

**AMENDED COVER PAGE**

**NO. 49886-3-II**

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

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**Appeal from the Superior Court for Lewis County  
Case No. 16-2-00673-21**

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**DRP HOLDINGS LLC and KEANLAND PARK HOMEOWNERS' ASSOCIATION,**

**Appellants,**

**v.**

**THURSTON COUNTY,**

**Respondent.**

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**BRIEF OF RESPONDENT THURSTON COUNTY**

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May 15, 2017

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## **I. INTRODUCTION**

Appellants seek their third review of a decision by Thurston County Environmental Health Division (EHD) imposing certain monitoring conditions upon the proposed septic system in response to Appellant's Application for On-Site Septic (OSS) Certificates. Thurston County continues to assert that the Thurston County Sanitary Code and the Washington Administrative Code allows for the imposition of monitoring requirements as a condition of issuance for OSS Certificates. Thurston County also asserts that Appellants acknowledged in 2008 that all matters had not been decided and additional conditions may be imposed at the time of Appellants' application for OSS Certificates.

## **II. COUNTY'S STATEMENT OF THE FACTS**

Appellants ask the Court of Appeals to overturn the prior rulings of the Thurston County Hearing Officer, Board of Health and the Lewis County Superior Court, specifically finding that the County had the authority to impose OSS conditions 4-7 concerning monitoring of effluent contained within the letter from Environmental Health dated January 7, 2016. [AR 41-48].

Appellants argue that state vesting law prohibits these conditions as that there were no specific local or state regulations related to the type of OSS proposed by Appellant related to effluent testing at the time a complete application was submitted. Appellants also argue that the decisions of the Hearing Officer, the Board of Health and the Superior Court imposed "improper deference" to the County Environmental Health Division in determining the testing standards for the

proposed project.

It is undisputed that in 2008, Appellants and the County did not have an agreement as to a final determination of OSS requirements [AR 225-27] and that counsel for Appellants acknowledged this prior disagreement, or failure to have a “meeting of the minds,” in a letter to Thurston County. *Id.* In that 2008 letter, Appellants acknowledged that local rules would need to be complied with at the time of OSS permitting and that there was risk that technology may change or increase in cost during the interim. *Id.*

Appellants agree that the following language of the Thurston County Sanitary Code was in existence at the time of Final Plat Approval:

(Article IV) **Section 16 Operation and Maintenance**

5.2 The health officer:

5.2.1 May 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].

16.2 The health officer shall:

16.2.1 Establish recommended conditions, monitoring schedules and reporting schedules to assure proper on-going operation and maintenance for all OSS. The conditions and monitoring schedules will vary depending on the type of system, population or facility(ies) served, the sensitivity of the site, and requirements within alternative system guidelines.

[AR 364 and 396].

It is undisputed that at the time of final plat approval the Washington Administrative Code (WAC) Chapter 246-272, *On-Site Sewage Systems (1995) Section 246-272-02001 Local Regulations* stated that:

- (1) Local boards of health may adopt and enforce local rules and regulations governing on-site sewage systems when the local regulations are:
  - (a) Consistent with, and as stringent as this chapter, and ...

[AR 440].

It is undisputed that WAC Chapter 246-272, *On-Site Sewage Systems (1995) Section 264-272-02001 Alternative Systems and Proprietary devices* stated that:

- (2) The local health officer:
  - (a) May require performance monitoring or sampling of any alternative system.

[AR 441].

Respondent Thurston County disagrees with the factual assertion contained in Appellants' briefing at pages 11-12, that Thurston County relied upon a policy [AR 35-36] adopted four years after the submission of the completed preliminary plat application in making its monitoring determination. This assertion by Appellants is not supported by any Findings contained in the record made by either the Hearing Officer, the Board of Health, or the Superior Court. This factual assertion is inaccurate, and should not be considered by the Court when making its determination.

The technology employed by the MicroFAST nitrogen OSS proposed by Appellant's was a new system that was not known to Thurston County in 2008 and had not been in wide use throughout Thurston County at the time of the January 7, 2016 letter to Appellants from EHD. [AR 199-208, 212-13, 486-88, 528-35, 557-64].

Testimony offered by EHD staff at the initial hearing established that the subject plats are in an environmentally sensitive area containing numerous water sources presenting a health danger to the public water supply. [AR 486-87, 493, 528-35, 548-53, 557-69].

The monitoring and testing required by Thurston County provided a plan for sample testing of one-third of the systems, that each system shall be tested at least once every three years, that the effluent shall meet a less than or equal to 30 mg/L standard, that the sample test results would be considered by a total nitrogen geometric mean as opposed to individual system scores. [AR 494, 561-65].

Thurston County's proposed monitoring requirement reduced Appellants financial burden for testing effluent by requiring that only one-third of systems were to be tested each year and that a mean average would be considered as opposed to a case by case potential for failure. *Id.* Hearing testimony explained that this methodology was offered as mitigation to offset the burden of testing the new unfamiliar technology. *Id.* [AR 528-35].

Respondent Thurston County agrees with Appellants' recitation of the Procedural History.

### III. RESPONSE

#### a) Standard of Review

Appellants seek relief under LUPA under alternative theories of “erroneous interpretation,” “not supported by substantial evidence” and/or “clearly erroneous application of the law to the facts.” RCW 36.70C.130 allows the Court to review the entire record *de novo* in order to make its determination. See *Wenatchee Sportsmen v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000), *Chinn v. City of Spokane*, 157 Wn. App. 294, 297, 236 P.3d 245 (2010).

“Our deferential review requires us to consider all of the evidence and reasonable inferences in the most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Julian v. City of Vancouver*, 161 Wn. App. 614, 624, 255 P.3d 763 (2011) citing *Cingular Wireless LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

“[U]nder the ‘clearly erroneous application’ test, we apply the law to the facts and will overturn the land use decision only if we have a ‘definite and firm conviction’ that the decision maker committed a mistake.” *Chin* at 298 citing *Citizens to Pres. Pioneer Park, LLC v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001). See also *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 234 P.3d 214 (2010).

“A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.” *Wenatchee Sportsmen* at 176 citing *Anderson v.*

*Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997).

The “substantial evidence” requirement of RCW 30.70C.130(1)(b) is met if the evidence within the record “would persuade a fair-minded person of the truth of the statement asserted.” *Federal Way v. Town & Country*, 161 Wn. App. 17, 252 P.3d 382 (2011) citing *Cingular Wireless* at 768.

“Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Wenatchee Sportsmen* at 176 citing *Wilson v. Employment Sec. Dep’t*, 87 Wn. App. 197, 201, 940 P.2d 268 (1997) in turn citing *Penick v. Employment Sec. Dep’t*, 82 Wn. App. 30, 37, 917 P.2d 136, *review denied*, 130 Wn.2d 1004, 925 P.2d 989 (1996).

In a challenge to sufficiency of the evidence, “[w]e view inferences in a light most favorable to the party that prevailed in the highest forum exercising fact finding authority.” *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002).

**b) Argument**

Appellants make the same arguments as they proffered to the Superior Court. Alternatively that under RCW 36.70C.130(1), that the underlying land use decision is an erroneous interpretation of the law, that the decision is not supported by substantial evidence, and/or that the decision is a clearly erroneous application of the law to the facts.

Appellants request that this Court reject and reverse the previous decisions

of three appellate bodies that upheld Thurston County's ability to impose, in relation to the issuance of operational certificates, conditions 4-7 for effluent monitoring and testing of the proposed MicroFAST nitrogen OSS. The County does not dispute that the application was vested under the 1995 version of WAC 264-272-020 and the 1999 version of the Sanitary Code.

The Decision of the Hearing Officer noted the following in Conclusion #1:

The EHD reviewing staff member who recommended approval of the plats in 2008 did so with the understanding that operational certificate issuance was the point in time at which monitoring requirements would be determined. To conclude that Article IV, Section 5.2 prevents the Division from requiring monitoring of these proprietary systems, because at time of application no effluent monitoring policy for this type of nitrogen reducing device was yet in place, would be contrary to the purpose of the Sanitary Code and to the case-specific recommendation for the approval of plats. The PRRD/preliminary plat applications vested under the 1995 WAC and the 1999 Sanitary Code. **These codes both authorize the local health officer to require monitoring of proprietary systems. The "policy" in place at the time of vesting was that monitoring of a given on-site septic system is determined at time of operational certificate issuance** pursuant to authority conferred in Section 16.

[AR 497-98]. Emphasis added.

This conclusion was supported by the Decision of the Board of Health, who stated that:

[T]he Board agrees with the Hearing Officer's conclusions that at the time these projects vested, the 1995 version of WAC 264-272-02011 and-04011 and the 1999 Thurston County Sanitary Code section 16.2 clearly authorized the health officer to require the type of monitoring of the proprietary systems challenged in this case. And that the monitoring of a given system is determined at the time of operational certificate issuance pursuant to the authority in Section 16.

[AR 624-25].

The Superior Court agreed that the vesting requirements of state law did not apply to the issue on appeal as the Sanitary Code and WAC in place at the time the preliminary plat was submitted, clearly stated that the monitoring requirements for the proposed OSS is determined at the time the Operational Certificates are issued. The Superior Court referenced the 2008 letter [AR 225-27] from Appellants' counsel that specifically acknowledged this fact. [CP 99].

The plain language of the 2008 letter [AR 225-27] indicates at least at the time the letter was authored, Appellants conceded that local rules would need to be complied with at the time of OSS permitting (issuance of certificates) and that there was risk that technology may change or increase in cost during the interim. The Hearing Officer specifically acknowledges that this requirement should have been contemplated by Appellants in their Conclusion #2 by finding that:

The 1999 Sanitary Code definition of operational certificate states that these certificates "shall contain conditions for the operation, maintenance, sampling and monitoring of the subject OSS"... The requirement to monitor is not a surprise, because it's stated in both conditions (of plat approval); monitoring proprietary nitrogen reducing septic systems for actual nitrogen reduction is not outside the scope of foreseeable monitoring requirements. The applicable version of the Washington Administrative Code specifically authorizes the local health officer to require performance monitoring or sampling of any proprietary system.

[AR 498]

Appellants assert that all three appellate bodies were erroneous in their interpretation that existing local and state regulation allowed the monitoring requirements at issue and/or the decision is a clearly erroneous application of law

to facts. To make that argument is to completely disregard the broad powers of the local health officers granted by former WAC 246-272-04011 [AR 441] that states the local health officer “may require performance monitoring or sampling of any alternative system.”

Appellants’ argument further ignores the broad powers granted to the Health Officer in former Article V, sections 5 and 16 of the Sanitary Code [AR 364, 396] that states that the Health Officer may require performance monitoring or sampling of any alternative system; and may establish recommended conditions, monitoring schedules and reporting schedules to assure proper on-going operation and maintenance for all OSS. The conditions and monitoring schedules “will vary depending on the type of system, population or facility(ies) served, the sensitivity of the site, and requirements within alternative system guidelines.” *Id.* This language is subjective and authorizes the Health Officer to impose conditions on a case by case basis, dependent on the local conditions to ensure the health and safety of its citizens. Appellants may be unhappy with the broad scope of regulatory power provided to the Health Officer under the WAC and Sanitary Code, but the plain language of both provisions that were effective at the time of vesting allow the very conditions imposed as a requirement of OSS certification. The conclusions of the Hearing Examiner, Board of Health and the Superior Court agreed that this language authorized the determination for testing of effluent, and Appellants have not shown by a “definite and firm conviction” that a mistake has been made through an erroneous conclusion or application of the law to the facts.

Appellants assert in their briefing that the conclusions of the Appellate bodies were not supported by substantial evidence.

In general, the County defers to the record and to the significant testimony offered by its witnesses, captured in the findings of the Hearing Officer and asserts that the record contains substantial evidence to support the conclusions of the Hearing Officer, the Board of Health, and the Superior Court. The substance of the evidence presented is not really the point of Appellants' contention. Appellants instead argue that "improper deference" was given to the EHD who lacks expertise with these nitrogen-reducing OSS due to the failure of EHD to consult with other agencies or the manufacturer.

Appellants claim that this deference should not be given due to the County's failure 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." The County Health Department is the local authority on these issues. The Hearing Officer, in Finding #3, specifically acknowledges that: "Environmental Health's 'failure' to consult either the State Department of Health or the manufacturer on what regime of effluent sampling, if any, would be appropriate does not overcome EHD's agency expertise with regard to implementing the Thurston County Sanitary Code for the protection of public health, nor its expertise specifically with what authority is conferred pursuant to operational certificate provisions." [AR 498-99]. This contention does not approach the reasonable person standard under the law cited above nor does it overcome the

presumption of validity due to the fact finder.

Additionally and worth noting, Appellant acknowledges in the February 2008 letter that technology and requirements could change between the date of the letter and the time of certificate issuance. [AR 225-27]. This acknowledgement supports the basic premise that as this technology is newer, and that sample testing should be required to ensure that these systems work properly in an ecologically sensitive area.

Appellants attempt to argue that the County “misapplied” state standards in determining an appropriate level of standards for the OSS effluent testing. At the hearing, County Staff testified that while they reviewed the tables and values in WAC 246-272A when considering appropriate nitrogen levels, they actually proposed a less stringent compliance level for Appellant regarding nitrogen levels and units tested per year as a mitigation due the perceived impacts the testing requirement would have on the developer. [AR 35-36, 37-40, 489-90, 528-35, 557-64]. Essentially the Appellants are arguing against a position that benefits them and reduces their potential costs.

#### **IV. CONCLUSION**

Appellants have not met their burden to establish under a de novo review that the prior decisions were clearly erroneous, an erroneous application of law to facts, or unsupported by substantial evidence. With or without deference given to the highest reviewing forum, the Court cannot find by a “definite and firm

conviction” that the trier of fact made a mistake in light of the evidence presented.

The decision of the Superior Court should be affirmed.

Respectfully submitted this 12<sup>th</sup> day of May, 2017.

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