

NO. 16-2-00673-21

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

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DRP HOLDINGS LLC and KEANLAND PARK HOMEOWNERS'  
ASSOCIATION,

Appellants,

v.

THURSTON COUNTY,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson E. Hunt

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BRIEF OF APPELLANTS

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## **INTRODUCTION**

Appellants, DRP Holdings LLC and Keanland Park Homeowners' Association (hereinafter collectively "DRP Holdings" or "DRP"), appeal the Lewis County Superior Court's Final Order affirming the Thurston County Board of Health's (hereinafter the "Board") decision denying DRP Holdings' appeal of certain effluent monitoring conditions imposed on its Keanland Park Planned Rural Residential Development (hereinafter "KPI"). DRP Holdings filed a petition under the Land Use Petition Act, Chapter 36.70C RCW ("LUPA"), challenging the Board's decision that affirmed the Thurston County Hearing Officer's (hereinafter "Hearing Officer") decision upholding a Thurston County Environmental Health Division (hereinafter "EHD") letter imposing certain effluent monitoring conditions for the on-site septic (hereinafter "OSS") systems in KPI. Before the Lewis County Superior Court (hereinafter "Superior Court"), DRP challenged the Board's decision on the basis that application of EHD's proposed conditions on the OSS systems in KPI violated state vesting law, and that the Board improperly accorded deference to EHD. The Superior Court affirmed the Board's decision, concluding that EHD's additional effluent monitoring conditions did not violate state vesting law and accorded proper deference to EHD's interpretation of the 1999 Thurston

County Sanitary Code (the “Sanitary Code”) at issue. DRP appeals the Superior Court’s decision.

## **ASSIGNMENTS OF ERROR**

The Superior Court erred by affirming the Board's decision denying DRP Holdings' appeal of an EHD letter that imposed novel effluent monitoring conditions on the OSS systems within KPI. Specifically, the Superior Court committed error by:

- Concluding that state vesting law under RCW 58.17.033 and RCW 58.17.170, and relevant precedent, did not prohibit EHD from imposing new effluent monitoring conditions at the time of operational certificate issuance, despite no similar conditions existing at the time of KPI's complete preliminary plat application or as part of the terms of KPI's final plat approval;
- Relying on a letter authored by DRP Holdings' counsel during preliminary plat review as evidence that Appellants' consented to EHD's ability to impose the monitoring conditions on OSS systems in KPI;
- Reaffirming deference to EHD in its interpretation of its regulations that are in direct conflict with state vesting law and state regulations of OSS systems.

## **ISSUES RELATED TO ASSIGNMENTS OF ERROR**

Under RCW 58.17.033 and RCW 58.17.170, may EHD impose novel effluent monitoring conditions on the OSS systems in KPI subsequent to final plat approval, where (1) the policy upon which the conditions are based was adopted after the application for the preliminary plat of KPI was deemed complete, (2) the need for such conditions was addressed and rejected during the preliminary plat hearing for the project, and (3) EHD

failed to impose or require such additional conditions on KPI in conjunction with final plat approval?

Should this Court accord deference to EHD's interpretation of the Sanitary Code and application of the Sanitary Code to KPI?

## STATEMENT OF CASE

### **A. The Keanland Park Planned Rural Residential Development Project**

Appellant DRP Holdings LLC (“DRP”) is the owner and developer of the Keanland Park Planned Rural Residential Development Project (“KPI”), and Appellant Keanland Park Homeowners’ Association (“HOA”) comprises individual lot owners within KPI (collectively “DRP Holdings”). AR 3, 8; CP 55. Under the conditions of the approval of the final plat of KPI, the HOA is responsible for centralized maintenance and monitoring of all on-site septic (“OSS”) systems within the plat. AR 104 (note 16); CP 55-64. As finally platted, KPI comprises 98 residential lots and a 267-acre undeveloped resource parcel. AR 228; CP 55-64.

### **B. Preliminary Plat Review and the Parties’ Agreement Forming the Basis for Use of Nitrate-Reducing OSS Systems**

On April 27, 2004, Thurston County deemed the preliminary plat application for KPI complete. AR 200, 229. KPI underwent extensive environmental review pursuant to the State Environmental Policy Act (RCW 43.21C), including preparation of an Environmental Impact Statement (“EIS”). AR 229; *see also* AR 49-68.

During County review of the preliminary plat for KPI, DRP’s and Thurston County’s hydrogeologists disagreed regarding the preferred methodology to be used in evaluating KPI’s compliance with the applicable

OSS standards for “nitrate loading assimilative capacity” to groundwater. AR 69-71, 225-227; AR 255-56; AR 520-21, 559-60. Because by that point the KPI preliminary plat had already been subject to four years of County review, the parties “agree[d] to disagree” over the methodology for evaluating compliance with assimilative capacity, and reached an agreement to resolve the issue. AR 69-71, 225-227; AR 559-60. Specifically, the parties agreed that DRP would use enhanced treatment OSS systems for all lots in KPI to mitigate potential impacts to the wetland area, and in turn, that use of these systems would also satisfy all relevant assimilative capacity standards for nitrate loading. AR 69-71, 225-227. Therefore, the record is clear that the use of nitrate-reducing OSS systems for all lots in KPI was not necessary to achieve compliance with health code requirements or remediate a failed septic condition; rather, the systems were agreed upon in order to provide mitigation for nitrate loading impacts to adjacent wetlands. AR 49-68; AR 255-256, 265. The County agreed to DRP’s use of the enhanced OSS systems on a plat-wide basis, so as long as there was a centralized monitoring and maintenance scheme through the homeowners’ association. AR 69-71, 225-227.

Counsel for DRP documented the resolution of this dispute by a confirming letter to EHD dated February 18, 2008 (the “2008 Agreement”). AR 69-71, 225-227. Notably, the 2008 Agreement made no mention of a

requirement for effluent monitoring or sampling to evaluate the performance of installed OSS systems, nor was such a requirement found within any adopted County policy at the time of the preliminary plat application, or the 2008 Agreement. AR 69-71, 225-227; AR 520, 580. In addition, neither the manufacturer of the proposed OSS system nor the State of Washington recommended or required any such sampling conditions for this purpose. AR 555-556, 585.

With respect to the 2008 Agreement, DRP Holdings' President, and owner and developer of KPI, Todd Hansen, testified at the administrative hearing that he understood that the County would not require sampling or effluent testing required for use of the enhanced OSS systems, as he specifically "posed that question" during the parties' negotiated resolution. AR 518-20. Mr. Hansen also testified that he agreed to the use of the OSS systems voluntarily based on a specific understanding that effluent sampling and monitoring would *not* be required. AR 520-21.

Thurston County held a public hearing on the preliminary plat for KPI on July 14, 2008. AR 228. At the hearing, EHD recommended a condition of preliminary plat approval addressing the OSS systems consistent with the parties' 2008 Agreement. AR 69-71, 225-227; AR 134; AR 228-291. However, an opponent to the KPI project, Black Hills Audubon Society ("BHAS"), urged the Hearing Examiner to impose an

additional condition requiring effluent monitoring of the OSS systems to validate their effectiveness in the field—precisely the same purpose that EHD asserts as the reason for the challenged conditions subject to this appeal. AR 134; AR 255-56, 267. DRP vigorously opposed the BHAS-requested condition, offering responsive expert reports and testimony. AR 87-89; AR 231, 255. The EHD reviewer present throughout the preliminary plat hearing, Mr. James Ward, offered no support for the BHAS-requested effluent monitoring condition, and instead requested only the conditions of approval reflected in the parties' 2008 Agreement. AR 134; AR 255-256. After considering the BHAS request and DRP's response, the Hearing Examiner declined to expand the proposed conditions of approval of the preliminary plat of KPI to require post-installation effluent monitoring of the enhanced OSS systems. AR 255-256, 265-267.

The Hearing Examiner's decision approving the preliminary plat for KPI became final on December 8, 2008. AR 200; AR 292.

### **C. Final Plat Review and Condition of Approval**

On August 26, 2015, the final plat of KPI was recorded following Thurston County review and approval, including EHD. AR 104; CP 55-64. In accordance with the 2008 Agreement and the Hearing Examiner decision approving the preliminary plat, note 16 of the final plat of KPI provides as follows:

Nitrate treatment devices registered by the Washington State Department of Health shall be incorporated for each on-site sewage system design. The Homeowners' Association shall be responsible for hiring a single certified monitoring specialist to monitor and maintain the on-site sewage systems within the subdivision. Sewage system contracts between each lot owner and the Homeowners' Association certified monitoring specialist will be required prior to sewage system permit issuance. Operation and maintenance certificates, which specify the maintenance and monitoring requirements of each system, will be required at the time of sewage system final construction approval, and shall be renewed in accordance with the provisions of Article IV.

AR 104; *see also* AR 267.

In conjunction with its final plat approval, DRP submitted a Declaration of Protective Covenants, Conditions, and Restrictions ("CCRs") including easement and authority provisions for the HOA to ensure performance of centralized monitoring and maintenance of all installed OSS systems, as required by the condition of approval. AR 104; AR 107-113.

As reflected by the signatures on the final recorded plat map, EHD, as part of the Thurston County public health department, was required to review and approve the final plat for KPI. CP 55-65; *see also* Thurston County Code § 18.16.060(A) (specifying requirement for public health review and approval of final plats). EHD approved the final plat for KPI

without imposing additional conditions requiring effluent monitoring or sampling of OSS systems, as it could have done pursuant to RCW 58.17.170(b). Rather, note 16 is identical to the condition requested by EHD during the preliminary plat review process and included in the Hearing Examiner's decision. AR 256, 267.

**D. Environmental Health Division's Imposition of New Conditions Following Final Plat Approval**

In May 2015, DRP began applying for OSS system installation permits, after selecting proprietary Bio-Microbics MicroFAST 0.5 ("MicroFAST 0.5") OSS systems to comply with the conditions of preliminary and final plat approval requiring the use of enhanced nitrate-removing OSS systems for all lots in KPI. AR 41-48; AR 137-164; AR 201. In conjunction with submitting OSS permit applications, DRP submitted a Third Party Monitoring Agreement (the "Monitoring Agreement") for County review, listing the monitoring requirements for the "single certified monitoring specialist" consistent with the note 16 of the final plat. AR 69-71, 225-227; AR 77-86, 214-223; AR 104.

Thurston County refused to approve DRP's proposed Monitoring Agreement and issue operational certificates for the installed OSS systems. AR 41-48; AR 201. Instead, by letter dated January 7, 2016 (the "EHD Letter"), in reliance on a policy adopted on July 18, 2008,

ONST.08.POL.606 (the “Policy”), EHD imposed additional conditions on the operational certificates requiring annual performance monitoring and testing, as follows:

4. The [Certified Monitoring Specialist] shall prepare a plan that shows that approximately one-third of built systems serving occupied homes in Keanland Park will be sampled each year and that each system will be sampled at least every three years.

5. The CMS shall sample effluent from the discharge end of the nitrogen-reduction component at least once every three years.

6. The effluent shall meet the following conditions:  
 $TN \leq 30 \text{ mg/L}$ .

7. If the total Nitrogen geometric mean for all the sample results in Keanland Park for that year exceeds the effluent limit by 25% ( $TN > 37.5 \text{ mg/L}$ ), then the individual systems that are not meeting the standard of 37.5 mg/L shall sample both the influent and effluent.

- a. If the system is reducing the Total Nitrogen concentration by at least 50%, then the system will be considered to be performing as designed.
- b. If the system is reducing the Total Nitrogen by less than 50%, the CMS will submit a written report of actions taken or proposed to bring the system performance back within the required limits.
- c. Systems that require corrective action due to elevated effluent nitrogen

concentration must be re-sampled to evaluate system performance.

- d. Systems that reduce effluent nitrogen concentration by 50% or more after correction will be categorized as meeting the reduction requirements.

AR 35-36, 212-213; AR 37-40, 344-347.

The County does not dispute that the Policy was adopted over four years after KPI's complete preliminary plat application, and five months after the parties' 2008 Agreement regarding the nitrate loading issues. AR 37-40, 344-347; AR 69-71, 225-27; AR 536, 579-80. Further, the County cannot dispute that the Policy was not incorporated or referenced as part of the final conditions of approval for KPI. AR 104; CP 55-64.

#### **E. Appeal of Conditions and Procedural History**

DRP timely appealed conditions 4-7 of the EHD Letter to the administrative Hearing Officer for EHD. AR 208-11. The Hearing Officer held an open record hearing on February 16, 2016, and issued Findings, Conclusions, and Decision on March 28, 2016. AR 482-500. The Hearing Officer denied DRP's appeal, concluding that DRP had not shown that the requirements exceeded the authority of EHD or were inconsistent with the conditions imposed on the final plat for KPI. AR 497-99. DRP Holdings timely appealed the Hearing Officer's decision on April 11, 2016. AR 1-8. The Board of Health (the "Board") conducted a hearing on May 18, 2016,

issuing its decision on June 3, 2016. AR 8, 624-26. With respect to KPI, the Board affirmed the Hearing Officer's conclusion. AR 624-26.

On June 24, 2016, DRP timely filed a Petition to Lewis County Superior Court under the Land Use Petition Act (Chapter 36.70C RCW), challenging the Board's decision. CP 1-17. The Superior Court held a Hearing on the Merits on November 1, 2016, issuing a decision on December 1, 2016 that was entered by Final Order on December 14, 2016. CP 97-103. The Superior Court affirmed the Board's decision, finding that EHD's additional conditions did not violate state vesting law notwithstanding their application to KPI after final plat approval. CP 98-100. In reaching this conclusion, the Superior Court relied on the 2008 Agreement, as evidencing DRP's understanding of the possibility for later effluent monitoring conditions, and as such, DRP "cannot be heard to complain" for the newly imposed conditions. *Id.* Specifically, the Court cited from the letter:

...Applicant understands that (1) compliance with all state and local rules regarding use and permitting of proprietary systems will occur at time of permitting, and (2) there is therefore some risk to the Applicant that the proposed technology might change or increase in cost between the time the plat is approved and requisite permits are applied for.

CP 99; AR 70, 226.

Further, like the Board, the Court deferred to EHD's interpretation of its Sanitary Code, rejecting DRP's claim that such deference was not warranted. CP 99-100.

## **ARGUMENT**

Primarily, this dispute centers on an application of state vesting law with respect to subdivisions (RCW 58.17.033 and RCW 58.17.170). The field performance monitoring conditions imposed on on-site septic (“OSS”) systems that Appellants DRP Holdings LLC and Keanland Park Homeowners’ Association (collectively, “DRP Holdings” or “DRP”) appeal in this case were not in place at the time of Keanland Park Planned Rural Residential Development’s (“KPI”) complete preliminary plat application, nor were the conditions included in the terms of final plat approval. By a plain application of state statutes, DRP should prevail and be allowed to move forwards with the KPI project as approved, in accordance with the terms of its final plat. The County’s purported authority under the 1999 Thurston County Sanitary Code (the “Sanitary Code”) to impose additional, novel conditions subsequent to final plat approval is wholly incongruent with the vested rights protections afforded to DRP in RCW 58.17. The Superior Court thus erred by affirming the Thurston County Board of Health’s (the “Board”) decision upholding the January 7, 2016 Thurston County Environmental Health Division (“EHD”) letter (the “EHD Letter”) imposing additional monitoring conditions on the OSS systems within the vested plat of KPI. Accordingly, this Court should reverse the Superior Court and Board of Health decisions, and remand the

matter to the Board with direction to remove Conditions 4-7 of the challenged EHD Letter requiring effluent monitoring and performance standards for the installed OSS systems within the plat of KPI.

### **I. Standard of Review**

On appeal under the Land Use Petition Act, Chapter 36.70C RCW (“LUPA”), this appellate Court stands in the same position as the Superior Court, applying the same standards under RCW 36.70C.130(1) to the administrative record before it. *Chinn v. City of Spokane*, 173 Wn. App. 89, 94-95, 293 P.3d 401 (2013). DRP asserts the same errors under LUPA before this Court as it did to the Superior Court, specifically that the Board’s decision is (1) an erroneous interpretation of the law, (2) is not supported by substantial evidence in the records, and (3) is a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(b)-(d). This Court reviews de novo whether the Board’s land use decision is an erroneous interpretation of the law under RCW 36.70C.130(1)(b). *Wash. State Dep’t of Transp. v. City of Seattle*, 192 Wn. App. 824, 836, 368 P.3d 251 (2016); *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). Under the RCW 36.70C.130(1)(d) clearly erroneous application of the law to the facts standard, this Court applies the law to the facts and overturns the Board’s decision if it has a “definite and firm conviction” that the decisionmaker committed a mistake. *Id.* Finally, under the RCW

36.70C.130(1)(c) standard, this Court is deferential to the highest fact finding authority below (here, the Hearing Officer), determining specifically whether the evidence is sufficient to persuade an “unprejudiced, rational person that a finding is true.” *Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866, 892, 244 P.3d 412 (2010). Pursuant to RCW 36.70C.140, this Court can reverse the Board’s decision and remand it for modification, including making such an order as necessary to ensure that the Board’s review is consistent with state vesting law.

**II. State vesting law prohibits EHD from imposing novel conditions on the KPI project following final plat approval.**

Washington’s vested rights doctrine with respect to subdivisions is expressly codified under RCW 58.17.033 (preliminary plat applications) and RCW 58.17.170 (final plat approvals). *See Snohomish Cnty. v. Pollution Control Hearings Bd.*, 187 Wn.2d 346, 358, 386 P.3d 1064 (2016) (recognizing statutory vested rights doctrine). Under these provisions, KPI is governed strictly by the terms of the approved final plat, as well as the statutes, ordinances, and regulations in effect at the time of complete preliminary plat application, unless there is a change of conditions that creates a “serious threat to the public health or safety in the subdivision.” RCW 58.17.170(3)(a); RCW 58.17.033(1); *Graham Neighborhood Ass’n v. F.G. Assocs.*, 162 Wn. App. 98, 112, 252 P.3d 898 (2011); *Ass’n of Rural Residents v. Kitsap Cnty.*, 141 Wn.2d 185, 193, 4 P.3d 115 (2000).

As the record makes abundantly clear, at the time of KPI's complete preliminary plat application, there were *no laws, ordinances, or regulations requiring effluent monitoring and sampling conditions on the use of enhanced OSS systems*. See AR 37-40, 344-347; AR 200; AR 229; AR 530, 536. KPI's final plat provides for a *single* condition concerning nitrate-reducing technology and centralized monitoring (note 16), which accurately reflects the parties' resolution to the nitrate loading issue, as evidenced in a 2008 letter from DRP's counsel to EHD (the "2008 Agreement"). AR 69-71, 225-227; AR 104; CP 55-64. It is therefore undisputed that the post-final plat field performance effluent monitoring requirements that EHD seeks to impose on KPI are reflected nowhere in the laws and regulations existing at the time of the KPI preliminary plat application or in KPI's terms of final plat approval.

The County, however, has argued below, and will likely continue to assert in response to this appeal, that the Sanitary Code<sup>1</sup> grants EHD unfettered authority to impose additional conditions on OSS systems at the time of operational certificate issuance. In fact, no provision of the Sanitary Code grants EHD unrestrained authority to circumvent state vesting law to this degree.

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<sup>1</sup> The parties do not dispute that this 1999 version was in effect at the time of complete KPI plat application.

A. Section 5.2.1 of the Sanitary Code does not provide EHD authority to impose field performance standards for OSS systems within the vested plat of KPI.

Section 5.2.1 of the Sanitary Code allows the County's Health Officer to "require performance monitoring or sampling of any alternative system in accordance with guidelines issued by the Washington state department of health or policies to be developed by the department." AR 364. At the time of KPI's complete preliminary plat application, which was in April 2004, there were no Washington State Department of Health ("DOH") guidelines requiring effluent monitoring of the MicroFAST 0.5 system. AR 90-103; AR 200; AR 229. Similarly, at the time of DRP's application for the subject OSS permits and approval of the Third Party Monitoring Agreement (the "Monitoring Agreement"), which was in May 2015, there were no state guidelines requiring effluent monitoring of the MicroFAST 0.5 system. AR 90-103; AR 201. EHD staff testimony during the administrative hearing confirmed that no such state guidelines presently, or formerly, exist. AR 555, 580-81, 585.

Consequently, based on Section 5.2.1, the *only* means for EHD to lawfully impose monitoring or sampling of nitrate-reducing OSS systems on the final plat of KPI is based on the second phrase of Section 5.2.1: "policies to be developed by the department." AR 364. While EHD did ultimately adopt such a policy, it did not do so until July 18, 2008, some

four years after the preliminary plat application for KPI was deemed complete, and five months after the 2008 Agreement. AR 37-40, 344-347; AR 69-71, 225-227; AR 228; AR 586-87. Indeed, EHD staff testified during the administrative hearing that the County had policies governing other types of monitoring at the time of KPI's complete application, but had no similar policy governing monitoring of nitrogen reducing proprietary systems. AR 536, 586-87. If the Policy had existed at the time of KPI's complete preliminary plat application, then DRP would be subject to its requirements pursuant to RCW 58.17.033(1). However, EHD admits that there was no such policy in effect. AR 536, 586-587. Further, the Hearing Examiner declined to propose OSS effluent monitoring conditions on the preliminary plat of KPI, even after considering a specific request to do so, and without any objection from EHD staff present at the hearing. AR 255-256, 265-267.

Finally, at the time of final plat review, EHD could have sought to impose effluent monitoring conditions on the basis that they were required as a result of a change of conditions that creates a "serious threat to the public health or safety in the subdivision." RCW 58.17.170(b); *see also* RCW 58.17.033(1). EHD made no such attempt, and instead approved the final plat of KPI with a condition consistent with the 2008 Agreement, as had been imposed by the Hearing Examiner in the preliminary plat

approval. AR 104; AR 267; CP 55-64. Therefore, in approving the Monitoring Agreement for the on-site septic systems, EHD is bound to the terms of the final plat condition, which does not include effluent monitoring. *Id.*; AR 69-71, 225-227; AR 267; RCW 58.17.170(3)(a).

In sum, EHD could have sought to impose effluent monitoring as outlined in the EHD Letter during preliminary plat review, again at the preliminary plat hearing, and even during the final plat approval process. However, EHD chose to do none of these things, and cannot rely on a Policy that did not exist at the time of complete preliminary plat application to impose effluent monitoring conditions on the OSS systems in KPI. The Board therefore erred in upholding the Hearing Officer's finding to the contrary, as it is an erroneous interpretation of and directly conflicts with state vesting law. RCW 58.17.170(3)(a); RCW 58.17.033(1); RCW 36.70C.130(1). The Board's decision should therefore be reversed.

B. Section 16.2 of the Sanitary Code does not provide EHD authority to impose field performance standards on OSS systems within the vested plat of KPI.

The EHD's second asserted basis of its authority is Section 16.2 of the Sanitary Code. AR 396-97. However, Section 16.2 similarly fails to give EHD authority to impose the challenged conditions on KPI following final plat approval.

Section 16.2 of the Sanitary Code authorizes the Health Officer to establish "conditions, monitoring schedules, and reporting schedules" that are designed to "assure proper on-going operation and maintenance for all OSS." AR 396-97. These "conditions, monitoring schedules" are precisely what are found in the submitted Monitoring Agreement, which is consistent with state permitting and manufacturer specifications for operation and maintenance of the systems. AR 77-86, 214-223; AR 90-103; AR 137-164. The Monitoring Agreement meets DRP Holdings' obligation under note 16 of KPI's final plat, which required that the HOA hire a monitoring specialist. AR 77-86, 104. *Nothing* in Section 16.2 grants the Health Officer, as EHD has previously claimed, unlimited authority to impose "whatever conditions, etc., are deemed necessary on a subjective basis" to protect public health following final plat approval. AR 13-14. There is no legal authority to support such a broad and unfettered interpretation of EHD authority; and, indeed, such a position violates state vesting law. RCW

58.17.170(3)(a). Thus, the Board's decision on this basis is a plainly erroneous interpretation of the Sanitary Code and state vesting law, and should be reversed. RCW 36.70C.130(1)(b).

C. *The 2008 Agreement cannot be reasonably be construed as an acknowledgment that DRP consented to the challenged conditions.*

Throughout the proceedings below, EHD has argued that the 2008 Agreement is evidence that DRP impliedly agreed that the County could, *and would*, impose such conditions on KPI at a later date. *See* CP 69-71, 225-227. Not only is the County's interpretation of the 2008 Agreement flatly contradicted by evidence in the record, the 2008 Agreement is wholly irrelevant to the fundamental legal question presented of whether EHD has legal authority to impose new effluent monitoring conditions on the OSS systems within KPI following plat approval, as discussed above in Part II.A and II.B. Nevertheless, because of the extensive reliance on the 2008 Agreement in the various proceedings below, DRP believes some discussion of the substance of the 2008 Agreement is warranted to inform the Court's review of the present appeal.

The 2008 Agreement expressly states that DRP's use of proprietary OSS systems (MicroFAST 0.5) were to "achieve compliance with assimilative capacity standards" and that compliance with state and local rules governing the "use and permitting" of said systems will occur at time

of permitting and “there is therefore some risk . . . that the *proposed technology* might change or increase in cost” from plat approval to permit application. AR 69-71, 225-227 (emphasis added). To the extent that the 2008 Agreement acknowledged that DRP was exposed to risk of future changes, that acknowledgement was strictly limited to changes and increased costs in the underlying technology, and cannot be reasonably construed as DRP’s acknowledgement or acceptance of the County’s ability to require additional conditions. There is no dispute that the 2008 Agreement contains no acknowledgement by DRP of County capacity or intent to impose additional field performance monitoring or sampling conditions on the installed systems. *Id.* At the Administrative Hearing, EHD staff conceded that this portion of the 2008 Agreement referred to potential future changes in technology of the proposed enhanced treatment OSS systems. AR 559-560. Consistent with EHD’s understanding, Mr. Hansen testified that this acknowledgement reflected concern regarding availability of the proprietary systems at the time of development. AR 516-21. The record is ripe with evidence that EHD *never* represented to DRP that it would impose additional field performance monitoring conditions on the systems described in the 2008 Agreement. *See* AR 519-521, 536, 559-560, 586. To the extent that the 2008 Agreement has any bearing on this Court’s review and decision, which DRP believes it should not, the 2008

Agreement evidences nothing more than DRP's understanding that nitrate-reducing technology and associated costs may change at a later date. AR 69-71, 225-227; AR 516-21, 559-560.

**III. EHD's interpretation of its Sanitary Code allowing it to impose conditions based on the Policy is not entitled to deference from this Court.**

In addition to the fact that the County's actions run afoul of state vesting law, the Board's deference to EHD's interpretation of its Sanitary Code, which it relied upon to reach the challenged decision, is wholly inappropriate in this instance. AR 624-625. EHD lacks any expertise in nitrate-reducing technology and monitoring, as evidenced by this singular instance of imposing a nitrate-monitoring scheme on any development within Thurston County and its reliance on standards under the Policy, which patently misapplies state standards. Thus, the Board's according deference to EHD's interpretation and application of its authority under the Sanitary Code is without substantial evidence in the record, and should be reversed. RCW 36.70C.130(1)(c); *see also Bayfield Res. Co. v. W. Wash. Growth Mgmt. Bd.*, 158 Wn. App. 866, 892, 244 P.3d 412 (2010) (finding the substantial evidence standard requires plaintiff to prove there is not sufficient evidence in the record to persuade a reasonable person that the declared premise is true).

*A. Standard for judicial deference to an agency's interpretation*

Courts only accord deference to an agency's interpretation on factual matters that are "complex, technical, and close to the heart of the agency's expertise." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997) (emphasis added); *see also* *McTavish v. City of Bellevue*, 89 Wn. App. 561, 564-65, 949 P.2d 837 (1998) (concluding that municipal ordinances are evaluated using the same rules of construction as statutes). An appellate court is not bound to an agency's interpretation of the statute or law at issue, even if the agency has specialized expertise in dealing with such issues, and especially if the interpretation is contrary to state law. *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 515, 137 P.3d 31 (2006); *see also* *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (stating that the duty of the judiciary branch is to say what the law is and need not defer to an agency's interpretation contrary to law). Further, judicial deference is not appropriate when an agency's action or interpretation is not consistent with a "pattern of past enforcement." *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 753, 317 P.3d 1037 (2014) (citations omitted). Rather, the local entity "bears the burden to show its interpretation was a matter of preexisting policy," and that the interpretation was part of an "established practice of enforcement." *Id.* (refusing to defer to the hearing board's

interpretation because the record showed that the interpretation of zoning regulations was not based on any preexisting policy but instead “entirely ad hoc”); *see also Sleasman v. City of Lacey*, 159 Wn.2d 639, 645-47, 151 P.3d 990 (2007) (finding that the City’s interpretation of its ordinance was not entitled to deference because the City failed to show that the interpretation was “part of a pattern of past enforcement” and had instead applied the interpretation “only one or two instances in 30 years”).

*B. EHD is not entitled to judicial deference to its interpretation of the Sanitary Code.*

As a preliminary matter, the record plainly reflects EHD’s utter lack of expertise with nitrogen-reducing OSS systems—both generally, as well as with the specific MicroFAST 0.5 system DRP proposed. AR 530, 555-556, 580-81. During the administrative hearing, EHD staff admitted that they lacked any experience with the operation of the nitrogen-reducing OSS systems within Thurston County, yet failed to seek any outside review or guidance from state or federal agencies with expertise in developing the proposed monitoring and testing protocol reflected in the challenged conditions. *Id.* Indeed, no official from the State Department of Health or manufacturer reviewed or had input to the County’s proposed field performance monitoring scheme. AR 37-40, 344-347; AR 556-57.

Although effluent monitoring standards generally might be considered “complex, technical” factual matters within an agency’s special

expertise, the determination as to whether the Sanitary Code authorizes EHD to impose the standards is not a complex matter solely within the agency's expertise. See *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997) (deferring for "complex, technical" matters only). Rather, that is a question of construction and interpretation of a regulation, which is reviewed de novo by the courts, and the reviewing court need not defer to an agency's interpretation where, as here, that agency's interpretation is contrary to state law. *Fish and Wildlife Officers' Guild v. Wash. Dep't of Fish and Wildlife*, 191 Wn. App. 569, 580, 364 P.3d 153 (2015); *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (stating that the duty of the judiciary branch is to say what the law is and need not defer to an agency's interpretation contrary to law). In affirming the Board's decision, the Superior Court stressed that the "lengthy, complex and technical factual data" in the record demonstrates that this is a "complex, technical" matter worthy of judicial deference to EHD. AR 624-625; CP 99-100. In reaching its conclusion, however, the Superior Court's decision, like the Hearing Officer and Board decisions before it, failed to properly distinguish between the technical facts comprising the challenged conditions (such as the effluent levels, standards, and monitoring techniques), for which deference would properly be accorded, and EHD's interpretation of the Sanitary Code as providing legal

authority to impose the conditions, for which deference is not accorded. AR 624-625; CP 99-100; *Overton*, 96 Wn.2d at 555.

Second, EHD *misapplied* the very state standards it asserts that it relied on in developing the challenged conditions. EHD staff testified during the administrative hearing that the baseline treatment standard for nitrogen found in the Policy was derived from treatment levels under WAC 246-272A. AR 37-40, 344-347; AR 433; AR 544-46. The values in that table, however, were expressly *not* to be applied as field compliance standards under the plain language of the referenced code: “Treatment levels used in WAC 246-272A are not intended to be applied as field compliance standards.” AR 74; *see also* AR 433. EHD’s plain misapplication of state standards in this regard demonstrates EHD’s complete lack of expertise in the nitrogen-reducing systems and monitoring protocol proposed for KPI. Therefore, the Superior Court’s and Board’s deference to EHD in imposing the field performance monitoring standards is neither appropriate nor warranted, given EHD’s lack of expertise. *See Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997) (deferring to agency only with expertise).

Finally, the Superior Court and Board improperly deferred to EHD’s interpretation of its authority under the Sanitary Code because EHD cannot show it exercised such authority to this extent in prior actions. *Ellensburg*

*Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 753, 317 P.3d 1037 (2014) (citations omitted) (refusing to defer to the hearing board’s interpretation because the record showed that the interpretation of zoning regulations was not based on any preexisting policy but instead “entirely ad hoc”). Here, EHD staff confirmed that the Policy upon which the conditions were based was created and adopted *directly* in response to KPI, and had not been previously applied. AR 586. Indeed, during the administrative hearing, EHD’s Environmental Health Program Manager, Steve Petersen, who was involved intimately in KPI’s preliminary and final plat review, and authored the letter imposing the challenged conditions, confirmed that the “[P]olicy was developed as a direct result” of the KPI project. AR 556-57, 585-87. The EHD has admitted that it lacked any regulation or policy concerning field performance monitoring standards for nitrate-reducing OSS devices prior to KPI, and had no history of interpreting or administering the Policy in the manner it sought to apply to KPI. AR 536, 556-557, 586. This Court cannot accord deference to EHD’s application of its Sanitary Code to impose the novel effluent monitoring conditions, which was clearly imposed on the vested KPI on an ad hoc basis and with no prior pattern of enforcement in EHD. *Ellensburg Cement Products, Inc.*, 179 Wn.2d at 753.

For all of these reasons, the Board's decision affirming the Hearing Officer's deference to EHD, as further affirmed by the Superior Court, is not supported by substantial evidence in the record and is an erroneous interpretation of the standards for deference to an agency's realm of authority. RCW 36.70C.130(1)(b)-(c). The Board therefore erred in affirming the Hearing Officer's decision relying on such expertise, and this Court should reverse the Board's decision accordingly.

## CONCLUSION

Under state law, the plat of KPI is governed strictly by the terms of the approved final plat, as well as the statutes, ordinances, and regulations in effect at the time of complete preliminary plat application. The record clearly demonstrates that EHD lacked regulatory authority under the Thurston County Sanitary Code in effect at the time of complete preliminary plat application to impose field performance monitoring conditions on the OSS systems. Similarly, no such monitoring requirements were imposed as conditions of KPI preliminary or final plat approval. For these reasons, the Board's decision affirming the Hearing Officer's decision denying DRP's appeal of the conditions is a clearly erroneous application of state vesting law and the Sanitary Code. Further, the Board's deference to EHD's interpretation and application of the Sanitary Code under the facts and circumstances is not supported by substantial evidence in the record. Accordingly, this Court should reverse the Superior Court and Board of Health decisions, and remand the matter to the Board with direction to remove Conditions 4-7 of the challenged EHD decision requiring effluent monitoring and performance standards for the installed OSS systems within the plat of KPI.

Respectfully submitted this 17<sup>th</sup> day of April 2017.

PHILLIPS BURGESS PLLC

A handwritten signature in black ink, appearing to read "Heather L. Burgess", is written over a horizontal line.

HEATHER L. BURGESS

WSBA #28477

Attorney for Appellants

**DECLARATION OF SERVICE**

I, Danielle Anderson, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a resident of the State of Washington over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Phillips Burgess PLLC, whose address is 724 Columbia Street NW, Suite 320, Olympia, Washington 98501.

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DATED at Olympia, Washington this 17<sup>th</sup> day of April, 2017.

  
 \_\_\_\_\_  
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