IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HARLAN CLAIR STIENTJES FAMILY TRUST and MARY JO STIENTJES, Respondents, v. THURSTON COUNTY (BOARD OF COUNTY COMMISSIONERS), LARESSA VIA-FOURRE and CHARLES VIA, Appellants.	No. 42395-2-II UNPUBLISHED OPINION

Johanson, J. — Harlan and Mary Jo Stientjes (the Stientjeses) obtained a building permit to construct a detached carport. Although their neighbors, Charles Via and Laressa Via-Fourre (the Via-Fourres)[1], opposed this construction, they did not timely appeal the building permit. The Via-Fourres argue that they timely appealed because the Stientjeses' building permit application was not complete until Thurston County later released a "stop work order." We hold that the letter lifting the "stop work" order was not a land use decision under the Land Use Petition Act

[1] We refer to the joint appellants as the Via-Fourres.

(LUPA),[2] thus, the Via-Fourres failed to appeal the building permit within LUPA's strict time limits and their appeal to the Thurston County Board of Commissioners was barred. We reverse the Board and reinstate the hearing examiner's denial of the Via-Fourres' appeal, thus upholding the trial court's decision.

FACTS

On July 11, 2007, the Stientjeses obtained a building permit from Thurston County (County) to construct a detached carport on their marine bluff property. Although the Via-Fourres opposed the carport's construction, they did not appeal the issuance of the building permit. Instead, they communicated their concern to Thurston County Development Services Department (Development Services) that the proposed carport's location may not satisfy marine bluff setback requirements under the county's Critical Areas Ordinance (CAO). Thurston County Code (TCC) 17.15.620(B)(2).

In response to the Via-Fourres' concerns about the marine bluff setback requirements, Development Services posted a stop work order at the site on August 28. On November 19, after receiving additional information, Development Services lifted the stop work order, allowing the carport's construction to proceed. This November 19 document, lifting the stop work order, is the focus of this appeal.

On November 30, the Via-Fourres appealed the November 19 decision, lifting the stop work order, to the county hearing examiner. Although the Via-Fourres appealed from the November 19 decision to lift the stop work order, they specifically referred to the Stientjeses'

[2] Ch. 36.70C RCW.

building permit as the basis for their appeal. The hearing examiner dismissed their appeal as untimely under LUPA. The Via-Fourres appealed the hearing examiner's dismissal to the Board of County Commissioners (Board). The Board reversed and remanded to the hearing examiner for further review.[3]

On remand, the hearing examiner determined that the Stientjeses' site plan complied with the CAO and that all the Via-Fourres' arguments failed on their merits. The Via-Fourres again appealed the hearing examiner's decision to the Board. The Board reversed the hearing examiner and reinstated the stop work order. Under LUPA, the Stientjeses petitioned the superior court for review of the Board's decision. The superior court reversed the Board and reinstated the hearing examiner's earlier denial of the Via-Fourres' appeal as untimely. The superior court found that under LUPA, the July 11 building permit was a land use decision; but that Development Services's November 19 lifting of the stop work order was not a land use decision appealable under LUPA. The superior court concluded that the Via-Fourres' failure to challenge issuance of the Stientjeses' building permit within 21 days rendered any later challenge an impermissible collateral attack under LUPA's bright line 21-day filing limitation. The Via-Fourres and Thurston County jointly appeal.

[3] The Stientjeses petitioned the superior court for review of the Board's reversal and remand decision. The superior court reversed the Board and reinstated the hearing examiner's dismissal order. The Via-Fourres appealed to Division One of this court, which held that the Board's decision was not a final land use decision and therefore not reviewable by the superior court. Division One reinstated the Board's remand to the hearing examiner. *Harlan Claire Stientjes Family Trust v. Via-Fourre*, 152 Wn. App. 616, 620-21, 217 P.3d 379 (2009).

ANALYSIS

I. Standard of Review

LUPA governs judicial review of Washington land use decisions. *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning and Land Servs.*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). With certain exceptions, LUPA provides the "exclusive means of judicial review of land use decisions." Former RCW 36.70C.030(1) (2003).[4]

The Stientjeses,[5] as the LUPA petitioner, continue to carry the burden of establishing that the hearing examiner erred under at least one of LUPA's six standards of review. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004). These standards are:

> (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;

[4] Former RCW 36.70C.030(1) provides:

> [LUPA] replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:
> (a) Judicial review of:
> (i) Land use decisions made by bodies that are not part of a local jurisdiction;
> (ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board;
> (b) Judicial review of applications for a writ of mandamus or prohibition; or
> (c) Claims provided by any law for monetary damages or compensation.

[5] The Via-Fourres and Thurston County appeal, however our General Order 2010-1 requires that the party filing an appeal in superior court under LUPA shall have responsibility for the opening and reply briefs before our court, and shall be entitled to open and conclude oral argument, whether designated as the appellant or respondent on appeal to this court.

> (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.

Former RCW 36.70C.130(1) (1995).

On review of a superior court's land use decision, we stand in the shoes of the superior court and review the administrative decision on the record before the administrative tribunal—not the superior court record—reviewing the record and the questions of law de novo to determine whether the facts and law support the land use decision. *Satsop Valley Homeowners Ass'n v. Nw. Rock, Inc.*, 126 Wn. App. 536, 541, 108 P.3d 1247 (2005). We review the factual record before the local jurisdiction's body or officer with the highest level of authority to make the final determination. *HJS Dev.*, 148 Wn.2d at 467. In this case, the Board, functioning as an appellate body, had the County's highest level of decision-making authority. *Quality Rock Prods., Inc. v. Thurston County*, 139 Wn. App. 125, 132, 159 P.3d 1 (2007), *review denied*, 163 Wn.2d 1018 (2008). Accordingly, we review the Board's decisions, not the hearing examiner's decisions, to determine whether the facts and law support the land use decision.

II. Standing

The Stientjeses argue that the Via-Fourres lacked standing to participate in the proceedings before the hearing examiner. We reject the Stientjeses' standing argument based on

LUPA's plain statutory language. Under LUPA, a person, other than the owner whose property is the subject of the land use decision, has standing if that person is or would be "aggrieved or adversely affected" by the decision. RCW 36.70C.060(2). A person is "aggrieved or adversely affected" when (1) the person is prejudiced or likely to be prejudiced by the decision, (2) the local jurisdiction was required to consider that person's asserted interests in making its decision, (3) a favorable judgment would redress or substantially eliminate the prejudice, and (4) the person has exhausted her administrative remedies. *Lauer v. Pierce County*, 173 Wn.2d 242, 253-54, 267 P.3d 988 (2011).

The Via-Fourres requested administrative relief to redress their asserted prejudice and exhausted those remedies by participating in the administrative proceedings below. *Lauer*, 173 Wn.2d at 255-56. As adjacent landowners, they alleged that the Stientjeses' proposed project would injure their property. *Chelan County v. Nykreim*, 146 Wn.2d 904, 934-35, 52 P.3d 1 (2002). Their interests include the marine bluff critical area boundary, which is one that the local government is required to consider. TCC 17.15.200. We hold that the Via-Fourres have standing as an aggrieved party.

III. Timeliness

The Stientjeses argue that the Via-Fourres did not timely file a LUPA appeal of the July 11 building permit. The Via-Fourres respond that they timely appealed because the County did not approve the Stientjeses' site plan and, therefore, the building permit, until November 19. We agree with the Stientjeses.

Timeliness is an issue of law, which we review de novo. *Satsop Valley Homeowners*, 126 Wn. App. at 541. To be timely, the LUPA petitioner must file a petition within 21 days of the relevant land use decision. RCW 36.70C.040(3). LUPA defines a "[l]and use decision" as the "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals" on administrative actions and regulatory interpretations affecting real property use. Former RCW 36.70C.020(1) (1995).[6] In the LUPA context, a final decision means " '[o]ne which leaves nothing open to further dispute and which sets at rest [the] cause of action between parties.' " *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194, 63 P.3d 764 (2002) (quoting Black's Law Dictionary 567 (5th ed. 1979)). A land use decision's finality is based on whether the governmental action at issue "reaches the merits," not on whether the action's wisdom is "potentially debatable." *Samuel's Furniture*, 147 Wn.2d at 452.

A follow-up letter to a stop work order may be a final land use determination under LUPA if it represents the final determination by the officer with the highest level of authority to make that determination. *Heller Bldg., LLC v. City of Bellevue*, 147 Wn. App. 46, 57, 194 P.3d 264 (2008). In *Heller*, the city required the developer to submit revised building plans for a downtown property after demolition revealed an unsafe foundation. *Heller*, 147 Wn. App. at 51. The city accepted the plan revisions, but it then issued a stop work order, alleging that the work exceeded the permit's scope, without specifying the controlling ordinances. *Heller*, 147 Wn.

[6] RCW 36.70C.020 was amended twice since 2007. The amendments do not affect the text of the statute but do affect the numbering of the subsections. The 2007 numbering is used in this opinion.

App. at 52. In a later letter, the city informed the developer of a new moratorium preventing development on all downtown property; the letter included the relevant ordinances and outlined the steps required to recommence construction after the moratorium expired. *Heller*, 147 Wn. App. at 52-53. Division One of this court held that the follow-up letter was a land use decision under LUPA because the follow-up letter finalized the stop work order, fundamentally changed the city's land use decision, and the city intended the follow-up letter to be a final determination. *Heller*, 147 Wn. App. at 57.

Similarly, a permit reinstatement may be a final land use determination under LUPA. *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, 843 n.15, 175 P.3d 1050 (2008). In *Twin Bridge*, the county issued permits to build a 960 square foot office building and a 4,000 square foot warehouse. *Twin Bridge*, 162 Wn.2d at 830. Later, the county issued two amended permits, one of which allowed for a 58,000 square foot building. *Twin Bridge*, 162 Wn.2d at 831. The city (but not the Department of Ecology) appealed the amended permits and the County suspended the permits, stating it required "a new substantial development permit." *Twin Bridge*, 162 Wn.2d at 831. After Twin Bridge obtained the development permit, the County reinstated the two amended permits; yet the Department of Ecology did not appeal the reinstatement. *Twin Bridge*, 162 Wn.2d at 832. Our Supreme Court concluded, "[R]einstatement of the permits—which necessarily decided the construction complied with the [Shoreline Management Act]—was a final decision from which Ecology could appeal under LUPA." *Twin Bridge*, 162 Wn.2d at 843, n.15.

The Via-Fourres argue that because Development Services had authority to post a stop

work order, it did not approve the building permit until November 19, when it lifted the stop work order. The Via-Fourres' timeliness argument depends on whether Development Services' lifting of the stop work order was a land use decision under LUPA.

LUPA defines a "[l]and use decision" as follows:

> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . ;
> (b) An interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
> (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property.

Former RCW 36.70C.020(1).

It is settled law that a local jurisdiction's building permit issuance constitutes a land use decision, subject to judicial review under LUPA. *Nykreim*, 146 Wn.2d at 929; *Asche v. Bloomquist*, 132 Wn. App. 784, 790, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d 1005 (2007). A local jurisdiction's decision concerning a building permit application is final for LUPA purposes if a party "receive[s] the relief it had requested" and "[n]o additional issues remain[ ]." *Samuel's Furniture*, 147 Wn.2d 453.

Here, the Stientjeses' July 11 building permit was an appealable land use decision that granted the Stientjeses their requested relief (permission to build a carport) and left no additional or unsettled issues; thus, it was "final." In contrast, the November 19 lifting of the stop work order changed nothing relative to the building permit or the permit application. The November 19 letter informed the Stientjeses:

> [S]ome additional information regarding your site has become available. . . . [I]t appears that your proposed RV cover does in fact meet the standard 2 : 1 setback from the marine bluff hazard area on-site. . . . Since the proposal does appear to meet the minimum requirements, a variance would not be needed for the proposed RV storage building. I have enclosed a copy of the (revised) approved site plan, which I have annotated with measurements taken on-site. The Stop Work Order[,] which was issued for non-compliance with standard setback requirements [,] may be removed at this time.

AR at 244.

The Via-Fourres argue that the "revised" site plan is part of the Stientjeses' permit application. Joint Br. of Via-Fourres and Thurston County at 28. But, the only "revision" consisted of measurement annotations showing that the original plan conformed to the marine bluff setback requirements. Contrary to the Via-Fourres' argument, the November 19 letter was not a component of the permit application; it merely lifted an order suspending the work permitted by the building permit issued July 11.

Additionally, unlike the circumstance in *Heller* where the follow-up letter finalized the stop work order and fundamentally changed the city's land use decision, here, the November 19 letter did not change the building permit. *Heller*, 147 Wn. App. at 57. Also, unlike the circumstance in *Twin Bridge* where the county reinstated two *amended* permits because Twin Bridge complied with the county's determination that it required "a new substantial development permit," here, the letter lifting the stop work order did not involve an additional requirement or an additional permit grant. *Twin Bridge*, 162 Wn.2d at 831. Thus, the November 19 letter did not meet the former RCW 36.70C.020(1) definition of a LUPA "[l]and use decision," and we hold that the November 19 letter was not a land use decision.

The Via-Fourres' appeal arose directly from the building permit issuance but they did not timely appeal that land use decision. LUPA's stated purpose " 'is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.'" *Nykreim*, 146 Wn.2d at 917 (quoting RCW 36.70C.010). Our Supreme Court has held that "even illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005). Thus, challenges brought after the deadlines for filing local administrative appeals or after LUPA's 21-day time period for filing an appeal constitute impermissible collateral attacks. *Habitat Watch*, 155 Wn.2d at 410-11; *Nykreim*, 146 Wn.2d at 933; *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000). We hold that the Via-Fourres' appeal is time-barred.[7]

ATTORNEY FEES

Although the Stientjeses request attorney fees, they did not comply with the mandatory RAP 18.1(b) requirement that a party must devote an opening brief section to the request for fees or expenses. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). RAP 18.1(b) requires more than a bald request for attorney fees on appeal; the rule requires argument and citation to authority. *Phillips*, 81 Wn. App. at 705. The Stientjeses do not provide citation or argument regarding RCW 4.84.370(1), which provides attorney fees to prevailing parties under certain circumstances; therefore, we deny their attorney fee request.

[7] Therefore, we do not reach the Stientjeses' additional arguments.

We reverse the Board and reinstate the hearing examiner's denial of the Via-Fourres' appeal, thus upholding the trial court's decision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, J.

Worswick, C.J.