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45726-1-II

IN THE COURT OF APPEALS
DIVISION II

SCOTT LANGE, Trustee, and ELIZABETH R. LANGE, Trustee,
Trustees of the LANGE FAMILY TRUST,

APPELLANTS,

vs.

DAVID A. CEBELAK and KRISANNE R. CEBELAK,
Husband and wife, and the marital community composed thereof,

RESPONDENTS.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In 1996, David and Kris Cebelak purchased a waterfront lot in Clallam Bay, Washington. Their intent was to build a vacation home on the lot. Mr. Lange owned a home across the street. When Mr. Lange purchased his property and constructed his home, he was of the opinion that the lot purchased by the Cebelaks was not a “buildable lot.” He was mistaken. This lawsuit, and a companion suit against Clallam County, are his attempt to prevent the Cebelaks from enjoying their vacation home.

Mr. and Mrs. Cebelak are not professional home-builders. Mr. Cebelak is an electrician and Mrs. Cebelak was a clerical worker at a bank. They used licensed building contractors to build their home and a detached garage. The home is a modest one story, three-bedroom house. Prior to any construction, the Cebelaks obtained all necessary permits, including building permits, from Clallam County, the State Department of Fish and Wildlife, and the Department of Ecology. They were found to be in compliance with all building codes, shoreline regulations and the State Environmental Protection Act, (S.E.P.A). After each stage of construction, the work was inspected and approved by the appropriate agency.

The Cebelaks obtained a building permit for their garage/shed on October 9, 1996. They received final approval from Clallam County in September 1997. Mr. Lange did not challenge this permit under LUPA. The Cebelaks obtained a building permit for their home on August 26, 1996. The foundation was poured in 1997. The building permit was amended on December 13, 1996 and on April 5, 1999. Clallam County performed a final inspection of the home and issued a certificate of occupancy on November 2, 1999. Mr. Lange failed to challenge any of these permits under LUPA. The Cebelaks were granted permits from Clallam County and the Department of Fish and Wildlife in 1998 to construct their upland seawall. There was a finding in 1998 that the seawall was exempt from the Shoreline Management Act in 1998. Mr. Lange did not challenge these permits under LUPA. After the storm of December 2006, Cebelaks were granted an emergency Hydraulic Project Permit to repair their upland seawall. Mr. Lange did not challenge this permit under LUPA.

Contrary to the accusations in Appellant's Brief, Mr. and Mrs. Cebelak made no misrepresentations to anyone. Mr. Lange informally complained to Clallam County, alleging that the Cebelak property did not meet zoning regulations and that permits had been granted without an inspection of the project. The Clallam County Department of

Community Development responded, in a letter dated May 12, 1997. They stated that, contrary to Mr. Lange's allegations, the site had been inspected numerous times by employees of the Clallam County Building and Planning Departments. They found no violations of the shorelines or zoning codes. The Clallam County Habitat Specialist determined that the construction was not within the 35 foot shoreline buffer, nor did it encroach on the 45 foot setback from Salt Air Street. No variance was required, because the building complied with all zoning codes. Mr. Lange never filed a LUPA petition to challenge these land use decisions.

The construction of the home included a buried rock wall that protects the home from sea action. This is referred to as an "upland sea wall." As with all other parts of the structure, this was constructed with the proper permits required by State, County and Federal regulations. The wall was inspected and approved by government officials before it was covered with gravel from the beach. Contrary to the allegations of Appellant, the Cebelaks made no misrepresentations about the location of the wall, or the Ordinary High Water Mark, (OHWM). The OHWM changes as the beach gradient changes, but the County and State officials who inspected the work and the property were well aware of its location in 1998. The relevant drawings locate

the sea wall by its distance from the edge of the street, not from the ever-changing OHWM. Mr. Lange's allegations that the permits were issued without inspection by Clallam County and Washington State officials are incorrect. Mr. Lange filed no LUPA appeal of any of the land use decisions dealing with the upland seawall.

In December 2006, a winter storm struck Clallam Bay. The storm caused significant erosion of properties all along lots fronting Clallam Bay, including the Cebelaks'. Mr. Lange's house, since it sits on the land side of Salt Air Drive, suffered no erosion, but there was some damage to a beachfront lot he owns. The Cebelak's rock wall was uncovered and suffered some damage. The storm was severe enough that a disaster declaration was issued by Clallam County and the State of Washington. The Cebelaks contacted Clallam County and the appropriate Washington State agencies and obtained an emergency building permit and an emergency hydraulic permit to allow the wall to be repaired. The Hydraulic Project Approval was issued on January 22, 2007. The location of the wall did not change. During and after the repair work, the work was inspected and approved by county and state inspectors. Mr. Lange filed no appeal of the permits as required by LUPA.

Mr. Lange brought this action on December 11, 2009. He alleged that the Cebelak property, when constructed in 1998, blocked his view, that it constituted a public and private nuisance, that the property constituted intentional and negligent trespass, loss of lateral support, and negligence. Most of these claims were dismissed on summary judgment. The Trial Court noted that most of the claims were barred by the applicable statute of limitations or LUPA. All claims that predated the storm in December 2006 were dismissed. It is Respondents' position that all of the claims are barred by LUPA. After the Court's ruling only intentional trespass claims, loss of lateral support and injunctive relief remained to be litigated.

Mr. Lange has completely failed to exhaust his administrative remedies before bringing this action. His argument that the Cebelaks misrepresented the location of their home, setbacks, etc. is unsupported by any facts. It is somewhat incredible to take the position that this could have occurred, considering the numerous inspections of the property by governmental officials before, during and after the construction on this property.

Mr. Lange also commenced an action against Clallam County in 2012. That claim was dismissed because of his failure to comply with LUPA. It is currently on appeal. Respondents' position is that

Mr. Lange's claims that the Cebelaks misrepresented facts, while untrue, is irrelevant, because his non-compliance with LUPA bars all claims. This action should be dismissed.

II.
ANSWER TO ASSIGNMENT OF ERRORS

1. The Trial Court did not commit error by dismissing Appellants' claims arising from the issuance of building permits, other land use decisions by County and State agencies, based on Appellants' admitted failure to comply with the Land Use Petition Act.
2. The Trial Court did not commit error by dismissing Plaintiffs claims for nuisance, trespass and loss of view for non-compliance with the applicable statutes of limitation.

III.
ISSUE PRESENTED

1. Does the Appellants' admitted failure to comply with the requirements of the Land Use Petition Act bar any claims, including nuisance and trespass which are based solely on land use decisions, such as the issuance of building permits, and the structures built on the authority of those permits?
2. Since Appellants admit that they did not comply with Land Use Petition Act or exhaust available administrative remedies, are they barred from collateral attack on the building permits or other land use decisions dealing with Respondents' property?
3. Do other statute of limitations apply to any action, including a claim of nuisance, which accrued when the building permits were issued and the structures permitted were built?
4. Are Respondents, as the prevailing party in a challenge to land use decisions, entitled to attorney fees, pursuant to RCW 4.84.370?

IV.

STATEMENT OF THE CASE

Plaintiff/Appellant filed this action in Clallam County Superior Court on December 11, 2009, (CP 2), seeking relief for “Trespass, Nuisance, Injunctive Relief, and Other Relief.” Appellant essentially admits that he never filed a LUPA petition, or sought any other administrative relief prior to the filing of the Complaint. All of Appellant’s allegations arise out of the granting of building permits and Hydraulic Project Approvals by governmental agencies. (CP 2-5)

David and Kris Cebelak, the Respondents herein, purchased their property on Clallam Bay in 1996. (CP 20) It is on the north side of Salt Air Street. They made an offer on the property in August 1996, which was contingent on the granting of a building permit for the property. (CP 20, 26) Clallam County issued a building permit for a mobile home or manufactured home on August 26, 1996. (CP 31) Once the building permit was issued, the Cebelaks closed on the property on October 4, 1996. (CP 20-21) Appellant bought property on the south side of Salt Air Street in 1994. (CP 89) This is not the property that he alleges was damaged in December 2007. He alleges that it was his belief that the lot purchased by Cebelaks was not a “buildable” lot. This was based on conversations with unnamed

Clallam County employees. (CP 90) He was misinformed. Other than Appellant's declaration, there is no evidence in the record to support this allegation. In fact, the lot met all the standards for building and the Cebalak's proposed structures required no variances. (CP 21, 46) Appellant was informed in a letter from the Clallam County Department of Community Development, on May 12, 1997, that, contrary to his allegations, the building and site had been inspected numerous times, and no variance was needed. (CP 46) The letter states, in part:

The site in question has been inspected numerous times by both the Clallam County Building and Planning staff. We are not aware of any violations to either the shorelines or zoning codes. Although some shoreline erosion is evident, the building does not fall within the 35 foot shoreline buffer as determined by the County Habitat Specialist, nor does it encroach on the 45-foot setback from the centerline of the Salt Air right-of-way. Since the setback requirements were met, no variance was required.

The appellant did not file a LUPA petition or seek any administrative relief in response to this letter or the issuance of building permits.

The Cebelaks built their home over a period of time. First, they erected a small garage on the property. (CP 20) (Mr. Lange refers to this as a cabin) Prior to building, they obtained plumbing and electrical permits. (CP 36, 38) The building received a final

inspection and approval in September, 1997. (CP 20) On December 13, 1996, they obtained a modification to their original building permit to allow the construction of a stick-built home. (CP 20, 41) The permit was revised a second time, on April 5, 1999, to build a one-story home, rather than the two-story home allowed under the original permit. (CP 20, 44) The home was constructed and, after numerous inspections, was approved for occupancy on November 2, 1999. (CP 42) Appellant did not file a LUPA petition or seek any administrative relief in regard to these permits and the construction of the home.

As part of the construction of their home, the Cebelaks wanted to build a bulkhead to protect it from erosion. Clallam County would not approve a bulkhead, but they approved an upland seawall, which was buried in beach gravel. Clallam County made findings and conclusions and issued a Shorelines Exemption Permit on June 19, 1998. (CP 21, 48-51) The Department of Fish and Wildlife issued a Hydraulic Project Approval on June 22, 1998. (CP 21, 53-56) Work was completed on the upland seawall on May 1999. It was inspected and approved by both agencies. Appellant did not file a LUPA petition or seek administrative relief from either permit.

Appellant spends a considerable time alleging that the upland seawall was based on a faulty designation of the OHWM. In fact, the

permit does not specify the location of the wall by reference to this mark. The Hydraulic Project Approval specifies the location by reference to structures. It states at CP 53:

3. The waterward face of the rock bulkhead shall be located in uplands landward of the ordinary high water line, in alignment with a point 21 feet waterward of the west end of the garage foundation and a point 26 feet waterward of the foundation of the proposed dwelling.

Other than being “upland” of the OHWM, the placement of this mark, which changes every time the beach gradient changes, would seem to be irrelevant. The wall was also inspected before and after construction and the regulatory agencies involved were well aware of its location. The buried upland seawall stayed buried until a major storm hit in December 2007.

On May 15, 2002, Appellant purchased four lots on Salt Air Street. Two of them were waterfront lots. One, lot 11, abuts the western side of the Cebelak property. (CP 91) These are small lots, neither of which is buildable. It is alleged that lot 11 was damaged by a storm that occurred in December 2007. (CP 2, 91)

On December 14, 2006, a major storm caused extensive erosion on Clallam Bay. (CP 21) The erosion was widespread and it exposed the upland seawall on the Cebelak property. The State of Washington declared a state of emergency due to the storm. The Cebelaks

contacted Clallam County and obtained a verbal approval to conduct emergency repairs on the seawall. (CP 21) On January 22, 2007, the Department of Fish and Wildlife issued a Hydraulic Project Approval for the repairs. (CP 58-63) The location of the seawall did not change. Work was completed, including on-site inspections by Fish and Wildlife and Clallam County Department of Community Development, in February 2007. (CP 22) Clallam County issued a Shoreline Management Act exemption on May 13, 2008. (CP 64-65) It states: "The purpose of this permit is to ensure that the shoreline that has already been constructed conforms with county and state requirement, and that all conditions of this proposal have been fully implemented." (CP 64) The document also records that the work was inspected on several days in 2007 and 2008, by representatives of Clallam County, Washington Department of Ecology, and Washington Department of Fish and Wildlife. The Conclusion, at CP 66, is:

In consideration of the above, the proposal is found exempt from the requirement of a shoreline substantial development permit. Additionally, this proposal is found consistent with the Clallam County Critical Areas Code, and meets the requirements for a Certificate of Compliance for work within the critical area.

Appellants did not file a LUPA petition or seek any administrative review of these actions.

The evidence is uncontroverted that the Cebelaks followed all government rules and regulations in regard to the construction of their garage, home, and seawall. The projects were inspected and approved by multiple government agencies. It is also uncontroverted that Appellant never met the requirement of LUPA to challenge any of these land use decisions or sought any other administrative relief.

All of Appellant's claims in this case arise from the issuance of building permits, shoreline act exemptions, hydraulic permit approvals, and other unchallenged land use decisions by Clallam County and the State of Washington. This includes claims of nuisance, loss of lateral support, intentional trespass, and loss of view. Appellant's entire case is an attempt to collaterally attack the permits that were legally granted to Respondents and which became final 21 days after their issuance. None of these claims would exist without the land use decisions involved and all those claims are barred by the failure to file a timely LUPA appeal. Appellant's claims should be dismissed.

V. ARGUMENT

A. Standard of Review

Summary Judgments are reviewed using a *de novo* standard, with the reviewing court engaging in the same inquiry as the trial court. *Highline School District 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). In such a review, all evidence and reasonable inferences are viewed in the light most favorable to the non-moving party. *Barber v. Bankers Life and Trust Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1975). The reviewing court only reviews the same evidence that was presented to the trial court. See: RAP 9.12.

Appellant incorrectly asserts that all of the non-moving parties arguments are regarded as true and that the Court should consider evidence outside the record. That is the standard for motions brought under Civil Rule 12(b)(6), not in a summary judgment proceeding. *Haberman v. Washington Public Power System*, 109 W.2d 107, 114, 744 P.2d 1032 (1987), cited by Appellant, was a review of a dismissal based on a CR 12(b)(6) motion, not a Motion for Summary Judgment. The inquiry of the trial court in a CR 12(b)(6) motion is much more generous to the non-moving party than it is in a Motion for Summary Judgment.

A plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion. *Lawson v. State*, 107

Wash.2d 444, 448, 730 P.2d 1308 (1986); *Bowman*, at 183, 704 P.2d 140. A complaint survives a CR 12(b)(6) motion if any state of facts could exist under which the court could sustain the claim for relief. *Lawson*, at 448, 730 P.2d 1308; *Bowman*, at 183, 704 P.2d 140; *Orwick*, at 255, 692 P.2d 793. Thus, a court may consider hypothetical facts not part of the formal record in deciding whether to dismiss a complaint pursuant to CR 12(b)(6). *Halvorson v. Dahl*, 89 Wash.2d 673, 675, 574 P.2d 1190 (1978).

Haberman, Supra, at 120.

The Court's inquiry in a Motion for Summary Judgment is to decide, based on the evidence submitted, whether there are any genuine issues of material fact that prevent the Court from ruling as a matter of law. CR 56(c), *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). In this case, the trial court ruled on summary judgment based on the uncontroverted facts submitted by the parties. The most important facts were either admitted or undisputed; that all claims arose from land use decision by government agencies and that Appellant never filed a LUPA petition or sought other administrative relief. This Court's inquiry is based on those same facts.

B. All of Appellants claims are barred by LUPA.

There is no independent basis for Appellants claims without questioning the validity of building permits issued to the Cebelaks. This action is an attempt to conduct a collateral attack on those land use decisions, without complying with LUPA. To put it another way, if the

Cebelaks had never developed this land, would Appellant's have a case for damage to their land, loss of view, trespass, or any of their other claims. The answer is clearly no. Appellant's allegations all arise from these land use decisions. Because of his failure to comply with LUPA, the court must dismiss these claims.

The Land Use Petition Act (LUPA), (RCW 36.70C.030), provides the exclusive remedy for contesting land use decisions. *Twin Bridge Marine Park v. State Department of Ecology*, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008). Once the 21 day appeal period passes, the decisions are final. The short time allowed to file a LUPA petition is intended to allow finality to land use decisions. In *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), the Court held that LUPA applied to all land use decisions, regardless of how they are characterized, and that the 21 day time limit was jurisdictional. The *Chelan County v. Nykreim* Court states the legislative intent of the act at 933:

To allow Respondents to challenge a land use decision [a boundary line adjustment] beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. 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.

This case deals with permits issued over a decade ago. Appellant has made no attempt to comply with the provisions of LUPA and the trial court was correct to dismiss the collateral attack on the decisions.

The issuance of a building permit is a land use decision. This is discussed in *Asche v. Bloomquist*, 132 Wn. App. 784, 796, 133 P.3d 475 (2006). The Court states at 478:

Initially, we note that LUPA applies to the issuance of this building permit because the building permit was a land use decision. LUPA is the exclusive means of judicial review of land use decisions. RCW 36.70C.030. Land use decisions are defined in the statute to be a “final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination” 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 interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property....

RCW 36.70C.020(1)(a)-(c). In *Samuel's Furniture v. Department of Ecology*, the Washington Supreme Court noted that a grading building permit was a final determination for purposes of LUPA. *Samuel's Furniture*, 147 Wash.2d 440, 453, 54 P.3d 1194 (2002). The court has also specifically noted that “[b]uilding permits are subject to judicial review under LUPA.” *Chelan County v. Nykreim*, 146 Wash.2d 904, 929, 52 P.3d 1 (2002).

Building permits and hydraulic project authorization permits were issued to the Cebelaks over a decade ago. Appellant's objections to those are barred by LUPA.

The exemptions from the Shoreline Management Act requirements issued to the Cebelaks are also considered to be land use decisions, subject to the requirements of LUPA. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 376, 223 P.3d 1172 (2009). The Shoreline Management Act requires that any challenge to shorelines decisions be filed within 21 days. See: RCW 90.58.180(1).

The construction of, and repair to, the upland seawall on Cebelaks' property was authorized by Hydraulic Project Approvals issued under the provision of RCW 77.55.010, Construction Projects in State Waters. RCW 77.55.141 and RCW 77.55.021(4) allow 30 days to appeal any decision regarding the issuance of a permit or approval. Appellants failed to comply with this deadline and any claim is now time-barred.

LUPA has a stringent and inflexible statute of limitations. The aggrieved party has 21 days to file a petition protesting the decision. RCW 36.70C.040(3). The 21 days began when the permits and exemptions were mailed or filed in the public record. RCW 36.70C.040(4). This is a real 21 days. Appellants have cited no provision for tolling the deadline, and there are none. Everyone, even a government

agency must follow LUPA. In *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002), it was held that the Department of Ecology could not contest a Whatcom County building permit, because they failed to file a LUPA petition within 21 days.

Appellants have alleged, without a factual basis, that the Cebelaks misrepresented the location of their buildings and seawall. This ignores the numerous inspections and approvals by the appropriate government agencies, but it is also irrelevant. Even illegal decisions are subject to the 21 day deadline.

The Supreme Court's decision in *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 120 P.3d 56 (2005), is determinative. **There, the court determined that even illegal decisions under local land use codes must be challenged under LUPA in a timely, appropriate manner.** *Habitat Watch*, 155 Wash.2d at 407, 120 P.3d 56. This includes defects in land use determinations that would have made the decision void under pre-LUPA cases. *Habitat Watch*, 155 Wash.2d at 407, 120 P.3d 56. Accordingly, the court held that LUPA's 21-day limitation on challenges applied. *Habitat Watch*, 155 Wash.2d at 409, 120 P.3d 56.

Asche, Supra, at 795. [Emphasis supplied]

In this case, there is no evidence in the record of any misrepresentation by the Cebelaks. The most absurd argument is that the rental of the home means that it is not a single family home. The term "single family home" is a zoning classification. It does not relate to the use of the property. In a

recent case, *Wilkenson v. Chiwawa Communities Association*, ___ Wn.2d ___, ___ P3d ___ (2014), 2014 WL1509945, the Supreme Court dealt with this same question. The appellants alleged that the rental of a house meant it violated covenants that limited construction to single-family homes.

The Court held, at page 12 of the opinion:

Nor does the 1988/1992 covenants' "single family residential use" restriction limit to whom the vacation rentals may be rented. Reading the restriction, as the Association does, to prohibit unrelated persons from residing within Chiwawa would require us to read the provision out of context. The "single family, residential use" restriction is incorporated into a provision that restricts the type of structures that can be built and how far from the front lines they must be built. Read in context, **the single-family covenant restricts only the type and appearance that may be constructed on the lot, not who may reside there.** [Emphasis supplied].

The zoning designation in this case is clearly intended to differentiate between multi-family housing units, such as condominiums or apartments, and stand alone, one family homes. It is not a restriction on the use of a persons' property. Appellant has cited no legal restriction on the use of Cebelak's home. There was no misrepresentation.

Under any interpretation, the Appellant's allegations of misrepresentation had to be dealt with within the context of LUPA. Cases dealing with remedies prior to the enactment of LUPA have no

precedential value. LUPA controls and it is the exclusive remedy, and Appellant admits his non-compliance.

Actual notice to a potentially aggrieved party is not required under LUPA. See *Asche, Supra*, at 796. In *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) permits for the construction of a golf course were renewed several times by a hearing examiner, who failed to give appropriate notice of several hearings on the subject. Construction of the golf course, seven years after the last public hearing, was the first notice to the Plaintiffs that the permit had been renewed. The Supreme Court held that the 21 day period began on renewal, regardless of the lack of notice. *Habitat, Supra*, at 400, 417.

Appellants cite a number of cases to support their argument that a building permit granted conveys no rights to the permit holder. (See P. 15, Appellant's Brief.) These cases are not on point. In every case cited, a timely LUPA petition had been filed. This allowed the exploration of the merits of the plaintiff's claims. Appellants allege that *Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.2d 988 (2011) allows a neighbor to contest the validity of a building permit. This was a case about vesting rights under a building permit. The Plaintiffs in that case had filed a timely LUPA petition. The *Lauer* court states, at 256:

The LUPA petition was timely filed. To be timely, a petition must be filed within 21 days of the relevant land use decision, including a ruling on a motion for reconsideration. RCW 36.70C.040(3); *Mellish v. Frog Mountain Pet Care*, 172 Wash.2d 208, 257 P.3d 641 (2011). This petition was filed 20 days after the motion for reconsideration was denied. Therefore, the petition was timely.

Appellant also cites *Heller Building, LLC v. City of Bellevue*, 147 Wn. App. 46, 194 P.3d 264 (2008). The *Heller* opinion states, at 49: “We hold that HBL's petition was timely, but that HBL fails to show that it is entitled to relief under LUPA.” In *Bierman v. City of Spokane*, 90 Wn. App. 816, 960 P.2d 434 (1998), the issue was the validity of a Certificate of Compliance issued by a hearing examiner. The *Bierman* court held, at 436, that the plaintiff had filed a timely LUPA petition. Appellants also cite, on page 17 of their brief, *Eastlake Community Council v. Roanoke Associates*, 82 Wn.2d 475, 513 P.2d 36 (1973). That is a pre-LUPA case, dealing with the authority of the Growth Management Board and vesting. This was probably overruled by *Town of Woodway v. Snohomish County*, ___ Wn.2d ___, 322 P.3d 1219 (2014). These cases do not support Appellant’s arguments. The admitted failure to file a LUPA petition in this case prevents any discussion of the validity of the Cebelak building permits or other land use decisions affecting their property. Collateral attack on these land use decisions is not permitted by LUPA.

The LUPA deadline is intended to give land use decisions finality, to allow people to use their property in a legal fashion, and promote reliance on the decisions of government. The Cebelaks relied on the land use decisions of government agencies to build their summer home on Clallam Bay. In *Asche v. Bloomquist*, 122 Wn. App. 784, 133 P.3d 475 (2006), the plaintiffs made claims very similar to those made by Appellants herein, including claims of public nuisance, private nuisance, lack of view, and violation of building codes. The Court held, at 788:

We hold that their failure to file a land use petition within 21 days of the issuance of a building permit as required by RCW 36.70C.040 is determinative. Their claims for nuisance, either public or private, fail and their due process actions fail because they did not properly file under the Land Use Petition Act (LUPA).

Since Appellants failed to meet the LUPA deadline, all claims arising out of these land use decisions are time-barred. This is essentially all of Appellant's claims. All of their claims arise out of the construction of permitted structures and should have been dismissed.

C. Appellants failed to exhaust their administrative remedies and are barred from pursuing this action.

Appellants essentially admit that they did not exhaust, or even seek, any administrative remedy. Appellant's reliance on *Channey v. Fetterly*, 100 Wn.App, 140, 995 P.2d 1284 (2000) is misplaced. That

case was overruled by *Cost Management Services, Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013), in which the Supreme Court held, at 646 of the opinion, that a party with an administrative remedy must exhaust the administrative process before it can proceed to Superior Court Review. A party is required to pursue relief through the appropriate agency before it can appeal to Superior Court for relief. See: RCW 35.05.534, *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997).

There are a number of administrative procedures and remedies available to persons with complaints about building permits, Shoreline Act exemptions, or hydraulic project authorizations. The Clallam County Code states that appeals of building permits must be filed within sixty days of the issuance of the permits, on forms provided by the county. See: CCC 21.01.140(2)(a). As discussed above, there were no variances issued to the Cebelaks' because they complied with all provisions of the code. Objections to permit exemptions by Clallam County C.D.C. must be filed with Clallam County Commissioners within 14 days of the decision to grant the exemption. Shoreline Act exemptions are governed by Chapter 27.12 of the County Code , and appeals are governed by Chapter 26 of the Clallam County Code. CCC 27.12.045 allows 14 days from the date of mailing or notice of the decisions to file an appeal. If Appellant had met

this requirement, he then had to seek review with the Shorelines Hearing Board, pursuant to RCW 90.58.180(1). A person aggrieved by the issuance of a hydraulic permit approval must formally appeal it using the procedure specified in RCW 77.55.141(4). There is no evidence in the record that Appellant complied with any of these administrative requirements. His failure to exhaust these administrative remedies bars the claims being made in this case.

Appellant made no effort to pursue any of the administrative remedies available to him, and where his complaints may have been heard. Appellant was informed of the law, in a letter he received from the Office of the Attorney General on March 18, 2010, in response to a tort claim he filed against the State of Washington. (CP 68). That letter states: “There is no indication you appealed the issuance of the Cebeak’s permit to the hydraulic appeals board, so you have failed to exhaust your administrative remedies.” Since Appellant made no effort to utilize available administrative remedies to contest the permits and exemptions granted to the Ceblelaks, he may not seek to have those permits and exemptions revoked in Superior Court. *Harrington v. Spokane County*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005). Appellant’s failure to follow the rules prescribed by LUPA and other statutes bars all claims in this action.

D. The Statute of Limitations bar all of Appellant's claims.

Appellant's claims include claims for negligent and intentional trespass, negligent injury to real property, obstruction of view, and loss of lateral support. (CP 2-5) As discussed above, all of these claims are based on construction done on Cebelak's property under the authority of building permits issued prior to 1999. Even without the operation of LUPA, these claims either fail to state a claim, or are barred by the applicable statutes of limitations.

Appellant seems to have abandoned the obstruction of view allegation, since it is not among Appellant's Assignments of error. There is no common law right to a view from one's property over a neighbor's property. *Collison v. John L. Scott, Inc.*, 55 Wn. App. 481, 488, 778 P.2d 534 (1989). The claim of loss of lateral support, presumably based on the construction of the upland seawall in 1999, does not fit the facts of the case. The claim is that the construction of the seawall caused erosion on Appellant's property. Loss of lateral support generally means the *removal* of soil or structures on the defendant's property line allows the collapse of Plaintiff's land. *Kelley v. Falungus*, 63 Wn2d 581, 388 P.2d 223 (1964). There is no claim for potential or probable future damage. *Hamm v. City of Seattle*, 159 Wash. 274, 286 P. 657 (1930). Here, the claim is that the construction of structures caused erosion. This may be the basis for a

claim of damage to land, but it does not contain the elements of loss of lateral support. In any case, the statute of limitations is two years, and it passed long before Appellant commenced this action. See: RCW 4.16.030.

The statute of limitations for negligent injury to real property is two years. RCW 4.16.130, *Wallace v. Lewis County*, 134 Wn. App. 1, 7, 137 P.3d 101 (2006). The Cebelaks' home construction was complete in 1999, their garage was complete in 1997 and the upland seawall was complete in 1998. The repairs to the wall, which did not change the location of the wall, were complete in February 2007. This action was filed December 11, 2009, 33 months after the last work was done. The claimed erosion of the beach occurred in December 14, 2006. Under any theory, Appellant's action is time-barred.

None of Appellant's claims constitute continuing torts. Plaintiff's actions accrued when they became aware of the alleged nuisance or trespass. The alleged damages all occurred no later than the storm on December 14, 2006. In fact, the only damage was during the storm that occurred on that date. There is no evidence in the record to show any continuing trespass or nuisance.

E. Respondents should be awarded attorney fees.

RCW 4.84.370 provides that the prevailing party in an action contesting a land use decision is entitled to reasonable attorney fees. It states:

Appeal of land use decisions--Fees and costs

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Essentially, once the decisions have been successfully defended on two levels, the permittee is entitled to reasonable attorney fees and costs.

Under this statute, parties are entitled to attorney fees only if a county, city, or town's decision is rendered in their favor and at least two courts affirm that decision. The possibility of attorney fees does not arise until a land use

decision has been appealed at least twice: before the superior court and before the Court of Appeals and/or the Supreme Court. RCW 4.84.370(1). Thus, parties challenging a land use decision get one opportunity to do so free of the risk of having to pay other parties' attorney fees and costs if they are unsuccessful before the superior court. *See Baker v. Tri-Mountain Res., Inc.*, 94 Wash.App. 849, 854, 973 P.2d 1078 (1999)

Habitat Watch v. Skagit County, 155 Wn.2d 397, 413, 1220 P.3d 56 (2005). The Cebelaks have been forced to endure the frivolous claims of Appellant in this action. They are entitled to prevail and to have Appellant pay their attorney fees and costs.

VI. CONCLUSION

This is a case in which one neighbor has attempted to prevent another neighbor from building on a lot that he coveted, but did not buy. It is an extreme case of “sour grapes.” Appellant has made no effort to comply with LUPA, the Shorelines Management Act, the Construction Projects in State Waters Act, or the Clallam County Code. Appellant has essentially asked this Court to change or ignore these laws and the cases interpreting these laws. This is essentially an admission of non-compliance with these laws and a failure to exhaust

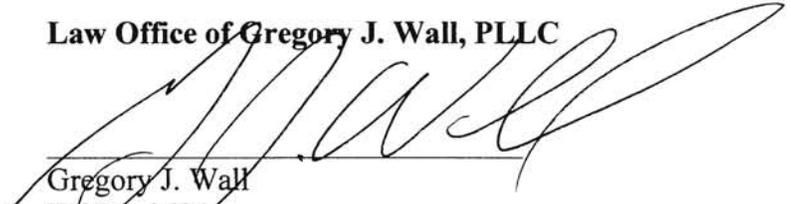
administrative remedies prior to seeking relief in Clallam County Superior Court.

All of Appellant's claims are based on the issuance of building permits, Shoreline Act exemptions, and Hydraulic Permit Approvals. When he failed to file LUPA petitions or seek other administrative review, these permits and exemptions became final, as the legislature intended. There is no independent basis for any of these claims. Had the permits not been issued and the structures permitted by these permits not been built, there would be no claim. All of the attempts to argue misrepresentation, illegal issuance of permits, and violation of environmental laws deal with matters that could have, and should have been argued in a LUPA petition. The failure to comply with LUPA bars the courts from considering the merits of these claims. LUPA does not allow collateral attack on final land use decisions. Even if it did, the statute of limitations expired prior to the commencement of this action.

This entire action should be dismissed and Appellants should be ordered to pay the attorney fees and costs incurred by Respondents.

Respectfully submitted this 10th day of June, 2014.

Law Office of Gregory J. Wall, PLLC

A handwritten signature in black ink, appearing to read "Gregory J. Wall", is written over a horizontal line. The signature is stylized and cursive.

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

SCOTT K. LANGE, Trustee, and
ELIZABETH R. LANGE, Trustee of the
LANGE FAMILY TRUST,

NO. 45726-1-II

CERTIFICATE OF SERVICE

Appellants,

vs.

DAVID A. CEBELAK and KRISANNE R.
CEBELAK, husband and wife, and the
marital community composed thereof,

Respondents.

The undersigned certifies that on the 10th day of June 2014, she caused a copy of the following documents:

- 1. Brief Of Respondent;
- 2. and this Certificate Of Service.

to be served on the parties listed below by the method(s) indicated:

Party/Counsel	Additional Information	Method of Service
Court Of Appeals of the State Of Washington Division II 950 Broadway, Suite 300, MSTB-06 Tacoma, WA 98402-4454	Court of Jurisdiction	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile <input checked="" type="checkbox"/> Email: coa2filings@courts.wa.gov

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5 I certify under penalty of perjury of the laws of the State of Washington that the
6 foregoing statements are true and correct.

7 Dated at Port Orchard, Washington.

8 

9 SANDRA RIVAS
10 Legal Assistant