

NO. 44476-3--II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SCOTT K. LANGE and ELIZABETH R. LANGE, husband and wife and
Trustees of the LANGE FAMILY TRUST,

Appellants,

v.

CLALLAM COUNTY, a Municipal corporation and SHEILA ROARK
MILLER, Director of the Department of Community Development,

Respondent,

BRIEF OF RESPONDENT CLALLAM COUNTY

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REPORT

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I. INTRODUCTION

Appellants Scott and Elizabeth Lange (“Lange”) filed a Petition for Writ of Mandamus in Jefferson County Superior Court, asking the Court to compel Clallam County and its Department of Community Development Director Sheila Roark Miller (collectively, “Clallam County”) to reopen and repeal the shoreline permits and exemptions granted to a neighboring property owner many years ago.

The County issued permits for construction of a shoreline home, outbuilding and bulkhead to David and Krisanne Cebelak in 1998. Following a major storm in December 2006, Clallam County granted permits and exemptions in 2007 allowing reconstruction and repair of the bulkhead. Although Lange has complained about the Cebelak structures and approvals for 15 years, he filed no administrative appeals or lawsuits against Clallam County arising from the Cebelak permits until 2012. The Complaint in this action sought to compel the County to re-inspect and order removal of the structures, by means of writ of mandamus.

The County filed a Motion to Dismiss which was granted by the trial court, the Honorable Craddock D. Verser. The Writ of Mandamus was quashed and the lawsuit was dismissed. Clallam County now respectfully asks this Court to affirm the trial court’s Order of Dismissal.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Clallam County believes that the issues pertaining to Lange’s assignment of errors can best be stated as follows:

A. Whether a Petition for Writ of Mandamus is properly dismissed where the Petitioner failed to pursue available legal remedies, including an appeal under the Land Use Petition Act.

B. Whether the Land Use Petition Act requires one seeking to challenge a land use permitting decision to do so within 21 days after the decision is issued.

C. Whether a Petition for Writ of Mandamus is barred by limitations where it seeks to compel a county to revisit permits and approvals issued to a neighboring property owner more than five years earlier.

D. Whether a mandamus petition is properly dismissed where it seeks to relitigate an issue previously decided against the Petitioner in an earlier lawsuit.

E. Whether mandamus can compel the manner of a local government's exercise of discretion.

III. FACTUAL BACKGROUND

For more than 15 years, Appellants Scott and Elizabeth Lange have been feuding with their neighbors David and Krisanne Cebelak ("Cebelak") over shoreline structures. This lawsuit filed against Clallam County arises out of that longstanding feud.

Between 1996 and 1998, Cebelak applied for and was granted permission by Clallam County and the Washington Department of Fish & Wildlife ("WDFW") to construct a home, an outbuilding and a bulkhead

on his waterfront property on the Strait of Juan de Fuca. (CP 79-81; CP 109). Lange was aware of the Cebelak home and outbuilding construction in 1997 and 1998 and believed that it was in violation of applicable shoreline regulations. He filed a written objection (CP 128-131) but filed no appeal or other challenge to the permits. (CP 79).

A major storm event struck the Strait of Juan de Fuca in December 2006. The storm damaged Lange's property as well as Cebelak's bulkhead. (CP 84). Cebelak applied for a permit and a shoreline exemption to rebuild and reinforce his bulkhead in 2007. Approvals were issued by WDFW and by Clallam County. (CP 79-81; 85). Lange complained about the approvals and retained an attorney in early 2007. In his written communication with the County, he demanded that the County "come down hard" on Cebelak for compromising Lange's view:

For various reasons, I would like to see the Cebelak storage building removed. If this occurs, I will back off on all other claims regarding his past construction activity. . . . All things considered, there are a lot of reasons you can and should come down hard on him for the storage building. If he fights back, I'll be there right in his face when he tries to get the building in compliance. A lot of others in the community will probably join me.

Feel free to use me as an excuse for coming down hard. It wouldn't offend me if you described me as a psycho with a high IQ, an unfortunate mastery of tort litigation that earned him the nickname of "fang" among his professional peers, an uncontrollable rage over having his view and beachfront destroyed by a con-man, and enough money to litigate for sport.

I'll leave him alone on the house and bulkhead if the cabin goes. Complete release of all my potential claims against

both Cebelak and the County. If the cabin stays, I'll play
all my cards. . . .

(CP 151). Notwithstanding Lange's periodic complaints and threats, he
filed no administrative appeal or lawsuit as to Cebelak's structures at the
time they were approved.

In May 2008 Clallam County officials inspected the bulkhead
repair work undertaken by Cebelak the pervious year to ensure that it had
been constructed properly. The County determined that the reconstructed
bulkhead did not result in significant changes from the previous authorized
bulkhead and therefore was consistent with the Clallam County Critical
Areas Code. (CP 206-208).

In December 2009, Lange filed a tort lawsuit in Clallam County
Superior Court against Cebelak for damage he attributed to the location
and construction of Cebelak's shoreline structures. (Clallam County
Cause No. 09-2-01303-1). Clallam County was not named as a defendant
in that action. (CP 69). In the summer of 2012, Cebelak filed a Motion
for Summary Judgment seeking a dismissal of Lange's claims. The trial
court, the Honorable Ken Williams issued a partial summary judgment
ruling which included a determination that any challenge to the Cebelak
permits was barred by Lange's failure to comply with the "exclusive
remedy" provisions of the Land Use Petition Act, RCW 36.70C:

The statutory language precludes a challenge to the land
use decision or to any requirement that the permitting entity
abate or alleviate issues arising from the land use permitted
even if improperly granted.

(CP 90). Judge Williams further held that any claims for damages by Lange which arose from events more than three years before the Cebelak lawsuit was filed in December 2009 were barred by the tort statute of limitations, RCW 4.16.080. (CP 97). Lange filed a Motion for Reconsideration which was also denied by Judge Williams. In his Order on Motion for Reconsideration, Judge Williams reiterated his dismissal of all claims relating to the building structures:

The primary basis for the Court's dismissal as it relates to the building structures and their use, including their location, is that the general statute of limitations would have passed since they were erected and were clearly visible to anyone including the Plaintiffs.

(CP 98).

In November 2012, a few months after Judge Williams' summary judgment order in the Cebelak lawsuit, Lange filed the instant lawsuit against Clallam County in Jefferson County Superior Court, in an apparent attempt to circumvent Judge Williams' rulings. The lawsuit was presented in the form of a Petition for Writ of Mandamus to compel Clallam County to "investigate his code complaint" concerning the Cebelak shoreline structures, and the permitting of those structures in 1998 and 2007. (CP 1, 10-11). In Exhibit A to the mandamus petition, Lange asserted that permits were improperly granted to Cebelak in 1998 and 2007. (CP 12-14).

Clallam County filed a Motion to Quash the Mandamus Petition and to Dismiss the Lawsuit. The motion was heard by Jefferson County Superior Court Judge Craddock D. Verser on January 4, 2013. After reviewing the pleadings and briefs of the parties, and hearing argument of counsel, Judge Verser granted the County's motion, quashed the writ and dismissed Lange's lawsuit. (CP 276-277). This appeal followed.

IV. ARGUMENT

A. Mandamus is an Extraordinary Remedy Which Does Not Apply in These Circumstances.

As the record demonstrates, Mr. Lange has been complaining about his neighbor's shoreline structures for 15 years. (CP 128-131; CP 144-146). He asserts that Cebelak's home, outbuilding and bulkhead should not have been permitted by Clallam County and WDFW in 1997-98, and that repairs and reinforcement of the bulkhead should not have been approved by Clallam County and WDFW in 2007. But Lange failed to file a timely challenge to the permits under the Land Use Petition Act (RCW 36.70C) within 21 days after the permits were issued (or, indeed, at any time).¹ Instead, he sought a writ of mandamus many, many years after the permits were issued and construction completed. He asked the trial court to order the County to go back, investigate and effectively revoke permits issued for Cebelak's structures in 1998 and 2007. Under these

¹ Nor did Lange avail himself of his administrative appeal remedies under CCC 35.01.155. (CP 179).

facts, the relief sought is barred by Lange's failure to pursue available legal remedies.

Mandamus is an extraordinary remedy. Walker v. Munro, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). It is available only under narrow circumstances. A party seeking a writ of mandamus must satisfy three requirements: (1) the party subject to the writ must be under a clear duty to act; (2) the petitioner must be "beneficially interested"; and (3) the petitioner must not have a "plain, speedy and adequate remedy in the ordinary course of law." RCW 7.16.170.

In this case, Lange had an adequate and speedy remedy to challenge the permits issued to his neighbor, under the Land Use Petition Act, RCW 36.70C. That statute allows a challenge to a building or land use permit, so long as it is filed within 21 days after issuance of the contested permit (and after administrative appeals have been exhausted). RCW 36.70C.040. The stated purpose of the statute is to simplify and streamline the process for challenging local land use decisions. RCW 36.70C.010. Because Lange failed to file a timely LUPA petition within 21 days after the permits were issued to Cebelak, he is precluded from seeking mandamus relief some five to 15 years later.

B. The Relief Sought by Lange is Barred by His Failure to Comply with LUPA.

1. LUPA is the Exclusive Remedy for Challenging Most Land Use Decisions.

The Land Use Petition Act was enacted in 1995 as a part of Washington's Regulatory Reform legislation. LUPA was designed to standardize and streamline the process for challenging land use decisions made by local governments. In most instances, LUPA is the "exclusive" means for challenging such decisions. RCW 36.70C.030.

The Washington Supreme Court has made it abundantly clear that LUPA's "exclusive remedy" provisions must be applied strictly and broadly, by requiring that a party who is unhappy with an action by local government relating to a land use permit file a timely LUPA petition and seek to have the permitting decision overturned. If a timely petition under LUPA is not filed, a party is forever barred from challenging the permitting action collaterally. Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000); Chelan County v. Nykreim, 146 Wn.2d 904, 925-26, 53 P.3d 7 (2002).

The definition of "land use decision" under RCW 36.70C.020(2) is very broad; it includes not only formal decisions on permits or other approvals, but also applies to a local government's interpretative decisions relating to a site specific application. See, Asche v. Bloomquist, 132 Wn. App. 784, 791, 801, 433 P.3d 475 (2006), rev. denied, 159 Wn.2d 1005. The exclusive remedy provisions of LUPA and its short (21-day)

limitations period reflect a “strong public policy supporting administrative finality in land use decisions.” Nykreim, supra, 146 Wn.2d at 931-33.

Lange makes a strained argument that he is not actually challenging the County’s permits, but is only challenging the structures that were built in reliance on those permits. The argument is disingenuous and groundless. The record unambiguously shows that Lange has been making essentially the same complaints against the Cebelak structures and the permit approvals since 1997. (CP 123). For example, on May 11, 1997, Lange sent a letter to Clallam County demanding that it “effective immediately, suspend all building and development permits that have been issued for the subject site.” (CP 129). Similarly, in February 2007, Mr. Cebelak sent a letter to the County requesting that it “hold off on approving any activity involving Mr. Cebelak’s bulkhead until the issues I am raising are resolved.” (CP 144-146). Moreover, Exhibit A to Lange’s Petition for Writ of Mandamus expressly identifies the permits from 1998 and 2007 which he contends were improperly issued. (CP 12-14). Furthermore, in oral argument, Lange’s counsel acknowledged that he was seeking to compel Clallam County to review the earlier permits. (VRP, p. 10). Thus, the assertion that Lange is not asserting a claim which is subject to LUPA is not credible.

A similar argument was recently rejected by this Court in Brotherton v. Jefferson County, 160 Wn. App. 699, 249 P.3d 660 (2011). In that case, the plaintiff argued that his failure to pursue a timely appeal

under LUPA should not be a bar to his collateral lawsuit, because he was seeking only a determination of invalidity of the County's application of its ordinance, and not a challenge to the permit itself. The Court of Appeals rejected Brotherton's strained argument:

The Brothertons also argue that LUPA does not apply because they are challenging only the constitutionality of JCC 8.15.165, not the validity of the County's land use decision. But their Complaint sought to reverse the County's denial of their waiver request and require the County to re-review their request under state law. The Brothertons' requested relief demonstrates that they are ultimately challenging the County's land use decision. Like the plaintiffs in *Holder*, the Brothertons' arguments arise directly from the County's final land use decision. Accordingly, LUPA applies.

160 Wn. App. at 705.

One of the stated purposes of LUPA and other aspects of Regulatory Reform is to encourage prompt and final resolution of land use disputes. The courts will no longer allow untimely challenges to permits or development approvals. In Samuel's Furniture v. DOE, 147 Wn.2d 440, 54 P.3d 1194 (2002), DOE argued that the Shoreline Management Act (SMA) gave it a right to challenge an allegedly illegal shoreline structure approved by a local government, without complying with the procedural requirements of LUPA. The Washington Supreme Court disagreed, noting the strong policy favoring finality in land use matters. The Court held that a party which does not comply with the procedural and jurisdictional requirements of LUPA has no standing to challenge the government's action. 147 Wn.2d at 459. Lange's mandamus petition, if

granted, would have been in violation of LUPA's strong public policy supporting administrative finality. The trial court properly dismissed Lange's petition.

Nor can Lange prevail by arguing that he is not challenging the permits, but only the County's allegedly faulty inspection and code interpretation. A similar argument was rejected by the Court of Appeals in Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006), rev. den., 159 Wn.2d at 1005 where it was held that a County's interpretation regarding the application of an ordinance to a building permit application must be timely challenged under LUPA, or the interpretation will be deemed valid, and may not be subsequently challenged in a collateral action:

... It does not matter whether the Asches are challenging the validity of the permit or the interpretation of the County zoning ordinance as applied to the piece of property. LUPA covers both.

132 Wn. App. at 791.

Much of the caselaw relied upon by Lange in opposition to the County's motion predates the enactment of LUPA and the Supreme Court caselaw construing LUPA. The principal case relied on by Lange is Chaney v. Fetterly, 100 Wn. App. 140, 995 P.2d 1284 (2000), which is cited repeatedly in his Opening Brief. The Court will note that Chaney was not a mandamus action, and indeed did not involve any obligation owed by a governmental entity. Therefore it has no relevance to this

appeal. Moreover, the case arose in 1997, prior to any significant appellate caselaw construing LUPA. The Court of Appeals noted in a footnote that neither party in the case had relied on LUPA. *Id.*, pp. 142-43, fn.2. And although the Court determined that it possessed “original jurisdiction” to consider Chaney’s claim against his neighbor, subsequent caselaw has established that LUPA provides the “exclusive remedy” in a challenge of local land use decisions. Significantly, the Court of Appeals in Chelan County v. Nykreim, 105 Wn. App. at 360 (2002) cited Chaney in support of the court’s exercise of original jurisdiction outside of LUPA. But the Washington Supreme Court *overruled* the Court of Appeals’ decision in Nykreim and held, in effect, that LUPA had “occupied the field” for challenges to land use decisions by local governments. 146 Wn.2d 904, 925-26.

Recent decisions have confirmed that the courts will not exercise “original jurisdiction” where the legislature has “prescribed procedures for the resolution of a particular type of dispute.” The Washington Supreme Court held in James v. Kitsap County, 154 Wn.2d 574, 115 P.3d 286 (2005) that pre-LUPA caselaw is no longer relevant to the procedural and limitations requirements which now apply to challenges to land use permit actions:

In *Henderson Homes*, we held that a three year statute of limitations applies to actions to recover invalid taxes under RCW 4.16.080(3) . . . This conclusion is no longer viable in the wake of LUPA, which establishes uniform procedures and by its own terms is the “exclusive means of

judicial review of land use decisions. . . .” (Emphasis by Supreme Court).

Id. at 587. Subsequent decisions have confirmed that the courts will not exercise “original jurisdiction” where the plaintiff has failed to avail himself of the remedy of LUPA:

. . . where statutes such as the Land Use Petition Act (“LUPA”) prescribe procedures for the resolution of a particular type of dispute, state courts have required “substantial compliance” or satisfaction of the “spirit” of the procedural requirements before they will exercise their jurisdiction over the matter.

Sundquist Homes, Inc. v. Snohomish County, 276 F. Supp. 2d 1123, 1126-27 (W.D. WA. 2003), aff’d, 2006 U.S. App. LEXIS 427 (9th Cir. 2006).

Nor can Lange avoid the strict procedural requirements of LUPA by arguing that Cebelak’s structures constitute a public nuisance. A similar argument was rejected by the Court of Appeals in Asche v. Bloomquist, supra. The Court held in Asche that, because a permit decision which is not timely challenged under LUPA must be “deemed valid,” a trial court in a collateral action would have no jurisdiction to determine that the approved structure constituted a nuisance:

Their public nuisance claims on this ground are barred by LUPA’s 21-day statute of limitations because the Asches would need to have an interpretive decision regarding the application of a zoning ordinance to a specific property declared improper to prevail.

132 Wn. App. at 801.²

In this case, requiring Clallam County to reopen and reinvestigate the permits previously approved would be in direct violation of the purposes of LUPA, as explained by the Washington Supreme Court:

Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.

Chelan County v. Nykreim, *supra*, 146 Wn.2d at 933.

In short, LUPA is a legal remedy which was available to Mr. Lange when the permits were issued to Cebelak in 1998 and 2007. Lange cannot avoid the strict procedural and jurisdictional requirements of LUPA by filing a mandamus petition five (or 15) years after the permits were issued.

2. LUPA Applies As a Bar to Mandamus Actions Arising in the Land Use Context.

Lange argues that the exclusive remedy provisions of LUPA should not apply to him because he is seeking mandamus relief, and the LUPA statute provides an exception for mandamus actions. But his argument is misplaced. Where LUPA provides an adequate and speedy remedy to challenge a land use permitting action, a failure to utilize that legal remedy is fatal to a mandamus petition.

² A public nuisance claim would also be inapplicable here, because such a claim requires that the alleged nuisance "affects equally the rights of an entire community or neighborhood." RCW 7.48.130. There are no such facts in this case.

In Stafne v. Snohomish County, 156 Wn. App. 667, 234 P.3d 225 (2010), aff'd on related grounds, 174 Wn.2d 24 (2012) the Court of Appeals held that the plaintiff's failure to timely file a LUPA appeal precluded a mandamus petition because an adequate and speedy legal remedy existed but was not utilized:

Mandamus is an extraordinary remedy that is not available when there is a "plain, speedy and adequate remedy in the ordinary course of law." RCW 7.16.170.

156 Wn. App. at 687. Stafne had petitioned to have his property rezoned to "Residential." The County denied his request. Stafne then filed a LUPA appeal, but after the 21-day deadline established by LUPA for appealing land use decisions. His LUPA appeal was therefore dismissed as untimely. Id. at 686. Stafne also sought relief by writ of mandamus, but his writ claim was likewise dismissed. On review, the Court of Appeals held that because Stafne did not avail himself of his legal appeal remedy under LUPA, he could not pursue a writ of mandamus:

The trial court did not abuse its discretion in deciding that Stafne had a plain, speedy and adequate legal remedy, and in denying his request for a writ of mandamus or prohibition.

Id. at 688. On appeal, the Supreme Court affirmed the dismissal of Stafne's mandamus action, but on slightly different grounds. The Court held that because the challenged county action was *legislative*, Stafne's actual appeal remedy was to the Growth Management Hearings Board.

The Court nonetheless agreed that Stafne's failure to pursue available appeal remedies barred his writ action:

Stafne did not appeal the Council's decision to the growth board, failing to utilize an available statutory right of appeal and leaving no administrative decision to review. As in *Torrance*, Stafne's failure to exhaust administrative remedies means the superior court cannot grant a constitutional writ.

174 Wn.2d at 39.

It is settled that a party's loss of a statutory remedy through delay does not result in an absence of an "adequate remedy at law," for purposes of standing to pursue writs of mandamus and prohibition. In Bock v. State, 91 Wn.2d 94, 586 P.2d 1173 (1978) a state licensing board notified Bock that it would take no further action on his request for a pilotage license. Fifty-three days later he filed a petition for mandamus. The board answered and argued that the plaintiff had failed to state a claim upon which relief could be granted because Bock had failed to pursue a timely statutory appeal remedy within 30 days. Therefore the court had no jurisdiction to hear a mandamus petition:

The Court below thus had no jurisdiction to review the board's action, and should have dismissed the action on that ground.

91 Wn.2d at 100. The above rule applies with even greater force in this case, because Lange not only failed to file a LUPA petition within 21 days of the County's action, he failed to file a LUPA petition *at any time* within

the past 15 years, despite his repeated expressions of concern about Cebelak's structures since 1997.

Where a party has failed to challenge a permit or other land use decision within 21 days under LUPA, it cannot be challenged through declaratory judgment or mandamus even if an argument can be made that the issuance of the permit was erroneous or unlawful:

Under *Wenatchee Sportsmen Ass'n*, approval of the BLA in this case despite its questionable legality "became valid once the opportunity to challenge it passed." Under this court's rationale in *Wenatchee Sportsmen*, the superior court should have dismissed respondents' declaratory relief action because it was time barred under the 21-day appeal time limit of LUPA. . . . Compliance with such time limits is essential for the court to acquire jurisdiction.

Chelan County v. Nykreim, *supra*, 146 Wn.2d at 925-26.

Importantly, the "exclusive remedy" provision of LUPA is applicable not only to approvals of permit applications, but also to determinations that a particular permit is *not* required. Thus, in Department of Ecology v. Samuel's Furniture, *supra*, the Washington Department of Ecology challenged a county's determination that a permit application was exempt from Shoreline Management Act permit requirements. But because the DOE had not filed a timely LUPA petition within 21 days after the County's decision, the Supreme Court held DOE had no standing to challenge the local government's interpretation of shoreline regulations:

Ecology's interpretation of the SMA would leave landowners and developers unable to rely on local

government decisions – precisely the evil for which LUPA was enacted to prevent.

147 Wn.2d at 459.

Similarly, in this case Lange has no standing to challenge the County's decisions to issue permits to Cebelak, or its refusal to undertake a further investigation. Lange failed to file a timely appeal of the County's permitting decisions, and he has no standing to seek mandamus relief. Summary dismissal of the mandamus petition was appropriate, based on absence of standing and jurisdiction.

3. Judge Williams' Decision as to the Effect of LUPA Gives Rise to Collateral Estoppel.

An additional basis for dismissing Lange's mandamus action is the collateral estoppel effect of Judge Williams' ruling in Lange v. Cebelak, Clallam County Superior Court Cause No. 09-2-01303-1. In support of its Motion to Dismiss Lange's Mandamus Petition, Clallam County attached Judge Williams' Memorandum Opinion and pointed out that not only did Judge Williams correctly state the law regarding LUPA, but that his decision collaterally estopped Lange from seeking a contrary decision in Jefferson County Superior Court. (CP 61, 65, 88-90, 98).

Collateral estoppel bars a party from relitigating an issue which has already been determined against him in another court. Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507, 754 P.2d 858 (1987). Collateral estoppel, and its companion doctrine res judicata, is designed to avoid relitigation of issues and claims which have already been determined in a

court of law. As the Washington Court of Appeals held in Cunningham v. State, 61 Wn. App. 562, 567, 811 P.2d 225 (1991):

... there has been an increasing judicial intolerance with efforts to avoid decisions made after fair consideration by shifting the scene to another court room.

In the earlier decision on Lange's tort claim against Cebelak, Judge Williams considered and ruled upon the legal effects of LUPA relative to Lange's challenges to the permitting actions by Clallam County and the state. Judge Williams held unambiguously that the statutory language of LUPA precludes a collateral challenge to the permits issued to Cebelak, or any claim that the County "abate or alleviate" the alleged damage:

The statutory language precludes a challenge to the land use decision or to any requirement that the permitting entity abate or alleviate arising from the land use permit even if improperly granted. (Emphasis added).

(CP 90). Judge Williams also held that even if one were to consider and apply the longer 3 year statute of limitations available in tort, those statutes have already run. (CP 98-99).

Lange's attempt to avoid Judge Williams' ruling by "shifting the scene to another courtroom" was improper. Collateral estoppel is an additional grounds supporting dismissal of the mandamus action.

C. The Mandamus Action is Also Barred by Limitations.

Even if there were no speedy remedy at law, Lange's petition for writ of mandamus would have to be dismissed based on limitations. The courts have consistently ruled that petitions for writs relating to land use

matters are governed by the same limitations period applicable to appeals. In Teed v. King County, 36 Wn. App. 635, 677 P.2d 179 (1984) the plaintiffs filed for a writ of mandamus to compel rezoning of their property to a classification that would permit parking and storage of heavy machinery. The plaintiffs filed their petition for mandamus 25 days after the County Council adopted a zoning ordinance that did not permit parking and storage of heavy machinery. The applicable King County Code provision required that appeals of zoning decisions be filed within 20 days. Because the plaintiffs' petition for writ of mandamus was filed 25 days after the county's decision, it was held to be untimely and dismissed as a matter of law:

Hence, since the application for an alternative writ of mandamus was filed on July 17, 1981, 25 days after the adoption of the Vashon Island Zoning Ordinance, the Superior Court was without jurisdiction to consider any challenge to the ordinance. "The rule is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal."

Id. at 641.

The Teed case was decided before LUPA was enacted in 1995, but the same rule applies. The time for appealing the County's issuance of building permits to Cebelak was 15 days under the then-current Clallam County Code. (CP 179). If he still remained dissatisfied, a LUPA appeal had to be filed within 21 days. RCW 36.70C.040. Lange's mandamus

action filed more than *five years* after the challenged County actions is clearly barred by limitations.³

Nor can Lange seriously argue that his mandamus petition is timely because he has in recent years obtained additional information regarding the Cebelak permits. The statute of limitations runs from the time a party has the right to apply to a court for relief. Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc., 166 Wn.2d 475, 209 P.3d 863 (2009). At the very minimum, Lange was required to file a challenge to the Cebelak structures promptly as soon as he learned of the issuance of the permits. In his own declaration, he states that he attributed the storm damage to the Cebelak bulkhead in December 2006, and that he observed the reconstruction of the bulkhead in February 2007. (CP 111-112). Yet no action challenging the permits was filed until December 2012. His mandamus petition was untimely, and the trial court had no jurisdiction to grant the relief requested. The writ was properly quashed and the case was properly dismissed.

D. Mandamus Cannot Compel the Manner of Exercising Discretion.

A final reason for dismissal of the writ action is the settled principle that mandamus may not be used to compel the exercise of a discretionary duty:

... the action of mandamus is not proper to compel a discretionary act. “The act of mandamus compels

³ Needless to say, Lange cannot avoid the narrow limitations period by merely asking the County to “revisit” and “enforce” its regulations relative to the bulkhead five or 15 years after approval.

performance of a duty, but cannot lie to control discretion.” Thus mandamus can direct an officer or body to exercise a mandatory discretionary duty, but not the manner of exercising that discretion.

Mower v. King County, 130 Wn. App. 707, 719, 125 P.3d 148 (2005).

Here, as Lange has acknowledged, the County evaluated Cebelak’s application to construct the bulkhead and other structures in 1998, as well as his application to rebuild the bulkhead in 2007. (CP 78-82).

Moreover, even after the 2007 bulkhead repair work was completed, the County inspected the work in July 2007 and May 2008 and determined that it was in compliance with shoreline regulations and the County Code. (CP 206-208). The County had no duty to do anything further.

Clallam County exercised its discretionary duty. While Lange may disagree with the *manner* in which the discretion was exercised (approving and issuing permits), mandamus may not be utilized to force local government to make a particular decision relative to a permit application. This is yet a final reason why the writ of mandamus was properly quashed.

V. CONCLUSION

The trial court properly dismissed Lange’s petition for a Writ of Mandamus. That decision should be affirmed by this Court.

DATED this 9th day of July, 2013.

KARR TUTTLE CAMPBELL

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Attorneys for Respondent

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America; State of Washington, employed at Karr Tuttle Campbell, 701 Fifth Avenue, Suite 3300, Seattle, WA 98104. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on July 10, 2013, a true copy of Brief of Respondents was served to the following by Legal Messenger:

Peter Ojala
Carson Law Group, P.S.
3202 Hoyt Ave.
Everett, WA 98201

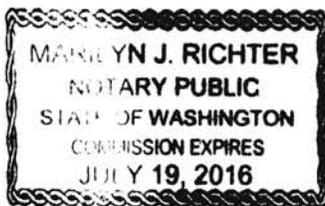
Nancy Randall

Nancy Randall

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

SUBSCRIBED TO AND SWORN before me this 9th day of

July, 2013



Marilyn J. Richter

Marilyn J. Richter

(Print Name)
NOTARY PUBLIC in and for the State of
Washington, residing in Bothell, WA
My Commission Expires: July 19, 2016