Did the Deputy HE Err in Relying on Irrelevant, Inflammatory and Hearsay Staff Comments & Setting Unconstitutional Requested Conditions? **YES.**

I. INTRODUCTION / SUMMARY¹

Appellant Rory Higham, by and through his attorney, Carolyn A. Lake of the Goodstein Law Group PLLC, and pursuant to Chapter 36.70C RCW, submits this Opening Brief in support of review and reversal of the Deputy Pierce County Hearing Examiner's Findings, Conclusions and Order, Pierce County Wetland Variance application WV2-11, No. 703430 for Rory Higham, Tax Parcel Number 0319142008 dated May 19, 2011 ("Land Use Decision"). The Deputy Pierce County Hearing Examiner erred when he denied Appellant's application for a variance to construct a single family residence and driveway on property located at located at 250 Chesney Road East, Tacoma, Washington, within Pierce County, and Order Denying Reconsideration dated June 6, 2011 ("Land Use Decision"). AR 28-35 and 2-3.

This Court should grant this appeal and remand for a new Decision granting the requested variance for wetland reduction for at least the following reasons:

1. In 2003, the County issued a wetland and wetland buffer land use approval for this site. That County approval was recorded against the property, and established a 37.5 foot

¹ AR denotes reference to the Administrative Record, on file with the Court. TR denotes reference to the transcript of Examiner's hearing, also on file.

buffer for Mr Hingham's farm pond. See AR 83-86, Hearing Exhibit 1-L, Wetland approval AFN 200306190272. The County/Deputy HE is collaterally estopped from now changing the required wetland buffer dimensions. If these established buffers are properly recognized, the proposed, primary single family residence is outside any buffer area.

2. In June 2004, the County also approved a Boundary Line adjustment which specifically and by its express terms added a pipe stem driveway access to the property. See AR 88-89 Hearing Exhibit 1-M, BLA AFN 200406115001. The County/HE is collaterally estopped from denying access to the site along the BLA established driveway access route.
3. In 2005 Pierce County approved construction of an irrigation well at the site. AR 99-101. The proposed home site subject of this action is depicted on well application reviewed and approved by the County. AR 102-3.
4. Appellant undertook additional clearing of the site from 2006 forward, and in early 2010 applied for the building permit to construct his single family home, to include a variance request to allow work within some buffers areas. AR 32, and 54-56.
5. The County/Deputy HE erred in denying the requested pipe stem access variance. The Deputy HE erred by finding the

home could be served by a pre-existing driveway easement access to the home site. He erred because (1) that easement access is insufficient to support both the existing ADU and the proposed, primary single family residence, **TR 23:1-11, 15-25**², (2) the easement access to the new home would also intrude into an area classified by the County as wetland buffer **TR 27:20-28:7**³ and by not recognizing allowing access through Appellant's preferred and County-approved pipe-stem access would be the least intrusive and best method to meet the applicable criteria of Pierce County Code (PCC 18E.30.060 and PCC 18E.40.060). AR 54-56. This Court should find that when the correct reading of the facts as applied to the applicable law, Appellant's variance criteria is met to allow minimal intrusion to a wetland buffer for the pipe stem access driveway.

²"to make sure that we could both meet the requirements for providing adequate and suitable , As Mr. Higham has noted, in 2005 there was, a boundary line adjustment. Part of that boundary line adjustment was to establish a new driveway back to that home site location. The existing access to 9 the existing home-site coming into the very southeastern corner is an easement across the neighbor's property....One of the issues that we've run into that is that existing easement comes very, very close to an existing structure. If we are to use that existing easement, enhance it or create a 24-foot wide entry for vehicles for two home-sites, that is going to come very, very close to that existing neighbor's home site. So our idea was to use the road way that was created as a part of the boundary line adjustment. There was not a wetland issue raised in the boundary line adjustment" **TR 23:1-11, 15-25**. Testimony of wetland biologist.

³ And again, we -- we owe we generally 21 disagree with county staff on the location of the homesite. We believe the homesite is consistent with wise utilization of the property. Yes, we're going to encroach into buffers that are imposed onto the site. We have looked at alternatives of using the existing easement to access the homesite, but in doing that, we're also crossing through buffer. So using the existing driveway that was created within the BLA seems to make more sense than creating additional roadway to connect the southeast corner to the southwestern corner to access the new homesite." **TR 27:20-28:7**. Testimony of wetland biologist.

6. The County/Deputy HE also erred in not recognizing the on-going agricultural use of the site. AR 60-61,72, 83-86, **TR 26:3-11&26:21-27:3**⁴, photos at 113-120, 22 and staff own testimony regarding existing agricultural well. AR 41. Recognition of the agricultural use allows the ongoing use of the critical area and buffer areas for the existing agricultural use.

II. APPELLANT'S STATEMENT OF FACTS

The Property subject of this appeal is a single-family residence located at 2501 Chesney Road East, Tacoma, WA 98445. AR 29, AR 58 (map). The property owner has been denied development of a single family home. The issue which prevents building a home is that County has attempted to require a wetland buffer with width been seventy five feet (75) to one hundred (100) feet AR 40, where in fact a thirty-seven-and-a-half (37.5) foot

⁴ However, we do take issue with the second recommendation. The site has been and continues to be managed as livestock pasture. And we don't want to lose that use by the addition of a homesite on this property. With a homesite and the existing ADU on this property, we're still at a moderate intensive land use; we're not increasing to a higher intensity land use. We still fall under what the county considers to be moderate intensive land use.... And again, with No. 4, we do take issue with the permanent fencing. If we are to propose putting a permanent fence to exclude livestock from portions of this property that have been used for livestock and then managed as such, there would be a significant chunk of this property lost and no longer usable for agricultural use. And again, we don't want to lose that continuing agricultural use." **TR 26:3-11&26:21-27:3.** Testimony of wetland biologist.

buffer had previously been adjudicated by the same parties and approved by the County. AR 83-85.

In 2003, the County issued a wetland and wetland buffer land use approval. That County approval was recorded against the property, and established a 37.5 foot buffer for Mr. Higham's farm pond. See AR 83-86 Hearing Exhibit 1-L, Wetland approval AFN 200306190272.

In 2004, the County also approved a Boundary Line Adjustment which specifically and by its express terms added a pipe stem driveway access to the property. See AR 88-89 Hearing Exhibit 1-M, BLA AFN 200406115001.

In 2005 Pierce County approved construction of an irrigation well at the site. AR 99-101. The proposed home site subject of this action is depicted on well application reviewed by the County. AR 102-3.

From 2006 forward, Appellant undertook additional clearing of the site and in early 2010 applied for the building permit to construct his single family home.

In 2010, Appellant applied for permits to build a single family residence on his land, to include a variance request to allow work within some buffers areas, and retain the current mobile

home as an ADU. AR 47-57, AR 32, and 54-56. If the buffers established in 2003 are properly recognized, the proposed, primary single family residence is outside any buffer area, and no variance is needed. A variance would be required only for the driveway access to the new home, under **either one** of two potential accesses (a) the easement access, or (b) the pipe stem access created expressly by the 2005 County approved pipe-stem access. The Appellant established that the pipe-stem access is the least intrusive and meets the County's variance criteria. **TR 27:20-28:7⁵. TR 25:9-21⁶.** AR 54-56.

A hearing before the Deputy Hearing Examiner on Appellant's application was held May 19, 2011. AR 29. The Deputy Examiner issued a ruling by mail on 19 May 2011 denying the

⁵ And again, we -- we owe we generally disagree with county staff on the location of the homesite. We believe the homesite is consistent with wise utilization of the property. Yes, we're going to encroach into buffers that are imposed onto the site. We have looked at alternatives of using the existing easement to access the homesite, but in doing that, we're also crossing through buffer. So using the existing driveway that was created within the BLA seems to make more sense than creating additional roadway to connect the southeast corner to the southwestern corner to access the new homesite." **TR 27:20-28:7.** Testimony of wetland biologist.

⁶ As identified by the county, there's not going to be a direct impact to wetlands or streams. We've avoided those impacts. We believe we've minimized those impacts by much of the prior work that was done in establishing wetland and buffer areas on-site, the very western portion of the site, the western property boundary, is going to be fenced. So that fence will isolate on-site activities from adjacent wetland areas to the west. And so that we do not really expect this homesite to result in a negative impact to the functions of adjacent or on-site wetlands and adjacent wetlands and buffers. **TR 25:9-21** Testimony of wetland biologist.

variance. AR 28. On June 1, 2011, Appellant filed a Request for Reconsideration. AR 10. The Deputy HE denied the Reconsideration request on June 16, 2011. AR 3, which became the “final Decision”, subject of this appeal. Appellant timely filed this LUPA appeal with Thurston County Superior Court.⁷

By ruling dated June 26, 2015, the Thurston County Court denied Appellant’s appeal. **Copy attached.**

III. STANDING.

Appellant Rory Higham is the owner of the property subject to the Deputy Examiner’s decision. AR 29. The Deputy Hearing Examiner’s decision is a “land use decision” as defined by RCW 36.70C.020(1), and is reviewable under the Land Use Petition Act. Additionally, under RCW 36.70C.060(2)(d) and other statutes, Appellant has exhausted his administrative remedies to the extent required by law.

Pursuant to RCW 36.70C.060, and other statutes, in this capacity, Appellant has standing as a “person aggrieved or adversely affected by the Land Use Decision.” Under RCW 36.70C.060(2)(b)

⁷ Venue is proper in Thurston County, pursuant to RCW 36.01.050(1) which provides that all actions against a county “may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts.”

and other statutes, the Appellant is a person whose asserted interests are among those the local jurisdiction is required to consider when it makes a land use decision.

IV. STANDARD OF REVIEW – LUPA APPEAL.

The scope of review in LUPA actions is governed by RCW 36.70C.130(1), under which the court may grant relief if the party seeking relief can establish that one of the following standards is met:

- (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;
 - (b) The land use decision is an erroneous interpretation of the law, after allowing such deference as is due the construction of the law by a local jurisdiction with expertise;
 - (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
 - (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 right of the party seeking relief.
- RCW 36.70C.130(1)(a)-(f).

Standards (a), (b), (e) and (f) present questions of law for which the standard of review is de novo. 7 Wash. State Bar Ass'n, Real Property Deskbook § 111.49, at 111-25. Standard (c) is reviewed under the "substantial evidence" standard of review,

which is defined as "a sufficient quantity of evidence to persuade a fair minded person of the truth or correctness of the order." *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), (quoting *Callegod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997)). The clearly erroneous test for (d) is whether the court is "left with a definite and firm conviction that a mistake has been committed." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1987).

If Appellant shows that Pierce County's actions fall within any of the articulated standards, this Court is required to grant relief.

V. CONCISE STATEMENT OF ERRORS COMMITTED.

1. The Deputy Examiner's decision is contrary to the evidence, fails to properly consider and/or interpret the law and is a clearly erroneous application of the law to the facts;
2. The Deputy Examiner erred by failing to recognize that because the Appellant and County had previously adjudicated certain material facts relevant to this present application (buffer width and pipe stem driveway access), the County was and is collaterally estopped to deviate from the outcome of that litigation, in two significant ways:

- a. The County/ Deputy Examiner is collaterally estopped from now changing the required wetland buffer dimensions. If these established buffers are properly recognized, the proposed, primary single family residence is outside any buffer area; and
 - b. The Deputy Hearing Examiner erred in his Decision as the County/HE are collaterally estopped from denying access to the site along the BLA established driveway access route;
3. The County/Deputy Hearing Examiner erred in finding the site has pre-existing driveway access to the home site giving access sufficient to support both the existing ADU and a proposed, primary single family residence; and that access to the new home via this route would also intrude into an area classified by the County as wetland buffer;
4. The Examiner erred in denying the variance;
5. The Land Use Decision is an erroneous interpretation of the law, and or of the facts in violation of RCW 36.70C.130 (d);
6. The County Deputy HE engaged in unlawful procedure or failed to follow a prescribed process, and that error was not harmless in violation of RCW 36.70C.130(a);
7. The County's land use decision is a clearly erroneous application of the law to the facts;
8. The Deputy Hearing Examiner's Land Use Decision is clearly erroneous application of the law to the facts;
9. The County's land use decision is **not** supported by evidence that is substantial when viewed in light of the whole record before the court in violation of RCW 36.70C.130(c);

10. Appellant specifically appeals the following:
 - a. Findings of Fact 5, 6, 7, 9, 10, 11, 12;
 - b. Conclusion of Law 1; and
 - c. Decision;
11. The Deputy Examiner's decision is based on inadmissible evidence.
12. The Deputy Examiner's decision fails to acknowledge Appellant's on-going agricultural use of the land; proper recognition of Appellant's agricultural use permits the ongoing use of the critical area and buffer areas for the agricultural use; and
13. The land use decision violates the constitutional right of the party seeking relief in violation of RCW 36.70C.130 (f).

VI. AUTHORITY & ARGUMENT

1. **County/ Deputy Examiner is collaterally estopped from now changing the required wetland buffer dimensions when the buffer had been previously adjudicated between the parties and resolved.**

The elements of res judicata/collateral estoppel are:

- (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Shuman v. Dep't of Licensing, 108 Wn. App. 673, 678, 32 P.3d 1011 (2001) citing *Thompson v. Dept. of Licensing*, Wn.2d 783, 982 P.2d

601 (1999). Each of the four criteria is met in this case as to the appropriate wetland buffer width to be applied. When the correct buffers are applied (37.5 foot), the SF residential home site does not intrude into buffers and no variance is required, for that footprint.

a. The issue of appropriate buffers for the wetland is

identical. The County's Staff Report admits that in 2001:

the wetland in question was identified was a Category II wetland with a 50 foot buffer. The buffer of the wetland was reduced to 37.5 consistent with the code in effect at the time. A wetland approval was issued to resolve the violation. The approval was recorded on June 10, 2003 under AFN 200306190272.

Staff Report at page 4 – (Staff's) findings of fact No. 3. AR 41.

As part of the pending permit processing, County staff seeks to impose a much greater buffer width from 75-100 feet for this **identical** wetland area. See Staff Report at page 3, AR 40. *Staff's characterization of the Proposal*. This detrimental change sought by the County is barred by collateral estoppel.

Collateral estoppel prevents re-litigation after the party estopped has had a full and fair opportunity to present his or her case, **even if second litigation of issues is presented in different claim or cause of action.** *In re Marriage of Mudgett*, 704 P.2d 169 Wash.App.Div.1, 1985.

The doctrine of res judicata is more comprehensive than

doctrine of collateral estoppel because **it relates to prior judgment arising out of same cause of action between parties** whereas collateral estoppel bars re-litigation of particular issue or determinate fact. *State v. Dupard*, 609 P.2d 961 Wash., 1980.

The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. *Hisle v. Todd Pacific Shipyards Corp.*, 93 P.3d 108 Wash., 2004.

When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the re-litigation of those issues is barred by collateral estoppel. *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 193 P.3d 1077 Wash., 2008.

Here, the County is attempt to change the wetland boundaries and imposed a significantly greater buffer restriction, after it has already pursued a wetland enforcement action – and approved its resolution via an established 37.5 foot wetland buffer recorded against the property. This re-litigation of the County-approved, established wetland buffer is barred by collateral

estoppel.

b. A final judgment issued in the prior enforcement action. The County's enforcement action was fully resolved via the Wetland Approval. Resolution is a final judgment. *Shuman v. Dep't of Licensing*, 108 Wn. App. 673, 678, 32 P.3d 1011 (2001). A party need not have a full trial in order to have a full and fair opportunity to present his or her case. *Morris v. McNicol*, 83 Wash.2d 491, 497, 519 P.2d 7 (1974).

c. The parties are identical (Rory Higham and County). The County was the entity that pursued the 2001 land use enforcement action. Rory was the property owner at that time. The parties in the two proceedings are identical.

d. Application of doctrine will not work an injustice. To determine whether application of the doctrine of collateral estoppel would work an injustice, the court must consider whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum. *August v. U.S. Bancorp*, 190 P.3d 86 Wash.App.Div.3,2008. See also *Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc.*, 108 P.3d 1247 Wash.App.Div.2, 2005.

Here, the County was in ***complete and exclusive control***

over the type, quality and **resolution** of its enforcement actions. The County chose to pursue the land use enforcement action. The County had full and fair opportunity to prosecute its charge. The County had full control to approve or not the resolution offered by the property owner. Ultimately the County approved the land use action and recorded the Wetland Approval against the property. That approval sets forth the exact dimensions of the wetland and its required buffer. Further, the property owner was required to establish the wetland boundary as “permanent”. See PCC 18E.10.070.C.2.a. and PCC 18E.10.070D, and PCC 18E.10.070.G.1.

PCC 18E.10.070.C.2.a. Title Notification.

a. When Pierce County determines that activities not exempt from this Title are proposed, the property owner shall file a notice with the Pierce County Auditor. **The notice shall provide a public record of the presence of a critical area and associated buffer, if applicable;** the application of this Title to the property; and that limitations on actions in or affecting such critical area and associated buffer, if applicable, may exist.

PCC 18E.10.070D. Tracts and other Protective Mechanisms. Prior to final approval of any subdivisions, short subdivisions, large lot divisions, or binding site plans, the part of the critical area and required buffer which is located on the site shall be placed in a separate tract or tracts. (See Figure 18E.10-2 in Chapter 18E.120), or alternative protective mechanism such as a protective easement, public or private land trust dedication, **or similarly preserved through an appropriate permanent protective mechanism as determined by Pierce County.**

PCC 18E.10.070.G.1 Markers. The Department may require the outer edge of the critical area boundaries or, if applicable, required buffer boundaries on the site to be flagged by the qualified professional, as outlined in each Chapter. **These boundaries shall then be identified with permanent markers** and located by a licensed surveyor, unless otherwise stated in this Title. The **permanent** markers shall be clearly visible, durable, and **permanently** affixed to the ground.

b. **Permanent Fencing.** The Department may require the construction of **permanent** fencing along the buffer boundary of a wetland, fish or wildlife habitat conservation area or active landslide hazard area.

3. **Signage.** a. The Department may require **permanent** signage to be installed at the edge of the critical area or, if applicable, the edge of the required buffer.
b. When a sign is required, it shall indicate the type of critical area and if the area is to remain in a natural condition as **permanent** open space.

There is **no injustice** to hold the County accountable for its independent enforcement choices, and the consequence of the resolution action it approves. The real injustice would be to allow the County essentially a “do-over” despite its pursuit, prosecution and approved resolution of its prior enforcement action. The doctrine of collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties. *Clark v. Baines*, 84 P.3d 245, Wash., 2004.

The doctrine is especially applicable in the context of land use matters. The Washington Supreme Court has issued strong policies

favoring finality in land use decisions and security for landowners proceeding with property development. *Samuel's Furniture, Inc. v. Dep't. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002); *Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001), *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005), *Asche v. Bloomquist* (2006) 133 P.3d 475.

Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited land use procedures in a consistent, predictable and timely manner. RCW 36.70C.010. *Chelan County v. Nykreim*, 146 Wash.2d 904, 929, 52 P.3d 1 (2002).

All elements of collateral estoppel are met. The County's present attempt to change the required buffers after they previously resolved the land use enforcement action which resulted in established recorded buffers is barred by collateral estoppel.

2. The County/Deputy HE is collaterally estopped from denying access to the site along the County approved & BLA-established driveway access route.

Each of the four criteria for collateral estoppel is also met with respect to the County's 2004 approval of the BLA. The

County/HE is collaterally estopped from denying access to the site along the County approved, BLA established driveway access route.

a. The issue of appropriate driveway access for the site today is identical to the County's review and approval in 2003-4. The County's Staff Report admits that:

A boundary line adjustment application was submitted on October 2003 to establish a pipe stem connection to Chesney Road. Resource Management did not review or approve the boundary line adjustment. The BLA was recorded on June 11, 2004 under AFN 2001406115001.

See Staff Report at page 4 – (Staff's) findings of fact No. 4. AR 41.

The County's recitation of the Boundary Line Adjustment (BLA) facts is a bit anemic. The BLA in question was *specifically* created for the precise purpose of a driveway access, just as the *original wetland delineation in 2003 was created expressly for the proposed home site:*

Anyway, in 2001 we worked with county staff to resolve a suspected violation. And in doing that, we established the location of some on-site wetlands. We established buffers. We put together a planting plan. The planting plan was implemented using a variety of native trees and shrubs. That plan was then reviewed by county staff and accepted. And then subsequent to that, a monitoring plan outlined that the plants had established and were meeting the performance criteria of that mitigation plan. Also, as a part of that mitigation plan, there was a buffer reduction. It went from, at that time, a 50-foot width and buffer down to 37.5 feet. **That was done in preparation for a future homesite back in the northern portion of the site.** We wanted to make

sure that we could both meet the requirements for providing adequate and suitable buffer around the wetland areas, **but also providing for a future homesite.**

As Mr. Higham has noted, **in 2005 there was a boundary line adjustment. Part of that boundary line adjustment was to establish a new driveway back to that homesite location.** The existing access to the existing homesite coming into the very southeastern corner is an easement across the neighbor's property.

TR 22:9-23:11, Testimony from Biologist. Although the staff Report alleges that “resource management did not review or approve” the BLA, the Pierce County Planning department did review and issue comments on the BLA application. See **Appendix 1, Pierce County Planning and land Services Department Preliminary Land division Review Checklist⁸**. That Pierce County Planning Department checklist was issued for the Higham BLA, and in pertinent part makes the following conclusions:

4. All structures satisfy the required minimum building setback for the zone. The following problems were found:

_____” .

No problems are noted on the form, the corresponding Box is marked “OK”.

⁸ See true and correct copy of Appendix 1 which was attached to and filed with the County as part of Petitioner’s Reconsideration. The Reconsideration is included in the Record on Appeal, but Appendix 1 is missing from the record. See reference at AR 17.

9. An environmental checklist is required because:
... Within a designated Environmental Sensitive Area

No Environmental Sensitive Areas are noted on the form, the corresponding Box is marked "N/A".

10. Critical Area and resource Land Checklist review, all necessary applications have been submitted. The following discrepancies were found:_____.

No discrepancies are noted on the form, the corresponding Box is marked "N/A".

Appendix 1, *Id.*

The information and County's responses make it clear that the County had full opportunity to review the driveway BLA to determine its conformance with applicable wetland and critical areas and buffers. The County was on clear notice of the BLA's purpose: to serve as driveway access. Despite this notice to the County and the County's opportunity to undertake critical area review, the County ***chose*** not to.

As part of the current permit, County staff seeks to invalidate the very purpose for the BLA, and to now deny driveway access. This detrimental change in the County's position is barred by collateral estoppel. Collateral estoppel prevents re-litigation after the party estopped has had a full and fair opportunity to present his or her case, **even if second litigation of issues is presented in different claim or cause of action.** *In re Marriage of*

Mudgett, 704 P.2d 169 Wash.App.Div.1, 1985.

When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the re-litigation of those issues is barred by collateral estoppel. *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 193 P.3d 1077 Wash.,2008.

b. A final judgment issued in the prior BLA application. The County's review of the driveway access BLA resulted in a final approval. Resolution is a final judgment. *Shuman v. Dep't of Licensing*, 108 Wn. App. 673, 678, 32 P.3d 1011 (2001). A party need not have a full trial in order to have a full and fair opportunity to present his or her case. *Morris v. McNicol*, 83 Wash.2d 491, 497, 519 P.2d 7 (1974).

c. The parties are identical (Rory Higham and County). The County was the entity that reviewed and approved the 2003-4 BLA AR 88-89. Rory was the property owner at that time. The parties in the two proceedings are identical.

The County Staff's attempt to distance itself from the prior driveway access BLA approval is of no merit or consequence. First, it's clear that the planning staff had opportunity to and in fact actually did review and comment on the BLA application, and noted

no concerns with critical areas or buffers at that time, and they are stopped from doing do now. Further, under principles of res judicata, the final outcome is binding upon parties to litigation and **persons in privity** with those parties. *Loveridge v. Fred Meyer, Inc.*, 887 P.2d 898 Wash., 1995. Even nominally different parties may have sufficiently identical interests to satisfy the “identity of parties” inquiry for application of collateral estoppel /rejudicata. *Matter of Pearsall-Stipek*, 136 Wash.2d 255, 961 P.2d 343 Wash., 1998. For example, in *Snyder v. Munro*, 106 Wash.2d 380, 383-84, 721 P.2d 962 (1986) the petitioners challenged the constitutionality of a statute establishing certain state legislative districts. Different named parties had challenged the same statute on the same constitutional grounds in federal court and lost. The court held that the petitioners were barred by res judicata from re-litigating the constitutionality of the statute in state court. *Snyder*, 106 Wash.2d at 384, 721 P.2d 962.

“The identity of the parties is not a mere matter of form, but is one of substance; **the court will look to the legal effect of the identity of the parties even though they may be nominally different.**” *Snyder*, 106 Wash.2d at 383-84, 721 P.2d 962 (citing *Rains v. State*, 100 Wash.2d at 664, 674 P.2d 165).

The *Snyder* court reasoned that the petitioners, though different persons, had the same legal interests as all citizens of the state. The court concluded, therefore, that there was sufficient identity of parties for purposes of res judicata. *Snyder*, 106 Wash.2d at 384, 721 P.2d 962. See also *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958) (holding final judgment against the State barred subsequent action by citizens because citizens' public rights were represented by the State in the earlier proceeding).

Here, the County is the approving entity as to both matters. And, the County planning staff did actually comment on the driveway access BLA, which was approved. As part of this Appeal, this Court should have little trouble finding the parties to the BLA action (County and property owner) are precisely the same as the current parties. Res Judicata applies and bars the County's current action to disavow the BLA.

d. Application will not work an injustice. To determine whether application of the doctrine of collateral estoppel would work an injustice, the court must consider whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum. *August v. U.S. Bancorp*, 190

P.3d 86 Wash.App.Div.3,2008. See also *Satsop Valley Homeowners Ass'n, Inc. v. Northwest Rock, Inc.*, 108 P.3d 1247 Wash.App.Div.2, 2005.

Here, the County was in ***complete and exclusive control*** over the review and ***resolution*** of the BLA application.⁹ The County (apparently) chose to **not** review off site wetland impacts as part of the BLA. That was its choice. The County had full and fair opportunity to do so. The County had full control to approve or not the application submitted by the property owner. Ultimately the County approved the driveway access BLA land use action and recorded the boundary and driveway access change against the property. That approval sets forth the exact dimensions of the driveway access and its location.

There is **no injustice** to hold the County accountable for its

⁹ See PCC 18E.10.070 D.2.a **Review Responsibilities.**

a. **The Department is responsible** for administration, circulation, and review of any applications and approvals required by this Title. And see: PCC 18E.10.070 D 3. **Review Process.**

a. The Department shall perform a critical area review for any application submitted for a regulated activity, including but not limited to those set forth in Section 18E.20.020. **Reviews for multiple critical areas shall occur concurrently.**

b. The Department **shall**, to the extent reasonable, **consolidate the processing of related aspects of other Pierce County regulatory programs which affect activities in regulated critical areas, such as subdivision or site development, with the approval process established herein so as to provide a timely and coordinated review process.**

independent application review and approval processes, and the consequence of the applications which it approves. The real injustice would be to allow the County essentially a “do-over” despite its review and recent approval of the land use application. The doctrine of collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties. *Clark v. Baines*, 84 P.3d 245, Wash., 2004. The doctrine of finality in land use approval actions also applies to the BLA, negating the County’s current stance of disavowing the effect of its prior approval.

3. **The County/Deputy HE erred in finding the site has a pre-existing driveway access to the home site, when that access is insufficient to support both the existing ADU and the proposed, primary single family residence.**

The Staff Report and HE ruling were impermissibly dismissive of the property owner’s reliance on the County-approved BLA which created the pipe-stem driveway access. The area of the BLA driveway was purchased by the property owner and the County-approved BLA application was successfully pursued precisely due to the need for a wider access than the driveway for the existing SF home provides, since the driveway will provide

access for two homes. **TR 23:5-11, 23:16-24:1.**¹⁰ In addition, the driveway which serves the existing SF home (to be an ADU) extends through the area classified by the County as a buffer of an off-site wetland. **TR 27:20-28:7.**¹¹ Thus, a variance is required for *either one* of two potential accesses to the new home: (a) the easement access, or (b) the pipe stem access created expressly by the 2005 County-approved BLA. The Appellant established that the pipe-stem access is the least intrusive and meets the County's variance criteria. **TR 27:20-28:7**¹². **TR 25:9-21.**¹³ AR 54-56. The Deputy

¹⁰ "As Mr. Higham has noted, in 2005 there was a boundary line adjustment. Part of that boundary line adjustment was to establish a new driveway back to that homesite location. The existing access to the existing homesite coming into the very southeastern corner is an easement across the neighbor's property. One of the issues that we've run into that is that existing easement comes very, very close to an existing structure. If we are to use that existing easement, enhance it or create a 24-foot wide entry for vehicles for two home sites, that is going to come very, very close to that existing neighbor's homesite. So our idea was to use the road way that was created as a part of the boundary line adjustment. There was not a wetland issue raised in the boundary line adjustment." **TR 23:5-11, 23:16-24:1 Testimony of Biologist.**

¹¹ "And again, we -- we owe we generally disagree with county staff on the location of the homesite. We believe the homesite is consistent with wise utilization of the property. Yes, we're going to encroach into buffers that are imposed onto the site. We have looked at alternatives of using the existing easement to access the homesite, but in doing that, we're also crossing through buffer. So using the existing driveway that was created within the BLA seems to make more sense than creating additional roadway to connect the southeast corner to the southwestern corner to access the new homesite." **TR 27:20-28:7.** Testimony of wetland biologist.

¹² "And again, we -- we owe we generally disagree with county staff on the location of the homesite. We believe the homesite is consistent with wise utilization of the property. Yes, we're going to encroach into buffers that are imposed onto the site. We have looked at alternatives of using the existing easement to access the homesite, but in doing that, we're also crossing through buffer. So using the existing driveway that was created within the BLA seems to make more sense than creating additional roadway to connect the southeast

HE erred by not granting the variance.

4. The County/Deputy HE erred in not granting the Variance, as all Criteria Is Met.

The Court should hold the County to its prior “permanent” designated wetland boundaries. When it does, it becomes clear Petitioner’s variance should be granted. The Court should grant the appeal and remand for approval of the variance based on the Findings of Fact set forth at AR 54-56 under PCC 18E.20.060 which sets forth the criteria to reduce wetland buffers below the standards of PCC 18E.30.060. AR 33.

Below, Appellant also shows how the County erred in denying the variance request. This Court should alternatively find that, based on the record, and when inadmissible allegations are properly excluded, Appellant met the variance criteria as described below and based on the Findings of Fact at AR 54-56.

a. There are special circumstances applicable to the subject property, or to the intended use such as shape, topography, location or surroundings that

corner to the southwestern corner to access the new homesite.” TR 27:20-28:7. Testimony of wetland biologist.

¹³ “As identified by the county, there's not going to be a direct impact to wetlands or streams. We've avoided those impacts. We believe we've minimized those impacts by much of the prior work that was done in establishing wetland and buffer areas on-site, the very western portion of the site, the western property boundary, is going to be fenced. So that fence will isolate on-site activities from adjacent wetland areas to the west. And so that we do not really expect this homesite to result in a negative impact to the functions of adjacent or on-site wetlands and adjacent wetlands and buffers.” TR 25:9-21. Testimony of wetland biologist.

do not apply generally to other properties or that make it impossible to redesign the project to preclude the need for a variance;

The intrusion of off-site wetlands and buffers onto the subject property is special circumstances applicable to the subject property which does make it impossible to redesign the project to preclude the need for a variance. AR 32, AR 41, Comment 6. Once the limitations of the driveway serving the existing SFR is understood, **any access** will require intrusion into an area classified by the County as a critical area buffer. The current variance proposal offers the least impacts.

b. The applicant has avoided impacts and provided mitigation to the maximum practical extent;

Once the boundary of the existing wetland is correctly understood to be 37.5 feet in width, AR 84, the SFR no longer intrudes into the wetland buffer. Once the limitations of the driveway serving the existing SFR is understood, any of the two choices of access will require intrusion into an area classified by the county as a critical area buffer. The current variance proposal offers the least impacts. Findings of Fact at AR 54-56. Thus the Appellant avoided impacts and provided mitigation to the maximum practical extent.

c. The buffer reduction proposed through the variance is limited to that necessary for the preservation and enjoyment of a substantial property right or use possessed by other similarly situated properties, but which because of special circumstances is denied to the property in question;

The buffer reduction proposed through the pipe stem access variance is limited to that necessary for the preservation and enjoyment of the residential and Agricultural use which is a property right or use possessed by other similarly situated properties.

County staff incorrectly offered a “site plan” for which it was claimed that “As clearly shown on the site plan provided, there are other alternatives. The project could redesigned and have no buffer reductions whatsoever” **TR 5:8-11**. The evidence at hearing shows this is **not** true. The staffer’s proposed homesite is located on the only area suitable on the entire site for the required septic.

In order to place a -- a new home site on this parcel and return the existing smaller home into an ADU, we've gone through and had a septic design looked at and submitted for approval. It's presently on hold. **But it basically takes up the best chunk of the property that will drain. That's about the only place -- other than where the existing septic system is for the ADU, that's approximately the only place on the site where that septic system is going to fit.** So in keeping with the prior discussions with the county in 2001, and the desire to keep some pasture out there, we've identified the location of the homesite in the northern portion of the property.

TR 24:20-25:8. *Testimony of wetland Biologist.* Under the County staffer's design, the property owner could have a house OR septic in that area but not both. However, since both house and septic are needed, it is undisputed that the variance is needed and should be grant to allow buffer reduction or intrusion so that both house and septic can be located on site.

Once the boundary of the existing wetland is correctly understood to be 37.5 feet in width, the SFR no longer intrudes into the wetland buffer. Once the limitations of the easement driveway serving the existing SFR is understood, use of either of the two accesses will require intrusion into an area classified by the county as a critical area buffer. Appellant's offered pipe stem access variance proposal offers the least impacts. Thus the Appellant has avoided impacts and provided mitigation to the maximum practical extent.

d. Granting the variance will not be materially detrimental to the public welfare or injurious to the property or improvement.

The Staff Report admits that the proposal to build a new single family home and retain the existing mobile home as an ADU **is consistent with the local zoning and land use of the area. It poses no direct hazard to either the site or**

surrounding properties, such as flooding or erosion. AR 44, Finding 4.

It meets the requirements of other codes (e.g., fire prevention, building) to ensure that the proposed improvement will not be at risk as a result of the buffer reduction. Id. However, Staff stated that reducing a wetland buffer *is expected* to have a negative impact on the functions of the wetlands. Id. No facts in the record establish any *actual* negative impact.

The testimony of Appellant's wetland biologist establishes just the opposite:

As identified by the county, there's not going to be a direct impact to wetlands or streams. We've avoided those impacts. We believe we've minimized those impacts by much of the prior work that was done in establishing wetland and buffer areas on-site, the very western portion of the site, the western property boundary, is going to be fenced. So that fence will isolate on-site activities from adjacent wetland areas to the west. And so that we do not really expect this homesite to result in a negative impact to the functions of adjacent or on-site wetlands and adjacent wetlands and buffers.

TR 25:9-21, Testimony of wetland biologist. Further, once the boundary of the existing wetland is correctly understood to be 37.5 feet in width, the SFR no longer intrudes into the wetland buffer. Once the limitations of the easement access serving the existing

SFR is understood, either of the two accesses will require intrusion into an area classified by the county as a critical area buffer. Thus Appellant has avoided impacts and provided mitigation to the maximum practical extent. The current pipe-stem access variance proposal offers the least impacts, and it should be granted.

5. The County/Deputy HE erred in not recognizing the on-going agricultural use of the site.

The owners carried out an established and allowed agricultural use on this site. See Hearing Exhibits 1D *County Land Characteristics* AR 60-61, 1H- Site plan AR 72, 1L- wetland approval AR 83-86, all reflecting the site's historic agricultural (AG) use (reference to livestock fencing, managed pasture lands, AG pond, photos AS 113-20, 122, and see Staff Report reference at page 4, Finding 7 to "existing agricultural well".¹⁴ AR 41. Recognition of the AG use allows the ongoing use of the critical area and buffer areas for the existing AG use.

¹⁴ In light of the heavy documentation of the Agricultural use in the record, the testimony of the purported neighbor is simply not credible. AR 31. Aerial photos attached to the County's Staff Report reflect that the two properties are interrupted by a thick stand of forested area, which completely screens the neighbor (or most others) from any view of the site. AR113-120,123.

6. The Deputy HE Erred in Relying on Irrelevant, Inflammatory and Hearsay Staff Comments & Unconstitutional Requested Conditions

The Deputy HE violated RCW 36.70C.130 (a)-(f) by the following:

- ✓ Decision at Page 3. “**Comments from Other Agencies/ Individuals**” Staff purports to paraphrase an unspecific phone call comment from an unidentified caller. AR 40. The Deputy HE engaged in unlawful procedure when relying on such inadmissible evidence and that evidence is not substantial when viewed in light of the whole record before the court, in violation of RCW 36.70C.130 (a) and (c).

- ✓ Page 4- **Finding No. 5** – Comments from Staff re; purporting to describe alleged previous un-permitted work, are irrelevant and inflammatory. AR 30, 43.

The Deputy HE (1) engaged in unlawful procedure when relying on such inadmissible evidence and (2) is a clearly erroneous application of the law to the facts and (3) that evidence is not substantial when viewed in light of the whole record before the court, in violation of RCW 36.70C.130 (a) (d) and (c), and as a result, the Deputy HE’s decision is an erroneous interpretation of the law. RCW 36.70C.130 (b)

- ✓ Page 6 **Comment:** Staff comments to the effect that the prior Approval “was based on regulations in effect at the time and does not apply to the current proposal” is legally wrong and without basis. AR 43.

The Deputy HE (1) engaged in unlawful procedure when relying on such inadmissible evidence and (2) is a clearly erroneous application of the law to the facts and (3) that evidence is not substantial when viewed in light of the whole record before the court, in violation of RCW 36.70C.130 (a) (d) and (c), and as a result, the Deputy HE’s decision is an erroneous interpretation of the law. RCW 36.70C.130 (b).

- ✓ Page 6 **Comment:** Staff comments offering an opinion that

“the existing access easement at the southeastern corner of the site is serviceable and there is no apparent need to modify access” lacks factual and or legal basis. AR 43.

The Deputy HE (1) engaged in unlawful procedure when relying on such inadmissible opinions and (2) is a clearly erroneous application of the law to the facts and (3) that evidence is not substantial when viewed in light of the whole record before the court, in violation of RCW 36.70C.130 (a) (d) and (c), and as a result, the Deputy HE’s decision is an erroneous interpretation of the law. RCW 36.70C.130 (b).

- ✓ Page 7 – **Recommended Conditions of Approval.** Staff recommended denial but alternatively if approved, listed requested approval conditions. One proposed staff condition seeks to require: “All agriculture use of the buffers will be discontinued as part of the mitigation.” AR 44, Condition 2. This condition is completely without basis and seeks to impermissibly intrude on the property owners’ ability to carry out an established and allowed use. See Exhibits 1D AR 60-61, 1H AR 72, 1L AR 83-86, all reflecting the site’s historic AG use (reference to livestock fencing, managed pasture lands, AG pond, photos at 113-120,123. and see Staff Report reference at page 4, Finding 7 AR 41 to “existing agricultural well”.

On remand, the Court should clarify that imposition of any such requested condition on remand would be (1) a clearly erroneous application of the law to the facts and in violation of RCW 36.70C.130 (d). Further in refusing to recognize/seeking to deny the property owner’s lawful agricultural use, the offending condition would violate Appellant’s constitutional rights, in violation of RCW 36.70C.130 (f).

VII. CONCLUSION

This Court should grant this appeal and remand for a new Decision (1) granting the requested variance, and (2) collaterally estopping the County from ignoring its prior approvals: (a) AR 83-86 Hearing Exhibit 1-L, Wetland approval AFN 200306190272, and (b) AR 88-89 Hearing Exhibit 1-M, BLA AFN 200406115001, which expressly created Appellant's preferred pipe-stem access.

Appellant also requests reasonable attorney fees and costs and any other relief the Court deems just and reasonable under the circumstances.

RESPECTFULLY SUBMITTED this 23rd day of November 2015.

GOODSTEIN LAW GROUP PLLC


By: _____

Carolyn A. Lake, WSBA #13980
Attorneys for Petitioner Higham

COPY ORIGINAL

Judge Erik D. Price, Dept. 4

FILED

JUN 26 2015

Superior Court
Linda Myhre Enlow
Thurston County Clerk

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

RORY HIGHAM, individual,

Petitioner,

NO. 11-2-01285-6

vs.

PIERCE COUNTY acting through its
PLANNING & LAND SERVICES
DEPARTMENT, a municipal corporation,

Respondent.

ORDER AFFIRMING DECISION OF
PIERCE COUNTY HEARING
EXAMINER

This Land Use Petition Act ("LUPA") appeal was heard on March 27, 2015.

Petitioner Rory Higham appeared and participated through his counsel of record, Carolyn Lake, Goodstein Law Group, PLLC. Respondent Pierce County appeared and participated through its counsel, Mark Lindquist, Pierce County Prosecuting Attorney, by Jill Guernsey, Deputy Prosecuting Attorney.

I. LUPA Decision

1. Pursuant to RCW 36.70C.120, et. seq., the Court, acting in its appellate capacity, reviewed the full administrative record created before the Pierce County Hearing Examiner in this matter, the transcript of the hearing before the Hearing Examiner, Case No.

1 WV2-11, and the briefs filed by the parties.

2 2. Petitioner Rory Higham did not meet his burden of proof under RCW
3 36.70C.130.

4 3. The Hearing Examiner had authority or jurisdiction to hear and decide the
5 issues presented in this case.

6 4. The Hearing Examiner's Decisions in this matter, dated May 19 and June 16,
7 2011, were supported by substantial evidence in the record and were a correct interpretation
8 of the law and application of the law to the facts of this case.

9
10 **II. Collateral Estoppel**

11 Regarding Petitioner's challenge to the Hearing Examiner's Decisions based upon
12 collateral estoppel, the Court makes the following findings of fact and conclusion of law:

13 1. To challenge the Hearing Examiner's Decisions based upon collateral
14 estoppel, Petitioner has the burden of proving all four elements of
15 collateral estoppel. As to each element:

16 **Element 1:** That the issue decided in the prior adjudication is identical with the one
17 presented in the second action, the Court finds that the Petitioner did not satisfy his burden as
18 to this element as the issues decided in the prior adjudication (grading of a wetland and
19 boundary line adjustment) were not identical to the issues in this matter (construction of a
20 structure and permit for a driveway construction);

21 **Element 2:** That the prior adjudication must have ended in a final judgment on the
22 merits, the Court finds that the Petitioner satisfied his burden as to this element as a prior
23 adjudication ended in final judgment on the merits;

24 **Element 3:** That the party against whom the plea is asserted was a party or in privity
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with the party to the prior adjudication, the Court finds that Petitioner satisfied his burden as to this element as Petitioner was a party in a prior adjudication; and

Element 4: That application of the doctrine does not work an injustice, the Court finds that the Petitioner did not satisfy his burden as to this element as the public's interest in ensuring proposed developments conform to newly adopted laws would be subverted by too easily granting vested rights.

The Court concludes that, because Petitioner has not met his burden of proving that all four elements of collateral estoppel have been met, the Hearing Examiner's Decisions cannot be challenged on the basis of collateral estoppel.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

The Hearing Examiner's Decisions in this matter, dated May 19 and June 16, 2011, are affirmed.

DATED this 26th day of June, 2015.

ERIK D. PRICE

Judge Erik D. Price

Presented by:

Approved & Notice of Presentment Waived:

MARK LINDQUIST
Prosecuting Attorney

GOODSTEIN LAW GROUP PLLC

By: [Signature]
Jill Guernsey, WSBA #9443
Deputy Prosecuting Attorney
Attorneys for Pierce County

By: [Signature]
Carolyn A. Lake, WSBA #13980
Attorneys for Petitioner
(authorized per email, 6.24.15)

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

RORY HIGHHAM,) THURSTON COUNTY
) CAUSE NO.
Plaintiff,) 11-2-01285-6
)
vs.) ADMINISTRATIVE
) LAW REVIEW
PIERCE COUNTY,)
)
Defendant.)

THE COURT'S RULING

BE IT REMEMBERED that on MARCH 27, 2015, the above-entitled matter came on for hearing before the HONORABLE ERIK PRICE, Judge of Thurston County Superior Court.

Reported by: Sonya Wilcox, Official Reporter,
CCR#2112
2000 Lakeridge Drive SW
Olympia, WA 98502
(360) 786-5569
wilcox@co.thurston.wa.us

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APPEARANCES

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For the Defendant:

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1 Before the Honorable ERIK PRICE, Presiding
2 Representing the Plaintiff, CAROLYN LAKE
3 Representing the Defendant, JILL GUERNSEY
4 SONYA WILCOX, Official Court Reporter

5
6 --oo0oo--

7 THE COURT: I appreciate the patience of the
8 parties and counsel permitting the Court some
9 additional minutes to review the file, the documents
10 that have been given to the Court for its attention,
11 the briefing, and some of the cases that I have
12 previously reviewed.

13 While I always attempt to be prepared for
14 argument, I never like to have my decision ultimately
15 made until I have the benefit of the oral arguments.
16 I stated when I left the bench that I expected to
17 make one of two announcements, that I can make a
18 ruling at this point or that I can't. I think I'm
19 satisfied that I can make a ruling at this point,
20 notwithstanding the preference of a judge to always
21 make sure your nouns and verbs match and have
22 everything in poetic unity. In absence of that, I
23 will pursue a decision orally at this point.

24 So this is a LUPA appeal, Land Use Petition Act.
25 There is a statute that governs this Court's review

1 of the underlying administrative decision. This
2 comes from RCW 36.70C.130, which outlines the grounds
3 for relief in these types of cases. It is a
4 different statute, of course, than the APA statute,
5 but there's substantial similarity between them.

6 This Court has plenty of experience in applying
7 its appellate review of administrative decisions, and
8 that is what it has been tasked with doing here.
9 Some of the main principles that are important are
10 that the party seeking leave from the decision, here
11 the petitioner, does have the burden to prove that
12 the decision was incorrect in a variety of potential
13 ways that RCW 36.70C outlines.

14 The Court does give deference to the decision
15 maker, especially on evidence and judgments of
16 evidence, and reasonable inferences are read in the
17 light most favorable to the party who prevailed at
18 the highest forum that exercised fact-finding
19 authority, here the County.

20 It does not mean that appellate review at the
21 Superior Court level of these types of decisions are
22 an empty exercise. That's something this Court takes
23 seriously. As I mentioned before, it happens
24 frequently here in this county, and it's a task I do
25 take seriously. In some respects, the reason for

1 that is the delay that it takes to get these
2 decisions to Superior Court.

3 There is frequently, not as much in the land use
4 area, a criticism of our administrative law structure
5 that has administrative decision makers whose
6 independence from the agency they are making
7 decisions about somewhat questionable. So if you, as
8 the Superior Court, merely defer blindly to those
9 agency decisions, you do a disservice, I think, to
10 the petitioners and to the citizens who interact with
11 government. That's more of a philosophical
12 discussion of the importance that this Court takes in
13 its role.

14 That being said, in this specific case there are
15 two principle arguments being made by the petitioner.
16 Again, I have reviewed the record. I have reviewed
17 the briefing. I have reviewed the initial petition
18 for review and certainly reviewed the underlying
19 agency decision, which, for specificity, I will say
20 was dated May 19, 2011.

21 The two principle arguments are as follows:
22 First, was there error in the hearing examiner's
23 application of law, and was there substantial
24 evidence to support his determinations and
25 application of the variance criteria? That variance

1 criteria and his application of it is principally
2 found in paragraph 13 of the May 19, 2011, decision.
3 The second principle argument made by petitioner is
4 whether the decision was erroneous due to the
5 application of collateral estoppel principles.

6 The petitioner has argued here today that that
7 second issue is the one that really drives the boat.
8 If this decision was erroneous because of collateral
9 estoppel, then there is no need to even discuss the
10 application of the variance criteria. That is not an
11 incorrect statement. However, I'm going to still
12 treat them in the opposite order. That is, I'm going
13 to first address my review of the hearings examiner's
14 decision from a substantial evidence perspective and
15 an error of law perspective before I treat the
16 collateral estoppel review.

17 As I mentioned, I reviewed all of the record.
18 That's one of the things that the Court in its
19 obligations to serve in the role that it serves must
20 do to see if there is substantial evidence to support
21 the decision and to understand the application by the
22 hearings examiner sufficiently to see if there is an
23 error of law.

24 In my review of the transcript, the hearings
25 record, the staff report, and the other items in the

1 record, I am persuaded by the County's arguments that
2 the petitioner has failed to demonstrate that there
3 was either a failure to follow the law or a failure
4 of substantial evidence to support the findings and
5 conclusions of the hearings examiner. Rather than
6 repeat those arguments, I would cite anybody checking
7 my work to pages 9 through 12 of the County's
8 response brief. Those arguments, together with my
9 review of the record in conjunction with those
10 arguments, satisfied me that there was no error by
11 the hearings examiner at least with regard to that.

12 The second principle argument made by petitioner
13 and the one which has been great focus of the oral
14 argument, as well as the briefing, is this notion of
15 collateral estoppel and whether collateral estoppel
16 applies here to defeat the decision by the hearings
17 examiner.

18 The elements of collateral estoppel are important
19 to the Court's analysis. I will repeat them for the
20 purposes of my decision. This is cited by the
21 petitioner in *Shuman v. Department of Licensing*, 108
22 Wn. App. 673. The elements are as follow, "(1) the
23 issue decided in the prior adjudication is identical
24 to the one presented in the second action; (2) the
25 prior adjudication must have ended in a final

1 judgment on the merits; (3) the party against whom
2 the plea is asserted was a party or in privity with a
3 party to the prior adjudication; and (4) application
4 of the doctrine does not work an injustice."

5 The petitioner argues that there is an
6 appropriate application of collateral estoppel to
7 principally two occurrences here: First, the 2003
8 wetland buffer established by the 2003 permit issued
9 by the County and, secondly, in 2004, the boundary
10 line adjustment that was approved by the County.
11 There is also some discussion in the briefing about
12 the 2005 well construction permit. That got less
13 play in the briefing.

14 I think petitioner does a complete job in terms
15 of addressing all four elements for those
16 occurrences, and I must say I'm easily persuaded by
17 two of the four elements, which is the party against
18 whom the plea is asserted was a party in the prior
19 adjudication and that the prior adjudication must
20 have ended in a final judgment on the merits. The
21 pause with that second one, whether there really was
22 a determination on the merits in the way that
23 collateral estoppel requires for the issuance of a
24 permit, but there wasn't a lot of dispute on that by
25 the parties. So I think clearly the parties are the

1 same. Those elements are easily met.

2 The two remaining ones are more difficult, and
3 that is the first one, that the issue decided in the
4 prior adjudication is identical, and the last one,
5 application of the doctrine does not work an
6 injustice.

7 Petitioner obviously argues that those two
8 elements are met by the 2003 permit, as well as the
9 2004 boundary line adjustment. To shorthand
10 petitioner's argument, petitioner argues that the
11 2003 wetland permit set the buffers in a permanent
12 way for this property at 75 feet, that the reason for
13 that permit in 2003 is irrelevant, that the
14 determination of that boundary as being the wetland
15 buffer is what is relevant and that is identical to
16 what is being asked by the structure construction
17 permit.

18 Secondly, with the 2004 boundary line adjustment,
19 the argument is the boundary line adjustment was for
20 the purpose of a driveway, and the proposal by the
21 County for the boundary line adjustment as a driveway
22 is identical to the construction of a driveway
23 necessary for the structure such that collateral
24 estoppel should apply.

25 The County in response says, now, wait a minute,

1 the 2003 permit was not for the construction of a
2 structure but was for grading of the wetland and that
3 any structure would require a separate permit and
4 that that permit would be governed by regulations in
5 place at the time of the request for the permit
6 rather than the regulations in place in 2003.

7 Same with the boundary line adjustment, the
8 County argues that the boundary line adjustment is
9 just that; it's a boundary line adjustment. It is
10 not a permit for a driveway construction, and,
11 therefore, the approval of the boundary line
12 adjustment means nothing with respect to a later
13 permit request for the driveway, and when a permit is
14 applied for for a driveway, then the regulations are
15 reviewed at that time.

16 Setting aside whether or not the application of
17 the doctrine works an injustice, the question is
18 governed in the Court's mind by what is meant by the
19 term "issue" in the first requirement for collateral
20 estoppel. That is, "is the issue identical?" What
21 is the "issue"?

22 If the "issue" in 2003 was the wetland buffers
23 and the "issue" today is the wetland buffers, those
24 issues are identical, according to the argument of
25 the petitioner. On the other hand, if the "issue" is

1 the type of permit in 2003, the type of permit is not
2 identical to the type of permit requested in 2010.
3 Therefore, the "issue" is not identical, and
4 collateral estoppel would not apply.

5 As the Court was considering this, in its view,
6 critical issue, it was aware of and contemplated the
7 principles from Abbey Road Group v. City of Bonney
8 Lake, 162 Wn. 2d. 244. Now, this case does not
9 discuss collateral estoppel, at least not in the part
10 that's been cited to the Court, but it does talk
11 about the Washington rule on vesting and the vesting
12 rights doctrine and the rule that Washington follows
13 that applicants are vested when they apply, which is
14 apparently a minority rule.

15 The majority rule provides that development is
16 not immune from subsequently-adopted regulations
17 until the building permit has been obtained and
18 substantial development has occurred. Washington
19 doesn't do that. Washington says, once you apply,
20 you are vested.

21 Again, that's not directly related to this issue,
22 but what is relevant, at least in the Court's
23 consideration of the principle question, comes from
24 page 251 when the Court is discussing the reasons
25 behind the vesting doctrine. The Court says, "The

1 goal of the statute is to strike a balance between
2 the public's interest in controlling development and
3 the developer's interest in being able to plan their
4 conduct with reasonable certainty. Development
5 interests can often come at a cost to public
6 interest. The practical effect of recognizing a
7 vested right is to potentially sanction a new
8 nonconforming use. 'A proposed development, which
9 does not conform to newly adopted laws, is by
10 definition inimical to the public interest embodied
11 in those laws.' If a vested right is too easily
12 granted, the public interest could be subverted."

13 The relevance of this language in the Court's
14 mind to this question goes to the balance of the
15 prejudice here being complained about by both
16 parties. The petitioner here complains with some
17 merit that he has had a development idea in mind;
18 that he has had interactions with the County along
19 the line; he has done what he needs to do to develop
20 this in steps; based on whatever limitations he had,
21 it took time, and each time, he has done what he
22 needed to do; and now at the end of this process, he
23 is told that this idea that he has will not work. He
24 says, again with some merit, but, County, you knew as
25 this was happening what I was trying to do, I wasn't

1 hiding anything at least with respect to the
2 driveway, and yet I cannot do what I wanted to do.

3 Now the County, on the other hand, says, well,
4 wait a minute, our regulations have been changing,
5 and you are not entitled to rely on the regulations
6 that are in play at the very beginning of this
7 process, but, rather, you have to be subjected to the
8 regulations that apply when you apply for the
9 specific permit.

10 This language from Abbey Road I think
11 acknowledges the tension there. It acknowledges the
12 hardship that developers go through. On the other
13 hand, it acknowledges the interest of the public in
14 ensuring that, as it says, vested rights are not too
15 easily granted. A broad application of collateral
16 estoppel would in many cases create a vested right
17 too easily it would seem to me.

18 With that as a background, I turn back to the
19 question, what is the "issue" that was decided
20 previously? Is the "issue" the type of permit or is
21 the "issue" the wetland buffer determination?
22 Consistent with what I believe to be the law of
23 vested rights and how that educates the question, my
24 answer is that the "issue" that was decided in 2003
25 is not the same "issue" that is being determined in a

1 2010 application for home construction permit.
2 Moreover, the "issue" that was decided in the 2004
3 boundary line adjustment is not the same "issue" that
4 is being decided in a driveway permit.

5 The answer to the two questions are somewhat
6 different in terms of their ease to arrive at it.
7 The BLA is a closer call in the Court's mind. I'm
8 not troubled by the conclusion that the 2003 grading
9 permit is substantially different from a construction
10 of the dwelling permit in 2010. That is a relatively
11 easy conclusion to come to such that collateral
12 estoppel does not work in that case.

13 It is a closer call with the boundary line
14 adjustment. I think my questions at oral argument
15 are probative of what concerns me. When you have an
16 application for a boundary line adjustment that looks
17 like a driveway easement and you have it labeled as a
18 "driveway," at some point there is an obligation or
19 should be an obligation for government to respond to
20 a citizen to say, we will give you this boundary line
21 adjustment but understand there are problems with the
22 driveway that it's designed to obtain. At some
23 point, there is a line there, but I could not find in
24 this case that that line was crossed by the County.

25 I still find that the "issue" was sufficiently

1 different between the boundary line adjustment and a
2 driveway construction permit such that collateral
3 estoppel will not functionally prevent the decision
4 that the hearings examiner made here.

5 With respect to the other elements of the
6 petitioner's petition for review, to the extent I
7 have not addressed them, I find they have failed to
8 persuade me that the hearings examiner's conclusions
9 are in any way in error. Therefore, on the basis of
10 this rather lengthy oral ruling, I will dismiss the
11 petition.

12 MS. GUERNSEY: Your Honor, I did not prepare
13 an order for today. I would ask that I prepare an
14 order in the future, circulate it to counsel, and
15 perhaps we can both sign off on it and present it to
16 the Court.

17 THE COURT: Yes. Well, Ms. Guernsey, my
18 court reporter will tell you it's not uncommon for
19 parties to be unprepared with an order that recites
20 exactly what I have done in my oral rulings.

21 Given the circumstances of these types of review
22 and the type of review that the Court of Appeals
23 makes of these decisions, which almost ignores what
24 the Court does, I typically permit the parties to try
25 to work together to put what they want the order to

1 look like, deferring heavily to what the aggrieved
2 party wants to see that order in terms of framing the
3 appeal.

4 If it is a minimalist order, I typically like
5 reference to the Court's oral ruling so that those
6 who correct this Court's homework can see why I did
7 or didn't do what I did. If the order is going to be
8 lengthy, at that point, I begin to start looking at
9 it to see if there are things slipped in that I
10 actually didn't decide.

11 So, again, that's a long way of saying my
12 suggestion is the parties work together. It appears
13 the parties can do that -- I'm encouraged by that --
14 and perhaps get a transcript. It's your choice, but
15 to present an order at some later time.

16 If an order can be agreed to, you can present it
17 ex parte in one of two ways: By providing \$30 to our
18 clerk's office, who will happily accept your money
19 then route it my direction, or to note it for
20 presentation on a Friday calendar.

21 Any questions, Ms. Guernsey, at this point?

22 MS. GUERNSEY: No, your Honor. We would
23 like to order a transcript of your ruling.

24 THE COURT: Ms. Lake, any questions from
25 you?

1 MS. LAKE: No, thank you, your Honor.

2 THE COURT: With that, nothing further
3 before the Court, we shall be in recess.

4

5 (Proceedings adjourned for the day at 3:04 p.m.)

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
COUNTY OF THURSTON)

I, SONYA L. WILCOX, RMR, Official Reporter
of the Superior Court of the State of Washington, in and
for the County of Thurston, do hereby certify:

That I was authorized to and did
stenographically report the foregoing proceedings held in
the above-entitled matter, as designated by Counsel to be
included in the transcript, and that the transcript is a
true and complete record of my stenographic notes.

Dated this day, April 21, 2015.

SONYA L. WILCOX, RMR
Official Court Reporter
Certificate No. 2112

PRELIMINARY LAND-DIVISION REVIEW CHECKLIST

Applicant: Delta Services
 Address: 2501 Chesney Rd E
Tacoma 98445

Surveyor: Delta Services
15317 Marquette E
Tacoma 98375

Date Filed: October 9, 2003
 Date Reviewed: November 10, 2003

Reviewer: John Hill

- Short Subdivision
- Large Lot Division
- Amendment
- Boundary Line Adjustment
- Other

Parcel Number: 0319142008
2019

Location: Section 14, Township 19 N, Range 03 E. Application Number: 375278

NA	OK	CORRECTIONS REQUIRED
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 1. The Assessor Treasurer's comments have been forwarded to surveyor and owner.
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 2. All required items of information are present. The following information items must be completed: _____
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> 3. The existing zoning is correctly shown. The correct zoning is: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 4. All structures satisfy required minimum building setbacks for the zone. The following problems were found: _____
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> 5. Complete and accurate lot dimensions have been provided and all of the proposed lots satisfy the minimum width, area, and density requirements of the zone. The following problems were found: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 6. All structures and uses conform to the allowed uses within this zone. The following problems were found: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 7. The free consent statement appearing on the plat drawing is correct. See Standard Note # ___ on the back of this form.
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 8. The surveyor's Certificate is stamped, signed, and current (not more than 90 days).
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> 9. An environmental checklist is required because: <ul style="list-style-type: none"> <input type="checkbox"/> Property in proposed short plat is part of short plat or formal subdivision previously exempted from SEPA. <input type="checkbox"/> Within a designated Environmentally Sensitive Area. <input type="checkbox"/> Within a Natural Shoreline Environment. <input type="checkbox"/> Large Lot Division. <input type="checkbox"/> Other _____
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> 10. Critical Area and Resource Land checklist review, all necessary applications have been submitted. The following discrepancies were found: _____
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> 11. The proposal complies with all related short plats, large lots, formal plats, boundary line adjustments and required associated notes and easements. The following discrepancies were found: _____

<<SEE ASSESSORS-TREASURERS REVIEW CHECKLIST ATTACHED>>

Other Comments: Review Parcel B" destruction of easement. Re-number Parcel C" to "B" for project clarification.

FILED
COURT OF APPEALS
DIVISION II

2015 NOV 23 PM 3:39

COURT OF APPEALS, DIVISION II STATE OF WASHINGTON
OF THE STATE OF WASHINGTON

BY Cm
DEPUTY

RORY HIGHAM

No. 47836-6-II

Appellant,

DECLARATION OF SERVICE

v.

PIERCE COUNTY,

Respondent.

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

1. OPENING BRIEF OF APPELLANT RORY HIGHAM

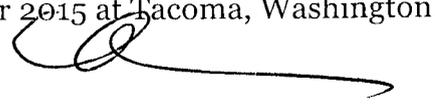
was served on November 23, 2015 on the following parties and in the manner indicated below:

Jill Guernsey
Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Ste. 301
Tacoma WA 98402-2160
Email: jguerns@co.pierce.wa.us

by United States First Class Mail
 by Legal Messenger
 by Electronic Mail
 by Federal Express/Express Mail

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

Dated this 23rd day of November 2015 at Tacoma, Washington.



Carolyn A. Lake

ORIGINAL