



COUNTY COMMISSIONERS

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HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
 FOR THURSTON COUNTY**

| | | |
|--------------------------------------|---|-------------------------------|
| In the Matter of the Appeal of |) | No. 2007103972 |
| |) | |
| |) | |
| Laressa Via-Fourre and |) | FINDINGS, CONCLUSIONS, |
| Charles Via |) | AND DECISION |
| |) | |
| |) | |
| <u>Of an Administrative Decision</u> |) | |

SUMMARY OF DECISION

The appeal of the November 19, 2007 administrative decision is **DENIED**. The County properly issued a building permit for the RV shed. After placing a Stop Work Order on the construction so it could review new information the County properly lifted the Order because the RV shed was not within the marine bluff setback. All issues of the appeal fail.

INTRODUCTION

Laressa Via-Fourre and Charles Via appealed a November 19, 2007 administrative decision issued by the Thurston County Development Services Department. The administrative decision had the following effects:

- 1) It lifted a Stop Work Order issued against building permit #07-108849 which was issued on July 11, 2007, for construction of a recreational vehicle shed on property at 9840 Johnson Point Road, Olympia, Washington; and
- 2) It determined that an administrative variance from Thurston County Code (TCC) 17.15.620(B)(2)(b) (which regulates the required setback for residential appurtenances from the ordinary high water mark on properties containing marine bluff hazard areas) would not be required before a property owner could proceed according to the building permit.

SUMMARY OF RECORD

Background:

On November 19, 2007, the Thurston County Development Services Department issued an administrative decision relating to the subject property is at 9840 Johnson Point Road, Olympia, Washington that is owned by Harlan and Mary Jo Stientjes (Applicant). The administrative decision had the following effects: 1) it lifted a Stop Work Order issued against building permit #07-108849 which was issued on July 11, 2007, for construction of a recreational vehicle shed on property at 9840 Johnson Point Road, Olympia, Washington; and 2) it determined that an administrative variance from Thurston County Code (TCC) 17.15.620(B)(2)(b) (which regulates the required setback for residential appurtenances from the ordinary high water mark on properties containing marine bluff hazard areas) would not be required before a property owner could proceed according to the building permit. On November 30, 2007, Laressa Via-Fourre and Charles Via (Appellants) appealed the November 9, 2007 administrative decision. A hearing on the appeal was initially held on February 4, 2008 and the appeal was denied. A subsequent appeal to the Thurston County Board of Commissioners and judicial appeals followed (*see: Findings of Fact Nos. 11 and 12*).

Hearing Date:

The Thurston County Hearing Examiner held an open record hearing on the appeal on February 4, 2008.

Testimony:

At the open record hearing the following individuals presented testimony under oath:

Scott Longanecker, Associate Planner, Thurston County Development Services
Kevin Hughes, Thurston County Roads and Transportation Services
Mike Kain, Thurston County Planning Manager
Laressa Via-Fourre, Appellant
Charles Via, Appellant
Harlan Steintjes, Applicant
Mary Jo Steintjes, Applicant
Gareth M. Johnson, Bracy and Thomas, Inc.
Jeff Pantier, Hatton Godat Pantier

Attorney Representation:

Jeffrey Fancher, Deputy Prosecuting Attorney, for the Thurston County Development Services Department
Paul Hirsch, for Appellants
Harlan Stientjes¹ for the Applicants

Exhibits:

At the open record hearing the following exhibits were admitted as part of the official record:

¹ Mr. Steintjes acted both as an applicant witness, providing testimony, and as an applicant attorney, providing legal argument.

EXHIBIT 1 Development Services Planning and Environmental Section Staff Report, dated February 4, 2007, with the following Attachments:

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|--------------|--|
| Attachment a | Notice of Public Hearing |
| Attachment b | Appeal application packet, received November 30, 2007 |
| Attachment c | Pre-Hearing Order, dated December 18, 2007 |
| Attachment d | Appellants' Motion for Reimposition of Stop Work Order with Exhibits A – G |
| Attachment e | Copy of revised site plan submitted by Mr. Steintjes and approved on November 19, 2007 |
| Attachment f | Reduced size copy of survey map by Bracy & Thomas |
| Attachment g | TCC 17.15, Figure 5 (Marine Bluff Hazard Area) Example |
| Attachment h | Surveyed profile of subject property, modified by Planning Staff sketch |
| Attachment i | Construction drawings of RV shed (3 pages) |
| Attachment j | Letter from Laessa Via-Fourre, dated December 5, 2007 |
| Attachment k | Letter from Laessa Via-Fourre, dated December 3, 2007 |
| Attachment l | Letter from Laessa Via-Fourre and Charles Via, dated November 26, 2007 with attached, undated photos |
| Attachment m | Letter from Laessa Via-Fourre and Charles Via, dated August 24, 2007 |
| Attachment n | Letter from Thurston County Development Services to Harlan and Jo Steintjes, dated November 19, 2007 |
| Attachment o | Decision letter from Thurston County Development Services to Harlan and Jo Steintjes, dated October 16, 2007 |
| Attachment p | Geotechnical Evaluation by Mr. David Strong PE, dated September 5, 2007 |
| Attachment q | Memo from Jim Goode, Thurston County Environmental Health, dated January 9, 2008 |
| Attachment r | Memo from Kevin Hughes, TC Development Review dated January 23, 2008 |
| Attachment s | Abbreviated Drainage and Erosion Control Plan submitted by Mr. Steintjes on September 13, 2007 |
| Attachment t | Photos by Staff |
| Attachment u | Letter from Thurston County Development Services to Harlan Steintjes, dated September 6, 2007 |
| Attachment v | Letter from Thurston County Development Services to Harlan Steintjes, dated September 14, 2007 |
| Attachment w | Proposed changes to Thurston County Code, TCC 17.15.620 (not yet adopted) |

EXHIBIT 2 Survey and letter from Gareth Johnson, prepared by Bracy & Thomas, Inc., December 17, 2007

EXHIBIT 3 RV Storage Shed Building Permit No. 07-108849 BA, issued July 11, 2007

- EXHIBIT 4 Applicant's Final Memorandum, February 13, 2008²
EXHIBIT 5 Appellants' Final Argument, February 15, 2008

PRE-HEARING SUBMITTALS: (these documents were submitted as part of the prehearing process in this matter. They are admitted as part of the administrative record with the following designations:

- A. Appellants' List of Witnesses, Exhibits, and Documents, dated January 18, 2008:
1. Survey entitled "Exhibit Map for Laressa Via," Gareth M. Johnson, PLS, Bracy & Thomas, Inc. Land Surveyors (*Made Exhibit 2 at hearing*), dated December 10, 1007
 2. Letter from Gareth M. Johnson, PLS (*Made Exhibit 3 at hearing*), dated December 17, 2007
 3. Letter from Richard R. Larson, Larson and Associates Land Surveyors & Engineers, Inc., dated January 17, 2008
 4. Figure 5, TCC 17.15 Critical Areas Figures
 5. Shoreline Master Program – Thurston Region Map, zoning map with legend, supplied by Thurston County, showing subject property
 6. Coastal Zone Atlas – Zone Stability Map, showing subject property
 7. Landslide Hazard Area Map, 2006, provided by Thurston Regional Planning Council, showing subject property
 8. Photographs (2) of marine bluff at Stientjes property
 9. Photograph of Appellants' view before RV barn built
 10. Photographic overview of Stientjes property
 11. Photograph of RV barn in question
 12. December 2007 emails of Thurston County employees Richard Dawson and Kevin Hughes
 13. Letter Applicant, dated September 6, 2007,
 14. Letter to Applicant, dated September 14, 2007
 15. Letter to Applicant, dated October 16, 2007
 16. Letter to Applicant, November 19, 2007, with "Revised Site Plan 9-15-07" and 2006 aerial photo with annotated measurements, other enclosures omitted
- B. Applicant Motion in Limine and Notice of Hearing, dated January 24, 2008
- C. Applicant Disclosure of Witnesses and Exhibits, dated January 24, 2008, including attachments:
- Exhibit g Photos titled "Neighbor Shed" and "Via Shed"; untitled photo
- Exhibit k Thurston County Assessor Records for parcels 56550105401 Fourre, 56550105400 Stientjes, 56550105303 Costello
- D. Appellants' Motion to Supplement List of Witnesses and Exhibits, dated January 31, 2008, including attachments:

² The Applicant offered a declaration by Mary Jo Stientjes, Applicant, as an attachment to the final legal memorandum requested by the Hearing Examiner. The declaration is untimely testimony and as such is not admitted in evidence.

1. January 29, 2008 Letter to Harlan Claire Stientjes Family Trust and Mary Jo Stientjes from Jeff Raley, Thurston County Development Services Compliance Officer
 2. Photo of Stientjes Residence Deck
- E. Applicant Memorandum and Argument, dated January 31, 2008
- F. Appellant's Memorandum, dated February 4, 2008

The Hearing Examiner issued a decision of denial of the appeal on March 4, 2008. The basis of the denial was that the Hearing Examiner lacked jurisdiction because the appeal had not been timely filed and that he was barred from ruling on the merits of the case. A timely appeal of the Hearing Examiner's decision was filed to the Thurston County Board of Commissioners (Board) by the Appellants. On April 30, 2008, the Board determined that the initial appeal was proper and timely, and remanded the case to the Hearing Examiner for a decision. The formal written decision was issued by the Board on May 12, 2008. On May 7, 2008, the property owners on which the activity occurred, Harlan and Mary Jo Stientjes (Applicant), filed an appeal of the Board's decision to the Thurston County Superior Court.

On September 23, 2008, the Superior Court granted the appeal of the Applicant and overturned the Board's decision. An appeal was filed with the Court of Appeals, Division I, who, on October 12, 2009, overturned the Superior Court decision and remanded the case to the Board for reinstatement of its original decision remanding the case to the Thurston County Hearing Examiner for review of the initial appeal.

Subsequent to the remand to the Hearing Examiner, 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 8, 2008 would be part of the remand record. In addition, it was ordered by the Hearing Examiner that the parties submit any additional exhibits to supplement the record. The parties complied and submitted the following:

- G. Remand Hearing material submitted by Applicant:
1. Superior Court - Memorandum for Hearing Examiner Originally Scheduled June 13, 2008
 2. Superior Court – Memorandum and Argument for Hearing Examiner Originally Scheduled August 29, 2008
 3. Superior Court – Rebuttal Memorandum and Argument for Hearing Examiner Originally Scheduled August 29, 2008
 4. Court of Appeals – Brief of Respondent
- H. Remand Hearing material submitted by Appellants.
1. Court of Appeals Opening Brief of Appellants
 2. Court of Appeals – Reply Brief of Appellants
 3. Superior Court – Merits Brief of Respondents
 4. Superior Court – Opening Brief of Respondents in Support of Their Cross Motions to Dismiss The Petition
 5. Superior Court – Responding Brief in Opposition to Petitioners Initial Motions

- I. Remand rebuttal material submitted by Applicant on February 1, 2010
 1. Hearing Examiner Decision dated March 4, 2008
 2. BOCC Decision dated May 12, 2008
 3. The Final Judgment for Petitioners before the Thurston County Superior Court in the LUPA Appeal, case # 08-2-01096-9 filed September 23, 2008, reversing the Board of County Commissioners
 4. The Court of Appeals Decision dated October 12, 2009
 5. Superior Court – Order of Remand and Repayment of Judgment dated January 29, 2010.

Prior to the drafting of these Findings and Decision, the Hearing Examiner made an unaccompanied site view and visit of the Applicant's property and the Appellant's property.

A review of the entire record has been made and the following Findings and Conclusions are the basis of the Decision issued in this matter. This Decision shall supersede the March 4th, 2008 Decision of the Hearing Examiner.³

FINDINGS

Findings for background for remand

1. *On November 30, 2007, Appellants appealed a November 19, 2007 administrative decision by the Thurston County Development Services Department lifting a stop work order (SWO) in effect against building permit #07-108849. The building permit had been issued on July 11, 2007, for construction of a recreational vehicle shed on property at 9840 Johnson Point Road, Olympia, Washington.⁴ The November 19, 2007 administrative decision lifting the SWO was based on Thurston County Development Services Department's (Development Services)⁵ determination that an administrative variance from Thurston County Code (TCC) 17.15.620(B)(2)(b) would not be required for the project authorized by the building permit to proceed. TCC 17.15.620(B)(2)(b) establishes the required minimum setback for residential appurtenances from the ordinary high water mark on properties containing marine bluff hazard areas. *Exhibit 1, Attachment b, Appeal packet; Exhibit 1, page 2.*
2. *The single-family residence of Harlan and Mary Jo Stientjes (Applicant) onsite was built in the early 1970s prior to adoption of the Thurston County Critical Areas Ordinance (CAO). There is no dispute that the residence is located within the marine bluff hazard area setback required by TCC 17.15.620. Because the residence was built prior to adoption of the CAO, it is considered a legally non-conforming structure. *Exhibit 4, page 7; Exhibit 1, Attachment u.*

³ Some of the Findings are verbatim as those in the March 4th, 2008, Decision. Those Findings are identified with an asterisk (*) at the beginning of the Finding.

⁴ The legal description of the subject property is a portion of Section 33, Township 20 north, Range 1 West, W.M., also known as Assessor's Parcel No. 56550105400. *Exhibit 1, page 2.*

⁵ Thurston County Development Services is now known as Thurston County Resource Stewardship Department
*Project 2007103972 Harlan Steintjes
Thurston County Hearing Examiner
Findings, Conclusions and Decision*

3. The Applicant submitted a building permit application for permission to build a shed to cover a recreational vehicle (RV) on July 11, 2007. The RV shed was proposed to be located landward of the Applicant's residence. Thurston County Permit Assistance Center Staff approved the site plan and issued the building permit on the same day, without routing the application to the Planning and Environmental Section of the Development Services. The submitted application materials indicated that the subject property was on Hogam Bay. It did not, however, include topographical information or reference setbacks for the marine bluff on-the site plan, and, did not show critical areas or their buffers. Further, the submittals did not answer required questions relating to steep slopes. Because of the missing information, the same-day approval was based on insufficient information. *Exhibit 1, page 2; Exhibit 1, attachment u, pg. 2; Exhibit 4, page 2; Testimony of Mr. Longanecker.*
4. The Appellants did not file an appeal of the issuance of the building permit. At some point in late July, and again in August, the Appellants informally raised concerns with Development Services about whether the proposed location of the RV shed would satisfy marine bluff setback requirements of the County's Critical Area Ordinance (CAO). *Harlan Claire Stientjes Family Trust, et al. vs. Laressa Via-Fourre and Charles Via, Washington Court of Appeals Division I, Docket Number 63865 (2009) (pg 2 of decision).*
5. The Appellants own and live in the residence at 9838 Johnson Point Road, landward of the Applicant's property. Development Services staff conducted a site visit in late July 2007 after receiving calls from the Appellants, who raised concerns regarding whether the placement of the RV shed satisfied the marine bluff setback required pursuant to TCC 17.15.620. After the initial site visit, Development Services staff determined that the marine bluff setback was satisfied. *Exhibit 1, page 2.*
6. Appellants again contacted Development Services about whether the RV shed satisfied the required 20-foot setback along the eastern property boundary in light of the landslide activity that had occurred in 2005. Based on this inquiry the staff discovered that the County's Geodata imaging (from 2003) pre-dated the 2005 landslide activity. The staff visited the site on August 28 and 29, 2007 and measurements were taken that indicated that the RV shed was being constructed within the required 20-foot setback along the eastern boundary.⁶ *Exhibit 1, page 3.*
7. *During the August 28 and 29, 2007 site visits, Development Services staff measured the distance between the RV shed and the top of the marine bluff. According to the measurements, the shed was set back 155 feet from the top of the marine bluff. Topographical information from Thurston County Geodata indicated that the bluff was approximately 100 feet tall. According to staff's analysis, a 100-foot-tall bluff would necessitate a minimum 200-foot setback from the top of the bluff pursuant to TCC

⁶ One support post was located 16 feet from the eastern boundary and the other was located 18 feet from the eastern boundary. *Exhibit 1, page 3; Exhibit 1, Attachment t.*

17.15.620. Staff decided additional information was necessary to determine whether the location of the shed was consistent with the required setback from the ordinary high water mark, and posted a SWO on-site on August 28, 2007. The staff required additional information from the Applicant regarding the alleged front yard setback and the potential intrusion into the marine bluff hazard area setback. *Exhibit 1, page 3; Testimony of Mr. Longanecker.*

8. *The Applicant was notified by Thurston County by letter dated September 6, 2007 of his options regarding the SWO. They included: 1) obtaining a survey accurately identifying the proper marine buffer location; 2) assuming some minor encroachment into the marine buffer setback and requesting an administrative variance from the buffer standard; or 3) withdrawing the building permit application. *Exhibit 1, Attachment u.* In response, the Applicant submitted a letter from a professional engineering firm. The opinion of the engineer was that the horizontal distance from ordinary high water mark (OHWM) to the top of the bluff was 130 feet, and that the proposed construction site was greater than 260 feet from the OHWM. Because a licensed surveyor or engineer did not stamp the letter with a professional seal and no survey map was attached, Development Services determined that the letter was not sufficient evidence of compliance with the required marine bluff setback. *Exhibit 1, page 3; Exhibit 1, Attachment d, exhibit B.*
9. *Subsequent to Development Services not accepting the unstamped letter, the Applicant applied for an administrative variance from the required minimum 200-foot marine bluff setback, which was denied. *Exhibit 1, Attachment o.* The Applicant appealed the variance denial. While processing the Applicant's appeal, Development Services became aware of more recent (2006) Geodata mapping which showed the subject property after the 2005 landslide activity. Based on review of the 2006 Geodata mapping and discussion with Geodata personnel regarding accuracy of Geodata mapping, Development Services determined that the proposed shed location did in fact satisfy the marine bluff hazard area setback requirement. As a result the SWO was lifted by letter dated November 19, 2007. The Applicant withdrew the appeal of the denied variance. *Exhibit 1, page 4; Exhibit 1, Attachment n.*
10. The Appellant filed an appeal of the lifting of the SWO by the County. The Appellant's November 30, 2007 "Appeal of Administrative Decision" form and attachments alleged the following errors of the November 19, 2007 administrative decision lifting the stop work order and determining that no variance from the marine bluff setback was required⁷:
 - a. Violation of Thurston County Sanitary Code Section 18: Applicant failed to identify and protect a reserve drainfield area in case the existing drainfield fails (and Appellants allege RV shed location is the only potential reserve drainfield on the subject property);
 - b. Violation of 17.15.410 critical areas ordinance, geological hazard area regulations (Appellants allege landslide activity on the Applicant's marine bluff);
 - c. Failure to provide geotechnical report allegedly required pursuant to 17.15.635(E)(5)(b);

⁷ Of the check boxes at the top of the appeal form, only the box for "17.15.410 Critical Areas" was checked. The box for "19.12.010 Shoreline Program" was not checked. *Exhibit 1, Attachment b.*

- d. Failure to provide revegetation and erosion control plans allegedly required pursuant to 17.15.635(G);
- e. Failure to provide a peer reviewed grading plan allegedly required pursuant to 17.15.635(C)(1);
- f. Failure to utilize best available science;
- g. Failure to require a survey to establish the marine bluff hazard area setback;
- h. Failure to require a certified soil scientist assessment; and
- i. Failure to comply with Applicant's deed, which Appellants allege requires "all buildings ... to be of neat architectural design."

Exhibit 1, Attachment b.

In subsequent memoranda prepared for the appeal hearing, Appellants alleged the following additional errors in the November 19, 2007 administrative decision:

- j. That the project should have been reviewed for compliance with regulations and policies of the Shoreline Master Program for the Thurston Region (SMPTR), specifically policies that require protection of waterfront views;
- k. That the County used incorrect methods to determine the marine bluff hazard area setback required pursuant to TCC 17.15.620(B)(2)(b);
- l. That additional alleged land use violations regarding a deck currently exist on the subject property, which allegedly pursuant to TCC 17.15.43(I) prevents the hearing examiner from upholding the November 19, 2007 administrative decision;
- m. That the County's determination that no administrative variance from the marine bluff setback was required was in error; and
- n. That the building permit should have been reviewed as a Type II permit, pursuant to 14.48.080(B), subjecting it to review pursuant to 20.60.020(2).

Pre-Hearing Submission F, Appellants' February 4, 2008 memorandum; Exhibit 5.

Appellants also requested that the hearing examiner reinstate the stop work order. *Exhibit 1, Attachment b.*

11. On March 4th 2008, the Hearing Examiner denied the appeal of the lifting of the SWO. The basis of the denial was that the Hearing Examiner lacked jurisdiction because the appeal had not been timely filed and that the Examiner was barred from ruling on the merits of the case. The Appellants filed a timely appeal of the Hearing Examiner's decision to the Board. On April 30th, 2008, the Board decided that the Appellant's initial appeal was proper and timely, and it remanded the case to the Hearing Examiner for a decision on the merits. The Board issued the formal written decision on May 12th, 2008. On May 7th, 2008, the Applicant filed an appeal of the Board's decision to the Thurston County Superior Court.
12. On September 23rd, 2008, the Superior Court granted the appeal of the Applicant and overturned the Board's decision. An appeal was filed with the Court of Appeals, Division I, who, on October 12, 2009, overturned the Superior Court decision and remanded the case to the Board for reinstatement of its original decision of a remand of the case to the Thurston County Hearing Examiner for review of the initial appeal. *Harlan Claire Stientjes Family Trust, et al. vs. Laressa Via-Fourre and Charles Via,*

Findings for appealed issues (each element of the appeal is addressed)

A. **WHEHER THE LOCATION OF THE RV SHED WAS A VIOLATION OF THE THURSTON COUNTY SANITARY CODE, SECTION 18:**

13. As part of the appeal, the Appellant alleged that the construction of the RV shed was completed in a location that created a violation of the Thurston County Sanitary Code Section 18: Specifically, the Appellant contended that the area where the RV shed is located is the only potential reserve drainfield on the Applicant's property. According to the Appellant because of the location of the RV shed construction there is no reserve drainfield on the subject property if the main drainfield fails. *Exhibit 1, Attachment b.*
14. Jim Goode, Supervisor for the Land Use and Water section of the Thurston County Environmental Health, reviewed the allegation of the Appellant and submitted that the area on which the RV shed is located was *not* a suitable area for a reserve septic drainfield area because the area has been disturbed and is not ideal for the septic system. Mr. Goode further submitted that there is sufficient area for a reserve septic system on the waterward side of the Applicant's residence. *Exhibit 1, attachment q.*

B. **WHETHER THE CONSTRUCTION OF THE RV SHED WAS A VIOLATION OF TCC 17.15.410- VIOLATIONS OF CRITICAL AREA ORDINANCES AND GEOLOGICAL HAZARD AREA REGULATIONS:**

15. TCC 17.15.410 reads as follows:
Administrative actions—Appeal of administrative action.
 - B. Any aggrieved person may appeal an administrative decision made under this title, including a decision by the health officer, to the hearing examiner. TCC Section 20.60.060 governs such appeals. Appeals of the location of a critical area boundary or of a wetland rating shall be supported by technical evidence.
 - C. Appeals shall be supported by technical evidence. Substantial weight shall be given to the special reports prepared for the specific project, unless the appellant can provide evidence which has been prepared by a qualified professional equivalent to the one who prepared the original report.
 - D. Any decision to require a special report pursuant to this chapter may be appealed within fourteen days of the mailing of written notification that a special report is required.
16. TCC 17.15.410 is a procedural ordinance. The Appellant did not provide substantive evidence to support this element of the appeal. Development Services did not submit argument relating to this element of the appeal. *Exhibit 1, pg. 4*

C. *WHETHER THE APPLICANT'S ACTIONS ARE VIOLATIONS OF CRITICAL AREA ORDINANCES AND GEOLOGICAL HAZARD AREA REGULATIONS:*

17. To support contentions of violations of the Thurston County Critical Area Ordinances (CAO) and Geological Hazard Area Regulations the Appellants submitted a survey map from Bracy & Thomas dated December 10, 2007. The map depicts the topography of the site and identifies areas such as the “top of bank” and “ordinary high tide line”. *Exhibit 2*. However, after reviewing the map Development Services determined that it did not have the meta-data that described the process or formula as to how the ordinary high water mark had been determined or if the “top of bank” was pre or post landslide. Because no structures were shown on the survey as a reference, Development Services stated that it was difficult to determine the precise location of the RV shed on the map. *Exhibit 1, Staff Report, pg. 4*. The staff claimed, however, that this survey raised questions r whether the RV shed meets the marine bluff setback depending upon the method used to determine the 2::1 marine bluff setback. *Exhibit 1, Staff Report,*

18. TCC 17.15.620(B) addresses setbacks for marine bluff hazard areas. The ordinance reads in part:

TCC 17.15.620 B. For a marine bluff hazard area, there shall be separate standards for an undisturbed vegetative buffer along the bluff and a setback for the primary residential structure, measured from the foundation or support beams, and its normal residential appurtenances which are as follows:

- i. A buffer of native vegetation shall be maintained from the ordinary high water mark to at least fifty feet landward from the top of the marine bluff.....
- ii. 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.
 - c. *In those cases where the size, shape, topography, or existing development would preclude development on a preexisting lot, or where the geology of a bluff can safely accommodate development within the 2:1 slope, the review authority may reduce the marine bluff setback to the farthest practical point landward, as provided in TCC Sections 7.15.415(reasonable use exceptions) and 17.15.420. (administrative variances)*

19. Development Services submitted that an issue in determining the starting measuring point for imposing a 2:1 setback is how the slope of the bluff is measured. TCC 17.15 includes an illustrative drawing of such a measurement (TCC 17.15 figure 5) (hereafter referred to as “figure 5”) *Exhibit 1, attachment g*. A proposed depiction of the 2::1 slope of the marina bluff on site submitted by the Appellants is similar to that shown on figure 5. *Exhibit 1, attachment f*. However, TCC does not mandate that the illustrative drawing is the only method of measuring the slope. . Because the terrain of terrain of figure 5 and the Appellant’s submittal depict a flat upper landward horizontal area, the depictions do not accurately reflect the actual condition of the Applicant’s property at the top of the bluff. *Exhibit 1, Staff Report, pg. 5*.
20. The actual topography of the subject property differs from the topography depicted in figure 5 and the Appellant’s exhibit. On the subject property the slope continues to trend upward as you move landward west from the bluff. Because of this difference the staff did not require the 2::1 slope to be measured in the same manner as figure 5, but instead used its discretion in determining the measurement.
21. The staff did not require a survey for the RV shed. This decision was consistent with the usual practice of the staff of not requiring surveys for single-family development. *Testimony of Mr. Longanecker*. In the Staff Report the staff did, however, set forth in detail the process used to determine the 2::1 slope and the required setback. It was stated:

Staff uses the available Thurston County Geodata (Geodata) topography and aerial photo mapping layers and Geodata measuring tools to determine the location of the 2::1 marine bluff setback relative to new building or other development proposals. This is done by bringing a subject property up in Geodata, adding the topography layer and a recent aerial photo layer. The topography layer is used to determine the height of the slope. This height is then multiplied by two (2) to obtain the distance to be measured on a horizontal axis from the OHWM. The OHWM is determined by looking at the topographical mapping and physical location of the shoreline in the aerial photo. With these two pieces of information, staff uses the measuring tool on Geodata to draw a horizontal line from the OHWM to the 2::1 slope line on the given property. Staff then compared this 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. 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. To staff’s knowledge this method has resulted in safe and appropriate setbacks in terms of health, safety, protection of property and preservation of critical areas. Ultimately, what this method results in is a building setback of twice the height of the marine bluff as measured from the OHWM on a horizontal plane.

Exhibit 1, Staff Report, pg. 5
22. As shown on Exhibit 1, attachment f, the Appellant’s surveyors mapped the OHWM and the slope profile and then applied a 2::1 angle beginning at the OHWM and ending where this line intersects with the existing topography. Because of the specific

topography of the site, this slope measurement resulted in a greater setback from the marine bluff than the method used by Thurston County staff as explained above [see finding 21]. The difference resulted because the topography on-site continues to rise in elevation landward of the top of the marine bluff, but at a lesser degree (approximately 10 – 15% slope) than the steep slope below the top of bluff. Because the topography continues to climb, rather than flattening out behind the bluff, the 2 :1 of the Appellant’s survey had the point of intersection at a point further landward than was determined by the staff [see finding 21]. *Exhibit 1, Staff Report, pgs. 5 and 6; Exhibit 1, attachment p.*

23. The Applicant initially provided a letter from a local professional engineer, Jeff S. Pantier, dated September 12, 2007, that supported the Applicant’s application and, in particular, that the RV shed satisfied the 2::1 marine bluff setback standard. *Exhibit 1, Attachment d.* Because the letter was not stamped with a professional seal and no survey map provided the Development Services did not accept the information as being persuasive to allow the RV shed without a setback variance. The Applicant then applied for a variance from the setback standards. *Exhibit 1, Staff Report, pgs. 3 and 4.* In a Decision letter from Thurston County Development Services to Harlan and Jo Steintjes, dated October 16, 2007 Development Services denied the administrative request. *Exhibit 1, attachment o.* An appeal of the decision was filed with the Hearing Examiner.
 24. In making the original decision that the RV shed was being constructed within setback the Development Services reviewed photos of the property. *Exhibit 1, Staff Report, pg. 3; Exhibit 1, attachment t.* However, while preparing for the appeal, Development Services discovered additional information, including updated photos, to support the claim of the Applicant that the RV shed was outside the required setback. The updated aerial photos of the property were taken in 2006, and included pictures of an area of the site that had experienced a landslide that apparently occurred after the original photos (exhibit 1, attachment t) photos were taken. After reviewing the photos on its computers, measuring distances with Geodata measuring tools and discussing the measurements with the Geodata staff, Development Services reversed its original decision and concluded, based on the new information, that there was sufficient data to show that the proposed RV shed satisfied the 2::1 marine bluff setback. *Exhibit 1, Staff Report, pg. 4.* The Appellant provided no credible evidence or testimony to support the argument that the measurements of the new photos were in error.
- D. WHETHER THE HEIGHT OF RV SHED and THE STANDARD 20-FOOT FRONTYARD SETBACK ARE IN VIOLATION OF COUNTY CODE STANDARDS.*
25. Implied in the staff report was that there has been agreements between the Applicant and Appellant regarding the location of property lines. The Development Services staff was apprised of the agreements and reviewed the survey that was submitted by the Appellant. Based on these the Development Staff determined that the RV shed satisfies the required 20-foot front yard setback. *Exhibit 1, Staff Report, pg. 6; Exhibit A, attachment 1.*

26. The Appellants provided no credible evidence to dispute that the determination of the Development Services that the RV shed was in violation of the frontyard setback. .
- E. *WHETHER THE GEOTECHNICAL REPORT IS MISSING VITAL INFORMATION RELEVANT TO LANDSLIDE HAZARD AREA AND MARINE BLUFF HAZARD AREA. (TCC 17.15.635 (E)(5)(b))*
27. TCC 17.15.635 identifies the requirements for geotechnical reports. TCC17.15.635 (E)(5) sets forth the requirements for reports relating to marine bluffs in Thurston County. One of the requirements TCC 17.15.635 (E)(5)(b) is:
5. The review authority shall allow development within the setback of a marine bluff hazard area as provided in TCC Section 17.15.620B2 only when:
 - b. This report can demonstrate conclusively that the hazards associated with the marine bluff can be overcome in such a manner as to prevent hazard to life, limb, or property, and/or the integrity of the marine bluff; and
28. The Applicant submitted a Geotechnical Evaluation that was authored by Mr. David Strong PE and dated September 5, 2007. *Exhibit 1, attachment p.* Development Services reviewed the evaluation and submitted that it "...provided more than sufficient information regarding the stability and safety of the RV shed" *Exhibit 1, Staff Report, pg. 7.* This opinion of the Development Services was premised on the small size of the RV shed and the location of the structure, which is more than 150 feet back from the bluff. The staff, which also used updated information from the Geodata information available (see finding number 24). further submitted that "[I]t is the opinion of Thurston County staff that no additional information was necessary to review the project" *Exhibit 1, Staff Report, pg. 7.*
29. Mr. Strong, while not providing an opinion on whether the RV shed was in the required setback, submitted that the geotechnical considerations on site, including the geological background of the soils on site and the historical erosional process on the bluff, do not raise "concerns about the proposed construction of a pole supported roof system for a RV cover". *Exhibit 1, attachment p.*
- F. *WHETHER A PROPER REVEGETATION PLAN AND EROSION CONTROL PLAN (TCC17.15.635 (A) AND RELATED THIRD PARTY REVIEW (TCC 17.15.635 (G)) SHOULD HAVE BEEN REQUIRED.*
30. TCC 17.15.635 identifies the requirements for geotechnical reports. TCC 17.15.635(G), which identifies the requirements for revegetation, reads:
- G. Revegetation Plan.
 - a. This plan shall include a detailed site plan drawn to scale showing the placement of all plants to be used, the quantities of each species, distance on-center for planting, list of all species to be used with both botanical and common names,

- size of the nursery stock to be used, and any details for planting procedures including timing and maintenance.
- b. This plan shall be prepared by a person who is knowledgeable about regional soil and climatic conditions as well as native plant materials suitable for installation on or near a marine bluff.
 - c. This landscape plan shall use a predominance of native species. It shall document why the species chosen for the site will be appropriate, will function in the capacity as designed (i.e., soil and bluff stabilization, or runoff distribution), and will be likely to survive in the location with a minimum of maintenance once established.
 - d. The review authority may waive the requirement for the plan if it can be demonstrated that the site will regenerate on its own within a reasonable time or that the size of the project does not necessitate a restoration plan.
31. Using its knowledge of the site and the history of the project, the Developmental Service’s staff determined that a revegetation plan was not required. According to the staff, the requirement was waived because “[T]hird party review is not typically required for the construction of a small residential appurtenance such as an RV shed”. *Exhibit 1, Staff Report, pg. 7.*
32. TCC 17.15.635 identifies the requirements for geotechnical reports. TCC 17.15.635(A), which identifies the requirements for erosion control plans, reads:
- A. Drainage and Erosion Control Plan.
 1. This plan shall address methods to minimize erosion and contain soil within the project boundaries during construction and to provide for stormwater management from the site and its surroundings during and after construction.
 2. The design standards for this plan are contained in the Drainage Design and Erosion Control Manual for Thurston County (1994), as amended.
 3. This plan shall be reviewed by the Thurston County development services department.
33. The building permit for the RV shed required the control of erosion measures. A review of the storm drainage control of the RV shed was made by the Thurston County Public Works (the agency that reviews storm drainage and erosion) and it was determined that the system was functioning properly. *Exhibit 1, attachment r.* There has been no showing of erosion caused by the RV shed.

G. *WHETHER THE APPLICANT WAS REQUIRED TO SUBMIT ANY GRADING PLAN THAT WAS PEER REVIEWED AND APPROVED (TCC 17.15.635 (C) (1))*

34. TCC 17.15.635 sets forth the requirements for geotechnical reports. TCC 17.15.635(C), which identifies the requirements for grading plans, reads:

C. Grading Plan.

1. This plan shall identify the proposed development project including the movement of material on-site along with the proposed and existing contours of the site and cross sections thereof.
2. This report shall be prepared by a civil engineer licensed in the state of Washington.
3. The standards for this report are found in Chapter 70 of the Uniform Building Code as amended.
4. This plan shall be reviewed by the Thurston County development services department.

35. Grading and earth disturbance was limited onsite to the installation of structure poles that were buried to support the roof of the open air RV shed and approximately 2 cubic yards of excavation for a fire pit near the bluff. *Exhibit 1, Staff Report, pg. 8; Exhibit 1, attachments I, s and t.* Because the excavation was less than 50 cubic yards, Thurston County Development Services did not require a Thurston County Grading Permit. No peer review was necessary. . *Exhibit 1, Staff Report, pg. 8.*

H. *WHETHER THE COUNTY ERRED IN NOT REQUIRING A GEOLOGICAL SURVEY AND BEST AVAILABLE SCIENCE*

36. In its review of the Applicant's project the County used Geodata aerial photos, topography layers, photographs, reports, site plans, construction drawings, Geodata measuring tools and other documents and plans (see exhibit list). Because of the small project that was proposed the County did not require a geological survey. *Exhibit 1, Staff Report, pg. 8.*

I. *WHETHER THE COUNTY WAS REQUIRED TO DO HAVE CERTIFIED SOIL SCIENTIST ASSESSMENT REVIEW*

37. There is no Thurston County requirement for a certified soil scientist assessment review for this project. *Exhibit 1, Staff Report, pg. 8*

38. Written notice of the public hearing was mailed to the parties and published in The Olympian and The Nisqually Valley News on January 25, 2008. The County received no public comments on the appeal. *Exhibit 1, page 9; Exhibit 1, Attachment a; Testimony of Mr. Longanecker.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is authorized to decide appeals of administrative determinations pursuant to Thurston County Code Sections 2.06.010(H) and 17.15.410(A).

Criteria for Decision

Some of the Thurston County ordinances that are relevant to the instant decision have been included in the Findings. Reference is made to Finding No. 15 (TCC 17.15.410); Finding No. 18 (17.15.620(B)); Finding No. 27 (TCC 17.15.635(E)); Finding No. 30 (TCC 17.15.635(G)); Finding No. 32 (TCC 17.15.635 (A)); (Finding No. 33 (TCC 17.15.635(C)

17.15.200 - Definitions—Critical areas, categories and terms.

The following definitions shall apply to this chapter

"Critical area administrative review" means an administrative (staff) review process to implement the provisions of this chapter for any land use, commercial building or *grading permit* that is *categorically exempt from SEPA* and that has critical areas or buffers affecting the project site.

17.09.055 - Categorical exemptions.

Pursuant to WAC 197-11-800(1)(c) and notwithstanding the provisions of WAC 197-11-800(1)(b), the following types of construction shall be *exempt*

f. Anyexcavation of five hundred cubic yards throughout the total lifetime of Excavation.....

Conclusions Based on Findings

1. The Applicant's residence is a nonconforming structure that is located within the marine bluff hazard area setback required by TCC 17.15.620. *Finding of Fact No. 2.*
2. The Applicant filed for a building permit for construction of a RV shed in a location on the subject property that is landward from the residence. The residence is closer to the marine bluff hazard area than the RV shed. *Finding of Fact No. 3.*
3. The Appellants own and live in the residence at 9838 Johnson Point Road, landward of the Applicant's property. They submitted concerns regarding whether the placement of the RV shed satisfied the required marine bluff setback pursuant to TCC 17.15.620. *Finding of Fact No. 5.* A long and detailed process followed in which the Appellants appealed County decisions regarding the RV shed. *Findings of Fact Nos. 3-12.*
4. The initial administrative review before the Thurston County Hearing Examiner resulted in a decision that the Hearing Examiner did not have jurisdiction. The Board overturned this decision. A Superior Court for Thurston County overturned the Board's decision and the Washington State Court of Appeals ultimately overturned the Court's decision. The matter was remanded to the Hearing Examiner for findings and a decision on the merits of the appeal. *Findings of Fact Nos. 11 and 12.*

5. A key issue of the instant appeal is whether an administrative variance from the requirements of Thurston County Code (TCC) 17.15.620(B)(2)(b), which regulates the required setback for residential appurtenances from the ordinary high water mark on properties containing marine bluff hazard areas, is required. Thurston County Department of Development Services was correct in determining it was not required because the location of the RV shed is outside the required setback of the marine bluff. *Finding of Fact No 24.*
6. The Appellants relied on TCC 17.15-figure 5 for its submitted survey to determine the slope. *Finding No. 22.* While this submitted survey used figure 5 as the method for determining the slope, it is not the only allowed method available. Figure 5 is only illustrative of one possible method. *Finding No. 19.* Because the actual topography of the subject property differs from the topography depicted in figure 5 the Appellant's exhibit and figure 5 are not reflective of the actual condition of the slope of the marine bluff hazard area. On the subject property the slope continues to trend upward as you move landward west from the bluff rather than reaching a flat plateau as shown in figure 5. *Finding No. 20.*
7. Although the Development Services staff did not require a survey because of the limited nature of the development, the Department correctly used alternative methods to determine the slope. *Findings Nos. 21 and 36.* The alternative methods utilized updated photographic evidence that earlier photographs of the property did not reflect. With this new evidence and the use of Geodata topography, aerial photo mapping layers and Geodata measuring tools the staff was able to determine the location of the 2::1 marine bluff setback relative to RV shed. The staff in its staff report adequately explained the exact process and the section quoted in Finding No. 21. *Finding No 21.*
8. The method used by the staff in determining the slope and the point to measure the setbacks correctly determined that the RV shed was outside the setback and no administrative variance was required. There have been no violations of the County's Critical Area Ordinance.
9. Because the RV shed was outside the setback the Applicant is not required to submit a geotechnical report. However, one signed by a professional engineer was submitted to support the stability of the location of the RV shed. The Applicant was not in violation of TCC 17.15.635. *Finding Nos. 27, 28 and 29.*
10. Using its knowledge of the site and the history of the project, the Developmental Service staff determined that a revegetation plan was not required. According to the staff, the requirement was waived because "[T]hird party review is not typically required for the construction of a small residential appurtenance such as an RV shed". The Applicant was not in violation of TCC 17.15.635(A) and (G). *Findings Nos. 30 and 31.*

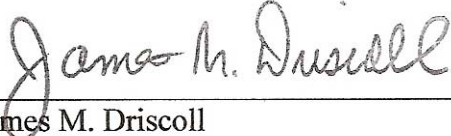
11. TCC 17.15.635(A) identifies the requirements for erosion control plans that are part of a Geotechnical plan. Technically, because the RV shed is outside the setback the Applicant was not required to provide the plans. However, the building permit for the RV shed required erosion control measures. The appropriate Thurston County department reviewed and approved the erosion control measures of the building permit. The Applicant provided no credible evidence to prove the methods were in error or that the County had erred in approving the methods. *Findings Nos. 32 and 33.*
12. TCC 17.15.635(C) identifies the requirements for grading plans that are part of a Geotechnical plan. Technically, because the RV shed is outside the setback the Applicant was not required to provide the plans
13. Grading and earth disturbance were limited onsite to the installation of structure poles that were buried for support of the roof of the open air RV shed. In addition, approximately 2 cubic yards of excavation for a fire pit near the bluffs were disturbed. Because the excavation was less than 50 cubic yards, Thurston County Development Services did not require a Thurston County Grading Permit. No peer review was necessary. The Applicant was not required to submit a grading plan and no peer review was required. *Findings Nos. 34 and 35.*
14. There is no Thurston County requirement for a certified soil scientist assessment review for this project. *Finding No. 37.* There was no error by the County.
15. The staff determined that the RV shed satisfies the required 20-foot front yard setback. The Appellants provided no credible evidence to dispute that the determination of the Development Services that the RV shed was in violation of the frontyard setback standards. *Findings Nos. 25 and 26.*
16. The area on which the RV shed is located is *not* a suitable area for a reserve septic drainfield area because the area has been disturbed and it is not ideal for the septic system. The County official determined that there is sufficient area for a reserve septic system on the waterward side of the Applicant's residence. *Finding No. 14.* There have been no violations of the Thurston County Sanitary Code.
17. While the Appellants submitted a survey based on their interpretation of TCC figure 5 and photographs and other supporting documents, the Applicant also submitted documentation relating to the slope. *Findings Nos. 17 and 19; Finding No. 28.* TCC 17.15.410 (a) requires that "Substantial weight shall be given to the special reports prepared for the specific project, unless the appellant can provide evidence which has been prepared by a qualified professional equivalent to the one who prepared the original report" The Appellant did not provide a report equivalent to the report of Mr. Strong. Mr. Strong's report on behalf of the Applicant supports the County's decision relating to stability of the site. *Finding No. 28*

18. The County properly considered other sources, including Geodata and updated photographs and applied its usual process in reviewing single-family development. With the use of this information the County was able to determine the setback from the slope. The RV shed was outside the setback from the slope. *Finding No. 24*
19. Being outside the marine bluff setback relieved the Applicant of the mandates of TCC 17.15.635.

DECISION

Based on the above findings and conclusions, the appeal of the November 19, 2007 administrative decision is **DENIED**. The County properly issued a building permit for the RV shed. After placing a Stop Work Order on the construction so it could review new information the County properly lifted the Order because the RV shed was not within the marine bluff setback. All issues of the appeal fail.

Done and Dated this 16th day of April, 2010.



James M. Driscoll
Thurston County Hearing Examiner