

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY *[Signature]*  
COURT OF APPEALS, DIVISION TWO,  
DEPUTY  
OF THE STATE OF WASHINGTON

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HARLAN CLARIE STIENTJES FAMILY TRUST

and

MARY JO STIENTJES,

Respondents

v.

THURSTON COUNTY,

LARESSA VIA-FOURRE and CHARLES VIA,

Appellants

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**JOINT BRIEF OF APPELLANTS  
IN RESPONSE**

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## I. INTRODUCTION

Following the issuance of building permit for a low value recreational-vehicle shed to respondents (hereinafter, Stientjes) based on their application that omitted important, required information, appellants, and next-door neighbors, Via and Via-Fourre (hereinafter, Via-Fourre) raised complaints with the Thurston County Development Services Department (DSD<sup>1</sup>) about, *inter alia*, the intrusion of the shed into a Marine Geologic Hazard area, the blockage of their view by the shed, and the endangering of their beach-access easement by further development in this critical area. In response to Via-Fourre's concerns, and based on its own investigation using geographical information system software and aerial photographs ("GeoData") and field observations, DSD posted a stop work order on the RV shed and informed Stientjes that the intrusion of the shed into the critical area could be addressed by providing an actual survey that proved the shed was outside of the critical-area setback, applying for an administrative variance from the critical-area setback restriction, or withdrawing the building-permit application. Stientjes first responded with a letter from a surveyor who, based on County GeoData data and tools, found the shed was outside of the marine bluff setback. DSD rejected this

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<sup>1</sup> Development Services Department is now known as the Resource Stewardship Department. Development Services Department (DSD) will be used here for consistency with the record below.

letter and its findings as insufficient. Stientjes next applied for a variance. DSD refused to grant the variance based on the effects of the shed on the property of Via-Fourre. Thereupon, Stientjes appealed the denial of a variance to the County hearing examiner.

Before Stientjes' appeal of the variance denial could be heard, DSD, applying its GeoData software to newer aerial photographs, determined that the shed did not intrude into the marine-bluff setback. Stientjes then withdrew their appeal. Via-Fourre, upon learning that DSD would no longer be protecting their interests, filed their own appeal to the hearing examiner, citing, *inter alia*, the intrusion of the shed into a Marine Geologic Hazard area, the blockage of their view by the shed, and the endangering of their beach-access easement by further development in this critical area setback, as shown by an actual survey they commissioned.

DSD found Via-Fourre's appeal to be timely and a full evidentiary hearing was held before the examiner. The hearing examiner's decision concluded that while the county code authorized the examiner to hear appeals of administrative decisions made under the critical areas ordinance, he found no criteria in the code for deciding whether such appeals should be granted. He therefore dismissed the appeal as not timely under the Land Use Petition Act (LUPA). Administrative Record (AR) 84, 91-93. Via-Fourre appealed this decision to the Thurston County Board of

County Commissioners (BOCC). The BOCC found that the hearing examiner had erred and that “pursuant to [Thurston County Code] 17.15.410, Via-Fourre filed a timely appeal of [DSD’s] decision regarding the marine bluff, and the hearing examiner had jurisdiction under the CAO to consider these issues.” AR 60-61. The BOCC ordered the matter remanded to the hearing examiner for a decision on the record already created. Before the examiner could render a decision on the merits, Stientjes filed a LUPA petition in superior court.

The superior court denied Via-Fourre’s initial hearing motions to dismiss this first petition based on Stientjes’ failure to exhaust their administrative remedies and the court’s lack of subject matter jurisdiction to hear a petition of a local jurisdiction’s decision that was not a final land-use determination. Upon denying these motions, the court went on to grant the petition in a decision from the bench and later signed Stientjes’ proposed final judgment that overturned the BOCC decision and reinstated the examiner’s original decision. Via-Fourre appealed to the Court of Appeals, which in a unanimous, published decision found that the trial court did not have the authority to consider the petition and reinstated the BOCC’s decision which remanded the matter back to the hearing examiner.

On April 16, 2010, the hearing examiner issued his decision on the merits, finding that “[a]ll issues of [Via-Fourre’s] appeal fail.” AR 40. Via-Fourre appealed this decision to the BOCC, arguing that the method by which DSD determined the marine bluff setback was in violation of the county code, the examiner had not considered their rights under the Shoreline Master Program for the Thurston Region (SMP), and that the construction of the RV shed constituted an addition and expansion for purposes of the Thurston County sanitary code. The BOCC unanimously reversed the examiner, again, finding that, with respect to the location of the marine bluff setback and the position of the shed, “staff’s method on the facts of this case is not in compliance with the code” and that [t]he hearing examiner erroneously interpreted and applied [Thurston County Code] 17.15.620(B)(2) ...” which pertains to the establishment of marine bluff setbacks. AR 2. The board further found that many of the hearing examiner’s findings of fact and conclusions “are not supported by substantial evidence in the record and/or the county code.” The BOCC did not reach Via-Fourre’s assignments of error regarding the SMP and the sanitary code, as these are not mentioned in its June 22, 2010 decision. Stientjes then filed the LUPA petition *sub judice*.

## II. STATEMENT OF THE CASE

1. On July 11, 2007, a building permit to construct a RV shed was issued by the Permit Assistance Center “over-the-counter” to the respondents Stientjes. As stated in the Thurston County Development Services Planning & Environmental Section Report (Staff Report) at AR 161:

The application and site plan were not routed to the Development Services, Planning and Environmental Section (Planning) for a field visit, *because the Applicant had failed to provide topographical information, and location and setback from the marine bluff on the initial site plan.* Therefore, the initial approval by PAC staff was at least partially based upon insufficient information supplied by the Applicant. [Emphasis added.]

2. Appellants Via and Via-Fourre own and occupy property, located approximately 300 feet from the ordinary high water mark of the Nisqually Reach, which adjoins the Steintjes property. AR 277<sup>2</sup>. Via and Via-Fourre’s residence is located on the extreme eastern portion of their property, near the property line with the Stientjes parcel. The RV shed at issue is located 21.5 feet from this common property line. AR 274.

3. Via and Via-Fourre also own a 10-foot wide beach-access easement running from the northeast corner of their parcel, across the

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<sup>2</sup> Copy of Bracy & Thomas survey at AR 277 is mis-copied; it is reproduced as an appendix attached hereto.

northernmost portion of the Stientjes property, and on to the shoreline. AR 277 and the Appendix hereto.

4. Following communications from Via-Fourre relating to their concerns with violations of the front-yard setback and the Critical Areas Ordinance marine bluff setback, communications the initial date of which there is conflicting testimony below, Development Services Department (DSD) staff visited the building site on August 28 and 29, 2007, and took measurements pertaining to both setbacks. These measurements resulted in the posting of a Stop Work Order (SWO) on August 28 to “address the frontyard setback violation<sup>3</sup> and to address the potential intrusion into the marine bluff hazard area setback.” Staff Report, AR 162.

5. DSD staff wrote Stientjes on September 6, 2007, informing them of three options to cure the marine bluff setback violation: 1) withdraw the building permit application; 2) supply a survey showing the shed was outside of the marine bluff setback; or 3) apply for a variance to allow encroachment into the bluff setback. Staff Report, AR 162; letter at AR 189.

6. After submitting a letter from a professional surveyor that DSD staff found inadequate because it “was not stamped, nor was an actual survey map provided,” (AR 269) Stientjes applied for an administrative

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<sup>3</sup> The front-yard setback violation was cured by Stientjes and is not an issue in this appeal.

variance. This application was denied by staff for failing to meet variance-approval criteria set out in TCC 17.15.420 and 20.07.050. DSD found, with particular regard to Via-Fourre, that

[t]he granting of the variance would be injurious to other land or improvements in the vicinity and neighborhood. The shoreline views of the neighboring residence immediately east [sic] (upland) of the subject property would suffer substantially if the variance were granted. [Criterion 5]

The proposal for a recreational vehicle cover would have a substantially greater negative impact to the neighboring property to the east [sic] (upland) and cause greater harm in terms of property value by diminishing the existing view than the harm caused to the applicant from denying the variance ... [Criterion 7]

Staff Report at AR 162-163; and Attachment o at AR 249.

7. Upon denial of the variance, Stientjes appealed this administrative decision to the hearing examiner. However, before the hearing was held, DSD changed its mind and decided that the RV shed was *outside* of the marine bluff setback and a variance was *not* needed. The SWO, in effect since August 28, was lifted. This was communicated to Stientjes and to the project file by a staff letter dated November 19, 2007. Staff Report at AR 163; and Attachment n at AR 244. Stientjes then withdrew their appeal.

8. Upon becoming aware of the November 19, 2007 administrative decisions to lift the SWO, declare the RV shed outside of the marine bluff setback, and finding a variance was not required, Via-Fourre appealed the

decisions, presenting a stamped survey by a licensed land surveyor showing that the shed was within the marine bluff setback. Staff Report, Attachment b at AR 277 and Appendix here.<sup>4</sup> Following a hearing on February 4, 2008, the hearing examiner determined on March 4, 2008 that he did not have jurisdiction to decide the appeal and dismissed it. AR 84.

9. Via-Fourre appealed the hearing examiner's decision to the BOCC which found in its decision of May 12, 2008, that the hearing examiner did have jurisdiction to decide the appeal and remanded the case to the examiner for a decision on the record created at the February 4 hearing. AR 60.

10. Before the hearing examiner could render his decision on remand, Stientjes filed a petition under the Land Use Petition Act in the Superior Court of Thurston County.

11. On September 23, 2008, the superior court, with Judge Katherine M. Stolz of the Pierce County Superior Court sitting as visiting judge, granted the petition, reversed the BOCC decision of May 12, 2008, and reinstated the March 4, 2008 decision of the hearing examiner.

12. Via-Fourre appealed the superior court decision to the Court of Appeals, which in a decision dated October 12, 2009, reversed the superior court on the grounds that the trial court lacked the authority to

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<sup>4</sup> A full size copy, 18" by 24", was used at the hearing before the hearing examiner and provided to Stientjes at that time.

hear the petition because the BOCC order remanding the case to the hearing examiner was not a final land-use decision, and reinstated the BOCC decision of May 12, 2008. *Stientjes Family Trust v. Thurston County*, 152 Wn.App. 616, 217 P.3d 379 (2009).

13. On remand, the hearing examiner denied Via-Fourre's initial appeal in a decision dated April 16, 2010, finding "[a]ll issues of the appeal fail."<sup>5</sup> AR 40.

14. On April 30, 2010, Via-Fourre timely appealed the hearing examiner's decision to the BOCC. AR 4.

15. Following the filing of the appeal, the three commissioners of the BOCC conducted a site visit as allowed by TCC 2.06.080(A).

16. After briefing by Stientjes and Via-Fourre, the BOCC announced its decision on June 22, 2010, finding that "[t]he hearing examiner erroneously interpreted and applied TCC 17.15.620(B)(2) to the facts of

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5. On page 5 of his decision (AR 44), the hearing examiner states "the parties to this case stipulated and agreed that no additional oral hearing was required and that the record developed at the initial hearing of February 4, 2008 would be part of the remand record." This is inaccurate. During a teleconference on February 11, 2010, with all counsel present, when the subject of additional testimony and evidence to supplement the record was raised by the examiner, counsel for Via-Fourre pointed out that the May 12, 2008 decision of the BOCC was that "[t]he hearing examiner shall *not* conduct a new hearing, but instead is directed to make his decision based on the record created during the February 4, 2008 hearing on this matter." (Emphasis in the original.) Therefore, there was no opportunity to submit new evidence. Further, the hearing examiner did not order "the parties to submit any additional exhibits to supplement the record." Rather, he requested copies of the briefing before the superior court and the Court of Appeals.

this case when it affirmed staff's interpretation and removal of the Stop Work Order[.]" and that numerous, pertinent findings and conclusions of the examiner were not supported by substantial evidence. AR 2.

17. Stientjes appealed the BOCC decision by filing a LUPA petition in Thurston County Superior Court, with Judge George L. Wood, Clallam County Superior Court sitting as visiting judge. The petition was granted. Clerk's Papers (CP) 187-98. Denial of Thurston County's and Via-Fourre's joint motion for reconsideration was entered on July 12, 2011, (CP 220-21) and the instant appeal timely filed.

18. Joint appellants' motion to file an over-length brief of up to 65 pages was granted by this Court on September 20, 2011.

### **III. STANDARDS OF REVIEW**

RCW 36.70C.130(1) sets out the standards for granting relief in a Land Use Petition Act (LUPA) appeal. The section provides that a court may reverse the County's land use decision only if Stientjes are able to carry their burden of establishing one or more of the following:

(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 for such deference as is due

the construction of a 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 rights of the party seeking relief.

Under the substantial evidence standard of RCW 36.70C.130(1)(c), courts must look to determine if there is sufficient evidence in the record that would "persuade a fair-minded person of the truth or correctness of the order." *Benchmark Land Co. v. Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002); *Wenatchee Sportsmen v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The party challenging an agency decision bears the burden of demonstrating that the decision is not supported by substantial evidence. *Nordstrom Credit v. Dep't of Revenue.*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993); see also 83 Am. Jur.2d Zoning and Planning §§ 652, 553 (1992).

A party challenging an action under RCW 36.70C.130(1)(d) is required to meet the heavy burden of proving an agency's application of the law to

the facts was “clearly erroneous.” This test is only met when the reviewing court is left with “the definite and firm conviction that a mistake has been committed.” *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 894, 83 P.3d 433 (2004); see also *Ecology v. PUDI*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993). Additionally, LUPA requires that deference be afforded to the County when deciding whether the decision was an erroneous interpretation of the law. The courts have provided “considerable judicial deference” to the construction of an ambiguous ordinance by the officials charged with its enforcement. *Hoberg v. Bellevue*, 76 Wn. App. 357, 359-60, 884 P.2d 1339 (1994). Standards (a), (b), (e) and (f) present “questions of law that we review de novo, giving deference to the Board’s specialized knowledge and expertise.” *Quality Rock v. Thurston County*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007); *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). The situation in this case is similar to *Quality Rock* in that the BOCC reversed the hearing examiner. *Id.* at 131. The court made it clear that deference is due the BOCC’s interpretation when deciding questions of law. *Id.* at 133. Accordingly, as in *Quality Rock*, considerable deference is due the BOCC decisions in this case if there is any ambiguity in the interpretation of a provision of the County code.

As a LUPA action, this case is subject to General Order 2010-1 of this Court. As such, Stientjes, as the parties asserting errors by the BOCC, continue to bear the burden of establishing such errors. Therefore, joint appellants intend to defend the BOCC's decisions and responded to Stientjes' arguments, not to directly challenge the errors of the Superior Court.

#### **IV. SUMMARY OF ARGUMENT**

Joint appellants, Thurston County and Via-Fourre, argue below that Via-Fourre had standing as "aggrieved parties" under the Thurston County code to initiate proceedings before the hearing examiner, as the BOCC found, and that Stientjes' assertion that Via-Fourre must somehow meet LUPA's standing requirements for bringing a petition, even though Via-Fourre are LUPA respondents, is incorrect as a matter of law. Nevertheless, Via-Fourre, as adjoining property owners who possess an endangered easement on the Stientjes property, can meet the requirements for LUPA petitioners.

Further, joint appellants argue that Via-Fourre's initial appeal to the hearing examiner was timely, as the reinstatement of Stientjes' building permit, with a revised site plan and the concomitant critical-area setback determination, are appealable land-use decisions under both the Thurston

County code and the rule of *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008).

Joint appellants also show that Stientjes' claim that Thurston County did not have authority to issue a stop work order in light of a possible violation of the County Critical Area Ordinance (CAO) ignores the plain language of the International Residential Code (IRC) and the CAO. Likewise, Stientjes' overwrought assertion that the BOCC site visit was "illegal" is without merit, ignoring as it does the plain language of the County code.

Joint appellants also demonstrate that Stientjes' reliance on the *Wenatchee Sportsmen*, *Nykreim*, and *Habitat Watch* line of cases, regarding the need for a LUPA petition to challenge even a mistaken land-use decision, is misplaced here because Thurston County's need to revisit the Stientjes permit was solely the result of Stientjes failing to reveal information on the permit application that they were legally required to reveal.

Finally, joint appellants argue that the DSD locating of the boundary of the marine bluff critical-area setback was technically flawed and a misinterpretation of the Thurston County code. Therefore, the BOCC was correct when it found that the hearing examiner's decision erroneously interpreted and applied County code to the facts of this case, and that

numerous of the examiner's findings of fact were not supported by substantial evidence.

## V. LEGAL ARGUMENT

### A. APPELLANTS VIA-FOURRE AND VIA HAVE HAD STANDING TO PARTICIPATE AT EVERY LEVEL OF THIS ACTION.

The November 19, 2007 letter of DSD staff member Scott Longanecker to Stientjes lifted the SWO order and notified Stientjes that their revised site plan of September 15 had been accepted. (AR 244 and lower left corner of AR 246 regarding site plan approval date of 11/19/07.) This letter sets forth several appealable administrative decisions and, in fact, had enclosed with it an appeal form. AR 245. One administrative decision is the determination of the location of the marine bluff setback; another is the concomitant finding that Stientjes' RV shed is outside of the setback. Yet another is the acceptance of the revised site plan. (*See* "Subject" heading on the letter at AR 244, listing "Administrative Site Plan review 2007102848 ...")

TCC 17.15.410(A) states:

*Any aggrieved person* may appeal an administrative decision made under this title, including a decision by the health officer, to the hearing examiner. Such appeals are governed by TCC Section 20.60.060. Appeals of *the location of a critical area boundary* or of a wetland rating shall be supported by technical evidence. [Emphasis added.]

DSD's decision relating to the location of the marine bluff setback, as defined at TCC 17.15.620(B)(2)(b), and the decision that the RV shed is outside of the marine-bluff critical area boundary were thus appealable to the hearing examiner by Via-Fourre as aggrieved persons, the latter defined at TCC 17.15.200:

"Aggrieved person" means one who is directly affected by the *approval*, denial or conditioning of a development permit reviewed under this chapter (such as the applicant); but who is not the owner, agent, tenant, operator, lessor or other person with a financial interest in the property upon which the development permit is requested. [Emphasis added.]

The building permit, and its site plan, is a development permit that DSD reviewed under Chapter 17.15, Critical Areas, of the county code. TCC 17.15.200. In reversing the hearing examiner's procedural decision, the BOCC stated in its decision of May 12, 2008:

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 11/17/07. [AR 60.]

This decision of the BOCC particularly notes the DSD staff letter of September 6, 2007 to the Stientjes:

Land use approval of your site plan is suspended at this time pursuant to R105.6 of the International Residential Code for the following reasons. (1) The application which

was submitted for the proposed RV cover was not complete because the application and site plan did not show critical areas or their buffers. (2) The project application did not answer questions relating to steep slopes listed under "Property Information" on page 2 of the application. [AR 189.]

The DSD letter of November 19, 2007, also sets out a fourth administrative decision, that is, the building of the RV shed does not require a variance from the marine bluff setback. This decision directly affected Via-Fourre by removing the requirement for the application of the variance criteria pursuant to TCC 17.15.420 and 20.07.050. When DSD previously had applied these criteria, the variance was denied specifically due to the impacts on Via-Fourre's shoreline views and the effect of the low-value shed on the value of Via-Fourre's property. As explained in the Staff Report: "[t]he granting of the variance would be injurious to other land or improvements in the vicinity and neighborhood." (See ¶ 6 of the Statement of the Case; also see photographs of the then-unfinished shed taken by county staff from Via-Fourre's back yard and back porch, at AR 264 and 265. The construction diagram at AR 218 shows these posts to be 14 feet in height above the ground. The roof shown at AR 218 has been complete. The photograph at AR 309, taken from Via-Fourre's back porch, shows the completed shed.

Administrative variances and marine bluff reviews are items subject to appeal to the hearing examiner pursuant to Table 1A: Permit Review Matrix: Thurston County Critical Areas Ordinance, at Chapter 17.15, Part 300. Likewise, TCC 20.60.060, referenced by TCC 17.15.410(A), governing appeals under Chapter 17.15, refers to Table 2: Permit Review Matrix: Thurston County Zoning Ordinance at 20.60.020, where “[o]ther administrative decisions/code interpretations” are listed as appealable to the hearing examiner.

Because of the omissions in the initial application, under *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 952, 954 P.2d 250 (1998), the County was within its rights to stop the construction, investigate the situation, and attach conditions to the permit, including the requirement for a variance. “In the eyes of the law the applicant for a grading permit, like a building permit, is entitled to its immediate issuance *upon satisfaction of relevant ordinance criteria ...*” (*Id.* at 960; emphasis added.) The right to the issuance of a building permit depends on the satisfaction of the relevant ordinance criteria. Stientjes did not satisfy those criteria as their application completely omitted information about the marine bluff critical area on their property. *The bluff itself is not shown on the original site plan of July 11, 2007.* AR 192. On this point there is no dispute.

The situation in this case regarding the incompleteness of the permit application is qualitatively different from that which this Court recently addressed in *Lauer v. Pierce County*, 157 Wn. App. 693, 706-07, 238 P.3d 539, *pet. rev. granted*, 171 Wn.2d 1008, 249 P.3d 182 (2011). In *Lauer*, the claim by neighbors of incompleteness was based on the mere lack of a descriptive label for a watercourse that was shown, with topographic contours, on the site plan. That watercourse was well known to Pierce County through a site visit the county's environmental biologist made prior to the application. Here, Thurston County's counter personnel depended on Stientjes presenting an accurate and complete application with site plan – and Stientjes failed in this duty.

When the DSD reversed itself, approved the site plan, and decided a variance was not required, Via-Fourre became aggrieved parties with a right to appeal the administrative decisions by the DSD that the shed was outside of the marine bluff setback, a variance from the marine bluff setback was not required, and their interests would not be considered by the County. Before that time, the County had been addressing their interests by its issuance of the SWO and the administrative review of the site plan. The hearing examiner's decision that Via-Fourre's only right of appeal was to the superior court by August 1, that is 21 days after the initial issuance of the building permit on July 11, besides being wrong on

the law, is a slippery slope that calls into question a county's right to condition a permit following an incomplete and misleading application. The BOCC reversal of this decision was correct. As the BOCC explained in its May 14, 2008 decision, the hearing examiner had erroneously interpreted the county code by not recognizing that

[u]nder 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 within a marine bluff in order for the structure to comply with 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. Such appeals are governed by TCC 20.60.060, and thus must be filed within 14 days of the administrative decision. The hearing examiner erred, to the extent his decision suggests that Via Fourre did not timely challenge the critical area determinations made by Mr. Longanecker. [AR 61.]

Besides the effects on their view and property value, Via-Fourre are owners of a beach-access easement across the north boundary of the Stientjes property, running from their parcel to the shoreline. AR 277 and Appendix here. Any development within the marine bluff setback area has the potential to further harm their shoreline access by increasing the risk of

landslides on the bluffs, thereby harming Via-Fourre's beach-access easement. This section of shoreline has already been the site of significant landsliding. (Staff Report at AR 162.) When the DSD had found that a variance was needed, it particularly referenced the impact of the shed on Via-Fourre property as its reason for denying the variance. Additionally, the marine bluff critical area and its buffer exist "[t]o minimize damage to personal health and property due to landslide, seismic, volcanic, or other naturally occurring events ..." TCC 17.15.600(A). Due to the Via-Fourre's possessing this easement, it is their property and health the county is obliged to consider and protect, and hence, theirs are among the interests the county was required to consider when it made the land use decision.

The BOCC in its May 12, 2008 decision that ordered the initial appeal to be decided on its merits, did not question the fact that Via-Fourre were aggrieved persons. In fact, in allowing the appeal to go forward, it particularly observed that "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."<sup>6</sup> (Emphasis added.) Likewise, nowhere in the hearing examiner's twenty-page decision of April 16,

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<sup>6</sup> The issue of Via-Fourre's standing as aggrieved parties was briefed by both parties when they first appeared before the BOCC as it was at the heart of the hearing examiner's March 4, 2008 decision – and the Board was unmoved by Stientjes' argument.

2010, that includes nineteen Conclusions Based on Findings, did the Examiner conclude that Via-Fourre are not aggrieved persons under the Thurston County code.

Thus, Via-Fourre are aggrieved persons with a right to appeal under the County code. And they have standing here as necessary parties pursuant to RCW 36.70C.040(2)(d), as they filed the appeals to the BOCC and are named in the decisions that are the subjects of this petition. Stientjes' argument that standing as aggrieved persons to file under LUPA and under the county code need to be somehow reconciled is inapposite. Stientjes argue that Via-Fourre must meet the requirements called out in RCW 36.70C.060, that is, the requirements to *file* a LUPA petition. But Via-Fourre are here responding to Stientjes' petition. Nonetheless, while not required to meet the LUPA standards as petitioners, Via-Fourre in fact do meet them.

RCW 36.70C.60(2)(a) requires that “[t]he land use decision has prejudiced or is likely to prejudice that person...” Via-Fourre meet this requirement on two grounds. First, they are owners of the aforementioned mentioned beach-access easement along the north boundary of the Stientjes property, running from their parcel to the shoreline. AR 277 and Appendix here. Any development within the marine bluff setback area has the potential to further harm their shoreline access by increasing the risk of

landslides on the bluffs. This section of shoreline has already been the site of significant land sliding. AR 162. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 52 P.3d 522, *amended on denial of reconsideration, review denied*, 149 Wn.2d 1013, 69 P.3d 875 (2002) (To satisfy standing requirement under Land Use Petition Act (LUPA) of being "aggrieved or adversely affected by the land use decision," objectors must allege facts showing that they would suffer an "injury-in-fact" as a result of the land use decision; in other words, objectors must show they personally will be specifically and perceptibly harmed by the proposed action.)

Second, Via-Fourre's interests in their property were injured when the DSD decided that the RV shed was outside of the marine bluff setback. If it had been correctly determined to be within the setback, as Via-Fourre proved by expert testimony before the hearing examiner, the shed would have required a variance, a variance that had been previously denied by DSD when it thought (correctly) that the shed was within the setback, because "[t]he granting of the variance would be injurious to other land or improvements in the vicinity and neighborhood." (Staff Report at AR 162-163; and Attachment o at AR 249.) This is a second injury-in-fact suffered by Via-Fourre.

RCW 36.70C.60(2)(b) states that to be an aggrieved party under LUPA, an adjoining property owner must be a person whose “asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision.” When the DSD found that a variance was needed, it particularly referenced the impact of the shed on Via-Fourre’s property as its reason for denying the variance. Additionally, the marine bluff critical area and its buffer exist “[t]o minimize damage to personal health and property due to landslide, seismic, volcanic, or other naturally occurring events ...” TCC 17.15.600(A). As also argued above, due to Via-Fourre possessing the access easement, it is their property and health the county is obliged to consider and protect, and hence, theirs are among the interests the County was required to consider then it made the land use decision that is the ultimate issue here.

RCW 36.70C.60(2)(c) requires that “[a] judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision ...” A decision by this Court to uphold the BOCC decision to reimpose the SWO will preclude Stientjes from keeping the shed were it will devalue and endanger their property.

In summary, Via-Fourre own a deeded easement that crosses the Stientjes property within the same critical area as the RV shed, a critical

area that has already suffered significant damage due to on-going erosion and landslides occurring on the Stientjes servient estate. Further injuring Via-Fourre is the fact that the RV shed is directly blocking their splendid view of the Puget Sound. Verbatim Report of Proceedings before the Hearing Examiner (RP:HE) 94:1 ff. Via-Fourre's loss of their view and further damage to their easement are specific injuries-in-fact to their interests and significantly devalue their property.

Stientjes' reliance on *Ashe v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), for the proposition that Via-Fourre do not have a "view easement, a common-law property right view, or any other property right to an unobstructed view" misses the point. What Via-Fourre are arguing is that they are being injured by an illegal, improperly sited building that blocks their view. In *Ashe*, the court found that because the offending building was code-compliant with the local zoning ordinance, the complainants had no grounds on which they could successfully challenge the legality of the structure. *Id.* at 798-799. Here, Via-Fourre are defending the BOCC's decision that the building is within the marine bluff setback and therefore improperly sited.

**B. THURSTON COUNTY FOUND THAT THE STIENTJES BUILDING PERMIT APPLICATION WAS NOT COMPLETE UNTIL NOVEMBER 19, 2007; THEREFORE VIA-FOURRE’S ADMINISTRATIVE APPEAL ON NOVEMBER 30, 2007 WAS TIMELY.**

In § V(A) above, joint appellants focused on Via-Fourre’s right to appeal. Here, argument will be directed more particularly at the timing of their appeal to the hearing examiner and Stientjes’ claim that Thurston County had no right to revisit their ill-obtained building permit.

Under TCC 14.48.100(B)(4), an application for a building permit is required to be accompanied by a “[s]ite plan, which shall include or show

- k. The location of any existing critical areas or buffers affecting the site, both on-site and on adjacent properties, including, but not limited to, shorelines, wetlands, streams, steep slopes and special habitats. Off-site information obtained from available county mapping is sufficient,
- l. If the project site is within a shoreline designation or has critical areas on-site, all existing vegetation proposed to remain and all proposed landscaping, including location and type,
- m. Topographic information for the entire subject parcel or parcels and a minimum of fifty feet onto adjacent parcels, based on available county two-foot contour maps ...”

A permit issued in violation of these requirements is an invalid permit subject to revocation or suspension. Section R105.4 of the International Residential Code (IRC)<sup>7</sup> states in its entirety:

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<sup>7</sup> Pursuant to state law (RCW 19.27.031), Thurston County has adopted the IRC as its building code for construction of residential buildings, including the type of structure at issue here.

The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or *of any other ordinance of the jurisdiction*. Permits presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid. The issuance of a permit based on construction documents and other data [e.g., a site plan] shall not prevent the building official from requiring the correction of errors in the construction documents and other data. The building official is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this jurisdiction. [Emphasis added.]

If the applicant fails to provide the required information, the County is authorized, pursuant to Section R105.6 of the IRC, “to suspend or revoke a permit issued under the provisions of this code wherever the permit is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any of the provisions of this code.”

Therefore, when a site visit by DSD staff revealed a violation of the front-yard setback and possible violation of the marine bluff critical area buffer, as well as showing the incompleteness and inadequacy of the site plan submitted with the building permit application, the County was within its authority under the IRC to suspend the permit, post a stop work order, and require further review of the site plan. In fact, the site plan and building permit were not approved until November 19, 2007, when DSD claimed new aerial photographs assisted it in determining that the shed

was outside of the setback, as discussed above. Pursuant to the IRC and TCC 14.48.100, it was only then that a putatively *valid* permit could be issued. (The original site plan is at AR 192; and an earlier revision, still incomplete, is at AR 200.)

The County issued its decision regarding the location of the Marine Bluff setback on November 19, 2007, in an approval letter which included the approval of the amended site plan.

Based on the 2006 aerial photos now available for internal staff use, it appears that your proposed RV cover does in fact meet the standard 2 : 1 setback from the marine bluff hazard area on-site. ... I have enclosed a copy of the *(revised) approved site plan*, which I have annotated with measurements taken on-site.

AR 244 (emphasis added).

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*Approved* by the Thurston  
County Development Services  
Department on 11-19-07  
[signed] Scott Longanecker  
Planner

AR 246 (emphasis added). This decision is what was timely appealed by Via-Fourre in their November 30, 2007 appeal to the hearing examiner.

AR 173

The site plan is not a subsequent permit but rather it is part of the building permit application. The site plan for a building permit on a parcel containing a critical area, such as Stientjes', that was almost entirely

within a marine bluff hazard area setback when they purchased it in May of 2007 and whose existing structures are “nonconforming,” must show the critical area. When, as here, a critical area is involved, TCC 17.15.310<sup>8</sup> requires that the review of the applied for permit be coordinated with a critical area review. (TCC 17.15, Table 5, No. 39, applies this requirement to construction of buildings appurtenant to single family residences.) The failure of Stientjes to include the required information circumvented this review.

Just because a building permit was improvidently granted upon an incomplete and misleading application, this does not mean that the beneficiary of such a permit has a right to not comply with existing codes and ordinances. In *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988), the court held that “[t]he duty to ensure compliance rests

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<sup>8</sup> TCC 17.15.310 states in relevant part: Review standards – Coordination with other permit reviews.

- A. This chapter does not require any permit in addition to those otherwise required by county ordinances.
- B. The performance standards and other requirements of this chapter shall be applied to uses and activities as shown in Tables 2 and 5 [No. 39, which lists single family residences and appurtenant structures] through any permit review or approval process otherwise required by county ordinances ...
- D. Thurston County may approve, approve with conditions, or deny any permit application for a use or activity listed in Tables 2 and 5 in order to comply with the requirements of this chapter.

with individual permit applicants, builders and developers.” Further, the court in *Taylor* found, in overruling *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 669 P.2d 468 (1983), that

the issuance of a building permit is an official action by which a local government implicitly approves a builder's plans to erect a structure of the type and at the place approved. Issuance of a building permit does not implicitly imply that the plans submitted are in compliance with all applicable codes. Nor do periodic building code inspections implicitly imply that the construction is in compliance with all applicable codes. Building permits and building code inspections only authorize construction to proceed; they do not guarantee that all provisions of all applicable codes have been complied with.

(*Taylor* at 167.)

Stientjes’ argument that they had an absolute right to proceed with their project after 21-days from the initial issuance, unaffected by any later determinations by the DSD or the hearing examiner, is simply not in keeping with the rule in *Taylor*. In *Heller Building, LLC v. City of Bellevue*, 147 Wn. App. 46, 194 P.3d 264 (2008), the court in dispatching an argument that an issued building permit created a vested right, described the argument as a “red herring.” (*Id.* at 60.) “The vested rights doctrine merely gives permit applicants a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application.” (*Id.* at 60, citing *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 16, 959 P.2d 1024 (1998).)

Here, DSD had the right to suspend the permit and make administrative determinations before reinstating the permit on November 19, 2007. And as both the DSD and BOCC determined, Via-Fourre had the right to appeal those administrative determinations to the hearing examiner within 14 days of their issuance, which they did.

In *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008), our Supreme Court considered the Department of Ecology's options to contest the *reinstatement* of building permits following their suspension. It found that Ecology was required to appeal the *reinstatement* of the building permits by LUPA petition. In *Twin Bridge* the issue was whether the initial issuance of the building permits was consistent with the Shoreline Management Act, while here the issue is consistency with the County CAO under the Growth Management Act. Nevertheless, the analogy is sound. As the court concluded in *Twin Bridge* at 846:

Skagit County made the determination that Twin Bridge's development was consistent with the County's SMP and Twin Bridge's existing shoreline permits when it issued the building permits. The disputed permits were substantial development permits and Ecology had no authority to issue fines based on compliance with a valid county permit. Moreover, *once the building permits were reinstated, this was a final land use decision by the local permitting authority, and Ecology was required to file a LUPA challenge.* [Emphasis added.]

The distinction here is that before Via-Fourre could file a LUPA petition to challenge the *reinstated* building permit, they were required to exhaust the administrative remedies available to them under the Thurston County code. RCW 36.70C.060(2)(d). This they did by appealing the CAO determination that allowed the building permit to be reinstated. Since the BOCC agreed that Via-Fourre had the right to appeal the reinstatement as aggrieved parties, and that their appeal was correct on the merits, they have never been compelled to file a LUPA petition.

**C. THIS CASE IS DISTINGUISHABLE FROM THE *WENATCHEE SPORTSMEN*, *NYKREIM* AND *HABITAT WATCH* LINE OF CASES BY THE FACT THAT THE ERROR HERE WAS THE DOING OF PETITIONERS WHOSE APPLICATION MISLED COUNTY STAFF ABOUT IMPORTANT SITE CHARACTERISTICS.**

Stientjes rely on the *Wenatchee Sportsmen*, *Nykreim* and *Habitat Watch* line of cases for the proposition that once the permit was issued and the LUPA filing deadline passed, no one – not the County, not an adjoining neighbor – can do anything about their circumvention of the law. Here, their reliance on these cases is misplaced.

In *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), the court found that the petitioner, a citizens' group opposing a special use permit issued for a golf course, was precluded by LUPA's 21-day filing limitation from challenging extensions of the permit. However,

nowhere in the opinion is there any indication that the permittee had failed to provide correct information or had failed to abide by all requirements to obtain and extend the permit. (*See, id.*, footnote 7 at 409, where the court implicitly acknowledges that under the Skagit County code a permit could be revoked for violation of a condition.) Rather, Skagit County failed to give the required public notice of the extension hearings.

Habitat Watch, a citizens group comprised of property owners neighboring the proposed golf course site, opposed the project. Habitat Watch was a party in public hearings that were held prior to the issuance of the initial permit and prior to the first permit extension. Although notice and a hearing were provided for the initial permit decision and the first extension, the county mistakenly failed to provide notice or a public hearing for the second and third permit extensions.

(*Id.* at 400.)

When Habitat Watch did become aware of the extensions, it filed a LUPA petition and a complaint for declaratory and injunctive relief in superior court challenging the validity of the last two special use permit extensions, as well as a subsequent grading permit. *Id.* at 404. The court found that the attack on the *grading permit* was collateral to Habitat Watch's attack on the special use permit and, therefore, was impermissible under the rule of *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Here, Via-Fourre's challenge to DSD's acceptance of the site plan is not a collateral attack on the building

permit, for the site plan is a necessary part of the application for a building permit. The site plan and building permit exist together, neither taking precedence in time. And here, the DSD and the BOCC agree that the site plan was not accepted by the County until November 19, 2007.

In *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), the court rebuffed a challenge brought by the county itself to a boundary line adjustment (BLA), approved by the county planning director, for failure to comply with LUPA's 21-day filing requirement. While acknowledging that the planning director misinterpreted county law in his approval (*id.* at 939) nowhere is there any indication that the information supplied by the applicants for the BLA was materially incorrect, incomplete, or misleading.<sup>9</sup> The error was made by the county's agent while he possessed all necessary information about the parcels at issue. The court in *Nykreim* notes

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<sup>9</sup> Although petitioners' application for the BLA in *Nykreim* showed three existing parcels, with legal descriptions, the court noted "there was no indication of record that the property had been previously divided as they asserted ..." (*Id.* at 910.) However, the planning director did not rely on the described, pre-existing parcels for his decision, but rather relied on "Section 200 of the Chelan County Subdivision Resolution in approving Petitioners' BLA application, concluding that the original parcel was divided into three existing legal lots because the location of the creek and road created separate legal lots." (*Id.* at 911.) So while the three "old" parcels identified in the application were not properly recorded, the county did not rely on this information in reaching its decision. Nor is there any indication in the opinion that the three "old" lots did not in fact exist, only that they were not properly recorded.

As *amici curiae* point out, if this court allows local government to rescind a previous land use approval without concern of finality, *innocent* property owners relying on a county's land use decision will be subject to change in policy whenever a new County Planning Director disagrees with a decision of the predecessor director. [*Id.* at 933; emphasis added, footnote omitted.]

Stientjes here are not “innocent property owners” since they failed to supply the information required to legitimately obtain a valid building permit, something they were required to do under the International Residential Code and TCC 14.48.100. Having failed to supply this information, they should not now be allowed to rely on prior court decisions where the permit applicants *were* innocent and the mistake was solely that of the government entity.

As with the grading permit in *Habitat Watch*, in *Wenatchee Sportsmen* it is a follow-on permit that was at issue, particularly a challenge to a project development permit after failing to bring a LUPA challenge against the prior site-specific rezone that allowed for the project in the first place. 141 Wn.2d at 177. Thus, appeal of the project development permit *was* a collateral attack on the rezone. As the court states

However, the issue of whether the RR-1 zoning allows for urban growth outside of an IUGA [interim urban growth area] should have been raised in a timely LUPA challenge to the *rezone*, not in the later challenge to the plat.

(*Id.* at 181; emphasis in original.)

The court in *Wenatchee Sportsmen* makes no mention of any omissions or errors in the application for the rezone, and it is hard to imagine that there were any material ones given the facts of the case. Therefore, *Wenatchee Sportsmen* stands for the proposition that follow-on permits cannot be an opportunity to collaterally attack a prior land use decision. In the case at bar, the site plan is part of the building permit application, not a second permit. Therefore, a challenge to the site plan is not a collateral attack on the building permit, rather is a direct attack – and here the attack was timely.

**D. SITE VISITS BY THE BOCC ARE ALLOWED UNDER THE THURSTON COUNTY CODE AND DO NOT VIOLATE THE LAW.**

Stientjes contend that the site visit by BOCC members was “a secret site inspection,” an “improper, untimely, deceitful independent investigation of facts” that negates the BOCC decision of June 22, 2010. *See* Appellant’s [sic] Brief (LUPA-2) at p. 17. However, site visits are specifically allowed under the Thurston County Code (TCC) for appeals being considered by the BOCC.

A. General. When an appeal has been timely filed and the deadline for receipt of memoranda has expired, the development services department shall deliver to the board a copy of the examiner’s decision, and the evidence presented to the examiner. *The board may view the site*

*either individually or together*, only to gain background information on the general appearance of the property; no one other than county staff can accompany the board members during the view...

TCC 2.06.080(A) (emphasis added). All three board members conducted a site visit pursuant to this section. There is nothing in the law that makes a site visit to gain background information illegal. The site visit should not have been a surprise to Stientjes as it is part of the BOCC appeal process codified at TCC 2.06.080(A). As the site visit is provided in the Thurston County Code, it was not improper for the BOCC to utilize this tool.

Additionally, even if the three BOCC members conducted the site visit together and discussed the case, it would not be considered a violation of the law. While the Open Public Meetings Act (ch. 42.30 RCW) requires that all meetings of the BOCC be open and public, the Act provides an exception for quasi-judicial matters. The Open Public Meetings Act does not apply to:

That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group;

RCW 42.30.140(2). It is clear that the BOCC was acting in its quasi-judicial capacity when it viewed the site related to the quasi-judicial matter involving named parties. The actions of the BOCC did not violate the Open Public Meetings Act. Stientjes' argument that a site visit is

“illegal” must be rejected as it was not only allowed under the County’s own code provisions, it was exempt from the Open Public Meetings Act.

**E. THE STOP WORK ORDER ISSUED BY THURSTON COUNTY IS SPECIFICALLY ALLOWED UNDER THE WASHINGTON STATE BUILDING CODE AND THE THURSTON COUNTY CRITICAL AREAS ORDINANCE.**

Stientjes challenge the validity of the stop work order issued by Thurston County involving the RV shed. Stientjes state, [a]fter issuance of the building permit, the County no longer has a right to unilaterally change or revoke the building permit. They can issue stop work orders until building code deficiencies are remedied. [Footnote omitted.] Similar authority under the CAO does not exist!” *See* Appellant’s [sic] Brief (LUPA –2), pg. 11.

Stientjes are mistaken. Thurston County has the authority to issue a stop work order under both the Washington State Building Code and the Thurston County Critical Areas Ordinance. As provided above in the Statement of the Case, Thurston County issued a stop work on the property on August 28, 2007, because it suspected that the RV shed under construction was too close to a critical area, a Marine Bluff Hazard Area. TCC 17.15.600. AR 267. Furthermore, the building permit was suspended due to the fact that applicants Stientjes had failed to provide required information about the critical area located on the property and because of

the possible violation of the Critical Areas Ordinance (ch. 17.15 TCC).  
AR 267.

It is important to note that Stientjes have never disputed that a critical area exists on their property in the form of a Marine Bluff Hazard Area as defined under TCC 17.15.200. With that in mind, TCC 14.48.100(B)(4)(k) requires that every application for a residential building permit include a site plan showing, among other things:

The location of any existing critical areas or buffers affecting the site, both on-site and on adjacent properties, including, but not limited to, shorelines, wetlands, streams, steep slopes and special habitats...

TCC 14.48.100(B)(4)(k). By not including the Marine Bluff Hazard Area on the site plan that was submitted on July 11, 2007, the Washington State Building Code allowed the suspension of the permit. Additionally, Stientjes failed to answer a specific question on the application asking for information about steep slopes. AR 267. This too allowed the County to suspend the permit.

The building official is authorized to suspend or revoke a permit issued under the provisions of this code wherever the permit is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any of the provisions of this code.

International Residential Code 2006 Addition (Effective July 1, 2007), R105.6.<sup>10</sup> Since the permit application failed to disclose the required information about critical areas, the permit was issued based on inaccurate and incomplete information. Pursuant to R105.6, the County had the authority to issue the stop work order and suspend the permit until the County had a chance to review and make a decision on the critical areas information.

Similarly, the Thurston County Critical Areas Ordinance (ch. 17.15 TCC) provides the County with the ability to issue a stop work order.

If the review authority determines that a violation has occurred, the review authority may: 1. Issue a stop work order to halt any activity which is in violation of this chapter.

TCC 17.15.430(C)(1). At the time the stop work order was issued, the County believed it was likely that the structure was being illegally constructed in a critical area buffer/setback. AR 267. Contrary to Stientjes' argument, the County had the authority under both the building code and the Critical Areas Ordinance to issue a stop work order on the permit.

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<sup>10</sup> The State of Washington adopted the International Residential Code as part of the official building code required for all counties and cities in the state. RCW 19.27.031. The language in R105.6 is identical to the building code in effect today (International Residential Code 2009 Addition (Effective July 1, 2010), R105.6). The County adopted the previous building codes through former TCC 14.20.010 and has adopted the current residential building code through TCC 14.18.010.

**F. THE BOCC CORRECTLY INTERPRETED TCC 17.15.620(B)(2) WHEN IT DETERMINED THE 2:1 SLOPE METHOD AND APPROPRIATE SETBACK.**

In its decision of June 22, 2010, the BOCC found that “[t]he hearing examiner erroneously interpreted and applied TCC 17.15.620(B)(2) to the facts of this case when it affirmed staff’s interpretation and removal of the Stop Work Order.” AR 2. Pursuant to TCC 2.06.080(D), the BOCC “may adopt, amend and adopt, reject, reverse, and amend conclusions of law and the decision of the examiner, or remand the matter for further consideration.” The BOCC is thus the highest authority in the County in matters of code construction and interpretation. As argued more fully above in § III, Standards of Review, RCW 36.70C.130(1)(b) requires deference be given to the construction of a law by a local jurisdiction with expertise. Here that deference is due the BOCC. *Quality Rock*, 39 Wn. App. at 133.

The BOCC likewise found the numerous findings of fact and conclusions of law were not supported by substantial evidence and did not properly apply the county code to the facts in the record. The decision particular notes six incorrect “Findings” when viewed in light of the whole record before the examiner and nine incorrect “Conclusions Based on Findings.” As presented by the hearing examiner in his decision (AR 40), many of these are actually mixed questions of fact and law. This may

explain why the examiner did not use the labels “findings of fact” and “conclusions of law” to bring organization to his decision. The examiner appears to recognize this when he writes under the heading “Criteria for Decision” that “[s]ome of the Thurston County ordinances that are relevant to the instant decision have been included in the Findings.” AR 56.

At the time of the issuance of the original building permit, the question of marine bluff setback was not addressed, since the Stientjes chose to omit certain relevant information. Afterward, Mr. Longanecker visited the site, took field measurements and found the structure was *within* the marine bluff setback and issued a stop work order. Later, Mr. Longanecker determined by aerial photography and GIS (“GeoData”) that the RV shed was not within the setback. Mr. Kain of Development Services visited the site, took measurements and found that the structure was indeed *within* the proscribed setback. However, Mr. Kain later appears to have changed his mind and now agrees with Mr. Longanecker’s photographic interpretations, apparently announced at the Prehearing Conference on Stientjes’ appeal of the denial of his request for a variance. The history of the DSD’s struggle to determine where the marine-bluff setback boundary is located on the Stientjes’ property is documented in Via-Fourre’s Motion for Reimposition of the Stop Work Order and the exhibits thereto (AR

182-212), and is briefly summarized above in ¶¶ 4 through 7 of the Statement of the Case.

In order to protect their property rights – both their view of the Nisqually Reach that was being blocked by the shed and their beach-access easement that would be endangered by the increased stormwater runoff associated with an increase in impervious area adjacent to Stientjes' already failing bluff – Via-Fourre hired Gareth M. Johnson, PLS, of Bracey & Thomas, Inc., Land Surveyors, to do a survey of the property and shed location, using the access afforded by Via-Fourre's easement. AR 277; and attached here as Appendix.

Surveyor Johnson applied the method required by TCC 17.15.620(B)(2) for determining marine bluff setbacks:

The primary structure and its normal residential appurtenances shall be set back from the top of the marine bluff for a distance which is the greater of the following:

a. Not less than fifty feet landward from the top of the marine bluff; or

b. A point measured from the ordinary high water mark landward at a slope of 2:1 (horizontal to vertical) which intersects with the preexisting topography of the site. Minor encroachment into the 2:1 setback may be permitted by the review authority where the structure foundation is set below the 2:1 slope line.

Applying this method, Mr. Johnson in his December 17, 2007 letter to Via-Fourre (AR 273) stated:

Our measurements find the intersection of the 2:1 slope line with the existing ground to be 261 feet from the line of ordinary high tide as measured along the centerline of the adjacent parcel. This intersection lies 24.7 feet Easterly of your parcel.

We also measured the approximate location of the neighboring RV structure relative to your parcel. The Westerly line of the structure lies 21.5 feet Easterly of your Easterly boundary, and the Easterly line of the structure lies 34.5 feet Easterly.

This shows the RV shed structure straddles the marine bluff setback boundary and that the structure intrudes 9.8 feet on to the setback. RP:HE 83:23. Mr. Johnson testified to these facts at the hearing, as well as providing a signed and stamped survey showing the ordinary high water mark and the intersection of the 2:1 line with the preexisting topography. (Johnson's testimony begins at RP:HE 77:1.)

Via-Fourre also submitted a January 17, 2008 letter from professional land surveyor Richard R. Larson who concurred with the method used by Mr. Johnson. AR 275 In fact, when asked by the hearing examiner about Mr. Johnson's survey method of determining the intersection of the 2:1 line with the existing topography, Jeffrey Pantier, a professional land surveyor employed by Stientjes who did *not* do an actual survey, responded: "All I'm saying is that the method from which Mr. Johnson measured the 2:1 slope, that is -- it's a two -- it's a line measured from the

ordinary high water mark on a 2:1 plane until that plane intersects existing ground. That's consistent with what I would do." RP:HE 111:7

On this point, the BOCC rejected the hearing examiner's findings 19 and 24. They rejected 19 "to the extent that it finds that [Via-Fourre's] survey does not accurately reflect the condition of the [Stientjes] property." Number 24 they rejected "to the extent that it finds that [Via-Fourre] did not provide credible evidence that the *method* upon which the measurements were taken were in error." AR 2; emphasis in original.

Mr. Johnson's survey is the only actual survey in the record. As Mr. Longanecker of DSD staff conceded at the hearing, use of the computer and GeoData method, the method used by DSD staff and adopted by the hearing examiner without qualification, can give an error of *plus or minus 20 feet* in locating the setback. RP:HE 33:1-3. This 40-foot margin of error is large enough to miss the 9.8-foot intrusion of the shed into the setback. And Via-Fourre proved that in this instance the DSD method did miss it.<sup>11</sup> Mr. Longanecker admitted to other problems with their GeoData GIS method: 5 to 10 foot additional error in establishing starting an ending

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<sup>11</sup> When presented with the opinion letter of Mr. Pantier, Stientjes' expert, Mr. Longanecker of DSD in his letter of September 14, 2007, pointed out the disclaimer on the County's GeoData website, which states, *inter alia*: "Disclaimer: ... the County and all related personnel make no warranty, express or implied, regarding the accuracy, completeness or convenience of any information disclosed on this map." AR 269-270. Yet, this is just the data DSD and the hearing examiner rely upon to dispute the results of Mr. Johnson, a professional land surveyor who stamps, signs, and thereby warrants his work. Unlike the County GeoData website, he does not "disclaim" all liability.

points of a length measurement, RP:HE 33:10-34:14; and lack of formal training of staff in the use of the GeoData tools, RP:HE 35:4-8. Kevin Hughes, Thurston County roads department, also testified to the inaccuracies inherent in selecting the starting and ending points in GeoData. RP:HE 52: 7-13.

Further, DSD concedes that the method the County uses to establish the 2:1 marine bluff setback is not designed to work unless the ground running inland from the top of the bluff is perfectly flat, a condition staff admits is not met at this site.<sup>12</sup> AR 164. Mike Kain, DSD planning director, testified to this problem at RP:HE 56: 6” “if the slope continues to go up beyond the top, it would not be possible from field measurements without a survey.”

This is because of instead of following the simple instructions given at TCC 17.15.620(B)(2)(b) to determine the setback, to wit – “A point measured from the ordinary high water mark landward at a slope of 2:1 (horizontal to vertical) which intersects with the preexisting topography of the site” – DSD first attempted the difficult and inherently imprecise job of using air photos and elevation contouring of unspecified accuracy to

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<sup>12</sup> The hearing examiner in his decision, particularly at Findings 19 and 20, appears to misapprehend this observation by Staff and dwells on Figure 5 (TCC 17.15), “finding” that the actual ground slope at the site is different from that shown in Fig. 5. However, that figure was put into evidence by Via-Fourre purely for illustrative purposes.

determine the bluff height, which they then double and project landward from the ordinary high water mark.

When asked to compare the method of the surveyor versus the method DSD used, Mr. Kain testified at RP:HE 60:22:

Q: Of course the survey showed that the structure is within the marine bluff setback and your method shows that it's outside.

A: That's because we have a different method, it's not because of the accuracy of anything. A surveyor's method on the 2:1, yes, shows the building slightly inside the 2:1. And the way the county does it, it's outside.

Q: And is the surveyor's method incorrect?

A *It is not the way we interpret the code.* [Emphasis added.]

In fact, the “findings of fact” concerning where the 2:1 line intersects the existing topography in the hearing examiner’s decision are really a matter of code construction. And the BOCC, to which deference is due in matters of code construction (RCW 36.70C.130(1)(b)) has laid this matter to rest in its 2010 decision.

In his April 16, 2010 decision, the hearing examiner, at Finding 21 (AR 51), quotes at length from the Staff Report concerning how staff actually apply the GeoData procedure for determining marine bluff setbacks. Buried in the quote is this notable sentence: “Staff then compared this [GeoData] result with *a scaled site plan* submitted for review and determined whether the proposal meets the required marine bluff setback, in addition to other standard yard setbacks.” Emphasis

added. But appellants are unaware of any adequate, scaled site plan ever being submitted by Stientjes. The approved site plan can be found at Staff Report, Attachment e at AR 213. Hopefully, this cartoonish sketch is not what DSD is now accepting as a “scaled site plan.” In fact, the only properly scaled drawing submitted is the survey of Mr. Johnson, and, as described below, when DSD apparently applied this method to Mr. Johnson’s survey, *they placed the shed within the setback*, conceding the superiority of Via-Fourre’s survey. (Staff Report, Attachment h at AR 216.)

The procedure DSD used ignores the ingenuity of the simple and elegant method of 17.15.620(B)(2)(b) that requires only three things: 1) determination of the ordinary high water mark; 2) the purely geometrical scaling of the 2:1 line; and 3) the elevation of the land surface in the vicinity of the intersection of the existing topography and the 2:1 line. No mention is made of the height of the bluff because bluff-height measurement is not a part of the 17.15.620(B)(2)(b) method. When one hears either or both of 1) the height of the bluff referenced in making this determination, or 2) the topography of the land *between* the top of the buff and the site of interest, one immediately knows the 2:1 method is not understood, or is not being applied correctly.

The Staff Report concedes this point when, in describing the County's method, it states on p. 5, second full paragraph, of the Staff Report (AR 164):

While this may be a slightly less precise method of determining the 2:1 slope line compared to a professional survey, it is the best method available to Thurston County staff.

Beyond wondering how Staff can quantify its error to "slightly," appellants do not question the truth of this statement. However, the method DSD uses is manifestly not in keeping with the directions the BOCC gave when it enacted this ordinance. It is simply an approximation. Therefore, it is not surprising that DSD's interpretation and determination of the marine bluff hazard area pursuant to TCC 17.15.620(B)(2)(b) has been confused, halting and contradictory.

The record of indecision clearly calls into question the reliability of the DSD's – and subsequently the hearing examiner's – most recent interpretation of the TCC 17.15.620(B)(2)(b) setback requirements. When faced with a survey done by a licensed land surveyor, contracted for at arm's length by Via-Fourre, the Staff concedes that the "professional survey" is more accurate.

On the issue of Staff's use of "alternative methods," and the subsequent endorsement of same by the hearing examiner, the BOCC rejected

[c]onclusions 7 and 8 to the extent that it concluded that staff correctly used alternative methods to determine the setback on the facts of this case." Where the ground surface continues to trend upward, as on Petitioners' property, "staff's method results in a less conservative setback than the more conservative setback dictated by the code. In these situations, staff's method is in violation of TCC 15.17.620(2)(B). [AR 3.]<sup>13</sup>

In fact, the Staff Report itself adopts the survey by drawing in the RV shed, showing it within the setback. AR 216. The report then argues that the survey may allow for an encroachment of the now-extended setback because of the saving clause of TCC 17.15.620(B)(2)(b):

Minor encroachment into the 2:1 setback may be permitted by the review authority where the structure foundation is set below the 2:1 slope line.

From this, the Staff Report concludes that if the more accurate method of a professional survey is used, then

To ensure that the foundation is installed below the 2:1 slope line, staff may suggest that the posts (foundation) be buried at least 6-feet below original grade. [AR 165.]

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<sup>13</sup> The BOCC also rejected conclusion 6 "to the extent that it concludes that [Via-Fourre] relied on TCC 17.15 figure 5 to determine the slope. [Via-Fourre] relied on the language of TCC 17.15.620(B)(2)(b) to determine the slope." Figure 5 (AR 276) is a diagram from the code that is meant as a visual aid to accompany the text. Via-Fourre included a copy in the record for illustrative purposes only. The hearing examiner appears to have misapprehended this point.

However, since the building plans for the RV shed (AR 218) only show posts buried to a depth of 4-feet, this indicates, not a DSD approval of the RV shed, but at best the possibility of applying for a variance from the regulation – and the application of the variance criteria discussed above.

Back when the DSD thought that the RV shed was *within* the setback, staff had no such doubts about the superiority of actual field surveys compared to GIS-based GeoData determinations. After Stientjes submitted their own computer-based setback determination by Jeffrey Pantier, DSD responded:

Your letter from Mr. Jeff Pantier is of less value as it does not appear to be based on any actual measurements or survey of the site. This not to say that I do not respect Mr. Pantier's opinion and in fact he may be right. However, I need concrete data on which to base my decision. If you believe that the proposed RV cover will be located outside of the 2:1 marine bluff setback, you can certainly provide a surveyed site plan, stamped by a Washington State licensed surveyor which clearly shows the proposed structure outside of the 2:1 setback. [AR 269.]

This is just what Via-Fourre did, showing that the structure is *within* the setback. In its decision, the BOCC rejects “[f]inding of fact 21 to the extent that it finds that staff never required a survey for the RV shed. Staff initially directed the [Petitioners] to submit a survey if [they] believed that [the] RV shed was outside of the marine bluff setback.” AR 2.

In fact, Mr. Pantier, Stientjes' own experienced surveyor, used the same GeoData method to obtain a different result from that obtained by DSD. AR 194. There, Mr. Pantier found the shed to be "265 feet from ordinary high water line," felicitously 4 feet beyond where Mr. Johnson accurately located the 2:1 line intersection with the ground surface. Mr. Longanecker of DSD testified that it was 220 feet from the OHWM. (See "2006 Aerial Photo" attached to the November 19, 2007 letter, at AR 247.) But as quoted above, Mr. Longanecker summarily dismissed Mr. Pantier's result because it did "not appear to be based on any actual measurements or survey of the site." Mr. Longanecker then cogently observed that "I need concrete data on which to base my decision." Via-Fourre's surveyor supplied just that to DSD in documents and testimony before the hearing examiner.

Mr. Pantier at the hearing himself abandoned his own GeoData-based determination of the setback boundary, adopted the Johnson survey to show, without benefit of exhibits, that his crew found that a *portion* of the shed's foundation extends 1.69 feet below the 2:1 slope line, an assertion that Via-Fourre are not able to verify and that the County has not verified. This testimony was offered in hope of finding relief in the saving clause of TCC 17.15.620(B)(2)(b): "Minor encroachment into the 2:1 setback may be permitted by the review authority where the structure foundation is set

below the 2:1 slope line.” Mr. Pantier, in taking this tact, was just following in the footsteps of DSD who in the Staff Report noted for the first time in this saga the same language to save their ill-founded decision from Via-Fourre’s actual survey. Thus, both the DSD and the Stientjes’ expert adopted the survey by Mr. Johnson, thereby conceding it was the most accurate measurement of the marine bluff setback.<sup>14</sup>

In his decision, the hearing examiner opines at length about the use of “alternative methods” to ascertain where the 2:1 line intersects the preexisting topography. Nevertheless, all *correct* methods should give the same result.

Finally, the hearing examiner in his decision, particularly at Conclusion Based on Findings No. 17 and Findings Nos. 27, 28, and 29,

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<sup>14</sup> If it could be demonstrated that the foundation of the RV shed extended below the 2:1 line, the burden of showing this must fall to Stientjes, then the term “may” as used in TCC 17.15.620(B)(2)(b) indicates only a grant of discretion to DSD, not a waiver of the principal rule. The basis of any exercise of this discretion must be reasonable and clearly articulated, not arbitrary and capricious. But nowhere in the Staff Report is there to be found a cogent discussion of how this discretion is being exercised. Via-Fourre posits that such discretion must consider not only bluff stability, but the other equities manifest in this case, including the value and need for the improvement, other options available to Stientjes to accomplish their goals, and the impacts on neighboring properties. Were the County to again apply the variance criteria of ch. 20.07 TCC, how could the result be different from when the criteria were previously considered, at the time DSD thought the shed was within the setback? Scott Longanecker reviewed the criteria in his letter of October 16, 2007. AR 249. In this letter Mr. Longanecker found that the granting of the variance would *not* be in harmony with the general purpose and intent of the Zoning Ordinance and *would* be materially detrimental to the public welfare or injurious to other land or improvements in the neighborhood. He also found that the practical difficulty to Stientjes by denial of the variance would be *less* than the effect on the neighboring properties if the variance was granted. These determinations were based on impacts to Via-Fourre’s view and the resulting loss in property value that would be caused by the low value RV shed. In any case, neither the hearing examiner nor the BOCC addressed this issue, although it was in record.

attaches substantial value to the two page geotechnical evaluation of David C. Strong, a licensed engineering geologist.<sup>15</sup> (Staff Report, Attachment p at AR 252.) Presumably, this emphasis is to show that even if the 2:1 setback is being violated, that is not important. However, this report is cursory, incomplete, and mistaken on at least one critical issue. It is apparently the product of a morning site visit on September 1, 2007. This visit appears from the report to have been no more than a walk around, as there is no indication of any geotechnical measurements having been taken. The only technical detail is a textbook summary of the local Quaternary geology.

TCC 17.15.635, Geologic hazard areas--Special report requirements, Section E, Marine Bluff Geotechnical Report. requires the following items be included – items that are *not* included in Stientjes' geotechnical report:

1. This report shall include a general description of the ... shoreline processes effecting the subject property ...
3. The report shall contain specific information on the following:
  - a. Stability or instability of the site including past slope failures if any, their timing, size, frequency, mechanism, assessment of the likelihood of future failures, and identify those aspects of the potential development that may contribute to future failures;
  - b. Hydrologic conditions including surface and groundwater flows, surface erosion, and the effects of groundwater on the bluff face;

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<sup>15</sup> This report is relied on in the oral testimony of staff before the examiner, typically to justify their "alternative method." See testimony of DSD planning manager Mike Kain at RP:HE 55:21 and 63:16-20.

- c. Assessment of the role of existing vegetation on maintaining slope stability on site;
- d. Shoreline processes including an evaluation of erosion and bluff retreat over the past decade ...

The omission of an evaluation of the hydrologic conditions is particularly troubling given that: 1) the Drainage and Erosion Control Plan is an abbreviated plan prepared by Stientjes, who are neither engineers nor hydrologists (AR 256); and 2) Jim Goode of the Thurston County Health Department has opined that a septic reserve system could be located between the bluff face and the residence (AR 254). The latter will certainly have an effect on the hydrologic loading in the bluff face, an issue that should be thoroughly evaluated before the area landward of the residence is lost to a low-value RV shed.

However, most remarkably, the geotechnical report states that “[d]uring our recent visit, we did not observe any evidence of recent mass wasting.”<sup>16</sup> However, there was a landslide on this section of the bluff in the winter of 2005-2006 of sufficient magnitude to be visible on the County’s aerial photographs, a fact Mr. Longanecker particular cites as a reason that his setback determinations based on 2003 air photos (pre-landslide) and 2006 air photos (post-landslide) are different. The Staff

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<sup>16</sup> Mass wasting, a term used in the Strong report but not defined there, is defined in the authoritative monograph by Prof. M.J. Selby, *Hillslope Materials and Processes*, Univ. of Oxford Press, 1982, ISBN 0-19-874126-X, p. 117: “Mass wasting is the downslope movement of soil or rock material under the influence of gravity ...”

Report also describes further mass wasting on this bluff in the winter of 2007-2008. AR 162. There are also photographs showing recent evidence of mass wasting on the bluff (AR 305 and 306). Additionally, the December 2007 emails between Kevin Hughes, Scott Longanecker, and Richard Dawson, all of Thurston County, discuss recent landslide activity on this bluff (AR 310); and the Coastal Zone Atlas – Zone Stability Map show the subject property to be unstable. AR 303. Additionally, appellant Charles Via testified to recent landslide activity on the bluff. RP:HE 99:21-100:6; 102:6-11.<sup>17</sup>

Stientjes in their opening brief refer to Mr. Strong’s report as “unrebutted.” Presumably, by this Stientjes mean that Via-Fourre did not go to the considerable, additional expense of hiring a licensed geologist to go on to Stientjes’ property and drill holes into it, assuming they could have obtained permission or an order to do so. But, in fact, the most fundamental point of the report –that there had *not* been recent landslides on the property – was rebutted by both Via-Fourre and DSD. Except for Stientjes and their geologist, this is one point everyone agrees upon.

The geotechnical report’s failure to address the manifest slope instability at this site, as required by TCC 17.15.635(E)(3)(a) and (d), leaves the report without *any* probative value. This geotechnical

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<sup>17</sup> Stientjes’ statement on page 31 of their opening brief that “[t]he only evidence of alleged slope failures was from the Vias” is obviously untrue.

evaluation must also be rejected under the standards of TCC 17.15.315(C)(1): “The rejection of parts or all of the special report shall be based upon: (1) Factual errors or omissions in the special report ...” And this what the BOCC did in rejecting the hearing examiner’s findings of fact 27, 28, and 29; and conclusions 9, 11, 12, and 17. Conclusions 9 and 17 were rejected “to the extent that they find that Mr. Strong’s report satisfied TCC 17.15.635(E) and the conclusion that the site was stable.”

Once it is correctly recognized that the shed is within a marine bluff setback, an administrative variance is required – and such a variance was already denied, because, as explained by DSD,

[t]he granting of the variance would be injurious to other land or improvements in the vicinity and neighborhood. The shoreline views of the neighboring residence immediately east [sic] (upland) of the subject property would suffer substantially if the variance were granted.

The proposal for a recreational vehicle cover would have a substantially greater negative impact to the neighboring property to the east [sic] (upland) and cause greater harm in terms of property value by diminishing the existing view than the harm caused to the applicant from denying the variance ... [AR 249.]

With respect to the need for a variance, the BOCC rejected the hearing examiner’s conclusion 5 “to the extent that it finds no variance was needed because the RV shed was outside of the marine bluff setback. As

described above, the hearing examiner erroneously interpreted and applied TCC 17.15.620(B)(2) to the facts of this case.”

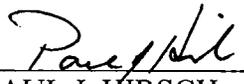
## V. CONCLUSION

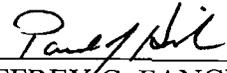
Based on the facts in the record and the argument above, appellants Thurston County, Laressa Via-Fourre, and Charles Via respectfully request that the Court affirm the decisions of the Thurston County Board of County Commissioners issued on May 12, 2008, and June 22, 2010, thereby reversing and vacating the decisions of the Superior Court.

DATED this 26th day of September 2011.

HIRSCH LAW OFFICE

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PROSECUTING ATTORNEY

  
\_\_\_\_\_  
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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual on the date indicated below.

Harlan C. Stientjes, WSBA #18647  
Attorney at Law  
9840 Johnson Point Road NE  
Olympia, WA 98516  
*Attorney for Respondents*

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

At: Manchester, Washington

Date: September 26, 2011

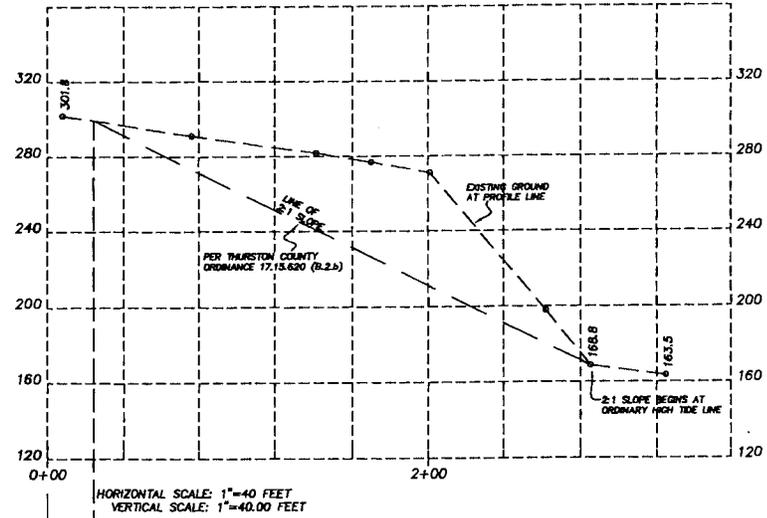


Paul J. Hirsch

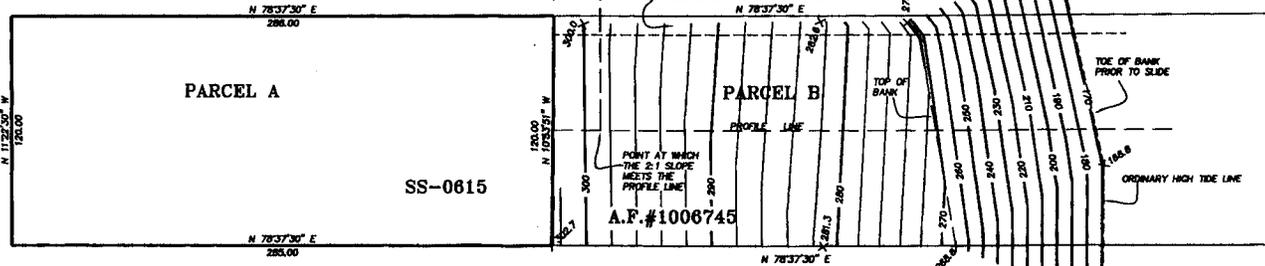
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VERTICAL DATUM IS ASSUMED;  
 ELEVATIONS SHOWN GIVEN FOR RELATIONAL PURPOSES ONLY TO MEASURE BETWEEN EXISTING GROUND LINE AND 2:1 SLOPE LINE.



JOHNSON POINT LOOP NE



PUGET SOUND

NOTES:  
 CONTOURS SHOWN ARE GENERATED FROM FIELD MEASUREMENTS LOCATING TOP OF BANK, TOE OF BANK, AND CONTOUR POINTS AROUND THE TOP OF BANK AT THOSE POINTS SHOWN HEREON.  
 SEE SURVEY RECORDED UNDER AUDITOR'S FILE NO. 333688 FOR SURVEY OF BOUNDARIES OF BOTH PARCELS.

EXHIBIT MAP FOR  
 LARESSA VIA

SHOWING HORIZONTAL AND VERTICAL RELATIONSHIPS OF THE TOE OF BANK/ORDINARY HIGH TIDE LINE TO THE EASTERLY LINE OF PARCEL A OF SS-0615 AS RECORDED IN VOLUME 8 OF SHORT PLATS AT PAGES 188 - 183 AND UNDER AUDITOR'S FILE NO. 1006745, RECORDS OF THURSTON COUNTY, WASHINGTON.

BRACY & THOMAS  
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