

No. 44476-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SCOTT K. LANGE & ELIZABETH R. LANGE, Husband and Wife, and
TRUSTEES of the LANGE FAMILY TRUST,
Appellant,

v.

CLALLAM COUNTY, a Municipal Corporation, and
SHEILA ROARK MILLER, DIRECTOR OF THE DEPARTMENT
OF COMMUNITY DEVELOPMENT
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR JEFFERSON COUNTY
No. 12-2-00260-5

OPENING BRIEF OF APPELLANTS

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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I. INTRODUCTION

This writ of mandamus action for code enforcement comes to the Court with an extensive history involving land use approvals, permits, and code enforcement complaints, regarding whether various structures as constructed and maintained are compliant with the permits/exemptions and approvals, all located on the shoreline of Clallam Bay in Clallam County. Lange lodged a code complaint that alleges and provides evidence of code violations, including violations of permit / exemption conditions of approval, and missing required permits. Clallam County refuses to provide a final determination or investigate and enforce the formal land use complaint filed by Lange, couching all of Lange's issues in the writ of mandamus for code enforcement as an impermissible challenge to the permits barred by LUPA. Lange argued that there is no other way to have the county comply with their mandatory duty to investigate the code violations than through a writ of mandamus. However, the superior court ruled that LUPA barred the writ seeking code enforcement. Today Lange has no reason to challenge the permits because they have conditions of approval that are not being met, and code enforcement provides a different LUPA land use decision not attacking a prior LUPA decision (but relying

upon it) by simply enforcing the prior land use decisions conditions of approval. There is no attack or changes to prior permits, but enforcement of conditions of approval. That is, there are new issues of compliance with permit conditions of approval that Lange can and is entitled to require the County to investigate and enforce, that were not issues that could have been raised in a LUPA challenge. It is when Lange discovered the structures were not built in accordance with the conditions of approval and that there were other code violations (missing permits), that Lange sought code enforcement. Lange has not received a final code enforcement decision.

A writ of mandamus is the proper vehicle for Lange to compel the County to investigate and enforce its own code and issue a final code enforcement determination as defined in RCW 36.70C.020 (c), under the Clallam County Charter and Clallam County Code Title 20 (administrative code enforcement).

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order of January 4, 2013 quashing the writ of mandamus and dismissing the action based upon LUPA or otherwise.
2. The trial court erred in dismissing the claim for attorney's fees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the Clallam County Charter and Title 20 of the Clallam County Code, require Clallam County, through its Director of Community Development, to investigate a code complaint and provide a written enforcement decision thereon regarding code violations and violation of permit conditions, irrespective of when those permits/exemptions were issued, where there has been no final code enforcement determination made by the County?
2. Pursuant to equity and the shoreline act, where, after more than seven years of seeking a final code enforcement decision and awareness by the County of the allegations, and the Director merely indicates it would be “foolish” for her to respond and investigate, are the actions and inactions of the County in bad faith, wanton, arbitrary, and capricious to warrant the award of attorney’s fees and costs in this mandamus action?

IV. STATEMENT OF CASE

a. History

The Cebelaks became new owners next to Lange, around 1996. They applied for and received building permits and/or exemptions in 1996 for structures on the property. After the Cebelak’s began some minor construction activities in 1997, Lange complained to Clallam County on 5/11/97 that it appeared the structure being installed must be violating set back conditions CP 130. Lange had received no notice of any permit or variance activity, though he was an adjacent landowner (CP 130). Lange

received a written reply in 24 hours and was assured that the County was watching the situation and set-backs closely (CP 136), though come to find out later there was no evidence the County even visited the site at the time of the letter, and documentary proof that they never signed off on any structures' set-backs as constructed from the OHWM. (CP 157). Come to find out much later, the Department of Fish and Wildlife had, early on, established the location of the OHWM with the Cebelaks on 1/22/1997 (CP 190), and subsequent applications by the Cebelaks misrepresented this location in order to obtain permits or approvals that were originally denied, in the summer of 1997. (CP 169-182).

Regardless, after a storm in 2006 exposed a buried bulkhead, Lange, after seeing the damage apparently caused by its location and configuration did some preliminary investigation into the permitting and approval history. (CP110-114). Lange filed a land use complaint in early 2007 with Clallam County in response to the Cebelak's request for an "emergency" rebuild and expansion of the bulkhead, alleging among other things, that the wall nor the buildings were built according to their permits/exemptions conditions and were missing required permits (CP 191-200). While acknowledging this formal complaint, providing repeated written assurances it would respond, and apparently initiating an

investigation, the County never provided or created a complete response or final determination to that land use complaint. (CP 201- 206). Nor did the County indicate Lange's 2007 land use complaint, in part or entirely, was barred by LUPA, though Lange specifically asked whether it was. (CP 192-199). No final decision was provided. (CP 225-232). However, without informing Lange, and though the property was subject to an open code enforcement matter, the County approved an after the fact permit for repairs to the bulkhead more than a year after the storm in 2008. (CP 208-210). Lange discovered this in a public disclosure request.

Lange then commissioned a detailed land survey that overlaid an August 1997 certified WA DNR photo to survey and show the history and extent of set back and permit/exemption condition violations. (CP15-16). Based upon this new information, Lange then filed an updated formal land use code complaint with the new Clallam County Director of Community Development Sheila Roark Miller in June of 2012 together with that survey. (CP 11-16.)

b. Select Permit Conditions & representations in the record

Select representations in applications and facts showing permit/exemption conditions are not being met.

- CP162 – This is Cebelak’s site plan as submitted with his building permit application. Note she shows 35’ distance to the “vegetation line” to give the appearance the setbacks are met.
- CP166 – This is the County’s markup on approval of permits. It notes the required 35 foot shoreline setback/buffers.
- CP 167 – The building permit exemption for the structures include the condition of approval that “Must maintain zoning setbacks and critical area setbacks” Permits for both the so-called storage building and the residence explicitly show rear (shoreline) setback to be 35 feet (CP 166), which condition was consistent with the applicable Shoreline Master Program requirements at the time.
- 10-9-1996: The building permit exemption for habitable structures includes the condition: “Must maintain zoning setbacks and critical area setbacks” (CP 167) Permits issued for both the storage building (cabin) and the residence explicitly show rear (shoreline) setback to be 35 feet (CP 166) consistent with the applicable Shoreline Master Program requirements. Accordingly, Cebelak’s site plan shows the appearance of the 35’ distance being met. (CP 162).
- During construction of the buildings in 1997 until final inspection in 1999, the inspector never signed off on the set backs inspection item, though the footings were installed in mid 1997. (CP 157).
- In January of 1998, the Cebelak’s sought a Shoreline Exemption request from Clallam County to “Install approximately 4’ x 150’ rock bulk head to replace existing deteriorating logs to protect SFR.” (CP 171)
- On the same date, they applied for a Hydraulic Project Approval for the same wall. (CP-188).
- The Hydraulic Project Approval sketch they provided to WDFW in their application was precisely the same sketch they supplied with their County shoreline exemption. *Compare* (CP189) *with* (CP 171).
- The difference between the two original sketches provided in the record is that the Washington Department of Fish and Wildlife (WDFW)

visited the site and determined where the Ordinary High Water Mark (OHWM) really was in January of 1997. WDFW indicated where the actual OHWM was on the HPA application attachments (CP 189), based upon a site visit on 1/22/1997 at which applicant was present. (CP 190). The actual WDFW field measured OHWM was at the base of the proposed rocks, adjacent to the “existing logs” (CP 189 – 190). The actual WDFW field measured OHWM is provided with distance ties to the actual building structures’ foundations, so there is no question of the location of that original WDFW field measured OHWM even to this day (26’ from the residence and 21’ from the so called storage building. (CP 189-190). This is well under the required 35’ (CP 166).

- 4-4-1998: While the original shoreline exemption request sketch to the County failed to show an OHWM (CP 171), the original shoreline exemption request for a new protective bulkhead at the so called “existing logs” and WDFW OHWM was nonetheless denied as inconsistent with the shoreline master program. (CP 175-176).
- 4-19-1998: The shoreline exemption for the shoreline was reapplied for though the first application did not show the OHWM (CP171). This go around, the Cebelak’s represented that the bulkhead be an “upland sea wall” (again 4’ high x 150’ long) to provide for protection from “exceptional” waves. (CP 178). They provided a new diagram that showed the location of the OHWM to be 40-45’ from their residence on April 17, 1998. (CP 182). Note in the revised shoreline exemption request applicant relocated the OHWM from where determined by WDFW to a point parallel and 19’ seaward of its actual location as determined by WDFW on 1/22/98. (CP 189-190).
- The revised shoreline exemption was approved based upon this representation of a changed location of the sea wall. (CP182.)
- The HPA was issued 6-22-1998, only after Clallam County approved the revised shoreline exemption request based upon the representation that Cebelak moved the proposed bulkhead to a location 20 feet landward of the OHWM.

The permits/exemptions indicate both storage building and residence must be 35 feet from OHWM (CP 159) and bulkhead must be 20 feet landward from the OHWM. (CP 182.) The survey Lange commissioned after continued inaction by the County, however, showed the bulkhead 26 feet from the WDFW OHWM at the residence and the bulkhead 3-4 feet seaward of the WDFW OHWM at the “storage building” (CP 15-16), as established by the Washington Department of Fish and Wildlife, and unchallenged by the County or the Cebelak’s. (CP 189-190.)

c. Formal Code Complaint & No response.

Specifically, Lange’s code complaint alleged, among other things:

“e. ***Bulkhead located at or waterward (West end) of OHWM, 20 feet waterward of location requested and approved by exemption.” (CP 13.)

“Misrepresentation or omission of material facts. Prior structure illegal – improperly located” (CP 14.)

Unlike the previous Director who delayed and ultimately never answered the 2007 land use complaint (CP 201-206), the new Director equivocally indicated it would be “foolish” for her to comment on the code complaint. (CP 18). The new Director did not indicate enforcement could not occur due to LUPA, but instead indicated “It would be foolish

for me to comment on the shoreline matter, specific to your neighborhood, with legal representation on both sides”. (CP 18). The first time the LUPA argument was raised by Clallam County was in response to the writ of mandamus. (CP 57-60).

After continued equivocal action but no final response, and after receiving a response to a public records request in the Fall of 2012, Lange filed for a writ of mandamus to compel a final code enforcement determination in November of 2012 in Jefferson County. (CP 1). Lange had also previously initiated injunctive relief and other remedies than code enforcement against the Cebelak in Clallam County Superior Court, which is still pending. (CP 65-102).

d. The Writ of Mandamus Compelling an Investigation and Enforcement Decision.

Upon application for an alternative writ, the Court, through the Clerk, issued an alternative writ of mandamus to investigate these code complaints and code violations and issue a final decision thereon. (CP 50).

After being served with the Writ to comply in 45 days or show cause in 30 days, the County Answered the writ (CP 103-107) and simultaneously moved to quash arguing the writ of mandamus action was

actually a challenge to permits and not for code enforcement, and was barred by LUPA, limitations, and discretion in enforcing codes and permits. (CP 54-64).

In the motion to quash, the County asserted Lange failed to appeal permits or land use decisions under the Land Use Petition Act “LUPA” (CP 57), that limitations barred the writ based upon the date of certain permits (CP 61), and that mandamus cannot compel the manner of exercising discretion in evaluating the permit applications (CP 62). The County’s motion focused primarily on LUPA, and recast Lange’s code complaint as a collateral attack on previously issued permits. (CP 57.)

Despite the complaint to investigate code violations including conditions of approval and missing permits, the trial court was convinced that LUPA barred the writ because Lange did not appeal the permits/exemptions in 1998 and did not appeal the permits/exemptions in 2007, and quashed the writ based upon LUPA and dismissed the action. (Verbatim Transcript of Proceedings 18-19); (CP 276-277). Lange appealed.

V. SUMMARY OF ARGUMENT

An alternative writ of mandamus was issued to the County and Director to investigate a formal land use complaint or show cause why the

County should not comply with the writ. The County moved to quash on the grounds that there was a plain, speedy, and adequate remedy in the ordinary course of the law – namely there was an opportunity to challenge the issuance of the permits/exemptions. The County argued that because Lange did not challenge the permits/exemptions under LUPA, Lange could not challenge the permits through a writ of mandamus and therefore the mandamus action was precluded and the court had no jurisdiction. The superior court agreed, and quashed the writ.

But this is the fatal flaw to the County’s position and why the trial court erred in quashing and dismissing the writ of mandamus. To describe the result or effect of failure to challenge when someone *actually tries* to challenge permits or exemptions outside of 21 days, is not the same as proving that the action Lange is seeking is actually a collateral challenge to the permits / approvals.

On the contrary, Lange has repeatedly sought and is now seeking by way of writ of mandamus for the County to investigate and enforce the permits / conditions of approvals pursuant to the administrative process of Title 20 applied to how the Cebelak’s have constructed and maintained the structures in non-compliance with the conditions of those permits / approvals, and their failure to obtain other required but missing permits.

After resolving the issue that LUPA does not bar the writ of mandamus, the only other issue of merit properly raised by the County in the motion to quash is the statute of limitations on the writ of mandamus, though the County merely argued the statute would begin to run upon issuance of the permits. Again, this is error and suffers the same error of characterizing the writ of mandamus as an attack on the permits and so would not be a proper ground to affirm the dismissal.

However, no matter when a theoretical time limitation begins to run, no statute of limitations applies to code violations pursuant to Clallam County Code, and accordingly, a writ of mandamus having the County investigate and enforce code violations is not precluded until the code violations, continuing in nature, are abated (or a final investigation and enforcement decision is otherwise made).

Barring code investigation and enforcement of code violations based upon LUPA or limitations, where there is no final code enforcement decision is error, untenable, and manifestly unreasonable and such an interpretation of LUPA is violative of substantive due process. It is shocking that Clallam County would even take such a position, as it would render code enforcement of permit conditions or missing permits a nullity after 21 days, leading to absurd results.

Because the County has exhibited bad faith in its responses and treatment of Lange and the code complaints in this code enforcement matter within the shoreline jurisdiction, Lange should be awarded attorney's fees and costs for this action and appeal on remand. It was error to dismiss the claim for attorney's fees with the quashing of the writ.

The mandamus should issue to compel the County to investigate and enforce the issues in the formal code complaint and provide a final determination thereon forthwith.

VI. ARGUMENT

A. STANDARD OF REVIEW ON THE GRANTING OF THE MOTION TO QUASH IS DE NOVO.

Review of the trial court's decision to grant the motion to quash is *de novo*. See, *Bock v. State*, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978)(motion to quash treated as motion for judgment on the pleadings). *Chief Seattle Properties, Inc. v. Kitsap County*, 86 Wash. 2d 7, 28, 541 P.2d 699, 712 (1975)("We find no inconsistency between CR 81(a) and mandamus proceedings and therefore hold CR 81(a) applies.").

To the extent the court ignored documentary evidence outside the record or simply referred to it for context, all allegations of Lange must be

taken as true. *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 120-121, 744 P.2d 1032 (1987). To the extent the court actually relied upon documentary evidence outside the pleadings, the motion to quash and dismiss would be treated as a motion for summary judgment. *Id.* Accordingly, at this stage in the proceedings without a hearing on the writ of mandamus, review of the decision on the motion to quash is *de novo*, and all allegations of Lange should be taken as true or the facts should be interpreted in favor of the non-moving party. *See, Bock*, 91 Wn.2d at 99. Either way, all statements of Lange must be taken as true, or all inferences of fact are in favor of the non-moving party, here, the Langes. *See, Haberman*, 109 Wn.2d at 120-121.

Whether the statute of limitations bars a suit is a legal question, and therefore the applicable statute of limitations issue is a question of law reviewed *de novo*. *Bennett v. Computer Task Group, Inc.*, 112 Wn. App. 102, 47 P.3d 594 (2002). However, if there is a dispute of fact regarding when the limitation period began, this is a question for the finder of fact. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 263, 840 P.2d 860 (1992).

In contradistinction to the present matter which was decided on a motion to quash before the show cause hearing, when there is a show cause hearing on the mandamus action, different review standards apply to

a superior court's determination of the different elements of a writ of mandamus. *See, Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *review denied*, 151 Wn.2d 1027, 94 P.3d 959 (2004) (review of remedy element is for abuse of discretion); *River Park Square, LLC v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). Here, there was not a show cause hearing on the writ of mandamus, so the review of all the elements of the writ is *de novo*.

B. Writ of Mandamus is proper for the administrative relief sought- a final code enforcement decision by Clallam County.

A court may issue a writ of mandamus to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. RCW 7.16.200.

In order for the alternative writ to issue the petitioner must show “(1) [T]he party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no ‘plain, speedy and adequate remedy in the ordinary course of law,’ RCW 7.16.170; and (3) the applicant is ‘beneficially interested.’” *Eugster v. City of Spokane*, 118 Wash.App. 383, 402, 76 P.3d 741 (2003), *review denied*, 151 Wash.2d 1027, 94 P.3d 959 (2004).

The County did not move to quash on whether there was a clear duty to act on the code enforcement complaint under the Charter and Title 20 of the Clallam County Code as cited by Lange. Similarly, there is no dispute that Lange as an adjacent landowner is beneficially interested. *State v. Grant*, 156 Wash. 96, 102 (1930)(adjacent landowner is beneficially interested to bring a mandamus action to investigate and cure a public nuisance).

The trial court granted the motion to quash and dismissed the action, relying on LUPA as providing a plain speedy remedy in the ordinary course of the law to challenge the permits / exemptions. The court erred in quashing the writ because Lange does not seek a challenge to the permits / exemptions, but through code enforcement seeks instead (1) to have the conditions of those approvals enforced and (2) missing permits acknowledged or the code violations otherwise abated.

In a mandamus action the question of whether there is another remedy precluding the mandamus is to focus on the precise duty in question. In a mandamus action “*the remedy issue turns on whether the duty the plaintiff seeks to enforce ‘cannot be directly enforced’ by any means other than mandamus*” *Eugster*, 118 Wn. App. at 414 (quoting *Bd.*

of Liquidation v. McComb, 92 U.S. 531, 536, 23 L.Ed. 531, 2 Otto 531 (1875))(emphasis added).

Here the remedy for the duty in question is a final written enforcement decision on investigation and enforcement of code violations under Title 20 of the CCC. LUPA does not apply to bar enforcement of code violations that are determined from the prior issuance of the permits / exemptions. LUPA, as applicable to the current permits / exemptions provides judicial *appellate* review, and is not an available remedy for the duty sought to be enforced, i.e. Title 20 code enforcement. *See, Chaney v. Fetterly*, 100 Wn. App. 140, 995 P.2d 1284 (2000) (noting the differences between administrative jurisdiction, original jurisdiction, and original appellate jurisdiction, as between the county and the superior court).

Lange does not seek judicial appellate review of the permits, but seeks a final investigation and enforcement decision under the original administrative jurisdiction of the County's code enforcement process in Title 20 of the Clallam County Code of the existing permits / exemptions conditions of approval. *See, Chaney v. Fetterly*, 100 Wn. App. 140, fn.2 995 P.2d 1284 (2000)(relief based upon enforcement of permit conditions is not a collateral challenge to the permit barred failure to utilize LUPA).

In this mandamus action, then, Lange is requesting this writ of mandamus to compel the County to exercise its original administrative jurisdiction of Title 20 code enforcement. He properly filed a code complaint under Title 20 alleging, among other things, that the structures were not built where they were approved, and that there were missing permits based upon misrepresentations by the Cebelaks. (CP 10-16).

Accordingly, Clallam County erroneously recasts the relief sought in this mandamus action, and this is the basis for the trial court's error. The trial court erred in barring the writ based upon LUPA for two independent reasons: (1) the writ commanded the county to investigate and enforce code violations, which include violations of the permit/exemption conditions of approval, and (2) there are missing permits so there were no final land use decisions to appeal because the original permits/exemptions had patent misrepresentations in the applications as shown by documentary evidence in the record. *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002) *as amended on denial of reconsideration* (2003)(Recognizing that LUPA does not protect against or bar code enforcement "against a party . . . who obtains a permit and then proceeds to violate the conditions of the permit."); *See, Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988

(2011)(building permit issued, and LUPA did not bar enforcement action by County where landowners were required to obtain missing county fish and wildlife variance which was a prerequisite to making the building permit valid and complete).

1. The Court erred in quashing the writ because it commanded the county to investigate and enforce code violations pursuant to the Clallam County Charter and Title 20.

- a. The Clallam County Home Rule Charter and Title 20 provide code enforcement relief to adjacent land owners who file a land use complaint with the Director of Planning and Development Services alleging code violations, so long as the Director investigates and enforces in accordance with the law.**

Article IV Section 4.25 of the Clallam County Home Rule Charter (“CCHRC”), as amended, provides an affirmative non-discretionary duty that “[t]he Director of the Department of Community Development **shall** . . . enforce . . . all laws, except health, with respect to the environment, natural resources, and land and shoreline development[.]” CCHRC Article IV §4.25. (CP 30.) The Charter, provided at CP 21-46, is supreme to the Clallam County Code.

The word “shall” is unequivocal in the Charter, and then again, the word “shall” is repeated *at least* four times in Title 20 code CCC 20.08.060 (See Appendix A), imposes a mandatory duty or requirement

upon the Director to investigate and enforce code violations. *See e.g., Eugster v. City of Spokane*, 118 Wash. App. 383, 407, 76 P.3d 741, 755 (2003)(use of the word shall is presumptively mandatory, creating a mandatory duty, unless contrary legislative intent is shown)(citations omitted). *But see, Carkeek v. City of Seattle*, 53 Wn. App. 277, 282 766 P.2d 480 (1989)(holding conflicting duties unique in Seattle’s code and to the situation at issue prohibit a writ of mandamus as there is no “clear duty”). Moreover, any conflict between the Title 20 and the Charter would be resolved in favor of the Charter as it is supreme. Here also, the general laws strongly favor mandatory enforcement in the shoreline areas. RCW 90.58.210-230. (Appendix D).

Here, the County did not argue to the trial court the writ should be quashed on these grounds, and, moreover, there are no conflicting duties by the Director to investigate and enforce violations of permit or exemption conditions of approval, rather the charter, the statutes and shoreline codes, and Title 20 all create mandatory duties to investigate and enforce. It is true that Title 20 provides multiple options and tools for the Director to address code violations, but at a minimum investigation and issuing a final determination is mandatory under the Charter and Title 20, and choosing one of the options of enforcement. The Director cannot do

nothing. The Director is bound by the Charter, and “shall ... enforce.” CCHRC §4.25; (CP 30); *Cf. Richards v. City of Pullman*, 134 Wn. App. 876, 882 (2006) (certain code enforcement procedures are mandatory, including investigation of alleged violations).

So the Director shall investigate and provide a written decision on the code complaint and shall enforce, but may select one of the enforcement strategies under Title 20. The Director is not excused to do nothing. It was error to quash the writ seeking investigation and enforcement of the code complaint.

b. Clallam County code Title 20 is an administrative remedy to have local experts investigate and cure code violations, which include missing permits and the failure to comply with permit and exemption conditions of approval, such as set back conditions, such that the land use code is applied in an equal and constitutional manner.

Clallam County has an administrative code enforcement scheme for civil code violations pursuant to CCC Title 20, placing mandatory duties upon the Director of Community Development, based upon the concept of code violations constituting public nuisances by definition.¹ (Appendix A). Civil code violations include violations of permit

¹CCC 20.08.020 (1). This code enforcement framework is markedly different from the code enforcement framework available to Chelan County in *Nykriem v. Chelan County*, 146 Wn.2d 904, (2002). However, *Nykriem* is distinguishable simply because in that case the County was challenging the same land use decision through a declaratory relief action. Here, Lange is not challenging the permit decisions, but is seeking compliance with the permits and any missing permits.

conditions CCC 20.08.010 (3)(b), or conditions of approval or requirements of exemptions CCC 20.08.010 (3)(a). Missing permits would also be a civil code violation. CCC 20.08.010(3)(a).

By its plain definition, then, a code violation as defined in the code, include any violation of the conditions of permit or exemption approval required in the land use control codes needed for the issuance of the permit or exemption at the time the permit or exemption is approved, whether expressed on the face of the permit/exemption or not. CCC 20.08.010(3),(9). If a development as constructed exceeds the scope or permission of an exemption, or a permit, or violates the conditions of approval, a continuing violation of the code exists, which would be subject to code enforcement until cured. CCC 26.10.700(5) (“Failure to comply with all the terms and conditions of a permit decision is also subject to enforcement pursuant to the provisions of CCC Title 20, Code Compliance”); CCC 20.20.050 (suspension or revocation of permit for code violations).

The legislative history of Title 20 also supports the conclusion that Title 20 is a separate administrative remedy available to the County and neighbors of code violators, to ensure compliance with the County code, permits, and conditions of approvals, and that after the completion of the

code enforcement process (potentially following an appeal to the hearing examiner), an aggrieved party can appeal under LUPA. (Appendix B at p.3). However, the code enforcement title was not meant to be a substantive land use control on the development of land. (Appendix B p.4). Accordingly, a code enforcement procedure should not substantively in and of itself, be a collateral challenge to the permits, but could merely trigger other law if properly carried out. *Id.* Therefore, this supports the conclusion that code enforcement is not a collateral attack on permits because it does not change permits/exemptions in and of itself.

Here, Lange's land use complaint details many code violations by failure of the Cebelak's to build their structures in accordance with the terms and conditions of their permits. (CP10-16). Lange properly invoked the County's administrative jurisdiction over continuing code violations pursuant to Title 20, by lodging a land use complaint with the County in the spring of 2012(CP 10-16) and prior in 2007 (CP192-199). CCC 20.08 *et seq.*

c. The Trial Court erred in dismissing based upon LUPA because the writ of mandamus compelled investigation and enforcement of code violations detailed in the land use complaint in accordance with Title 20, and as such is not a collateral challenge to the permits/exemptions land use decisions.

The Order and writ commanded the County and Director to investigate and enforce and provide a written decision thereon (CP 47-51), not to re-determine past permits, but to investigate the complaint which included allegations of code violations including non-compliance with those permits and/or any missing permits. (CP 13-15). Accordingly, the code enforcement is not a collateral challenge because (1) LUPA plainly distinguishes between code enforcement decisions and permit/exemption issuance decisions, there being different issues raised, and (2) to interpret LUPA otherwise to bar the writ of mandamus violates due process.

i. LUPA plainly distinguishes between code enforcement decisions and permit/exemption issuance decisions.

LUPA by its plain terms is mutually exclusive to judicial review by way of a writ of mandamus. RCW 36.70C.030(1) reads:

[T]his chapter does not apply:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of 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 shoreline 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... (emphasis added).

Likewise, land use decisions appealable pursuant to LUPA, include both permit decisions and some enforcement decisions. RCW 36.70C.020(2)(a)-(c). RCW 36.70C.020(2) defines “land use decision” as follows:

(2) ‘Land use decision’ means a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(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 ordinance 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[.]*”

(emphasis added).

Under the plain language of LUPA, permit decisions are different than code enforcement decisions, so appeal rights under LUPA of a permit decision (judicial review remedy) are different than enforcement rights under Title 20 and Charter to provide a code enforcement decision

(administrative remedy). *See, Chaney v. Fetterly*, 100 Wn. App. 140 (2000). Even presuming for the sake of argument the original permits / approvals were “illegal,” LUPA does not bar an examination by the County into whether Cebelak is compliant with such permits / approvals through code enforcement.

In *Chaney v. Fetterly*, 100 Wn. App. 140, 995 P.2d 1284 (2000), a landowner obtained a building permit and a variance, lawfully, from County. *Chaney*, at 143-144. They began to construct, and received notice that they were constructing in violation of their permit. *Id.* The issue was regarding their variance and building permit that was issued required an 8’ set back, and the building was allegedly being constructed within that 8’ set back. *Id.* The neighbor sued the landowner, for failure to comply with the permit conditions requiring an 8’ set back. *Id.* at 144. The building owner defended saying Chaney failed to exhaust administrative remedies with the county to the hearing examiner and then to superior court, which included failure to appeal the original building permit, failure to appeal the County’s “no action” code enforcement decision, and failure to appeal the County’s withdrawal of a stop work order. *Id.* at 144, fn.2-3.

The trial court granted summary judgment for failure to exhaust administrative remedies. The Court of Appeals reversed, and held that

when an agency and a court have concurrent original jurisdiction, the action invoking the court's appellate jurisdiction is not a prerequisite to exhaust. The crux to the analysis was the nature of the relief sought in superior court- the Chaney's were seeking compliance with the permits as issued, and were not assailing the variance or the 8' set back, but rather compliance with the building permits and 8' set back. The court noted that Chaney's had no reason to be appealing the building permits because they were not objecting to anything the building permits allowed. *Id.* 145 fn.8. Accordingly, the appellate jurisdiction under LUPA would not have covered the same issues— i.e. whether the building as constructed complied with the conditions of approval (i.e. did the building as constructed encroach on the 8' required set back) – not an issue reviewable in a challenge to the permit. Accordingly, the failure to exhaust or appeal within the LUPA statute of limitations did not bar the Chaney's suit regarding compliance with the permits. *Id.*² Likewise, where code enforcement of permit / exemption conditions of approval is a different issue than a challenge to the permits, LUPA cannot be remedy in the ordinary course of the law to obtain code enforcement. *Id.*

² It should be noted that Lange directly sued Cebelak's in Clallam County seeking *inter alia* injunctive relief, which action is still pending after a summary judgment, in an analogous situation to *Chaney v. Fetterly*. See CP 65-102.

Though ultimately properly overruled on the LUPA issue, the Court of Appeals in *Nykriem* also recognized this principal regarding the distinction between administrative and judicial original jurisdiction in *Chaney v. Fetterly*, but the appeals court in *Nykriem* misapplied the concept by failing to recognize the distinction between an action to challenge the same land use approval, versus challenging the *compliance with the conditions of that land use approval* that was at issue in *Chaney v. Fetterly*. See, *Chelan County v. Nykriem*, 105 Wn. App. at 360 *overruled by*, *Chelan County v. Nykriem*, 146 Wn.2d 904, 52 P.3d 1 (2002) (holding that LUPA barred the County's declaratory relief action challenging the same permit).

Direct review of the same decision and issues by alternative judicial means is flatly barred by LUPA. *Nykriem*, 146 Wn.2d 904 (Declaratory relief on the same land use decision barred, irrespective of quasi-judicial or ministerial nature of land use decision). *Stafne v. Snohomish County*, 156 Wn. App. 667 (writ of mandamus attempting to force a decision already made to not docket a comprehensive plan amendment barred by available appeal remedies) *affirmed on other grounds*, 174 Wn.2d 24, 271 P.3d 868 (2012). Further, subsequent permit decisions are unreviewable based upon the failure to challenge earlier

permits under LUPA if the sole ground for appeal was decided by the previous land use decision, *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410 (2005), but review of compliance with permit conditions is not barred. *Id.* at 411 (petition for revocation was not barred by LUPA, but failed on its merits because the hearing examiner did not err in concluding the landowner commenced construction in accordance with its special use and grading permits). Even in *Samuel's Furniture*, a case involving whether or not the development was within the shoreline jurisdiction or not, it was pointed out that LUPA would not prevent Ecology from challenging compliance with permit conditions “against a party . . . who obtains a permit and then proceeds to violate the conditions of the permit.” *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002); *cf. Wenatchee Sportsman v. Chelan County*, 141 Wn.2d 169, 182 (2000) (“The only issue that can be raised concerning the rezone is whether the plat application conforms to the [illegal] zoning requirements.”)

Again in contrast to Clallam County's lack of any response in this matter, courts routinely recognize post permit code enforcement not being barred by LUPA. In *HJS Development v. Pierce County*, 148 Wn.2d 451, 61 P.3d 1141 (2003), a landowner obtained a preliminary plat which contained conditions of approval. *HJS Development*, at 463. The

landowner subsequently violated those conditions of approval. *Id* at 464-465. Upon discovery of violations of the permit conditions, the County instituted code enforcement proceedings to rescind the land use approval. The Supreme Court affirmed the hearing examiner's revocation of the approvals based upon the violations of the conditions of approval, and that the conditions could never be satisfied. *Id* at 484. "When conditions of approval of [a land use approval] cannot be satisfied or are deliberately violated, remedial action, such as revocation, may be the only remedy." *Id* at 483. Revocation is appropriate in cases in which it is impossible to satisfy the permit conditions of approval because of knowing and deliberate violations of conditions. *Id* at 484. *See also, Richards v. City of Pullman*, 134 Wn. App. 876, 879 (2006)(code enforcement commenced more than six months after issuance of building permit where building was built in violation of set-back requirements, and because landowner did not timely appeal code enforcement decision under LUPA by one day, could not challenge the code enforcement on statute of limitations grounds).

In other words and by analogy, the issuance of a prior illegal permit, does not preclude an examination of whether or not the structures after they are built are in compliance with the terms of those illegal permits / approvals through code enforcement. In deed, Lange is seeking

a code enforcement investigation and final determination on whether or not the development as constructed was approved and permitted and whether necessary permits were not obtained. These are separate types of “land use decisions.” RCW 36.70C.020(2)(a)-(c). *See, Post v. City of Tacoma*, 167 Wn.2d 300, (2006)(noting that the Court has never had occasion to determine whether LUPA applies to a local jurisdiction’s determination of violations and assessments of penalties.)

So likewise, the issue of whether the structures as-built conform with the OHWM and set back conditions of approval and as represented and permitted could not have been addressed in a LUPA appeal of the permits, because the structures were simply not installed at the time the initial approvals were issued, and there has been no final land use determination regarding compliance with permit conditions and approvals based upon missing information. *Chaney v. Fetterly*, 100 Wn. App. 140, 995 P.2d 1284 (2000); *See also, Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011)(building permit issued, and LUPA did not bar enforcement action by County where landowners were required to obtain missing county fish and wildlife variance which was a prerequisite to making the building permit valid and complete).

LUPA does not apply to a writ of mandamus to obtain such a final

code enforcement decision, just as LUPA wouldn't apply to a writ of mandamus forcing a decision on a permit where a local government has dallied in not providing one.

- ii. **The denial of a final land use decision on the code enforcement matter through inaction and/or barring it under LUPA, violates due process and would otherwise be unconstitutional as applied, so LUPA should not be interpreted to bar the writ of mandamus action.**

To interpret that LUPA such that it bars the relief Lange seeks (a code enforcement determination), violates canons of construction that statutes should not be construed to be unconstitutional as applied. Title 20 entitles Lange to code enforcement relief. The County is denying him that relief in an arbitrary and capricious manner. Accordingly the superior court erred.

“To determine whether a regulation violates due process, we employ a three prong due process test. *Guimont I*, 121 Wn.2d at 609, 854 P.2d 1. We must determine (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether the regulation is unduly oppressive on the landowner. *Guimont I*, 121 Wn.2d at 609, 854 P.2d 1.”

Peste v. Mason Cnty., 133 Wn. App. 456, 474, 136 P.3d 140, 149 (2006).

County codes provide protected property rights in neighbors, protected by procedural due process, and compliance with county codes is a property right. *Asche v. Bloomquist*, 132 Wn. App. 784, 797, 133 P.3d 475 (2006).

In addition to procedural due process, an as applied takings claim also requires a final decision, which the County is denying.

[A]n “as applied” regulatory takings claim is not ripe until “the initial government decision maker has arrived at a definite position, conclusively determining whether the property owner was denied ‘all reasonable beneficial use of its property.’ ” *Guimont II*, 77 Wash.App. at 85, 896 P.2d 70 (quoting *Orion Corp. v. State*, 109 Wash.2d 621, 632, 747 P.2d 1062 (1987)).

Peste v. Mason Cnty., 133 Wash. App. 456, 473, 136 P.3d 140, 149 (2006).

The County is denying that final decision. LUPA cannot be interpreted to confer special privileges or revoke constitutional substantive due process as applied and property rights, and the trial court’s application of LUPA barring the writ of mandamus seeking code enforcement does that, so must be in error. If LUPA grants immunity from enforcement, it is legislation extending “irrevocable special privilege” not available to all” in violation of the Washington Constitution Section 8 and Section 12.

The County must now give Lange a final answer or determination under due process, and has been depriving Lange of due process by failing

to respond. The delayed responses and equivocal responses violate due process if LUPA bars the writ of mandamus. The County needs to investigate and determine these violations or not, as the code complaint raises genuine issues of material fact as to code violations. The writ of mandamus should enter.

Here, Lange filed a land use complaint pursuant to Title 20 of the Clallam County Code. The complaint seeks investigation and enforcement pursuant to Title 20 code enforcement regarding code violations, and the Clallam County Home Rule Charter and Code makes enforcement non-discretionary. There is no other relief besides mandamus to compel the County through the Planning Director to investigate and enforce the June 2012 code complaint. The writ merely commands an investigation and enforcement decision.

iii. Common Sense / Policy

If as pointed out in *Lauer*, county experts aren't able to determine whether a permit application has misrepresentations in 28 days, how could a layman neighbor determine whether a permit application had misrepresentations in 21 days, especially if nothing were built? The LUPA statute of limitations does not bar this action.

If Clallam County is to rely on LUPA as the mechanism for quashing the writ of mandate previously granted, it must explain how LUPA terminates its non-extinguishable duty to investigate and enforce its codes and the terms of permits issued in this matter. That is what this case is about – not whether LUPA forces Lange to be silenced regarding permit issuances, but whether LUPA paralyzes the County’s authority to enforce the alleged violations. Under *Samuel’s Furniture, Lauer, and Chaney*, and *HJS Development*, enforcement of permit conditions are not barred by failure to appeal the original permit. *Cf.* CCC 20.20.050 (suspension or revocation of permit for code violations).

In short, while it is shown that significant part of Lange’s complaint relate to code enforcement of on-going code violations, it cannot be determined with certainty whether any parts of Lange’s complaint are in fact collateral challenges barred by LUPA without the County, through its expertise, completing an investigation of the code complaint through the Title 20 process. Therefore, LUPA does not bar the compulsion of the investigation and enforcement through a writ of mandamus.

2. LUPA does not bar the writ of mandamus seeking investigation of code violations for missing permits because there were no final land use decisions to appeal as there was an absence of permits and/or the original permits/exemptions had patent misrepresentations in the applications as shown by documentary evidence in the record

Courts have also held that the failure to appeal under LUPA also relates to the appellate subject matter jurisdiction over a collateral attack to a prior land use decision. *Chelan County. v. Nykreim*, 105 Wn. App. 339, 360, 20 P.3d 416, 427-28 (2001)(holding a LUPA defense was a challenge to the court's subject matter jurisdiction and could be raised for the first time on appeal) *rev'd on other grounds*, 146 Wn.2d 904, 52 P.3d 1 (2002)(holding LUPA barred the action). In deed, the County in this action argues that the court has no jurisdiction based upon LUPA. (CP 61)

Lauer v. Pierce County exemplifies that the LUPA statute of limitations does not bar code enforcement by a County and the requirement for permits if they are missing, as prompted by a code enforcement action, even after building permits are issued and

construction begins. *Lauer v. Pierce County*, 173 Wn.2d 242, 250-252 (2011).

As the code enforcement scheme is an administrative remedy which Lange has properly invoked, Lange has been thwarted in exhausting his administrative remedies with respect to missing permits and violations of existing permit conditions, and accordingly had no standing to challenge any purported land use decisions until these remedies administrative remedies of code enforcement are exhausted.

Without a final determination on the code enforcement decision for missing permits and/or misrepresentations in obtaining approvals, there is nothing to appeal and Lange has no standing to appeal. *Ferguson v. City of Dayton*, 168 Wn. App. 591 (2012)(administrative review process created by City prevents a building permit from becoming final); *see also, Lauer v. Pierce County*, 173 Wn.2d 242, 262, 267 P.3d 988 (2011)(In addition to being fully completed, a land use application must be valid, that is, it must be made in good faith and not contain any knowing misrepresentations of material fact) (citing *Kelly v. Chelan County*, 157 Wn. App. 417, 425 (2010)). Lange is entitled to a final code enforcement decision for a “final land use decision” so he can either appeal or accept the decision of the Director. RCW 36.70C.020(2)(c).

Lauer makes it plain that unauthorized development, despite the appearance of a permit or approval, is not vested as to a neighbor nor county inaction under LUPA if there are conditions in the permit that require additional permits, but especially where misrepresentations are made in obtaining those approvals. *Lauer*, 173 Wn.2d 242, 267 P.3d 988 (2011); *See, Twin Bridge Marine*, 162 Wn.2d 825, 844, 175 P.3d 1050 (2008) (“the building permits became valid and the right to construct vested due to Ecology’s [failure to appeal under LUPA]”)(emphasis added). *Lauer* indicates that where there is a missing permit, the issuance of a different permit that requires the missing permit as well, does not bar the requirement that the missing permit be obtained through code enforcement by the County, nor does it bar a challenge to the issuance of the missing permit once the land owner attempts to obtain it.

The only difference between the current action and *Lauer*, is that in *Lauer*, Pierce County did code enforcement, which is what Lange is seeking the County to do in this matter by way of writ of mandamus. The current action is merely one step removed from the situation in *Lauer*, based on the Clallam County’s failure to investigate and issue a final code enforcement decision.

In *Samuel's Furniture* a collateral attack of a local jurisdiction's determination a development was outside the shoreline jurisdiction based upon the absence of an allegedly required shoreline permit was barred under LUPA, where the issue was a dispute regarding the actual shoreline jurisdiction. *Samuel's Furniture*, 147 Wn.2d at 448. But *Samuel's Furniture* is plainly distinguishable from *Lauer* because in *Samuel's Furniture*, the issue was an interpretation of the permit jurisdiction of the shoreline act, *Samuel's Furniture*, at 448, and in *Lauer*, the building permit location was squarely within an undisputable set back and the County brought code enforcement at the insistence of neighbors. *Lauer*, 173 Wn.2d at 249-50. The landowner in *Lauer* had a previous dispute regarding the existence of the buffer, and lost, but misrepresented the buffer on subsequent applications. *Id.* Moreover, in *Samuel's Furniture*, it was pointed out that LUPA would not prevent Ecology from challenging compliance with the permit conditions "against a party . . . who obtains a permit and then proceeds to violate the conditions of the permit." *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 456 (2002).

One of the conditions of the building permit issued in *Lauer* was that the permit site plan must include "all set backs from buildings" and that "[a]ny land use permits required to approve the building permit

application shall be applied prior to or with the building permit application.” *Id* at 260. The court noted that the permit, though issued and construction had begun, was missing those conditions of a site plan showing the true 35-foot set-backs, and was missing a fish and wildlife variance, as determined through a code complaint and code enforcement action. *Id* at 250. Based upon the code enforcement action in *Lauer*, the County obtained a required but missing wildlife variance. *Id* at 251.

When the neighbors in *Lauer* challenged the issuance of the wildlife variance, they had standing because they had participated through code enforcement and were not required to appeal the original building permits into superior court because LUPA standing required merely exhaustion of *administrative* remedies. *Id* at 255-56. Likewise, though the County ostensibly had notice of the issuance of the building permit, it was not barred under LUPA from bringing code enforcement and requiring missing permits. *Id* at 250-251.

Here, Lange is in the same position as the neighbors in *Lauer*, except the County refuses to make a code enforcement decision.

In *Twin Bridge Marine v. Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008), Ecology’s challenge based upon an alleged absence of a shoreline permit was rejected for failure to appeal a building permit under LUPA.

But in *Twin Bridge Marine*, unlike in *Lauer*, there was a previous shoreline permit and two SEPA decisions that authorized the building permits and it was *implicitly* decided by the County that no new shoreline permit was required, and hence Ecology was barred from raising the issue of the need for new shoreline permits and collecting penalties. *Twin Bridge Marine*, 162 Wn.2d at 845-846. *Twin Bridge Marine* analogized the finality principles that LUPA provides to the vesting development rights. *Id.* at 843. Even though the wildlife variance was a necessary prerequisite to the building permit in *Lauer*, and arguably would have been an *ipso facto* approval, the Supreme Court in *Lauer* did not adopt the rationales of *Twin Bridge Marine* (*ipso facto* approval) and *Nykriem* (county cannot challenge its own building permit decision), when it recognized the code enforcement process invoked by the neighbors and carried out by the County in making the landowner conform his construction to missing permits.

Based upon the holdings and rationale of *Twin Bridge Marine*, *Nykriem*, and *Lauer*, the only distinction in *Lauer* is either that code enforcement is not barred by LUPA as a collateral challenge to a building permit, or that misrepresentations in permit applications are grounds to collaterally challenge a prior building permit.

Twin Bridge Marine even noted that *Samuel's Furniture* public policy statement regarding Ecology's enforcement authority favoring administrative finality was premised upon the applicants "good faith" reliance on a local government's determination. *Twin Bridge*, 162 Wn.2d at 845. *Lauer* also focused upon "good faith" reliance in its discussion on vesting only with complete *and valid* land use applications in the analogous vesting context. *Lauer*, 173 Wn.2d at 262 (a valid permit is one without knowing misrepresentations).

Accordingly, with respect to the absence of permits and evidence of material misrepresentations in permit applications and approvals, under a reasonable extension of *Lauer* that harmonizes the decision with *Nykriem* and *Twin Bridge Marine*, there is no final land use decision protected by the LUPA statute of limitations or which could be appealed pursuant to LUPA, and therefore, LUPA does not bar this action for writ of mandamus compelling investigation and enforcement of the Clallam County Code for missing permits and knowing misrepresentations in the applications.

No one disputes the Cebelak's developments are outside of the shoreline jurisdiction, and no one disputed or challenged the OHWM as determined by WDFW in 1998. Yet there is evidence Cebelak

misrepresented the location of the OHWM on building permits, exemptions, and shoreline exemptions for the sea wall/bulkhead. *Compare* (CP 182) *with* (CP 190). Cebelak's buildings are not set back from the OHWM the conditioned amount of 35 feet, so at a minimum, a shoreline variance is required. The sea wall/bulkhead was also represented to be set back from the OHWM on the shoreline exemption that was approved (but originally denied). (CP 169-182). The bulkhead was represented to be only four feet tall, but when the storm exposed it (CP 169-182), it was over eight feet tall (CP 111). Accordingly, there is prima facie evidence that Cebelak is missing permits and/or necessary approvals based upon knowing misrepresentations, or is in violation of his permits and conditions of approval.

C. The Statute of Limitations Does Not Apply to Code Violations Which Are Properly Deemed Public Nuisances And Continuing Under Clallam County Code, Therefore the Mandamus Action is Not Barred by Limitations or LUPA.

Code violations in Clallam County do not cure through the passage of time. Assuming there are code violations as defined by Clallam County code for violations of conditions of approval in the existing permits / exemptions, and/or missing required permits, no statute of limitations nor LUPA bar investigation and enforcement of those code violations, as the

writ commands, where there has been no RCW 36.70C.020(2)(c) final enforcement determination.

Accordingly the writ is not barred by limitations for two reasons: (1) Clallam County Code defines code violations to be public nuisances, RCW 7.48.190 provides no lapse of time can legalize a public nuisance, RCW 36.32.120(10) empowers Counties to declare nuisances, and (2) code violations are continuing in nature, and a code enforcement remedy is equitable and injunctive.

The legislature has specifically empowered Counties to declare by ordinance what shall be deemed a nuisance, including a public nuisance. RCW 36.32.120(10). “Have the power to declare by ordinance what shall be deemed a nuisance within the county...; to prevent, remove, and abate a nuisance at the expense of the parties creating, causing, or committing the nuisance;...” RCW 36.32.120(10).

Clallam County code makes violations of permit conditions and code violations public nuisances, through the definition of code violation. In turn, the CCC defines code violations as public nuisances. CCC 20.08.020 (1); 21.01.150 (3); 27.01.260 (2); 27.12.055 (3); 33.59.010 (3); and 35.01.130 (1). (Appendix C). All such public nuisances are continuing nuisances until abated. RCW 7.48.190. In turn, public nuisances

continuing in nature are not subject to a statute of limitations. RCW 7.48.190 provides that no lapse of time can cure a public nuisance and such are continuing nuisances. The codes provide for investigation and enforcement in accordance with CCC Title 20.

Moreover, Title 20 provides a timeline framework of how to enforce the code, not whether to enforce the code. Specifically, the suggested times for decisions are non-jurisdictional, that is “Failure to meet these guideline response dates does not in any way prevent the Director from investigating and enforcing potential violations outside of these response dates.” CCC 20.08.050.

In accordance with violations of code being public nuisances not subject to cure by the lapse of time, Washington does not recognize doctrines of “active acquiescence” in violations, or “permit by estoppel” *Mercer Island v. Steinmann*, 9 Wn. App. 479, 486 (1973). Rather, where code violations exist and are continuing to injure a neighbor, they must be rectified. *Radach v. Gunderson*, 39 Wn. App. 392 (1985) (equitable injunctive relief abating the condition is appropriate for continuing violations); *State v. Grant*, 156 Wash. 96 (1930). There has been no final land use decision on the current enforcement matter, so a takings claim is not ripe. *Asche v. Bloomquist*, 132 Wn. App. 784 (2006).

Though not argued by the County, limitations nor LUPA do not bar the writ of mandamus action seeking code enforcement because there has been no final land use decision *on the code enforcement matter*, and even if there were, a new code enforcement matter could be brought until the code violation (public nuisance) were abated.

A final land use decision for purposes of appellate jurisdiction is “one which leaves nothing open to further dispute and which sets at rest a cause of action between the parties” *Samuel’s Furniture*, 147 Wn.2d at 452 (quoting Black’s Law Dictionary 567 (5th ed. 1979)).

Here, while code enforcement requests were made, no final land use decision under RCW 36.70C.020(2)(c) were made or provided to Lange. In fact, this is what the mandamus is seeking – a final determination. The County does not raise this argument in their motion to quash, and for good reason. No final code enforcement decision on 2007 complaint nor an affirmative “no further action” was provided. (CP 201); (CP 119 line 3-8); (CP 225-232). No statements from the County indicating it would take “no further action.” Likewise, in 2012 there are no statements from the County fixing the consummation of the code complaint process. In 2012, the Director equivocally indicated it would be “foolish” for her to comment “on the shoreline matter” when both sides

had legal counsel. (CP 18). *See, Bock v. State*, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978)(noting Washington adopted the federal approach to a “final” appealable decision).

No final unequivocal response was provided following the 2012 land use code complaint. (CP 18). Moreover, as discussed above, because code violations are continuing in nature and as deemed public nuisances no statute of limitations applies, a code complaint under the administrative process of Title 20 could be issued over and over until there is abatement.

D. Attorney Fees For Bad Faith

Attorney’s fees have not historically been awarded in a writ of mandamus action per se in Washington, as attorney’s fees are generally not awarded as part of the cost of litigation in the absence of a contract, statute, or recognized ground in equity.

However, here there are grounds in equity to award attorney’s fees for bad faith, willful, wanton, and arbitrary misconduct by Clallam County in refusing to investigate and provide a final land use decision on the code enforcement complaint especially in the shoreline areas of the State. *See, Stegmeier v. City of Everett*, 21 Wn. App. 290, 295 (citing *Barten v. Turkey Creek Watershed Joint Dist. No.32*, 200 Kan. 489, 438 P.2d 732 (1968), *Annot.* 73 A.L.R.2d 903 (1960)).

After more than seven years of seeking a final code enforcement decision and awareness by the County of the allegations, and the Director merely indicates it would be “foolish” for her to respond and investigate, are the actions and inactions of the County wanton, arbitrary, and capricious entitling Lange to attorney’s fees and costs in equity and pursuant to the Shoreline Management Act. Moreover, while some minimal effort was expended on responding to the complaint, good faith was not exercised by the County. Delays were invoked unnecessarily based upon a promise of an attorney’s opinion. (CP 225-231). Particularly, in response to a plea from Scott Lange for the County to give him some definitive answer after dragging its feet and giving him an attorney opinion on just one aspect of the complaint from 2007, John Jay remarked in an email to the Director taking a flippant attitude of – let’s let Lange prove the violations, he “doth protest too much.” (CP 228). Likewise, the new Director provided no good faith response despite prima facie evidence of code violations. “It would be foolish for me to comment on the shoreline matter, specific to your neighborhood, with legal representation on both sides” (CP 18).

Attorney’s fees may also be awarded under the Shoreline Management Act for shoreline act violations by violators, including the

County. RCW 90.58.230. As the County is a “person” subject to the shoreline act, RCW 90.58.030(1)(e), the failure to enforce and tolerating violations or refusing to investigate would be a violation of the act. RCW 90.58.230. *See also*, CCC 35.01.030(3). If there are violations, the County’s refusal to even decide whether it will do code enforcement would be a violation of the Shoreline Management Act and CCC Title 35, attorney’s fees are appropriate to consider on remand on statutory grounds as well. It is not Lange’s duty to investigate and enforce the land use code, it is the Directors. Clallam County should pay in equity for the work Lange has had to do investigating this matter, including attorney’s fees and costs.

VII. Conclusion & Request for Relief

Because there is no other way to force the County Director to do investigation and enforcement of its code for code violations pursuant to a code complaint under CCC 20.08 in superior court, the writ of mandamus in this matter was erroneously quashed and the matter was erroneously dismissed.

This Court should remand to the trial court to enter a judgment and reinstate the writ of mandamus. Alternatively at a minimum this Court

should remand to have the trial court set a hearing on why the County should not investigate the code enforcement complaint of June 2012. The Court should remand to allow a hearing on the arbitrary and capriciousness of the County's inactions and bad faith for an award of reasonable attorney fees for having to prosecute this action at the superior court and appellate court.

Dated this 14 day of June, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. C. Ojala", written over a horizontal line.

Peter C. Ojala, WSBA#42163
Carson Law Group, P.S.
3202 Hoyt Ave, Everett WA 98201
(425) 493-5000
Attorney for Appellants

VIII. APPENDIX

- e. (include relevant portions of the record, applicable rules, statutes).**

APPENDIX A

Chapter 20.04 NAME AND PURPOSE

Sections:

20.04.010 Name and purpose.

20.04.020 Statement of goals.

SOURCE: ADOPTED:

Ord. 812 04/03/07

20.04.010 Name and purpose.

(1) The purpose of this title is to identify processes and methods to achieve compliance with laws and regulations adopted by Clallam County pursuant to Article XI, Section 11 of the Washington Constitution and other State laws that promote and protect the general public health, safety, and environment of Clallam County residents. According to the provisions of RCW 36.32.120(7), this title declares certain acts to be civil violations and establishes civil enforcement procedures and penalties, and also declares certain acts to be misdemeanors, punishable by a fine of not more than \$1,000 and/or imprisonment in a County jail for not more than 90 days.

(2) It is the intent of Clallam County to pursue code compliance actively and vigorously in order to protect the health, safety, and environment of the general public.

(3) While this title authorizes Clallam County to take action to enforce laws and regulations, it shall not be construed as placing responsibility for code compliance or enforcement upon Clallam County in any particular case, or as creating any duty on the part of Clallam County to any particular person(s).

20.04.020 Statement of goals.

It is the policy of Clallam County to emphasize code compliance by education and prevention as a first step. While warnings and voluntary compliance are desirable as a first step, enforcement through civil and criminal remedies should be used as needed to assure and effect code compliance. Abatement should be pursued only when appropriate and feasible.

The Clallam County Code is current through Ordinance 889, passed February 12, 2013.

Disclaimer: The Clerk of the Board's Office has the official version of the Clallam County Code. Users should contact the Clerk of the Board's Office for ordinances passed subsequent to the ordinance cited above.

Ordinances Adopted But Not Yet Codified
(<http://www.clallam.net/nav/index.asp?page=countycode>)

County Website: <http://www.clallam.net/>
(<http://www.clallam.net/>)
County Telephone: (360) 417-2234
Code Publishing Company
(<http://www.codepublishing.com/>)
eLibrary
(<http://www.codepublishing.com/elibrary.html>)

Chapter 20.08 GENERAL PROVISIONS

Sections:

- 20.08.010 Definitions.
- 20.08.020 Declaration of public nuisance, misdemeanor.
- 20.08.030 Enforcement authority and administration.
- 20.08.040 Conference.
- 20.08.050 Guidelines regarding responses to potential violations.
- 20.08.060 Investigating potential violations.
- 20.08.070 Enforcing civil code violations.
- 20.08.080 Service of citation, notice and order, and stop work order.
- 20.08.090 Right of entry and warrants.
- 20.08.100 Certificate of correction.
- 20.08.110 Limitation of liability.
- 20.08.120 Denial of permits.

SOURCE: ADOPTED:
Ord. 812 04/03/07

20.08.010 Definitions.

The words and phrases designated in this section shall be defined for the purposes of this title as follows:

- (1) "Abate" means to take whatever steps are deemed necessary by Clallam County to remove, stop, rehabilitate, demolish, or repair a condition which constitutes a public nuisance.
- (2) "Appellant" means the party appealing a citation, notice and order, order to stop work, or Director's decision on a request for certificate of correction.
- (3) "Civil code violation" means and includes one or more of the following:
 - (a) An act or omission contrary to an ordinance of Clallam County that regulates or protects the public health, safety, environment, or use and development of land or water, whether or not the ordinance is codified; and
 - (b) An act or omission contrary to the conditions of any permit issued pursuant to any such ordinance, or a notice and order or stop work order issued pursuant to this title.
- (4) "Department" means:
 - (a) The Clallam County Department of Community Development; or
 - (b) Such other department as the Clallam County Board of County Commissioners by ordinance authorizes to utilize this title.
- (5) "Director" means, depending on the code violated:
 - (a) The Director of the Department of Community Development, and authorized representatives of the Director, including, but not limited to, enforcement officers and inspectors whose responsibility includes the detection and reporting of civil code violations;

(b) The Director and authorized representatives of such other department as the Clallam County Board of County Commissioners by ordinance authorizes to utilize this title; or

(c) Such other person as the Clallam County Board of County Commissioners by ordinance authorizes to utilize this title.

(6) "Hearing Examiner" means the Clallam County Hearing Examiner, as provided in Chapter 26.04 CCC, Hearing Examiner.

(7) "Mitigate" means to take measures, subject to Clallam County approval, to minimize the harmful effects of the violation where remediation is either impossible or unreasonably burdensome.

(8) "Permit" means any form of written certificate, approval, registration, license, or any other written permission issued by Clallam County.

(9) "Permit conditions" means the conditions of permit approval including but not limited to:

(a) The provisions of any mitigation plans, habitat management plans, and other special reports submitted and approved as part of the permit approval process;

(b) The easement and use limitations shown on the face of an approved final plat map which are intended to serve or protect the general public.

(10) "Person" means any individual, association, partnership, corporation, or legal entity, public or private, and the agents and assigns of the individual, association, partnership, corporation, or legal entity.

(11) "Person responsible for code compliance" means either the person who caused the violation, if that can be determined, or the owner, lessor, lessee, tenant, or other person entitled to control, use or occupy, or any combination of control, use or occupy, of the subject property, or both.

(12) "Remediate" means to restore a site to a condition that complies with regulatory requirements as they existed when the violation occurred; or, for sites that have been degraded under prior ownerships, restore to a condition that does not pose a threat to public health, safety, or environment.

(13) "Subject property" means the real property where the civil code violation has occurred or is occurring.

20.08.020 Declaration of public nuisance, misdemeanor.

(1) All civil code violations are hereby determined to be detrimental to the public health, safety, and environment and are hereby declared public nuisances, which may be subject to abatement and recovery of abatement costs pursuant to RCW 36.32.120(10), as now enacted or hereafter amended.

(2) Any person who knowingly causes, aids, or abets a civil code violation by any act of commission or omission is guilty of a misdemeanor, punishable by a fine of not more than \$1,000 and/or imprisonment in a County jail for not more than 90 days. Each calendar week (seven days) such violation continues shall be considered a separate misdemeanor offense.

(3) The Prosecuting Attorney may at any time bring such additional injunctive, declaratory, criminal, or other actions as are necessary to enforce the provisions of the Clallam County Code.

(4) Nothing in this title shall be interpreted to mean that civil and criminal remedies for the same violations may not be brought simultaneously.

20.08.030 Enforcement authority and administration.

(1) All conditions determined to be civil code violations may be enforced pursuant to the provisions of this title except to the extent preempted by State or federal law, and except to the extent preempted by any contrary enforcement and penalty provisions contained in the ordinance being enforced.

(2) The procedures set forth in this title shall not in any manner limit or restrict the Director or the Prosecuting Attorney from remedying civil code violations or abating public nuisances in any other manner authorized by law.

(3) If the Director establishes, based on the provisions of CCC 20.08.060, that a civil code violation exists, the Director may:

- (a) Enter into voluntary compliance agreements with persons responsible for code compliance as authorized in this title, and waive a portion of unpaid penalties and associated interest according to the provisions of this title;
- (b) Issue citations and assess civil penalties ("penalties") as authorized by this title;
- (c) Issue notice and orders and order remediation or mitigation of the civil code violation, assess penalties and costs of code compliance ("costs"), and/or suspend or revoke any permit previously issued by the Director, as authorized by this title; and/or
- (d) Issue stop work orders to order work stopped at a site, as authorized by this title.

(4) The Director shall send out regular bills for penalties and costs owing under this title. If penalties and/or costs remain unpaid 90 calendar days after they have been imposed (or, if appealed, 90 calendar days after final resolution of the appeal), the Director is authorized to:

- (a) Impose interest at six percent per annum;
- (b) Record a lien against the subject property if owned by the person responsible for code compliance;
- (c) Use the services of a collection agency according to the provisions of RCW 19.60.500.

(5) In administering the provisions for code enforcement, the Director is authorized to waive any one or more such provisions so as to avoid substantial injustice by application thereof to the acts or omissions of a public or private entity or individual, or acts or omissions on public or private property including, for example, property belonging to public or private utilities, where no apparent benefit has accrued to such entity or individual from a code violation and any necessary remediation is being promptly provided. For purposes of this provision, substantial injustice cannot be based on economic hardship.

(6) The provisions of this title detailing departmental administration of code compliance procedures are intended only for the purpose of providing guidance to Clallam County

employees and are not to be construed as creating a basis for appeal or a defense of any kind to an alleged violation.

(7) The provisions of this title authorizing the enforcement of noncodified ordinances are intended to assure compliance with conditions of approval on permits or approvals which may have been granted pursuant to ordinances which have not been codified, and to enforce new regulatory ordinances which are not yet codified. Departments should be sensitive to the possibility that citizens may not be aware of these ordinances, and should give warnings prior to enforcing such ordinances, except that a stop work order may be issued any time when a civil code violation is found to be in progress.

20.08.040 Conference.

An informal conference may be conducted at any time by the Director at his discretion and subject to available resources for the purpose of facilitating communication among concerned persons and providing a forum for efficient resolution of any violation. Interested parties shall not unreasonably be excluded from such conferences.

20.08.050 Guidelines regarding responses to potential violations.

It is the County's policy to investigate and to attempt to resolve all potential code violations. At the discretion of the Director, potential violations may be processed in any order that maximizes the efficiency of enforcement. However, at times when not all potential code violations can be investigated due to lack of resources or otherwise, the most serious potential violations should be addressed before less serious potential violations. The following guidelines should be applied by the Director in prioritizing responses to potential violations:

- (1) Violations that present an imminent threat to public health or safety.
- (2) Violations that present a high risk of damage to public resources and/or facilities.
- (3) Violations involving a regulated use or activity under Chapter 27.12 CCC, Clallam County Critical Areas Code, or CCC Title 32, Floodplain Management, or involving shorelines or shorelands under Chapter 35.01 CCC, Shoreline Management.
- (4) Violations that may result in damage to real or personal property.
- (5) Violations that do not fit within any of the previous categories, and have only minor public impacts. These potential violations should be processed in the order in which they are received, and as resources allow.

As a guideline and if resources allow, all potential violations should be investigated within 60 calendar days and enforcement actions should be initiated within 120 calendar days of coming to the Department's attention. Failure to meet these guideline response dates does not in any way prevent the Director from investigating and enforcing potential violations outside of these response dates.

20.08.060 Investigating potential violations.

The Director shall determine, based on information derived from such sources as field observations, the statements of witnesses, relevant documents, and available data systems, if the following elements have been established. All elements must be established to determine that a civil code violation has occurred or is occurring.

- (1) The Director shall identify the person responsible for code compliance as defined in this title.

(2) The Director shall identify the specific provision of the relevant ordinance, permit condition, notice and order, or stop work order that has been or is being violated.

(3) The Director shall determine whether there are reasonable grounds to believe that the acts or omissions that constitute the violation did occur or are occurring. Such grounds may be established either by personal observation or by reliable evidence from witnesses.

20.08.070 Enforcing civil code violations.

When a civil code violation has been established according to the provisions of CCC 20.08.060, the Director may use the following guidelines in enforcing the violation. Failure to meet the following guidelines does not in any way prevent the Director from enforcing the violation.

(1) Stop work orders should be issued promptly upon discovering a violation in progress.

(2) Except as provided in subsections (1) and (3) of this section, the Director may issue a written warning to the person determined to be responsible for code compliance. Warnings may be mailed by regular mail, hand-delivered in person, or posted on the subject property. The warning shall inform the person determined to be responsible for code compliance of the violation and allow the person an opportunity to correct it or enter into a voluntary compliance agreement as provided for by this title. The site shall be reinspected as identified in the warning.

(3) No warning need be issued in emergencies, repeat violation cases, cases that are already subject to a voluntary compliance agreement, cases in which the violation creates a situation or condition that is not likely to be corrected within a short period of time, cases in which a stop work order is necessary, or if the person responsible for code compliance knows or reasonably should have known that the action was a civil code violation.

(4) Notice and orders may be issued in cases where corrective action, such as remediation and/or mitigation, is necessary to bring about compliance.

(5) Citations may be issued in cases where corrective action is not necessary or already ordered in a previous enforcement action.

Any complainant who provides a mailing address and requests to be kept advised of enforcement efforts shall be mailed copies of all written warnings, voluntary compliance agreements, citations, notice and orders, stop work orders, decisions on requests for certificate of correction, notices of hearings, and orders of Hearing Examiner with regard to the alleged violation. Unless otherwise served as a person responsible for code compliance, the landowner of the subject property, and the applicant of the underlying permit shall also be mailed copies of all written warnings, voluntary compliance agreements, citations, notice and orders, stop work orders, decisions on requests for certificate of correction, notices of hearings, and orders of Hearing Examiner with regard to the alleged violation.

20.08.080 Service of citation, notice and order, and stop work order.

(1) Service shall be made on a person responsible for code compliance by one or more of the following methods:

(a) Service in person may be made by leaving a copy of the citation or notice and order with the person, or at the person's house of usual abode with a person of suitable age and discretion who resides there.

(b) Service directed to the landowner and/or occupant of the subject property may be made by posting the citation or notice and order in a conspicuous place on the subject property and concurrently mailing a copy of the same as provided for below, if a mailing address is available.

(c) Service by mail may be made by mailing two copies of the citation or notice and order, postage prepaid, one by ordinary first class mail and the other by certified mail, to the person's last known address. The taxpayer's address as shown on the tax records of Clallam County shall be deemed to be the proper address for the purpose of mailing such notice to the landowner of the subject property. Service by mail shall be deemed effective upon the third business day following the day of mailing.

(d) For notice and orders only, when the address of the person responsible for code compliance cannot reasonably be determined, service may be made by publication once in a local newspaper with general circulation and, in addition, the notice and order should be posted in a conspicuous place on the subject property.

(e) Service of a stop work order may be made by posting the stop work order in a conspicuous place on the subject property or by serving the stop work order in any other manner permitted by this section.

(2) The person effecting the service shall make proof of service by a written declaration stating the date and time of service and the manner by which service was made.

(3) The failure of the Director to make or attempt service on any person named in the citation, notice and order, or stop work order shall not invalidate any proceedings as to any other person duly served.

20.08.090 Right of entry and warrants.

(1) Any entry made to private property for the purpose of inspection for code violations shall be accomplished in strict conformity with Constitutional and statutory constraints on entry. The Director (or his designee) is authorized to enter upon any property for the purpose of administering this title provided the Director shall make entry only if such entry is consistent with the Constitutions and laws of the United States and the State of Washington.

(2) The Director is authorized to enter upon property or premises to determine whether Clallam County codes are being obeyed, and to make any examinations, surveys, and studies as may be necessary in the performance of his or her duties. These may include but are not limited to the taking of photographs, digital images, videotapes, video images, audio recordings, samples, or other physical evidence. All inspections, entries, examinations, studies, and surveys shall be done in a reasonable manner. If the property is occupied, the Director shall ask permission of the occupants before entering the property. If an owner, occupant, or agent refuses permission to enter or inspect, the Director may seek an administrative or criminal search warrant.

(3) The Prosecuting Attorney may request that a District Court or Superior Court of competent jurisdiction issue an administrative search warrant. The request shall be supported by an affidavit of a person having knowledge of the facts sworn to before the judge and establishing the grounds for issuing the warrant.

(a) If the judge finds that the affidavit given upon proper oath or affirmation shows probable cause to believe that a Clallam County code has been violated, the judge may

issue an administrative warrant for the purpose of conducting administrative inspections or gathering of evidence. The warrant shall:

- (i) State the grounds for its issuance and the name of each person whose affidavit has been taken in support of the warrant;
- (ii) Be directed to the Director (or his designee) or a person authorized by the relevant code to execute it;
- (iii) Command the person to whom it is directed to inspect the area, premises, or building identified for the purpose specified and the evidence that may be gathered;
- (iv) Direct that it be served during normal business hours.

(b) When executed, a copy of the warrant shall be left on the property or the premises searched.

(c) A warrant issued under this section shall be executed and returned, accompanied by a written inventory of any evidence taken, within 10 calendar days of its date unless, upon a showing of a need for additional time, the court orders otherwise.

(d) If evidence is seized pursuant to a warrant, a copy of the written inventory of any evidence taken shall be provided to the person from whom or from whose premises the evidence was taken, together with a receipt for the evidence taken.

(e) The judge who has issued a warrant shall attach thereto a copy of the return (the endorsement made by the person executing the warrant, stating what (s)he has done under it, the time and mode of service, etc.) and all papers returnable in connection therewith and file them with the Clerk of the Court in which the inspection was made.

(4) Any search warrant obtained pursuant to criminal sections authorized under this title shall be governed by appropriate Washington State statutes and court rules.

20.08.100 Certificate of correction.

(1) It shall be the responsibility of any person identified as a person responsible for code compliance to bring the subject property into compliance with Clallam County Code. Payment of penalties and costs, applications for permits, acknowledgement of stop work orders, and compliance with other remedies does not substitute for performing the corrective work required to bring the subject property into compliance with Clallam County Code.

(2) A violation shall be considered ongoing and daily penalties continue to accrue up to the date that the subject property has been brought into compliance with Clallam County Code, as determined by the Director, and as evidenced by a written certificate of correction in the form of a letter issued by the Director.

(3) A request for a certificate of correction shall be in writing on a form made available by the Director and shall be submitted to the Director. This request shall include the following:

- (a) The address, legal description, and/or Clallam County tax parcel number of the subject property;
- (b) A declaration of corrective actions performed;
- (c) Authorization for the Director or his designee to enter and remain upon the subject property, during normal Clallam County business hours, to verify whether the subject

property has been brought into compliance, in the form of written permission of the occupant or, if not occupied, the landowner; and

(d) Name, mailing address, and phone number of the person requesting the certificate of correction.

(4) The Director shall issue a decision on a request for a certificate of correction in writing within 10 calendar days of receipt of the written request and shall serve the same on the person responsible for code compliance, the party requesting the certificate of correction, the landowner of the subject property, the complainant, and the applicant of the underlying permit, if any, by mailing a copy of the same to the last known address of each party. The person effecting the mailing shall declare in writing the date and address the mailing was made. Service by mail shall be deemed effective upon the third business day following the day of mailing. The decision of the Director on a request for a certificate of correction may be appealed pursuant to the appeal provisions of this title.

(5) The certificate shall include a legal description of the subject property, shall indicate the date on which daily penalties ceased to accrue (the date the request for a certificate of correction was received), and shall state if any unpaid penalties and costs for which liens have been recorded are still outstanding and continue as liens on the subject property.

(6) A certificate of correction shall not constitute nor be considered a warranty, guarantee, or certification of any kind, express or implied, by Clallam County as to the physical condition of the subject property.

20.08.110 Limitation of liability.

Any person determined to be responsible for code compliance pursuant to a citation or notice and order shall be liable, jointly and severally with all persons responsible for code compliance, for the payment of any and all penalties and costs. However, if the landowner of the subject property affirmatively demonstrates that the action which resulted in the violation was taken without the landowner's knowledge, that landowner shall be liable, jointly and severally with the person responsible for code compliance, only for the costs of bringing the subject property into compliance with Clallam County Code.

20.08.120 Denial of permits.

The Director shall not issue any permit or other development approval on a property subject to a stop work order, notice and order, citation, or voluntary compliance agreement as long as the civil code violation that is the subject of the stop work order, notice and order, citation, or voluntary compliance agreement remains uncorrected, except that the Director may issue such permits necessary to correct the violation.

The Clallam County Code is current through Ordinance 889, passed February 12, 2013.

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Code Publishing Company
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(<http://www.codepublishing.com/elibrary.html>)

Chapter 20.12 VOLUNTARY COMPLIANCE AGREEMENTS

Sections:

20.12.010 Authority and effect.

20.12.020 Contents.

SOURCE: ADOPTED:

Ord. 812 04/03/07

20.12.010 Authority and effect.

(1) Whenever the Director determines that a code violation has occurred or is occurring, the Director may enter into a voluntary compliance agreement with a person responsible for code compliance as provided for in this chapter.

(2) A voluntary compliance agreement may be entered into at any time after issuance of a warning, citation, notice and order, or stop work order and before an administrative appeal is decided pursuant to the provisions of this title.

(3) A landowner's submission of a request to be considered for assistance under a voluntary compliance agreement does not in any way toll, suspend, or otherwise affect any deadlines, periods of appeal, accrual of daily penalties, and the like.

(4) The voluntary compliance agreement is a commitment by the person responsible for code compliance to perform specific corrective actions, which may consist of a combination of remediation of the site and mitigating the impacts of the violation.

(5) By entering into a voluntary compliance agreement, the person responsible for code compliance admits that the conditions described in the voluntary compliance agreement exist and constitute a civil code violation, and acknowledges that, if the Director determines that the terms of the voluntary compliance agreement have not been met, (s)he may be liable for any remedy authorized by this title.

(6) The Director may record a copy of the executed voluntary compliance agreement with the Clallam County Auditor's Office. In that case, the Director shall record a certificate of correction with the Clallam County Auditor's Office when all violations specified in the voluntary compliance agreement have been corrected as required by the voluntary compliance agreement.

(7) The Director may grant in writing an extension of the time limit for compliance or agree to a modification of the required corrective action if the person responsible for code compliance makes a request therefor in writing, which describes in detail the circumstances that render full or timely compliance under the original conditions unattainable, and shows due diligence or substantial progress in correcting the violation.

(8) The voluntary compliance agreement is not a settlement agreement.

20.12.020 Contents.

In addition to identifying the name and address of the person entering into the voluntary compliance agreement ("responsible person"), a voluntary compliance agreement shall contain the following:

- (1) The address, legal description, and/or Clallam County tax parcel number of the subject property;
- (2) A summary of the information that forms the basis of the determination that a violation has occurred or is occurring on the subject property;
- (3) A reference to the specific provisions of the ordinance, permit condition, notice and order provision, or stop work order that was or is being violated;
- (4) An acknowledgement by the responsible person that the conditions described in the voluntary compliance agreement exist and constitute a civil code violation, and that (s)he is the person responsible for code compliance as to that violation;
- (5) A description of the corrective actions to be taken by the responsible person, including any permits and associated mitigation plans and/or special reports that must be obtained, the due date by which the corrective action must be completed, and an acknowledgement by the responsible party that these actions are necessary to correct the violation;
- (6) Authorization for the Director to enter and remain upon the subject property, during normal Clallam County business hours, to determine whether the terms of the voluntary compliance agreement are being met, in the form of written permission of the occupant or, if not occupied, the landowner;
- (7) An acknowledgement by the responsible person that (s)he is responsible for notifying the Director in writing of the corrective actions taken to meet the terms of the voluntary compliance agreement;
- (8) An acknowledgement by the responsible person that the violation is not considered corrected unless and until the Director issues a written certificate of correction;
- (9) Acknowledgement by the responsible person that (s)he is responsible for the stated amount of penalties and costs being assessed and accruing pursuant to the provisions of this title, and that any waiver of penalties according to the schedule provided for in this title shall only apply if the responsible person meets all the terms of the voluntary compliance agreement;
- (10) Acknowledgement by the responsible party that penalties and costs are due 30 calendar days after they are imposed, and that if any penalties or costs remain unpaid 90 calendar days after they are imposed, interest will begin to accrue at six percent per annum, a lien will be recorded against the subject property (if owned by the responsible person), and/or the amounts due will be forwarded to a collection agency for collection;
- (11) An acknowledgement that failure to meet the terms of the voluntary compliance agreement may subject the responsible person to any remedy authorized by this title, including but not limited to assessment of additional penalties, costs, suspension, revocation, or denial of a development permit, and/or abatement;
- (12) An acknowledgement by the responsible party that (s)he knowingly, voluntarily, and intelligently waives the right to appeal the existence of the violation, the determination of responsibility, the agreed upon corrective action, and the imposed penalties and costs;
- (13) An acknowledgement that the voluntary compliance agreement will be recorded against the subject property in the Clallam County Auditor's Office.

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Chapter 20.16 CITATIONS

Sections:

20.16.010 Authority and effect.

20.16.020 Contents.

SOURCE: ADOPTED:

Ord. 812 04/03/07

20.16.010 Authority and effect.

(1) Whenever the Director has reason to believe that a civil code violation has occurred or is occurring, or that the terms of a voluntary compliance agreement have not been met, the Director may issue a citation to any person responsible for code compliance. Issuance of a warning, stop work order, or notice and order is not required before issuing a citation.

(2) A citation represents a determination that a civil code violation has occurred and that the person named therein is responsible for code compliance.

(3) Failure to appeal the citation according to the procedures set forth in this title shall render the citation a final determination that the conditions described in the citation exist and constitute a civil code violation, that the person named therein is liable, and that the stated penalties are properly imposed.

(4) Penalties will be imposed according to the provisions of the penalties schedule contained in this title.

(5) The payment of penalties does not relieve a person responsible for code compliance of any obligation to stop and correct a violation and does not waive any of the penalties and costs accrued and accruing under previously or subsequently issued citations, stop work orders, notice and orders, or any other legal action.

(6) Issuance of a citation in no way limits the Director's authority to issue a stop work order, notice and order, or subsequent citations, or pursue any other legal action.

(7) The Director may revoke or modify in writing a citation issued under this title if the original citation was issued in error or if a party to a citation was incorrectly named. A modified citation shall identify the reasons and underlying facts for modification and shall be governed by the same procedures as citations contained in this title.

20.16.020 Contents.

In addition to identifying the name and address of the person to whom the citation is issued, the citation shall contain the following:

(1) The address, legal description, and/or Clallam County tax parcel number of the subject property;

(2) A summary of the information that forms the basis of the determination that a violation has occurred or is occurring on the subject property;

(3) A reference to the specific provisions of the ordinance, permit condition, notice and order provision, or stop work order that was or is being violated;

- (4) Notification of the amount of civil penalty per violation being assessed and accruing pursuant to the provisions of this title, and notification that penalties are due and payable within 30 calendar days of service of the citation;
- (5) Notification that if any penalties remain unpaid 90 calendar days after they are imposed, interest will begin to accrue at six percent per annum, a lien will be recorded against the subject property (if owned by the responsible person), and/or the amounts due will be forwarded to a collection agency for collection;
- (6) Notification that the citation may be appealed to the Hearing Examiner within 14 calendar days of the date of service of the citation;
- (7) Notification that collection of the penalties assessed in the citation shall be stayed as to the appealing party while any administrative appeal under this title is pending;
- (8) Notification that a failure to appeal the citation within the appeal time limit renders the citation a final determination that the conditions described in the citation exist and constitute a civil code violation, that the named party is liable as a person responsible for code compliance, and that the stated penalties are properly imposed;
- (9) Notification that failure to correct the violation potentially subjects the named person to further remedies, including but not limited to assessment of additional penalties, costs, orders to correct the violations, suspension, revocation, or denial of a development permit, and/or abatement;
- (10) Notification that it is the duty of the person responsible for code compliance to notify the Director in writing of any actions taken to achieve compliance;
- (11) Notification that the violation is not considered corrected unless and until the Director issues a written certificate of correction.

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Chapter 20.20 NOTICE AND ORDERS

Sections:

- 20.20.010 Authority and effect.
- 20.20.020 Contents.
- 20.20.030 Assessment of penalties.
- 20.20.040 Assessment of costs of code compliance ("costs").
- 20.20.050 Suspension or revocation of permit.

SOURCE: ADOPTED:

Ord. 812 04/03/07

20.20.010 Authority and effect.

(1) Whenever the Director has reason to believe that a civil code violation has occurred or is occurring, or that the terms of a voluntary compliance agreement have not been met, the Director may issue a notice and order to any person responsible for code compliance.

Issuance of a warning, stop work order, or citation is not required before issuing a notice and order.

(2) A notice and order represents a determination that a civil code violation has occurred and that the person named therein is responsible for correcting the violation, as well as the other penalties and remedies specified in the notice and order.

(3) Failure to appeal the notice and order according to the procedures set forth in this title shall render the notice and order a final determination that the conditions described in the notice and order exist and constitute a civil code violation, that the person named therein is liable, and that the stated sanctions are properly imposed.

(4) Issuance of a notice and order in no way limits the Director's authority to issue a citation, stop work order, or a subsequent notice and order, or pursue any other legal action. Payment of the penalties and costs assessed under the notice and order does not relieve the person named therein of the duty to correct the violation and does not waive any of the penalties and costs accrued and accruing under previously or subsequently issued citations, stop work orders, notice and orders, or any other legal action.

(5) The Director may record a copy of the notice and order with the Clallam County Auditor's Office. In that case, the Director shall record a certificate of correction with the Clallam County Auditor's Office when all violations specified in the notice and order have been corrected as required by the notice and order.

(6) The Director may grant in writing an extension of the time limit for compliance or agree to a modification of the required corrective action if the person responsible for code compliance makes a request therefor in writing, which describes in detail the circumstances that render full or timely compliance under the original conditions unattainable, and shows due diligence or substantial progress in correcting the violation.

(7) Whenever there is new information or a change in circumstances, the Director may add to, rescind in whole or part or otherwise modify a notice and order by issuing a supplemental notice and order. A supplemental notice and order shall be governed by the same procedures as notice and orders contained in this title.

(8) The Director may revoke or modify a notice and order issued under this title if the original notice and order was issued in error or if a party to an order was incorrectly named. A modified notice and order shall identify the reasons and underlying facts for modification and shall be subject to the same procedures as notice and orders contained in this title. If the underlying notice and order was recorded, the modified notice and order shall also be recorded with the Clallam County Auditor's Office.

20.20.020 Contents.

In addition to identifying the name and address of the person to whom the notice and order is directed, the notice and order shall contain the following:

- (1) The address, legal description, and/or Clallam County tax parcel number of the subject property;
- (2) A summary of the information that forms the basis of the determination that a violation has occurred or is occurring on the subject property;
- (3) A reference to the specific provisions of the ordinance, permit condition, notice and order provision, or stop work order that was or is being violated;
- (4) Notification of the corrective actions required to be taken, including any permits and associated mitigation plans and/or special reports that must be obtained and the due date by which the corrective actions must be completed;
- (5) Notification that the notice and order may be recorded against the subject property in the Clallam County Auditor's Office subsequent to service;
- (6) Notification of the amount of civil penalty per violation being assessed and accruing pursuant to the provisions of this title, and notification that penalties are due 30 calendar days after they are imposed;
- (7) Notification of any costs being assessed, and notification that costs are due 30 calendar days after they are imposed;
- (8) Notification that if any penalties or costs remain unpaid 90 calendar days after they are imposed, interest will begin to accrue at six percent per annum, a lien will be recorded against the subject property (if owned by the responsible person), and/or the amounts due will be forwarded to a collection agency for collection;
- (9) Notification of the suspension or revocation of any permit previously issued by the Director relating to the subject property;
- (10) Notification that, if the corrective work ordered to be commenced or completed is not so commenced or completed by the date specified in the notice and order, the Director may seek further remedies including but not limited to assessment of additional penalties, costs, suspension, revocation, or denial of development permits, and/or abatement, or may forward the case to the Prosecuting Attorney for consideration of additional injunctive, declaratory, criminal, or other actions as may be necessary to enforce the provisions of the Clallam County Code;
- (11) Notification that any person named in the notice and order or having any legal or equitable title in the subject property may appeal the notice and order to the Hearing Examiner within 14 calendar days of the date of service of the notice and order;

(12) Notification that enforcement of the notice and order shall be stayed as to the appealing party while any administrative appeal under this title is pending, except when the Director determines that the violation poses a significant threat of immediate and/or irreparable harm and so states in the notice and order issued;

(13) Notification that a failure to appeal the notice and order within the appeal time limit renders the notice and order a final determination that the conditions described in the notice and order exist and constitute a civil code violation, that the named party is liable as a person responsible for code compliance, and that the stated sanctions are properly imposed;

(14) Notification that it is the duty of the person responsible for code compliance to notify the Director in writing of any actions taken to achieve compliance with the notice and order;

(15) Notification that the violation is not considered corrected unless and until the Director issues a written certificate of correction.

20.20.030 Assessment of penalties.

(1) Penalties will be imposed according to the provisions of the penalties schedule contained in this title.

(2) The payment of penalties does not relieve a person responsible for code compliance of any obligation to stop and correct a violation and does not waive any of the penalties and costs accrued and accruing under previously or subsequently issued citations, stop work orders, notice and orders, or any other legal action.

20.20.040 Assessment of costs of code compliance ("costs").

(1) Independent of other remedies available under this title, the Director may charge to the person responsible for code compliance the direct and indirect costs incurred by Clallam County to pursue code compliance, including staff time at the hourly rate specified for technical assistance in Chapter 5.100 CCC, Consolidated Fee Schedule, at Planning Division services, as well as actual expenses incurred in investigating the violation and pursuing citations, notice and orders, and stop work orders, and monitoring compliance under voluntary compliance agreements.

(2) Costs charged create a joint and several obligation in all persons responsible for code compliance. Such costs are due and payable 30 calendar days from assessment. The Director may collect the costs by any appropriate legal means, including forwarding the same to a collection agency for collection. A lien for unpaid costs may be recorded according to the lien provisions of this title. A lien for costs shall run with the subject land (if owned by the person responsible for code compliance), and shall accrue interest at six percent per annum from the date of recording the lien until paid in full.

20.20.050 Suspension or revocation of permit.

(1) The Director may suspend or revoke any permit issued by that Director whenever:

(a) The permit holder has committed a code violation in the course of performing activities subject to that permit;

(b) The permit holder has failed to comply with the provisions of a notice and order, stop work order, or voluntary compliance agreement; or

(c) For a permit or approval that is subject to critical areas review, the permit holder has failed to disclose a change of circumstances on the development proposal site which materially affects a permit holder's ability to meet the permit or approval conditions or

which makes inaccurate the critical areas study that was the basis for establishing permit or approval conditions.

(2) A suspension or revocation authorized by subsection (1) of this section shall be carried out through the notice and order provisions of this chapter and shall be effective upon the compliance date established by the notice and order. The revocation or suspension may be appealed to the Hearing Examiner within 14 calendar days of the date of service of the notice and order, using the appeal provisions of this title.

(3) Notwithstanding any other provision of this title, the Director may immediately suspend operations under any permit by issuing a stop work order pursuant to the provisions of this title.

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Chapter 20.24 STOP WORK ORDERS

Sections:

20.24.010 Authority and effect.

20.24.020 Contents.

SOURCE: ADOPTED:

Ord. 812 04/03/07

20.24.010 Authority and effect.

(1) Whenever the Director has reason to believe that a civil code violation is occurring, or that the terms of a voluntary compliance agreement are not being met, the Director may issue a stop work order. Issuance of a warning, citation, or a notice and order is not required before issuing a stop work order.

(2) A stop work order represents a determination that a civil code violation has occurred or is occurring and that any work or activity that is causing or contributing to the violation on the subject property must cease.

(3) Failure to appeal the stop work order according to the procedures set forth in this title shall render the stop work order a final determination that the civil code violation occurred and that work was properly ordered to cease.

(4) Issuance of a stop work order in no way limits the Director's authority to issue a citation or notice and order, or pursue any other legal action.

20.24.020 Contents.

In addition to identifying the name and address of the person to whom the stop work order is directed, if known, the stop work order shall contain the following:

(1) The address or location of the civil code violation;

(2) The legal description or the Clallam County tax parcel number of the subject property;

(3) A summary of the information that forms the basis of the determination that a violation has occurred or is occurring on the subject property;

(4) Notification of the specific provisions of the ordinance, permit condition, or notice and order provision that was or is being violated;

(5) Notification that the stop work order requires the immediate cessation of the specified work or activity on the subject property and that work or activity may not resume unless authorized in writing by the Director in the form of a certificate of correction;

(6) Notification that a stop work order may be appealed to the Hearing Examiner within 14 calendar days of the date of service of the stop work order but that any stop work order remains in full force and effect until resolution of the appeal;

(7) Notification that failure to appeal the stop work order within the applicable time limits renders the stop work order a final determination that the civil code violation occurred and that work was properly ordered to cease;

(8) Notification that a violation of a stop work order shall be a separate civil code violation, subject to assessment of additional penalties and costs.

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Chapter 20.32 APPEALS

Sections:

- 20.32.010 Administrative appeal.
- 20.32.020 Notice of hearing.
- 20.32.030 Hearing.
- 20.32.040 Order of the Hearing Examiner.
- 20.32.050 Reconsideration of Hearing Examiner's order.
- 20.32.060 Appeal of Hearing Examiner's order.

SOURCE: ADOPTED:
Ord. 812 04/03/07

20.32.010 Administrative appeal.

(1) Within 14 calendar days from the date of service of a citation, notice and order, stop work order, or Director's written decision on request for certificate of correction, any person so served or any person with legal or equitable title in the subject property may appeal the Director's decision by filing a notice of appeal with the Director.

(2) The notice of appeal must be in writing and must be received no later than 4:30 p.m. on the last day of the appeal period at Clallam County Department of Community Development, 223 E. 4th Street, Suite 5, Port Angeles, WA 98362. If the last day of an appeal period falls on a weekend or legal holiday, the appeal period shall be extended until 4:30 p.m. the next business day. A form notice of appeal is available at the Office of Clallam County Department of Community Development and must include the following:

- (a) The phrase "Notice of Appeal";
- (b) The decision being appealed;
- (c) A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
- (d) A brief statement of the appellant's issues on appeal, noting appellant's specific exceptions and objections to the decision or action being appealed;
- (e) The specific relief requested, such as reversal or modification;
- (f) The appeal fee which is the same as required under CCC 5.100.300 for Type I, II and III appeals;
- (g) Any additional requirements set forth in the underlying Clallam County Code;
- (h) Any additional attachments provided by the appellant;
- (i) The verification, by declaration under penalty of perjury, by at least one appellant as to the truth of the matters stated in the appeal.

(3) A notice and order shall be stayed as to the appealing party while any administrative appeal under this title is pending, except when the Director determines that the violation poses a significant threat of immediate and/or irreparable harm and so states in the notice and order

issued. Any stop work order issued pursuant to this title shall not be stayed while any administrative appeal under this title is pending and shall remain in full force and effect until the appeal is final.

(4) When multiple citations, stop work orders, or notice and orders have been issued simultaneously for any set of facts constituting a violation, the appellant shall consolidate the citations and/or orders and submit one appeal.

20.32.020 Notice of hearing.

(1) If the Director receives one or more notices of appeal, the Director shall issue and serve a notice of hearing to the appellants at least 15 calendar days prior to the date of the hearing on appeal. Requests from multiple parties concerning the same violation shall be consolidated.

(2) The notice of hearing shall contain the date, time, and location of the hearing; the legal authority and jurisdiction for the hearing; the file number, address, and other identifying information for the underlying decision or action being appealed; a brief statement as to the issue(s) to be considered; reference to the applicable Clallam County Code section(s), and the name and telephone number of the Director.

(3) The notice of hearing shall be served on the party who filed the notice of appeal, the person responsible for code compliance, the landowner of the subject property, the complainant, and the applicant of the underlying permit, if any, by personal service or by mailing a copy of the same to the last known address of each party. The person effecting the service shall declare in writing the date and address the personal service or mailing was made. Service by mail shall be deemed effective upon the third business day following the day of mailing.

(4) In addition to the preceding and at the cost of appellant, the Director shall provide notice of the hearing on appeal by mailing a copy of the notice of hearing to the following persons:

(a) All owners of adjacent properties that abut the subject property. Documents of record within the Clallam County Assessor's Office shall be controlling as to the status of legal ownership. For the purposes of this section, properties separated by public right-of-way are considered to be adjacent properties.

(b) If the underlying permit is a Type III permit, to all parties of record established for the underlying permit, which include any person or persons who submitted written or oral testimony during the review of the underlying permit and/or any person who requested in writing to receive notification of any decisions relating to the underlying permit.

20.32.030 Hearing.

Appeals of administrative decisions made under this title shall be heard by the Clallam County Hearing Examiner as an open record appeal hearing pursuant to the provisions of CCC 26.10.620 and Clallam County administrative policies.

20.32.040 Order of the Hearing Examiner.

The order of the Hearing Examiner shall be served on the person responsible for code compliance, the party who filed the notice of appeal, the landowner of the subject property, the complainant, and the applicant of the underlying permit, if any, by mailing a copy of the same to the last known address of each party. The person effecting the mailing shall declare in writing the date and address the mailing was made. Service by mail shall be deemed effective upon the third business day following the day of mailing.

20.32.050 Reconsideration of Hearing Examiner's order.

Appeal decisions of the Hearing Examiner may be reconsidered upon a motion of reconsideration pursuant to Clallam County administrative procedures.

20.32.060 Appeal of Hearing Examiner's order.

The appeal decisions of the Hearing Examiner as set forth in the order of the Hearing Examiner shall be final and conclusive unless proceedings for review are properly and timely commenced in Superior Court.

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APPENDIX B

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August 2006 DRAFT proposed ordinances

Code Compliance Title

- 1. Memo re Code Compliance Title & amendments**
- 2. New Title – Code Compliance**

Amendments to enforcement sections of:

- 3. Chapter 21.01 – Building & Construction Code**
- 4. Chapter 27.01 – Environmental Policy**
- 5. Chapter 27.12 – Critical Areas Code**
- 6. Chapter 29.47 – Subdivisions**
- 7. Chapter 33.59 – Zoning**
- 8. Section 33.49.510 – WCF**
- 9. Chapter 35.01 – Shoreline Management**
- 10. Section 26.01.080 – Planning Agency
Section 26.10.700 – Consolidated Dev't Permit Process**

Junk Vehicles:

- 11. Memo re Junk Vehicle Public Nuisance**
- 12. New Chapter 19.60 – Junk Vehicle Public Nuisance**

Selinda Barkhuis, Senior Planner
Clallam County Department of Community Development
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MEMORANDUM
Clallam County Department
of Community Development

Memo re Code Compliance Title and amendments
From Selinda Barkhuis, Senior Planner, DCD
Dated August 8, 2006

Summary

The purpose of this project is to identify consistent processes and methods to achieve compliance with the laws and regulations of Clallam County. The emphasis is on achieving voluntary compliance, as a result of warnings and voluntary compliance agreements.

The previous draft of the new Code Compliance Title ("CCT Draft 1") was circulated to the BOCC, Planning Commission, BOH, Public Works, Prosecutor's Office, and Hearing Examiner in April, 2006. The attached draft ("CCT Draft 4") is a significantly improved version.

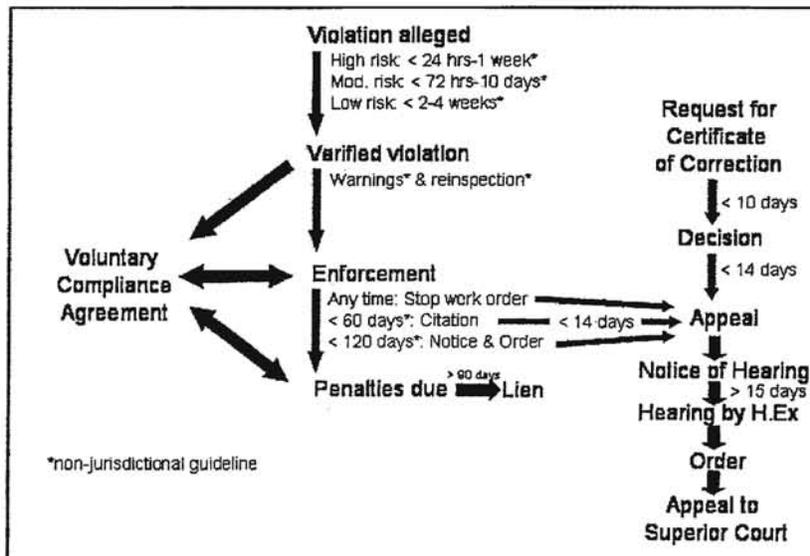
The purpose of the attached Amendments is to refer to the new Code Compliance Title for enforcement. No substantive changes were made to any of these codes.

The proposed Junk Vehicles ordinance also refers to the new Code Compliance Title for certain procedures, and should, therefore, be adopted simultaneously.

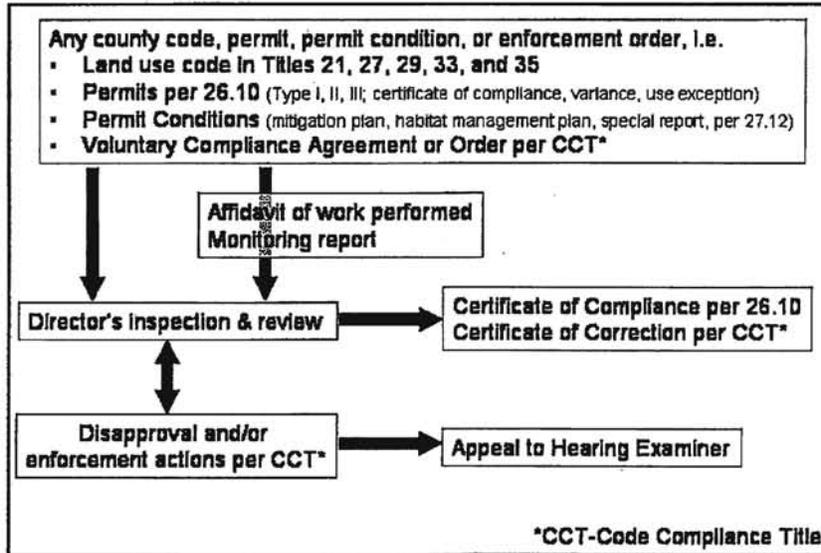
Next Steps

1. To make final changes
2. To decide on process of adoption

Flowchart of proposed Code Compliance Title as reflected in CCT Draft 4:



Flowchart of monitoring and enforcement of land use codes, permits, conditions, and enforcement orders:



Summary of comments received to CCT Draft 1

- Chris Cowgill received CCT Draft 1, a copy of the April 3 2006 Status Report to the BOCC, and the comments to those received from the Prosecutor's Office, and responded back as follows: "Both myself and Ray Bradford had a chance to look it over and neither of us have any new suggestions or concerns. The proposed code looks like a good way to give our departments enforcement options, and does not appear to assign any requirements that would be against our interest, nor does it require any major procedural changes for the department."
- The Planning Commission received CCT Draft 1 and the April 3 2006 Status Report to the BOCC, and CCT Draft 1 was also presented to them during the April 19 2006 Planning Commission Meeting. They had questions which were answered during the meeting and some of which are discussed below.
- DHHS received CCT Draft 1 and the April 3 2006 Status Report to the BOCC and asked some follow up questions and relayed a request expressed by WRIA 20 planning unit members for tougher penalties and enforcement of critical area violations.
- The Prosecutor's Office received CCT Draft 1 and made comments. The attached CCT Draft 4 reflects all the substantive comments received, although additional substantive changes were made at my own initiative subsequent to review by the Prosecutor's Office that have not (yet) been reviewed by the Prosecutor's Office.

Questions asked about Code Compliance Title, and answers

- Chapter 1
 - Question: Do we want to add provision of what the new title does or does not apply to?
Answer: I have added language to section 3 of Chapter 1 that indicates that the Title's provisions are "preempted by state or federal law," and any "contrary enforcement and penalty provisions contained in the ordinance, resolution, regulation or public rule being enforced," and "shall not be construed to affect the authority of

the Clallam County Board of Health to enforce the Clallam County health code regulations.”

- **Chapter 2**

- **Question: How does Chapter 2 section 5 “guidelines” play out with section 7 “procedures for identifying violations?”**

Answer: Section 5 provides guidelines for deciding which cases to investigate first where a choice must be made and Section 7 provides guidelines for deciding what remedy to pursue when a violation is found. These sections specify that their provisions are NOT jurisdictional but are meant merely to guide staff. In my opinion, including them will help achieve the following goals: timely response to public concerns; consistent response to similar violations; adequate staffing levels.

- **Chapter 36**

- **Administrative Appeal Process:** The Code Compliance Title at section 3 of Chapter 36 provides that appeals of administrative decisions made under the title shall to the Clallam County Hearing Examiner as an open record appeal hearing.

- The Code Compliance Title at section 1 of Chapter 36 restricts the right to appeal administrative decisions to “any person so served [with a citation, Notice and Order, stop work order, or Director’s decision on request for certificate of correction] or any person with legal or equitable title in the subject real property.”

- The Code Compliance Title at section 6 of Chapter 36 provides that the Hearing Examiner’s decision is final, subject to appeal to Superior Court. There would not be an interim appeal from the Hearing Examiner to the BOCC.

- **Public Notice:** The Code Compliance Title provides that the Notice of Appeals Hearing would go out to the neighbors of the subject property, akin to appeals of Type I-II permits under CCC 26.10.610.

- LUPA at RCW 36.70C has been subject to criticism because it requires aggrieved parties to appeal final administrative decisions within 21 days even though these aggrieved parties may not even have been aware of the underlying decision.

- Just like judicial appeals of permit actions are governed by LUPA, judicial appeal of land-use related enforcement actions are also governed by LUPA. Contrary to permit actions, however, enforcement actions are not subject to the Local Project Review provisions of RCW 36.70B. What that means is that, as far as I can tell, there is no requirement for public notice in enforcement actions like there is for permit actions, even though neighbors must avail themselves of the same LUPA appeal proceedings if they consider themselves aggrieved at the outcome.

- Since neighbors may well consider themselves aggrieved by the outcome of enforcement actions on a neighboring property. When they find out that they are precluded from appealing the outcome because they missed the LUPA deadline as a result of being unaware of the underlying administrative appeal, they may well become critical at the county for having failed to provide them with some sort of notice.

- I suggest, and such suggestion is reflected in section 2(4) of Chapter 36 of CCT Draft 4, that neighbors receive notice when an enforcement action is being administratively appealed, in the same way and to the same extent that neighbors receive notice when a Type I or II permit action is being administratively appealed, as provided for in CCC 26.10.610(5).

Amendments

The enforcement sections of the following land-use codes are proposed for amendment to refer to the new Code Compliance Title.

- Chapter 21.01, Building and Construction Code. The amendment reflects the fact that none-SEPA permit applications are not governed by 26.10, therefore requiring the included appeal process language.
- Chapter 27.01, Environmental Policy.
- Chapter 27.12, Critical Areas Code.
- Chapter 29.47, Subdivisions. The amendment reflects the relevant enforcement provisions of RCW 58.17.
- Chapter 33.59, Zoning.
- Section 33.49.510(5), WCF.
- Chapter 35.01, Shoreline Management. CCC Chapter 35.01 adopts Chapter 90.58 RCW and Chapter 173-27 WAC, as amended. The amendment refers to the Code Compliance to fill in the procedural "gaps" of the enforcement provisions of the RCW and WAC. 
- Chapter 26.01, Planning Agency.
- Chapter 26.10, Consolidated Development Permit Process.

Adopting the Code Compliance Title and amendments

• Planning Enabling Act and Growth Management Act requirements

- **Code Compliance Title.** In my opinion, the proposed ordinance creating the new Code Compliance Title is subject to neither the Planning Commission hearing procedures of RCW 36.70, nor the 60-day CTED notification procedures of RCW 36.70A. The Code Compliance Title itself does not contain any substantive "controls" on the "development of land." It merely spells out the procedures to be used by the county in exercising its right under RCW 36.32.120 to enforce its regulations (including those that contain substantive controls on the development of land). Lacking substantive controls on the development of land, the Code Compliance Title should neither be considered an "official control" under RCW 36.70, Planning Enabling Act, nor a "development regulation" under RCW 36.70A, Growth Management. 
- **Amendments.** In my opinion, the same analysis holds true for the ordinances proposing to amend existing code. The ordinances amending existing code do not propose to amend any substantive "controls" on the "development of land," but rather propose to amend only existing procedures being used by the county in exercising its right under RCW 36.32.120 to enforce its regulations (including those that contain substantive controls on the development of land).

• SEPA

- **Code Compliance Title.** The Code Compliance Title is also not subject to RCW 43.21C, State Environmental Policy, which at WAC 197.11.800, Categorical Exemptions, at (19) specifically exempts "regulations... relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment..."
- **Amendments.** In my opinion, the same analysis holds true for the ordinances proposing to amend existing code.

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APPENDIX C

Chapter 27.12 CLALLAM COUNTY CRITICAL AREAS CODE

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- 27.12.015 Statement of policy.
- 27.12.020 Policy goals.
- 27.12.025 Applicability.
- 27.12.030 Regulated uses and development activities.
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- 27.12.040 Pre-existing uses.
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27.12.855 Geologic hazardous areas – Special requirements.

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27.12.865 Critical aquifer recharge areas – Special requirements.

Part Nine. Definitions

27.12.900 Definitions.

SOURCE: ADOPTED:

Ord. 471 06/16/92

AMENDED SOURCE: ADOPTED:

Ord. 493 12/01/92

Ord. 533 11/30/93

Ord. 609 02/25/97 (Extends Expiration)

Ord. 612 04/08/97 (Extends Expiration)

Ord. 618 07/08/97 (Extends Expiration)

Ord. 630 01/13/98 (Extends Expiration)

Ord. 631 02/03/98

Ord. 641 07/14/98 (Extends Expiration)

Ord. 659 01/12/99 (Extends Expiration)

Ord. 671 07/13/99 (Extends Expiration)

<u>Ord. 681</u>	12/28/99
<u>Ord. 709</u>	06/26/01
<u>Ord. 767</u>	01/25/05
<u>Ord. 815</u>	04/03/07

Part One. General Provisions

27.12.010 Statement of purpose and authority.

The purpose of this chapter is to identify and protect critical areas as required by the Growth Management Act of 1990 (Chapter 36.70A RCW) and to implement the goals and policies of the Clallam County Comprehensive Plan, Title 31 of the Clallam County Code (CCC), by establishing general requirements and regulations. Furthermore, the purpose is to protect public health, safety and welfare, and maintain or enhance the biological and economic resources of the County while respecting legally established private property rights.

This chapter is adopted under the authority of the Growth Management Act, Chapter 36.70A RCW, the Planning Enabling Act, Chapter 36.70 RCW and the Clallam County Charter, as now or hereafter amended. This chapter supplements the development requirements contained in the various chapters of the Clallam County Code by providing for additional controls and measures that are necessary to protect critical areas.

In the administration of this chapter, Clallam County will consult with regulatory agencies and utilize best available science. Provisions of this chapter shall be considered the minimum necessary to protect regulated critical areas; shall be liberally construed to serve the purposes of this chapter; and shall be deemed neither to limit nor repeal any other powers under State statute or County regulation.

27.12.015 Statement of policy.

It is the policy of Clallam County that the beneficial functions of critical areas be protected, and potential dangers or public costs associated with the inappropriate use of such areas be minimized by reasonable regulation of uses within, adjacent to or directly affecting such areas.

27.12.020 Policy goals.

To implement the purpose and policy stated above, as well as the environment and open space goals adopted in the Clallam County Comprehensive Plan, CCC 31.02.320, as applicable, it is the intent of this chapter to accomplish the following:

- (1) Conserve and protect the environmental attributes of Clallam County that contribute to the quality of life for residents of both Clallam County and the State of Washington.
- (2) Guide development proposals to the most environmentally suitable and naturally stable portion of a development site.
- (3) Avoid potential loss of life and damage of property due to landslide, subsidence, erosion, or flooding.
- (4) Protect the general public against avoidable losses from maintenance and replacement of public or private facilities, property damage, subsidy cost of public mitigation of avoidable impacts, and costs to the public for emergency rescue and relief operations.
- (5) Classify, designate and regulate critical areas and identify the environmental functions that these areas perform.

- (6) Protect critical areas and their functions by regulating use and management within these areas and on adjacent lands.
- (7) Maintain and protect both acreage and critical ecological functions of regulated wetlands in Clallam County through general protection standards, enhancement, restoration and creation.
- (8) Preserve, protect, manage, or regulate critical areas that have either a direct or indirect effect on conserving fish, wildlife, other natural resources, and values.
- (9) Protect water quality by controlling erosion, by providing guidance in the siting of land uses and activities to prevent or reduce the of release chemical or bacterial pollutants into waters of the State, and by maintaining stream flows and habitat quality for fish and marine shellfish.
- (10) Conserve drainage features that function together or independently to collect, store, purify, discharge and/or convey waters of the State.
- (11) Maintain ground water recharge and prevent the contamination of ground water resources to ensure water quality and quantity for public and private uses and critical area functions.
- (12) Protect areas with potential for marine aquaculture activities from degradation by other types of uses.
- (13) Protect and conserve unique, fragile, irreplaceable and valuable elements of the natural environment for the enjoyment of present and future generations.
- (14) Reduce cumulative adverse environmental impacts to water availability, water quality, wetlands, aquatic and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas.
- (15) Implement the policies of the Environmental Policy Act, Chapter 43.21C RCW; the Growth Management Act, Chapter 36.70A RCW; the Floodplain Management Code, Chapter 86.16 RCW; the Water Pollution Control Act, Chapter 90.47 RCW; the Groundwater Quality Standards, Chapter 173-200 WAC; the Clallam County Shoreline Master Program and State Shoreline Management Act, Chapter 90.58 RCW; the Clallam County Charter; the Clallam County Code and all adopted County functional and community plans.
- (16) Provide the regulatory framework to supplement adopted policies in the Clallam County Comprehensive Plan, CCC Title 31, and the Zoning Code, CCC Title 33, which set forth land use designations, open space preservation, natural resource protection, wildlife migration corridor preservation, fish and wildlife habitat protection, wetland protection and, overall, protects the natural features in Clallam County by promoting wise use of lands within Clallam County.
- (17) Maintain and enhance local control of resources in Clallam County in order to effectively respond to the challenges of Federal Endangered Species Act listings, Growth Management Act requirements and other mandates through wise land stewardship, protection of critical areas and increased knowledge of natural systems and the functions that they perform.
- (18) Promote harmonious co-existence between the ongoing use of pre-existing development sites in critical areas, and the functional protection of those critical areas.
- (19) Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(20) Promote the restoration of degraded critical areas and their buffers in order to regain lost ecological functions and values and improve the economic health and stability of Clallam County.

27.12.025 Applicability.

(1) This chapter classifies and designates critical areas in Clallam County and establishes controls for the protection of critical areas. The jurisdiction and applicability of this chapter includes the critical area and adjacent areas, as set forth in Table 1 below. Unless otherwise exempt by this chapter or by State statute, all alterations of the natural environment and all development activity within the jurisdictional areas of this chapter shall be conducted in compliance with the provisions of this chapter.

(2) The Growth Management Act, Chapter 36.70A RCW, requires the protection of the following critical areas which are classified and designated for protection under this chapter: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) aquatic and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. Table 1 below lists the categories of critical areas regulated under this chapter.

Table 1. Categories of Critical Areas and Jurisdiction of This Chapter

Critical Area	Jurisdiction
Wetlands	Within 200 feet of regulated wetlands
Aquatic habitat conservation areas (Type 1-5 waters, Shorelines of the State)	Type 1/Shorelines of the State: Equivalent to the Clallam County Shoreline Master Program Type 2-5: Within 200 feet
Wildlife habitat conservation areas	Class 1: Within 200 feet or equivalent to critical habitat designations for threatened or endangered species under the federal Endangered Species Act, or Washington State law Class 2: Within 200 feet
Geologically hazardous areas	Within 200 feet of a landslide, erosion or seismic hazard area
Frequently flooded areas	Designated special flood hazard areas (floodway and floodplain)
Critical aquifer recharge	Designated critical aquifer recharge areas

(3) Buffers are required between those development activities specified under CCC 27.12.030 and designated wetland, aquatic habitat conservation areas, wildlife habitat conservation areas and landslide hazard areas which are further outlined in this chapter.

(4) The provisions of this chapter are in addition to the land use controls set forth by CCC Title 33, Zoning Code. While additional permits are not generally required, those activities regulated by the Zoning Code are also subject to critical area requirements such as buffers and other performance standards. The development standards and other requirements of this chapter shall be incorporated into the review or approval process for other development permits administered by Clallam County.

(5) Nonproject actions, such as rezones, code and plan adoption, and annexations shall be reviewed for consistency with this chapter.

(6) When any provision of other chapters of the Clallam County Code conflicts with this chapter, that provision which provides the most protection to the critical area shall apply.

(7) This chapter recognizes legally established, pre-existing land uses and developments. Maintenance, expansion or change to pre-existing land uses and developments shall be consistent with CCC 27.12.040.

(8) Vesting. Nothing contained in this chapter shall require any change in plans, construction, alteration, or permitted use of a structure specified in a complete application for a Clallam County development permit submitted prior to the effective date of this chapter. Improvements and uses authorized by resolution of the Board of County Commissioners, or any valid permit issued by the County or the State of Washington prior to the effective date of this chapter may be developed as set forth in said permit unless the review authority determines, based on review of changed physical or environmental conditions or catastrophes, that the prior conditions will result in a detrimental impact to the critical area and/or public interest.

Land uses that have been discontinued for eighteen (18) or more consecutive months are considered abandoned and no longer vested under this chapter; except that agriculture, which has been discontinued for five (5) consecutive years, is considered abandoned and will no longer be vested under this chapter. Subsequent uses of the property must be in conformance with this chapter and the County Code, as they apply.

27.12.030 Regulated uses and development activities.

(1) Permitted Uses. Those land uses and development activities described in CCC Title 33, Zoning Code, and the Clallam County Shoreline Master Program as permitted or conditional uses are also recognized under this chapter, and are subject to the performance standards and other requirements of this chapter. Compliance with this chapter is demonstrated by the issuance of a certificate of compliance, variance or reasonable use exception, as specified in this chapter.

(2) The following types of permit and/or actions are required by the County Code. In review of these land uses and activities, Clallam County shall assure compliance with this chapter. Approval by Clallam County of the following permit or actions shall also be considered a certificate of compliance, as required by this chapter. Proposed land use or development activities not requiring one of the permit types that are listed below, and not listed as exempt in CCC 27.12.035 shall also comply with this chapter.

• Building permit	• On-site sewage disposal permit
• Public water system permit	• Land Divisions and related actions under CCC Title 29
• Zoning conditional use or variance	• Road approach permit
• Shoreline permit (variance, conditional use, substantial development, exemption)	• Storm water and/or clearing and grading, if applicable
• Comprehensive Plan and zoning map amendment	

(3) Clallam County shall not grant any permit, license or other development approval that is inconsistent with the provisions of this chapter.

27.12.035 Activities not regulated by this chapter – Exemptions.

The following developments are exempt from the requirements of this chapter and do not require a certificate of compliance; provided, that best management practices are incorporated where practicable and necessary in order to avoid impacts to critical areas:

- (1) Outdoor recreation such as bird watching, boating, bicycling, canoeing, fishing, hiking, horseback riding, hunting, jogging, photography, swimming, and similar activities not requiring clearing or grading.
- (2) Emergency work when done to protect life or property and authorized by the County Board of Commissioners. An "emergency" is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this chapter.
- (3) Construction of wildlife nesting structures not involving clearing or grading.
- (4) Education and scientific research projects which will have no damaging effect upon the environment.
- (5) Site investigation work (e.g., soil surveys, soil logs) or other related activities necessary for designating critical areas.
- (6) The placement of temporary or permanent field stakes or monuments for survey purposes, delineating critical areas and buffers, or marking of property lines or corners pursuant to CCC Title 29.
- (7) Existing and ongoing agriculture that was conducted prior to the effective date of this chapter on lands designated as critical areas or their associated buffers; provided, that such lands are classified as farm and agricultural land pursuant to Chapter 84.34 RCW; provided further, that all activities occurring on such lands employ best management practices (BMPs). For the purposes of this exemption, acceptable BMPs shall include: (a) activities carried out consistent with farm plans issued and authorized by the Natural Resources Conservation Service (NRCS); (b) activities that demonstrate consistency with total maximum daily loads (TMDL) established by the Department of Ecology for specific operations; and/or (c) activities that demonstrate consistency with standard BMPs published by the NRCS, as now or hereafter amended. Written confirmation by the administering agency that applicable BMPs are being met will constitute evidence of eligibility for this exemption. (See also CCC 27.12.025(7)).
- (8) Normal repair and routine maintenance and operation of residences, landscaping, utilities, roads, trails, irrigation and drainage ditches, and fish ponds which were lawfully constructed, approved, or established prior to the effective date of this chapter; provided, that no expansion results.
- (9) Operation and maintenance of all electric facilities, lines, equipment or appurtenances, water and sewer lines; natural gas, cable communications and telephone facilities, lines, pipes, mains, equipment or appurtenances, except for power, water, and sewer substations and pump sites or new utilities within designated frequently flooded areas; provided, that the standards specified in Part Five of this chapter are met. For the purposes of this chapter, operation and maintenance shall include those usual acts necessary for the continued use of existing services in their establish locations. Replacement, expansion, relocation or placement of new utility service lines shall be subject to the standards of this chapter, as applicable.
- (10) State forest practices conducted pursuant to Chapter 76.09 RCW. This exemption does not apply to Class IV – general (conversions), or forest practices occurring within designated urban growth areas, or forest practices designated as areas likely to convert through a memorandum of understanding between Clallam County and the Washington Department of Natural Resources, as applicable.

(11) Normal and nondestructive pruning and trimming of vegetation for maintenance purposes, or thinning of limbs of individual trees to provide for a view corridor or removal of non-native vegetation and replacement with native vegetation; provided, that increased erosion or landslide potential or negative impacts to the critical area do not result.

27.12.040 Pre-existing uses.

All uses or structures that were lawfully established prior to the effective date of this chapter and are consistent with CCC 27.12.035 may be continued. However, any development regulated by this chapter to alter, expand, replace, or reconstruct, or otherwise increase the nonconformity of a pre-existing use or structure that is located within a critical area or its buffer and does not meet the standards set forth by this chapter shall be subject to the standards of this chapter, as provided for in this section, and in addition to other standards set forth by the County Code. Clallam County shall review such development proposals and determine if the proposed development conforms with the standards of this chapter, or if the proposal increases the nonconformity of the existing development.

(1) Expansions or Minor Changes. Expansions or minor changes to a pre-existing use or structure which does not conform to the standards of this chapter may be allowed subject to the standards set forth by this subsection. Those proposals that cannot meet the provisions of this subsection shall not be permitted unless a variance or reasonable use exception approval is granted by the applicable review authority pursuant to this chapter.

(a) If a pre-existing use or structure is located within a buffer set forth by this chapter, the pre-existing use may be continued, maintained, remodeled, or reconstructed provided there is no material expansion of the use or structure within the buffer or increase of the nonconformity with this chapter. For the purposes of this subsection, a material expansion that results in an increase in nonconformity shall be determined to exist when:

(i) There is an increase in the footprint of the nonconforming use or structure, as defined by this chapter; or

(ii) For residential development, there is an increase in the number of bedrooms, bathrooms or kitchens, such that would have the effect of increasing the quantity of effluent generated by the use of the nonconforming structure.

(b) For wetland or aquatic habitat conservation area buffers, a habitat management plan pursuant to Part Eight of this chapter will be required if such activity results in material disturbance to the critical area buffer outside the original footprint.

(c) For landslide hazard buffers (includes channel meander hazards), a geotechnical report and habitat management plan in accordance with Part Eight of this chapter are required.

(d) Activities associated with pre-existing uses undertaken on previously disturbed areas (non-native soils or slopes which are the result of previous excavation, filling or grading) are permitted; provided, the activities do not decrease slope stability, do not significantly alter surface or ground water flow, do not increase the size of the disturbed areas, and do not result in a permanent decrease in vegetated area.

(e) Any expansion or minor change to a pre-existing use or structure which does not conform to the standards of this chapter and is allowed or conditionally allowed pursuant to this subsection shall require the issuance of a certificate of compliance prior to any such activity.

(2) Repair, Reconstruction or Minor Improvements within Landslide Hazards or Floodways. Repair, replacement or minor improvements of a pre-existing use or structure within a landslide hazard (includes channel meander hazards) or floodway shall comply with the following:

(a) Consistent with RCW 86.16.041(2)(a), Floodplain Management, which states: "Restriction of land uses within designated floodways including the prohibition of construction or reconstruction of residential structures except for: (i) Repairs, reconstruction or improvements to a structure which do not increase the ground floor area; and (ii) Repairs, reconstruction or improvements to a structure the cost of which does not exceed fifty percent of the market value of the structure either: (A) before the repair, reconstruction, or repair is started, or (B) if the structure has been damaged and is being restored before the damage occurred. Work done on structures to comply with existing health, sanitary, or safety codes or to structures identified as historic places shall not be included in the fifty percent determination."

(b) Pre-existing structures for human occupation located within a landslide hazard (includes meander hazards) may not be reconstructed or replaced without meeting the provisions of this chapter unless a variance or reasonable use exception approval is granted by the applicable review authority pursuant to this chapter.

27.12.045 Review authority requirements.

In the administration of this chapter and evaluation of a development proposal regulated by this chapter, Clallam County, as the review authority, shall:

- (1) Assist the public in the interpretation and applicability of this chapter.
- (2) Make available to the public information on the critical area designations including, but not limited to: maps showing the general location and extent of critical area designations; the most current Flood Insurance Study for Clallam County; and any public data related to critical area classifications, functions, and characteristics.
- (3) Confirm and make interpretations, where needed, of the regulatory boundary of regulated critical areas and the applicability of protection standards contained within this chapter.
- (4) Determine whether development proposals are consistent with this chapter, and grant, deny or condition projects as appropriate. This includes administrative authority to allow buffer width averaging and variances to buffer widths as set forth by this chapter. In all cases, the process to modify or reduce standards shall be based on site specific criteria determined through a review of individual project circumstances and based on the same criteria required for the granting of a variance.
- (5) Determine whether proposed alterations to critical areas are appropriate under the standards contained in this chapter or are necessary to allow reasonable use of the property.
- (6) Determine if the protection mechanisms and mitigation measures proposed by the applicant are sufficient to protect the public health, safety and welfare consistent with the goals, purposes and objectives of this chapter, and if so, condition the permit or approval accordingly.
- (7) As appropriate, inspect regulated uses and activities for conformance with this chapter.
- (8) Maintain and make available for public inspection all records pertaining to certificates of compliance or other permits granted, denied or conditioned under this chapter (e.g., flood elevation certifications).

- (9) Where possible, maintain and make available, a list of qualified consultants to delineate and classify critical areas and prepare special reports.
- (10) Coordinate review of proposals with other agencies of jurisdiction and relay information to the applicant about other required permits for any development proposal within designated frequently flooded areas.
- (11) Coordinate review of critical area permit approvals with other known agencies of jurisdiction as required under Chapter 26.10 CCC, Consolidated Development Permit Process Code, and Chapter 27.01 CCC, Clallam County Environmental Policy Code.
- (12) Notify adjacent communities and the Washington Department of Ecology of any alteration or relocation of a watercourse within a designated frequently flooded area, submit evidence of such notification to the Federal Insurance Administration and require that maintenance is provided within the altered or relocated portion of said watercourse so that the flood-carrying capacity is not diminished.
- (13) Develop and maintain administrative guidelines for conducting wetland classifications pursuant to this chapter, including, but not limited to: supplemental procedures for classifying wetland watershed and landscape functions; required data forms for reporting classification criteria; and procedures for updating and/or supplementing existing information.
- (14) Process any appeal of an interpretation, designation, determination, and/or decision by the review authority in accordance with Chapter 26.10 CCC, Consolidated Development Permit Process Code.

27.12.050 Official designation of critical areas.

The location and extent of critical areas shall be designated by Clallam County based upon best available information from qualified professional sources. Clallam County shall develop, and make available to the public, maps or other data bases, as appropriate, which show the location, extent, and classification of regulated critical areas as accurately as feasible. This information shall be advisory and used by the Administrator in determining the applicability of the standards of this chapter to a particular location or development proposal site. When additional information is required as to the location or extent of a critical area that may be affected by a proposed development activity, the Administrator may require additional information or may hire a qualified professional at the applicant's expense. Any land, water, or vegetation that meets the criteria of critical area designation under this chapter which is not identified on maps or other publicly available documents shall be subject to the provision of this chapter.

Critical areas shall not include those lands where a qualified professional or qualified professional sources demonstrate to the satisfaction of the Administrator that maps or other information used to identify the location and extent of critical areas are in error. Qualified professional sources shall mean the following for each of the designated critical areas listed below:

- (1) Wetlands. Written recommendations or published reports from State or federal agencies charged with wetland identification, or a biologist with wetlands ecology expertise and who is knowledgeable of wetland conditions within the North Olympic Peninsula Region, and who has professional experience in this occupation demonstrated by a minimum of two years practical experience of delineating wetlands and wetland plant identification; or those individuals or firms which have been certified by the Society of Wetlands Scientists.

(2) Aquatic and Wildlife Habitat Conservation Areas. Written recommendations or published reports from State or federal agencies charged with management of fish and wildlife resources, or a person with a bachelor's degree in biological sciences or related field from an accredited college or university and four years' experience as a practicing biologist.

(3) Geologic Hazard Areas. Written recommendations or published reports from State or federal agencies charged with identification of geologic hazards, or by a geotechnical or civil engineer or geologist licensed in the State of Washington who is knowledgeable of regional geologic conditions and who has professional expertise in geologic hazard evaluation.

(4) Frequently Flooded Areas. Written recommendations or published reports from State or federal agencies charged with the identification of flood control, or a civil engineer licensed in the State of Washington. The Administrator may allow a land surveyor licensed by the State of Washington to recommend designation of frequently flooded areas where base flood elevation data is available.

(5) Critical Aquifer Recharge Areas. Written recommendations or published reports from State and federal agencies charged with designation of geologic or water resources features, or a person(s) with a four-year degree in hydrology, hydrogeology, or related field from an accredited college or university and also having demonstrated experience in hydrogeologic assessment.

27.12.055 Enforcement.

(1) A violation is:

(a) Any action or omission that violates any of the provisions of this chapter; or

(b) Any action or omission that violates any of the provisions of any mitigation plan, habitat management plan, certificate of compliance, or other special report prepared pursuant to this chapter and approved by the review authority as part of any certificate of compliance, variance, reasonable use exception approval, or as a part of any Type I, II, or III permit issued under Chapter 26.10 CCC.

(2) A violation of the provisions of this chapter shall constitute a civil violation subject to a monetary penalty as well as prosecution as a misdemeanor. Conviction of a violation or payment of a penalty does not relieve a violator from compliance with this chapter.

(3) A violation of the provisions of this chapter is hereby determined to be detrimental to the public health, safety, and environment and is hereby declared to be a public nuisance, subject to prevention, removal, or abatement at the expense of the person(s) creating, causing, or committing such violation, and subject to the recording of a lien for such expenses against the property where the public nuisance is located, with such lien to be of equal rank with State, County, and municipal taxes.

(4) Violations of the provisions of this chapter are subject to the enforcement and penalty provisions contained in CCC Title 20, Code Compliance, except to the extent preempted by State or federal law or by any contrary enforcement and penalty provisions contained in this chapter.

(5) Any person subject to this chapter who violates any provision of this chapter or the provisions of a permit or approval issued pursuant to this chapter shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to such violation.

(6) Clallam County shall not issue any permit, license or other development approval on a development proposal site subject to an enforcement order under this section; provided, that Clallam County may issue such permits to rectify or correct enforcement orders.

27.12.060 Warning and disclaimer.

The degree of protection required by this chapter is considered reasonable for regulatory purposes. This chapter does not imply that lands outside of critical areas designated under this chapter do not provide beneficial functions nor does it imply that land outside of designated critical areas will be free from flood and geologic hazards. For example, larger floods can and will occur on occasions and flood heights may be increased by human-induced or natural causes. This chapter shall not create liability on the part of Clallam County, any officer or employee thereof, for any damages that result from reliance on this chapter or any administrative decision lawfully made pursuant to the spirit and purpose of this chapter.

Maps and other data prepared and made publicly available by the County or other agency to assist in the implementation of this chapter are based on best available information. This information shall be advisory and used by the review authority to provide guidance in determining applicability of the standards of this chapter to a property. Any land, water, or vegetation that meets the critical area designations of this chapter which are not mapped or otherwise designated within publicly available documents shall be subject to the provisions of this chapter.

27.12.065 Severability.

If any provision of this chapter or its application to any person or circumstances is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected.

27.12.070 Conflict.

Where other County regulations are in conflict with this chapter, that which provides the most protection to the critical area shall apply.

Part Two. Wetlands

27.12.200 Applicability and purpose.

This section applies to all development activities proposed within the jurisdiction for a regulated wetland. The intent of this section is to:

- (1) Maintain and protect regulated wetland acreage and increase the quality, function and values of regulated wetlands within Clallam County;
- (2) Identify hydrologic functions of wetlands and their role within a watershed and provide needed protection of the role of wetlands from a landscape ecology perspective;
- (3) Preserve natural flood control, storm water storage and drainage or stream flow patterns; and
- (4) Prevent turbidity and pollution of wetlands and fish- or shellfish-bearing waters, and maintain wildlife habitat.

27.12.205 Regulated uses and activities.

Applicability of this chapter is set forth in Part One of this chapter. Unless otherwise specified in this chapter, proposals located within the jurisdiction of this chapter as it applies to regulated wetlands shall require:

Chapter 33.59 ENFORCEMENT

Sections:

33.59.010 Enforcement.

33.59.020 –

33.59.090 *Repealed.*

SOURCE: ADOPTED:

Ord. 581 12/19/95

AMENDED SOURCE: ADOPTED:

Ord. 601 07/23/96

Ord. 817 04/03/07

33.59.010 Enforcement.

(1) A violation of the provisions of this title is any action or omission that violates a provision of this title or a condition of any permit or approval issued pursuant to this title.

(2) A violation of the provisions of this title shall constitute a civil violation subject to a monetary penalty as well as prosecution as a misdemeanor. Conviction of a violation or payment of a penalty does not relieve a violator from compliance with this title.

(3) A violation of the provisions of this title is hereby determined to be detrimental to the public health, safety, and environment and is hereby declared to be a public nuisance, subject to prevention, removal, or abatement at the expense of the person(s) creating, causing, or committing such violation, and subject to the recording of a lien for such expenses against the property where the public nuisance is located, with such a lien to be of equal rank with State, County, and municipal taxes.

(4) The provisions of this title are subject to the enforcement and penalty provisions contained in CCC Title 20, Code Compliance, except to the extent preempted by State or federal law, and except to the extent preempted by any contrary enforcement and penalty provisions contained in this title.

(5) Any person who violates this title or the provisions of a permit or approval issued pursuant to this title shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to such violation.

(6) Clallam County shall not issue any permit, license or other development approval on a development proposal site subject to an enforcement order under this chapter; provided, that Clallam County may issue such permits to rectify or correct enforcement orders.

33.59.020 – 33.59.090

Repealed by Ord. 817, 2007.

The Clallam County Code is current through Ordinance 889, passed February 12, 2013.

Disclaimer: The Clerk of the Board's Office has the official version of the Clallam County Code. Users should contact the Clerk of the Board's Office for ordinances passed subsequent to the ordinance cited above.

Ordinances Adopted But Not Yet Codified
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County Website: <http://www.clallam.net/>
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Chapter 35.01 SHORELINE MANAGEMENT

Sections:

- 35.01.010 Purpose.
- 35.01.020 Definitions.
- 35.01.030 Reference to State laws and administrative codes.
- 35.01.040 Applicability and permit requirements.
- 35.01.050 Additional criteria for exemptions.
- 35.01.060 Nonconforming development standards.
- 35.01.070 Permit authorization and expiration.
- 35.01.080 Review by Shorelines Hearings Board.
- 35.01.090 Rescission – Service of notice.
- 35.01.100 County Master Program.
- 35.01.110 Inspection.
- 35.01.120 Revisions to shoreline permits.
- 35.01.130 Enforcement.
- 35.01.140 Conflicts – Master Program with other County land use regulations.
- 35.01.150 Real property assessments.
- 35.01.160 Severability.
- 35.01.170 Effective date.

SOURCE: ADOPTED:

Ord. 44 04/19/73

AMENDED SOURCE: ADOPTED:

Ord. 62 11/19/75
Ord. 134 04/28/81
Ord. 310 09/22/87
Ord. 358 10/10/89
Ord. 388 06/19/90
Ord. 490 11/03/92
Ord. 631 02/03/98
Ord. 650 10/20/98
Ord. 819 04/03/07

35.01.010 Purpose.

The purpose of this chapter is to implement the Shoreline Management Act of 1971 (Chapter 286, Laws of 1971, 1st Ex. Sess.), and to regulate development on the shorelines of the County in a manner consistent with the policy declared in Section 2 of that Act and consistent with the Clallam County Shoreline Master Program.

This chapter sets forth procedures for the administration of the Clallam County Shoreline Master Program, adopted by Clallam County in 1976, as amended, which sets forth policies, standards and guidelines for developments along the shorelines of Clallam County.

35.01.020 Definitions.

As used in this chapter, unless the context otherwise requires, the following definitions and concepts apply. Other definitions related to shorelines are provided in the Shoreline Master Program. Any definition provided herein shall prevail over those definitions adopted in the Shoreline Master Program should a conflict arise:

- (1) "Administrator" means the Director of the Department of Community Development or his/her designee, who is responsible for carrying out the administrative duties set forth in this code.
- (2) "Advisory Committee" means the Clallam County Planning Commission or other appointed committee.
- (3) "Board" means the Board of County Commissioners of Clallam County.
- (4) Date of Filing. In accordance with WAC 173-27-130(6) and (7), the "date of filing" of an approved substantial development or a denied conditional use or variance permit with the Department of Ecology means the date that the complete application filing is received by Department of Ecology. The "date of filing" of an approved conditional use or variance permit concurrent with a substantial development permit means the date that the Department of Ecology makes a decision on the application and said decision is transmitted back to Clallam County.
- (5) "Days" shall mean calendar days unless otherwise specified in this chapter. Should a deadline fall on a weekend or official holiday, the deadline date shall extend until 5:00 p.m. on the next working day.
- (6) "Department" means the Washington State Department of Ecology.
- (7) "Department of Community Development" means the Department of Community Development of Clallam County.
- (8) Development. In accordance with WAC 173-27-030(6), "development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals including the grading of land; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level.
- (9) "Conditional use" is defined by WAC 173-27-030(4) and regulated under WAC 173-27-160 and means a use, development, or substantial development which is classified as a conditional use or is not classified within the applicable Master Program.
- (10) Exemption to Substantial Development Permit Requirements. In accordance with RCW 90.58.030(e), 90.58.140(9), 90.58.147, 90.58.355, and 90.58.515 and WAC 173-27-040 and this chapter, an application request and subsequent written statement of exemption to substantial development permit requirements is issued by the Administrator that a particular development proposal is exempt from the shoreline substantial development permit requirements as long as it is also generally consistent with the Master Program, including the policies of the Shoreline Management Act, RCW 90.58.020.
- (11) "Extreme low tide" means the lowest line on the land reached by a receding tide.
- (12) "Fair market value," as defined by WAC 173-27-030(8), means the open market bid price for conducting the work, using the equipment and facilities, and purchase of the goods, services and materials necessary to accomplish the development. This would normally equate to the cost of hiring a contractor to undertake the development from start to finish, including the cost of labor, materials, equipment and facility usage, transportation and contractor overhead and profit. The fair market value shall include the fair market value of any donated, contributed or found labor, equipment or materials.

(13) "Floodplain," as defined by WAC 173-22-030(4), for the purposes of this chapter, means the 100-year floodplain area as defined by the Federal Flood Management Agency which includes those lands along a water body which have been or may, with a one percent chance in any given year, be inundated by the base flood of such water body.

(14) "Floodway," as defined by WAC 173-22-030(5), means those portions of the area of a river valley lying streamward from the outer limits of a watercourse upon which floodwaters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually, said floodway being identified, under normal condition, by changes in surface soil conditions or changes in types or quality of vegetation ground cover condition. The floodway shall not include those lands that can reasonably be expected to be protected from floodwaters by flood control devices maintained by or maintained under license from the federal government, the State, or a political subdivision of the State.

(15) "Hearings Board" means the State Shorelines Hearing Board.

(16) "Master Program" means the Comprehensive Shoreline Use Plan for Clallam County, and the use regulations together with maps, diagrams, charts or other descriptive material and text, a statement of desired goals and standards developed in accordance with the policies enunciated in Section 2 of the Shoreline Management Act of 1971.

(17) "Nonconforming use" or "pre-existing nonconforming use," as defined by WAC 173-27-080, means a shoreline use or structure that was lawfully constructed or established prior to the adoption of the Shoreline Master Program and this chapter, but which does not conform to present regulations or standards of the Master Program or policies of the Shoreline Management Act.

(18) "Ordinary high-water mark," as defined by RCW 90.58.030(2)(b) and WAC 173-27-080, on all lakes, streams and tidal water is that mark which will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, or as it may naturally change thereafter; provided, that in any area where the ordinary high-water mark cannot be found, the ordinary high-water mark adjoining saltwater shall be the line of mean higher high tide and the ordinary high-water mark adjoining freshwater shall be the line of mean high water.

(19) "Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, or agency of the State or any local governmental unit however designated.

(20) "Road Department" means the Road Department of Clallam County.

(21) "Shorelands" or "shoreland areas," as defined by RCW 90.58.030(2)(f), means those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward 200 feet from such floodways; and all wetlands and river deltas associated with the streams, lakes and tidal waters which are subject to this chapter and as designated by the Department of Ecology. Any county or city may determine that portion of a 100-year floodplain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward 200 feet therefrom.

(22) "Shorelines" means all of the water areas within the unincorporated portion of Clallam County, including reservoirs, and their associated wetlands and 100-year floodplains, together with the lands underlying them except:

(a) Shorelines of State-wide significance;

(b) Shorelines on segments of streams upstream of a point where the mean annual flow is twenty (20) cubic feet per second or less and the wetlands associated with such upstream segments; and

(c) Shorelines on lakes less than twenty (20) acres in size and wetlands associated with such small lakes.

(23) "Shorelines of State-wide significance" means those shorelines described in Section 3(2)(e) of the Shoreline Management Act of 1971 and listed in Appendix A of the Shoreline Master Program, as amended, and Chapter 173-18 WAC, as amended, which are within the unincorporated portion of Clallam County.

(24) "Shorelines of the County" are the total of all "shorelines" and "shorelines of State-wide significance" within the County.

(25) "Substantial development" means any development of which the total cost or fair market value exceeds \$2,500, or any development which materially interferes with the normal public use of the water or shorelines of the County unless it meets the definition of an exemption to the substantial development permit requirements as provided in RCW 90.58.030(3)(e) and WAC 173-27-040.

(26) "Substantial development permit" means the shoreline management substantial development permit provided for in Section 14 of the Shoreline Management Act of 1971 (RCW 90.58.140).

(27) "Variance" is that defined pursuant to WAC 173-27-170.

(28) "Wetlands" or "wetland areas," as defined by RCW 90.58.030(2)(g), are areas inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in similar areas. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

35.01.030 Reference to State laws and administrative codes.

This chapter adopts Chapter 90.58 RCW and Chapter 173-27 WAC, as amended.

35.01.040 Applicability and permit requirements.

(1) Applicability. The requirements set forth by this chapter apply to those lands within 200-feet of the ordinary high-water mark of a shoreland and any associated wetland, floodway, or 100-year floodplain where applicable.

(2) Permit Requirements. Any development regulated by this Chapter requires one of the following types of permit approvals prior to site preparation or construction of said activity:

- Substantial development permit (Type III permit pursuant to Chapter 26.10 CCC), and/or
- Conditional use (Type III permit pursuant to Chapter 26.10 CCC), and/or
- Variance (Type III permit pursuant to Chapter 26.10 CCC), or
- Exemption to a substantial development permit (Type I permit pursuant to Chapter 26.10 CCC).

(3) Review criteria for all proposed developments which are subject to this chapter includes the following:

(a) All developments proposed on the shorelines of the County shall be consistent with the policies of the Shoreline Management Act of 1971, Chapter 90.58 RCW and the Clallam County Shoreline Master Program.

(b) All developments proposed on the shorelines of the County shall be consistent with the Chapter 27.12 CCC, Interim Critical Areas Code, as it applies, as amended.

(c) All developments proposed on the shorelines of the County shall be consistent with the Chapter 32.01 CCC, Floodplain Management Code, as it applies, as amended.

(d) All developments proposed on the shorelines of the County shall be consistent with the CCC Title 31, Clallam County Comprehensive Plan, as it applies, as amended.

(e) All developments proposed on the shorelines of the County shall be consistent with CCC Title 33, Clallam County Zoning Code, as it applies, as amended.

(f) All developments proposed on the shorelines of the County shall be consistent with Chapter 27.01 CCC, Clallam County Environmental Code, as it applies, as amended.

(g) All development proposed on the shorelines of the County shall be consistent with adopted watershed plans, flood management or reduction plans as they apply.

(4) Permit Processing.

(a) Requirements for public notice, hearings, permit decisions and appeals for developments subject to this chapter are provided in Chapter 26.10 CCC, Consolidated Development Permit Process Code.

(b) Shoreline substantial development, conditional use and variance permits shall be processed in accordance with Chapter 26.10 CCC, Consolidated Development Permit Process Code.

(c) Shoreline exemptions shall be processed in accordance with Chapter 26.10 CCC, Consolidated Development Permit Process Code whereby the Administrator has the authority to approve, approve with conditions, or deny such requests in accordance with this chapter and the Shoreline Management Act.

(5) Prohibitions within the Shoreline Jurisdiction.

(a) Surface drilling for oil and gas is prohibited in all waters of Puget Sound north to the Canadian boundary, including Hood Canal, and in the Strait of Juan de Fuca from the ordinary high-water mark seaward to the Canadian national boundary and on all lands within 1,000 feet landward from the ordinary high-water mark within Clallam County.

(b) No permit shall be issued for any new or expanded building or structure of more than thirty-five (35) feet above average grade level on shorelines of the County that will obstruct the view of a substantial number of residences in adjoining areas unless the Master Program permits the same and then such permits shall be granted only when overriding considerations of the public interest will be served.

35.01.050 Additional criteria for exemptions.

(1) Any person undertaking a development within the shorelines of the State which is not a substantial development, variance or conditional use must apply to the Department of Community Development for a statement of exemption from the Shoreline Management Act substantial development permit requirements.

(2) A statement of exemption shall be required for any project with a certification from the Governor pursuant to Chapter 80.50 RCW; a substantial development permit shall not be required for any project with this certification.

(3) The expedited permit process set forth by Second Substitute House Bill 2879 (Chapter 249, Laws of 1998) for fish habitat or passage improvement projects is hereby adopted by Clallam County. This process sets forth a requirement that the applicant notify Clallam County of the request for a permit waiver which includes local shoreline exemption permits and any associated permit fees for those projects which qualify for this waiver. The request shall be in the form of a Joint Aquatic Resources Permit Application (JARPA). Qualified projects must meet the criteria set forth by the legislation which shall include any County-sponsored projects.

(a) Clallam County hereby adopts the joint aquatic resource permit application form as an alternative shoreline exemption permit application form.

(b) Upon receipt of an application deemed to be qualified by Washington State Department of Fish and Wildlife, Clallam County shall provide comments within fifteen (15) days to the Department of Fish and Wildlife and also the applicant. These comments shall include whether or not the proposal is consistent with the following:

(i) All developments proposed on the shorelines of the County shall be consistent with the policies of the Shoreline Management Act of 1971, Chapter 90.58 RCW and the Clallam County Shoreline Master Program.

(ii) All developments proposed on the shorelines of the County shall be consistent with the Chapter 27.12 CCC, Interim Critical Areas Code, as it applies, as amended.

(iii) All developments proposed on the shorelines of the County shall be consistent with the Chapter 32.01 CCC, Floodplain Management Code, as it applies, as amended.

(iv) All development proposed on the shorelines of the County shall be consistent with adopted watershed plans, flood management or reduction plans as they apply.

(c) Any fish enhancement or passage improvement project that is constructed or completed without obtaining approval of a waiver by Clallam County in accordance with Chapter 249, Laws of 1998 shall be deemed a violation of the following regulations, as

they now apply or are hereafter amended: this chapter, the Clallam County Shoreline Master Program; Chapter 32.01 CCC, Clallam County Floodplain Management Code; Chapter 27.12 CCC, Interim Critical Areas Code; and Chapter 90.58.147 RCW. Such projects are subject to violation and enforcement procedures set forth by these regulations.

(4) For those shoreline protection structures that qualify as a shoreline exemption, the Administrator shall allow for up to a ten (10) percent increase for any fill placement or removal for the purposes of maintenance for a period of one year from the date of approval of the request; provided, that the compliance with Chapter 43.21C RCW, State Environmental Policy Act and all other applicable regulations are made.

35.01.060 Nonconforming development standards.

As provided in WAC 173-27-080, the following standards apply to all pre-existing, nonconforming developments, including uses and structures in the County.

(1) A pre-existing, nonconforming development, use or structure may be continued and maintained provided that it is not enlarged, intensified, increased, or altered in any way which increases its nonconformity, including further encroachment into a setback, except that a single-family dwelling located landward of the ordinary high water mark may be enlarged or expanded in conformance with applicable bulk and dimensional standards by the addition of space to the main, legally established, structure, or by the addition of a normal appurtenance as defined by WAC 173-27-040(2)(g) upon approval of a conditional use permit. This provision applies only to the specific development that exists on the effective date of the Shoreline Management Act, the Master Program, or amendments thereto. [WAC 173-27-080(2-5)].

(2) A pre-existing, nonconforming development, or portion of such development, may be converted to another nonconforming development upon approval of a conditional use permit. [WAC 173-27-080(6)].

(3) If a pre-existing, nonconforming development is damaged to an extent not exceeding seventy-five (75) percent replacement cost of the original structure as calculated on a cumulative basis, it may be reconstructed to those configurations existing immediately prior to the time the structure was damaged, so long as restoration is completed within one year of the date of damage. [WAC 173-27-080(8)]

(4) If a pre-existing, nonconforming development is discontinued for twelve (12) consecutive months or for twelve (12) months during any two (2) year period, any subsequent use shall be conforming. It shall not be necessary to show that the owner of the property intends to abandon such nonconforming development in order for the rights to expire. [WAC 173-27-080(9)]

(5) Normal maintenance of pre-existing, nonconforming developments includes those usual acts to prevent a decline or lapse or cessation from a lawfully established condition, does not enlarge or intensify, increase or alter the development so as to increase its nonconformity, and shall include replacing a failing on-site sewage disposal system, provided the replacement system complies fully with the requirements of WAC 246-272-16501, Repair of Failures.

(6) An undeveloped lot, tract, parcel, site, or division which was lawfully established prior to the effective date of the Shoreline Management Act or the Master Program but which does not conform to the present lot size, density standards, or lot width requirements may be developed so long as such development conforms to other requirements of the Shoreline Management Act and Master Program. [WAC 173-27-080(10)]

35.01.070 Permit authorization and expiration.

(1) The Administrator shall deliver to the following persons copies of the application and the approval, conditional approval or disapproval of a substantial development, conditional use, or variance permit application in accordance with Chapter 26.10 CCC:

- (a) The applicant;
- (b) The Department;
- (c) The Washington State Attorney General;
- (d) Any person who has written requesting notification.

(2) Development pursuant to a substantial development permit shall not begin and shall not be authorized until twenty-one (21) days from the date the Administrator files the approved substantial development permit with the Department of Ecology and Attorney General, or until all review proceedings initiated within twenty-one (21) days of the date of such filing have been terminated.

(3) Issuance of a substantial development, conditional use, or variance permit does not obviate requirements for other federal, State and County permits, procedures and regulations.

(4) Construction or substantial progress toward construction of a project, as defined pursuant to WAC 173-27-090(1), for which a substantial development, conditional use or variance permit has been granted pursuant to this chapter must be undertaken within three years after the approval of the permit by local government or the permit shall terminate and no extensions may be granted. If such progress has not been made, a new permit will be necessary.

(5) Construction or substantial progress toward construction of a project meeting the criteria for an exemption must be undertaken within one year after the approval by the local government or the permit shall terminate and no extensions may be granted.

(6) No substantial development, conditional use or variance permit authorizing construction shall extend for a term of more than five years. If a project for which a permit has been granted has not been completed within five years after the approval of the permit the Administrator shall, at the expiration of the five-year period, review the permit, and upon a showing of good cause, extend the permit for one year; otherwise, the permit terminates; provided, that no permit shall be extended unless the applicant has requested such review and extension prior to the permit expiration date.

(7) The effective date of the permit shall be the date of the last action required on the shoreline permit or exemption that authorizes the project to proceed, including all administrative or legal actions on any such approval.

(8) Any construction begun prior to the completion of said reviews and appeal periods is not authorized and shall be at the applicant's own risk and may result in a potential violation of this chapter.

35.01.080 Review by Shorelines Hearings Board.

Any person aggrieved by the granting, denying or rescission of a substantial development, conditional use or variance permit by the Hearing Examiner or Board of County Commissioners may seek review from the Hearings Board in accordance with those procedures provided for under RCW 90.58.180 and those regulations adopted by the Shorelines Hearings Board.

35.01.090 Rescission – Service of notice.

(1) Any permit granted pursuant to this chapter may be rescinded or modified upon a finding by the Administrator that the permittee has not complied with the conditions of the permit using the “notice and orders” provisions of CCC Title 20, Code Compliance, and mailing copies of the notice and order by regular mail to the applicant, agencies, and interested parties to include adjacent property owners defined by Chapter 26.10 CCC.

(2) Following rescission of a shoreline permit, the Prosecutor shall initiate legal proceedings to abate the action or development which is not in compliance with the approved permit application or which is inconsistent with the Master Program.

35.01.100 County Master Program.

(1) All guidelines and the Master Program adopted or approved and this chapter shall be available for public inspection at the office of the Board, the Department of Community Development and the County Auditor.

(2) The Planning Commission or other designated appointed committee shall periodically review the Master Program for Clallam County and recommend such amendments as are necessary. Such amendments shall be submitted to the Board of Clallam County Commissioners for their action prior to submittal to the Department in accordance with Chapter 173-26 WAC. No such amendment shall become effective until adopted by the Department.

(3) When necessary to achieve implementation of the Master Program, the Board may either alone or in concert with other governmental entities acquire lands and easements which improve access to the shorelines of the County; said acquisition may be accomplished by purchase, lease, or gift.

(4) The Department of Community Development and the Clallam County Planning Commission shall review all administrative and management policies, regulations, plans and ordinances relative to lands in Clallam County adjacent to the shorelines of the County and recommend appropriate action to the Board so as to achieve a land use policy on said land consistent with the policy of this chapter, the Shoreline Management Act of 1971, the guidelines and the Master Programs for Shorelines of the County. The Department of Community Development, Planning Commission, and Board, in reviewing land use regulations for such areas, shall take into consideration any recommendations developed by the Department as well as any other State agencies or units of local government.

35.01.110 Inspection.

The Administrator may inspect properties as necessary to determine whether permittees have complied with conditions of their respective permits and, whenever there is reasonable cause to believe that development has occurred upon any premises in violation of the Shoreline Management Act of 1971 and this chapter, may enter upon such premises pursuant to the provisions of the “right of entry and warrants” section (CCC 20.08.090) of CCC Title 20, Code Compliance, at all reasonable times to inspect the same.

35.01.120 Revisions to shoreline permits.

(1) Clallam County adopts, by reference, WAC 173-27-100 (Revisions to Substantial Development, Conditional Use, and Variance Permits) and any subsequent amendments adopted thereto.

(2) Applications for revisions to shoreline permits shall be on a form prescribed by the Administrator and shall be accompanied by a filing fee in the amount established under Chapter 5.100 CCC.

(3) Upon receipt of a complete application for a revision to a shoreline permit and upon payment of the fees, the Administrator shall make a written decision of approval, conditional approval or denial within 10 working days of receipt of the application.

(4) The action of the Administrator may be appealed to the Hearing Examiner in accordance with Chapter 26.10 CCC.

35.01.130 Enforcement.

(1) If a violation is confirmed, the Administrator shall initiate code compliance proceedings according to the provisions of CCC Title 20, Code Compliance, except to the extent the provisions of said code compliance title are preempted by State law as set forth in RCW 90.58.210, 90.58.220, 90.58.230, and WAC 173-27-240 through 173-27-300, as amended.

(2) The Clallam County Prosecuting Attorney shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the County in conflict with the provisions and programs of this chapter or the Shoreline Management Act of 1971, and to otherwise enforce the provisions of this chapter and the Shoreline Management Act of 1971.

(3) Any person subject to the regulatory program of this chapter who violates any provision of this chapter or the provisions of a permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to such violation. The Clallam County Prosecuting Attorney shall bring suit for damages under this subsection on behalf of the County. Private persons shall have the right to bring suit for damages under this subsection on their own behalf and on behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation, the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the private person bringing suit, where he prevails.

(4) Clallam County shall not issue any permit, license, or other development approval on a development proposal site subject to an enforcement order under this section; provided, that Clallam County may issue such permits to rectify or correct enforcement orders.

35.01.140 Conflicts – Master Program with other County land use regulations.

Where other County land use regulations are in conflict with the Master Program, the more restrictive regulation shall apply and such application shall extend only to those specific provisions which are more restrictive unless otherwise specified.

35.01.150 Real property assessments.

The restrictions imposed by the Shoreline Master Program shall be considered by the County Assessor in establishing the fair market value of the property.

35.01.160 Severability.

If any provision of this chapter or its application to any person or legal entity or circumstances is held invalid, the remainder of the chapter or the application of the provision to other persons or legal entities or circumstances shall not be affected.

35.01.170 Effective date.

This chapter shall take effect 10 days after the date of adoption.

The Clallam County Code is current through Ordinance 889, passed February 12, 2013.

Disclaimer: The Clerk of the Board's Office has the official version of the Clallam County Code. Users should contact the Clerk of the Board's Office for ordinances passed subsequent to the ordinance cited above.

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Code Publishing Company
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APPENDIX D


[RCWs](#) > [Title 90](#) > [Chapter 90.58](#) > [Section 90.58.210](#)
[90.58.200](#) << [90.58.210](#) >> [90.58.220](#)

RCW 90.58.210

Court actions to ensure against conflicting uses and to enforce — Civil penalty — Review.

(1) Except as provided in RCW [43.05.060](#) through [43.05.080](#) and [43.05.150](#), the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

(2) Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

(3) The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time.

(4) The person incurring the penalty may appeal within thirty days from the date of receipt of the penalty. The term "date of receipt" has the same meaning as provided in RCW [43.21B.001](#). Any penalty imposed pursuant to this section by the department shall be subject to review by the shorelines hearings board. Any penalty imposed pursuant to this section by local government shall be subject to review by the local government legislative authority. Any penalty jointly imposed by the department and local government shall be appealed to the shorelines hearings board.

[2010 c 210 § 39; 1995 c 403 § 637; 1986 c 292 § 4; 1971 ex.s. c 286 § 21.]

Notes:

Intent -- Effective dates -- Application -- Pending cases and rules -- 2010 c 210: See notes following RCW [43.21B.001](#).

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW [34.05.328](#).

Part headings not law -- Severability -- 1995 c 403: See RCW [43.05.903](#) and [43.05.904](#).

Severability -- 1986 c 292: See note following RCW [90.58.030](#).

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[RCWs](#) > [Title 90](#) > [Chapter 90.58](#) > [Section 90.58.220](#)

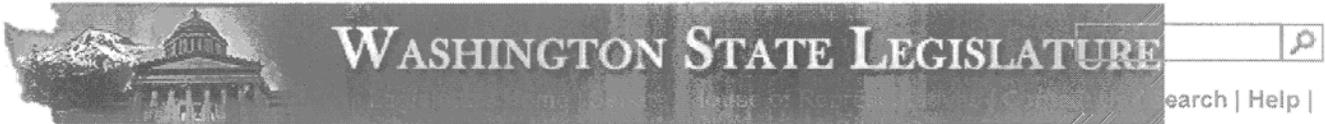
[90.58.210](#) << [90.58.220](#) >> [90.58.230](#)

RCW 90.58.220 General penalty.

In addition to incurring civil liability under RCW [90.58.210](#), any person found to have wilfully engaged in activities on the shorelines of the state in violation of the provisions of this chapter or any of the master programs, rules, or regulations adopted pursuant thereto shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five nor more than one thousand dollars or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment: PROVIDED, That the fine for the third and all subsequent violations in any five-year period shall be not less than five hundred nor more than ten thousand dollars: PROVIDED FURTHER, That fines for violations of RCW [90.58.550](#), or any rule adopted thereunder, shall be determined under RCW [90.58.560](#).

[1983 c 138 § 3; 1971 ex.s. c 286 § 22.]





RCWs > Title 90 > Chapter 90.58 > Section 90.58.230

[90.58.220](#) << [90.58.230](#) >> [90.58.240](#)

RCW 90.58.230
Violators liable for damages resulting from violation — Attorney's fees and costs.

Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party.

[1971 ex.s. c 286 § 23.]

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COURT OF APPEALS
DIVISION II

2013 JUN 14 PM 5: 04

No. 44476-3-II

STATE OF WASHINGTON

BY CA DEPUTY COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SCOTT K. LANGE & ELIZABETH R. LANGE,)	Certificate of Service
Husband and Wife, and TRUSTEES of the LANGE)	
FAMILY TRUST,)	
)	
Appellant)	
)	
v.)	
)	
CLALLAM COUNTY, a Municipal Corporation,)	
and SHEILA ROARK MILLER, DIRECTOR OF)	
THE DEPARTMENT OF WASHINGTON FOR)	
JEFFERSON COUNTY)	
)	
Respondent.)	

Peter C. Ojala declares as follows:

I am an employee of Carson Law Group, P.S., a United States citizen, over the age of eighteen (18) years, and am competent to testify to the matters set forth herein.

I certify that on June 14, 2013, I sent by Legal Messenger, a copy of the following documents: Opening Brief of Appellants and this Certificate of Service to the following attorney:

Mark R. Johnsen
Karr Tuttle Campbell
701 5th Ave, Suite 3300
Seattle, WA 98104

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: June 14, 2013

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "P. C. Ojala", written in black ink. The signature is positioned above a horizontal line.

Peter C. Ojala, WSBA #42163
Attorney for Appellant
3202 Hoyt Ave
Everett, WA 98201
(425) 493-5000