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COURT OF APPEALS
DIVISION II

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No. 38427-2-II

STATE OF WASHINGTON

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

HARLAN CLARIE STIENTJES FAMILY TRUST

and

MARY JO STIENTJES,

Respondents

v.

THURSTON COUNTY,

Defendant

and

LARESSA VIA-FOURRE and CHARLES VIA,

Appellants

REPLY BRIEF OF APPELLANTS

Paul J. Hirsch
Attorney for Appellants
WSBA 33955
PO Box 771
Manchester WA 98353
(360) 649-0042
pjh@hirschlawoffice.com

TABLE OF CONTENTS

A. Introduction 1

B. Argument in Reply 1

 1. Via-Fourre’s Opening Statement of the Case is a True Report of the Facts and Procedure Relevant to the Issues Presented for Review 1

 2. Contrary to Stientjes’ Argument, They Did Not Exhaust Their Administrative Remedies as Required by RCW 36.70C.060(2)(d) 3

 3. Stientjes Confuse the Issue of Via-Fourre’s Standing as Aggrieved Persons 6

 4. Stientjes Claim That Via-Fourre Assert That a Building Permit is Not a Land Use Decision. Via-Fourre Make No Such Assertion 7

 5. Stientjes Unjustly Blame Others for Their Failure to Disclose Pertinent Information on Their Initial Application for a Building Permit 7

 6. Stientjes Argue that Their Right to the Initially Issued Building Permit of July 11, 2007 is “Vested” And Not Via-Fourre Nor Thurston County Can Do Anything About It. They Are Wrong 12

C. Conclusion 13

TABLE OF AUTHORITIES

Table of Cases

Adkins v. Aluminum Co. of Am., 110 Wn.2d 128,
750 P.2d 1257 (1988) 6

Heller Building v. City of Bellevue, 147 Wn. App. 46,
194 P.3d 264 (2008) 12

Holder v. City of Vancouver, 136 Wn. App. 104,
147 P.3d 641 (2006) 5

*Pacific Rock Environmental Enhancement Group v.
Clark County*, 92 Wn. App. 777, 964 P.2d 1211 (1998) 5

Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988) 12

Ward v. Board of County Com'rs, Skagit County,
86 Wn. App. 266, 936 P.2d 42 (1997) 3

Statutes

RCW 36.70C *passim*

Thurston County Code

TCC 14.20.11(1) 11

TCC 17.15, Table 5 10

TCC 17.15.305 10

TCC 17.15.310(D) 10

TCC 17.15.410 10

Rules of Court

RAP 2.4(b)	6
RAP 10.3(a)(5)	1
RAP 10.3(a)(8)	7

A. INTRODUCTION

Appellants Via-Fourre offer this reply brief to correct only certain of Respondents Stientjes's mischaracterizations of the arguments and factual assertions in Via-Fourre's opening brief, and rely on their opening brief to more comprehensively set forth the pertinent issues and arguments.

B. ARGUMENT IN REPLY

1. Via-Fourre's Opening Statement of the Case is a True Report of the Facts and Procedure Relevant to the Issues Presented for Review

While accusing Via-Fourre of having misstated the facts in their opening brief's Statement of the Case (Resp. Brief at 11), Stientjes use their opening Statement of the Case to improperly offer legal argument and ultimate conclusions in disregard of RAP 10.3(a)(5). Stientjes, however, do not identify any specific misstatements of fact by Via-Fourre.

Via-Fourre stand by their Statement of the Case as presented in their opening brief. Stientjes's inappropriately placed legal arguments and conclusions are addressed by Via-Fourre in the Argument sections of their opening brief and in this reply brief.

In the Introduction to their opening brief, Stientjes do another recitation of "facts," cherry picking Findings [of fact] from the Hearing Examiner's Findings, Conclusions and Decision of March 4, 2008, while

also conflating Findings and Conclusions [of law] in a numbered list. Resp. Brief at 6 ff. Via-Fourre do not dispute that the items numbered one and two of this list are findings of fact by the Hearing Examiner. And while Via-Fourre do disputed the date of their first contact with Developmental Services Department (hereinafter DSD) regarding their concerns with the RV shed, such is immaterial as no appellate court has announced a discovery rule with respect to the LUPA 21-day limitation.¹

However, items three and four on that list are the Hearing Examiner's Conclusions, not "Finding of Fact and Conclusion of Law" as described by Stientjes. These conclusions , as well as items five, six, and seven, which are properly described as Conclusions, were rejected as wrong, or immaterial, by the Board of County Commissioners (hereinafter BOCC) on appeal and hence are not binding on anyone.

Stientjes, at page 5 of their opening brief, quote Via-Fourre's responding brief in the Superior Court where they stated: "this is a review of questions of law, as the real factual disputes between Via-Fourre, Thurston County and Stientjes are not before this Court." Essentially the same language appears at page 35 of Via-Fourre's opening brief to this

¹ Other than this minor point at Finding 4, Via-Fourre are not aware of any material misstatements in the Hearing Examiner's Findings. What they – and the Board of County Commissioners (BOCC) – do object to are the Conclusions reached by the Hearing Examiner. And those Conclusions Via-Fourre timely appealed to the BOCC who agreed with Via-Fourre.

Court. The point being made in both instances is that an ultimate matter at issue before the Hearing Examiner – the location of the marine bluff setback in relation to the RV shed – was not reached by the Hearing Examiner since he thought he lacked jurisdiction to decide the issue. This is an issue that was to be decided on remand.

2. Contrary to Stientjes' Argument, They Did Not Exhaust Their Administrative Remedies as Required by RCW 36.70C.060(2)(d)

Stientjes, when they argue that only the county DSD review constitutes “administrative remedies” (Resp. Brief at 31), misapprehend the meaning of this term-of-art as used in RCW 36.70C.060(2)(d). While the term is not explicitly defined in Chapter 36.70C, a review of the case law touching on this subsection shows clearly that the term is understood by the appellate courts to include all hearings and appeals up to and including those before a board of county commissioners. See, e.g., *Ward v. Board of County Com'rs, Skagit County*, 86 Wn. App. 266, 270, 936 P.2d 42 (1997):

The purpose of LUPA is “to reform the process for judicial review of land use decisions made by local jurisdictions.” RCW 36.70C.010. Under LUPA, a “land use decision” is “a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals,” on, inter alia, “an application for a project permit or other

governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used[.]”

RCW 36.70C.020(1)(a). In order to obtain a final determination of the local governmental body with the highest level of authority to make the determination, one must, by necessity, exhaust his or her administrative remedies. Thus, exhaustion of administrative remedies is a necessary prerequisite to obtaining a decision that qualifies as a “land use decision” subject to judicial review under LUPA, whether the party seeking review is an owner, applicant, or other aggrieved party.

Stientjes’ failure to await a decision by the Hearing Examiner on the merits of the Via-Fourre appeal to the Hearing Examiner, as ordered by the BOCC, requires dismissal of their petition. Once all administrative, i.e., county, proceedings are exhausted and a *final* decision made by the local jurisdiction, only at that point would the Superior Court have subject matter jurisdiction to decide all issues, including those of standing, that were implicated in the final decision. No objections would be waived that had been properly preserved below.

While misapprehending the exhaustion requirement under LUPA, Stientjes appear to suggest that Via-Fourre are arguing that orders of remand are never appealable (Resp. Brief at 31). Via-Fourre do not so argue nor do they need to. The question is not are remands ever appealable, the question is are such orders appealable as land use decisions under LUPA? They are not. Via-Fourre have addressed this issue in their opening brief.

Chapter 36.70C is explicit about when the courts will have subject matter jurisdiction to review a local jurisdiction's land use decisions. Orders of remand from a local jurisdiction's body or officer with the highest level of authority to make final determinations is not listed as being appealable to Superior Court. Certainly a BOCC decision ordering further proceedings by the Hearing Examiner is not a final determination. Given the legislature's intentional omission of such interlocutory rulings, appellate courts' normal powers of discretionary review are not available in LUPA. See, e.g., *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 964 P.2d 1211 (1998).

Stientjes's reliance on *Holder v. City of Vancouver*, 136 Wn. App. 104, 147 P.3d 641 (2006) for the proposition that they must appeal the BOCC decision via an immediate LUPA petition is misplaced. In *Holder*, the petitioner/appellant filed a LUPA petition but then abandoned LUPA in favor of a *res judicata* argument at both the trial and appellate levels. This Court found that this abandonment of the proper means to appeal the hearing examiner's final decision to be fatal and dismissed the appeal, affirming the trial court. Here, Stientjes insist on *pursuing* a LUPA appeal of a BOCC decision that is not a final land use decision.

There is no danger to Stientjes of waiving their right to appeal questions of the Hearing Examiner's jurisdiction or Via-Fourre's standing

to bring an appeal to the Hearing Examiner once the local jurisdiction actually renders a final determination in this case. It is well-settled that appellate courts in Washington have a duty to review all interlocutory orders and rulings that might prejudicially affect the final judgment. See, e.g., *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257 (1988); RAP 2.4(b).

3. Stientjes Confuse the Issue of Via-Fourre's Standing as Aggrieved Persons

In their brief Stientjes offer both confusing argument on the law and misstatements of fact on this issue. See particularly pages 20 through 25 of Stientjes' brief. They quote at length from RCW 36.70C.060, a section of LUPA concerned with "[s]tanding to *bring* a land use petition", seeming to forget that Via-Fourre were the *respondents* in Superior Court. While in their opening brief Via-Fourre argued at length that they would potentially have such standing since the final judgment of the trial court mistakenly called it into question, this is a fundamental misapplication of RCW 36.70C.060.

Stientjes further state that the Hearing Examiner did not find that Via-Fourre had a protected property interest that would give them standing as aggrieved parties (Resp. Brief at 24). However, the Hearing Examiner

found nothing on this point at all, simply dismissing their appeal as untimely. On the other hand, the BOCC, with the entire record before them, decided that Via-Fourre had the right to have their appeal heard and decided by the Hearing Examiner.

4. Stientjes Claim That Via-Fourre Assert That a Building Permit is Not a Land Use Decision. Via-Fourre Make No Such Assertion

At page 28 of the Brief of Respondent, Stientjes claim that Via-Fourre “assert that an application for a building permit is not a land-use decision ...” Via-Fourre make no such assertion. It is well-established that the *issuance* of a building permit is a land use decision. What Via-Fourre assert is that an *order of remand* is not a land use decision under LUPA. And it is an order of remand that Stientjes appealed to the Superior Court.

5. Stientjes Unjustly Blame Others for Their Failure to Disclose Pertinent Information on Their Initial Application for a Building Permit

Stientjes attach copies of their initial building permit application to their brief as Exhibit B and the original, improvidently granted building permit, with their *very first* site plans, as Exhibit C. Via-Fourre do not believe that Exhibit B is part of the record below, and only portions of Exhibit C are included in the record below, and thus these should not be attached to the brief. RAP 10.3(a)(8). Nonetheless, Via-Fourre raise no

objection as they believe these documents to be fair and accurate copies of records that well should have been included in the administrative record.

The second page of said Exhibit B shows two things relating to the studied incompleteness of the application: 1) “Hogum Bay” is mentioned as a body of water within 300 feet of the property, but it is not identified as “Salt” as required by the application; and 2) neither “yes” nor “no” is checked in response to the question “Slopes greater than 50%?” Obviously, one or the other must be true. As shown by the administrative record, particularly cited in Via-Fourre’s opening brief, there are slopes of greater than 50% on the property. Likewise, in the site plans attached to Exhibit C, the name “Hogum Bay” is written at the very bottom of the page, beneath a straight line that presumably is meant to indicate a shoreline. But, as discussed at length in Via-Fourre’s opening brief, it is the applicant’s responsibility to indicate slopes, critical areas, and buffers. This the Stientjes’s exhibits show was not done.

A material fact in this case is the presence on the Stientjes property of a marine bluff geological hazard area and its associated buffer. (See, e.g., AR at 50). It is this fact that Stientjes were required to show on their site plan and application, not just that “Hogum Bay” was nearby². Not all

² While not part of the record before this Court, Via-Fourre suggest that if the Court were to take judicial notice of United States Geological Survey quadrangle maps “Longbranch, WA” and “Nisqually, WA”, the Court would observe that “Hogum Bay” is

shorelines in Thurston County are geologically critical areas comprised of marine bluffs. The shoreline at the Stientjes property is, however. Stientjes failed to indicate this fact and thereby deceived counter staff at DSD.

In their lengthy Introduction, if Via-Fourre understand it correctly, Stientjes claim that Via-Fourre either deny a building permit was issued on July 11, 2007, or they have “admitted” (Resp. Brief at 8) that their November 30, 2007 appeal to the Hearing Examiner is actually an appeal of the July 11, 2007 permit and therefore not timely. Neither claim passes muster.

The first sentence of ¶ 1 of Via-Fourre’s Statement of the Case in their opening brief states: “On July 11, 2007, a building permit to construct a shed for a recreational vehicle (RV) was issued by the Thurston County Permit Assistance Center (PAC) ‘over-the-counter’ to Stientjes, neighbors on land adjoining that of Via-Fourre.” This is hardly the artful burial of a salient fact. But as is clear from the second sentence of that same paragraph, quoting the Staff Report, “the initial approval by PAC staff was at least partially based upon insufficient information supplied by the Applicant.” As the BOCC recognized in their Decision of May 12, 2008, the building permit application in question was not completed until

approximately five miles south of the Stientjes property that itself is near the northern extreme of Johnson Point. The water body adjacent to the Stientjes property is properly called Nisqually Reach.

November 19, 2007. Quoting the BOCC decision (AR at 250; also attached as an appendix to Via-Fourre's opening brief):

The hearing examiner erroneously concluded the building permit was issued on 7/11/07, and Via-Fourre's appeal dated 11/30/07 was not timely. However, by various actions of the county staff, this building permit was officially suspended on September 6, 2007, *due to non-compliance with the CAO* and not reinstated until 11/19/07. [Emphasis added.]

The BOCC goes on to explain the legal authority for this conclusion, legal authority Stientjes incorrectly states Via-Fourre have not provided:

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

Stientjes repeatedly attempt to place the blame on DSD staff for not catching the omission.

On page 9, particularly footnote 2, of their brief Stientjes attempt to lay the blame for the deficiencies of their initial application on Lois Anderson of their contractor's office, claiming that "there is not a scintilla of evidence that indicates the Respondents were in any way participatory

in or had knowledge of the contents of the Application for Building Permit until months after the completion of the building during the hearing before the Hearing Examiner.” However, Stientjes nowhere argue that this is a legally meaningful fact.

The permit application itself, attached as Exhibit B to Brief of Respondent, contains the following language immediately under Ms. Anderson’s signature: “As owner, or agent on owner’s behalf, I hereby affirm and certify that the information provided is accurate ...” Similar, TCC 14.20.11(1) states: “Any owner or authorized agent who intends to construct ... a building or structure ..., or to cause such work to be done, shall first make application to the building official and obtain the required permit.”

By causing Ms. Anderson and her employer to make the application on their behalf, they authorized her to act on their behalf. If Stientjes mean to imply that they are not responsible for the acts of their agent, then they fail to argue on what grounds the doctrine of *respondeat superior* does not apply in this case.

6. Stientjes Argue That Their Right to the Initially Issued Building Permit of July 11, 2007 is “Vested” And Not Via-Fourre Nor Thurston County Can Do Anything About It. They Are Wrong

Via-Fourre argued at length in their opening brief that under *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988) and *Heller Building v. City of Bellevue*, 147 Wn. App. 46, 194 P.3d 264 (2008) the only thing that vests regarding a building permit is the right “to have [an] application processed according to the zoning and building ordinances in effect at the time of the application.” *Id.* at 60. Compliance with zoning ordinances, including a county CAO, however, remains “with individual permit applicants, builders and developers.” *Taylor*, 111 Wn.2d at 168.

Nonetheless, Stientjes nowhere in their responding brief attempt to address or distinguish these controlling cases. Rather, they repeatedly insist that it is the county’s job to catch their deceptions and if the county fails to do so then they have acquired a “vested right.” This is nonsense. A decision by this Court affirming the final judgment of the Superior Court would be a decision declaring that if an applicant for a developmental permit, either through commission or omission, fails to reveal to a land use regulator material and lawfully required information, then that permittee is good to go after LUPA’s 21-day limitation period expires. Nothing anyone can do about it; catch me if you can.

C. CONCLUSION

Based on the facts and argument present here and in their opening brief dated March 6, 2009, and upon the record before this Court, Appellants Via-Fourre request that the Court enter judgment:

1. Granting their appeal;
2. Vacating the Superior Court's Final Judgment for Petitioners of September 23, 2008 and dismissing the Petition;
3. Upholding the May 12, 2008 Decision of the Thurston County Board of County Commissioner that remands the case to the Thurston County Hearing Examiner for a decision on the merits;
4. Awarding them their statutory costs;
5. Ordering the statutory costs they paid over in the Superior Court action be returned to them; and
6. Granting such other and further relief as the Court finds just and proper.

Dated: May 18, 2009



Paul J. Hirsch
Attorney for Via-Fourre and Via
WSBA No. 33955
PO Box 771
Manchester WA 98353-0771
Telephone: (360) 649-0042
pjh@hirschlawoffice.com

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**CERTIFICATE OF SERVICE:
REPLY BRIEF OF APPELLANTS**

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

Dated: May 18, 2009



Paul J. Hirsch
Attorney for Appellants
WSBA No. 33955
PO Box 771
Manchester WA 98353-0771

**Certificate of Service: Reply Brief - 1
Stientjes v. Via-Fourre
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Paul J. Hirsch
Attorney for Appellants
PO Box 771
Manchester WA 98353
(360) 649-0042
pjh@hirschlawoffice.com