

70218-1

70218-1

2013 SEP 26 PM 1:25  
SUNIL K. JAYARAM  
COURT CLERK

APPEAL NO. 70218-1-I

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

(Whatcom County Superior Court Case No. 12-2-03029-1)

---

**DAVID COTTINGHAM AND JOAN COTTINGHAM,**

Appellants,

vs.

**RONALD MORGAN AND KAYE MORGAN, et al.**

Respondents.

---

**Respondent Morgans' Response Brief**

---

Douglas R. Shepherd  
Bethany C. Allen  
Shepherd and Abbott  
2011 Young Street, Ste 202  
Bellingham, WA 98225  
(360) 733-3773

---

September 25, 2013

W.M.G.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ISSUES.....	7
III.	STATEMENT OF THE CASE.....	8
IV.	LEGAL ARGUMENT.....	11
A.	Standards of Review.....	11
1.	Findings of Fact.....	11
2.	Conclusions of Law.....	12
3.	Summary Judgment.....	12
4.	Award of Attorneys' Fees under CR 11 and RCW 4.84.185.....	13
B.	The Court Did Not Have Jurisdiction Over Cottinghams' Untimely LUPA Petition.....	13
C.	Cottinghams' Claims are Barred by Res Judicata...	20
D.	Cottinghams' Claims are Barred by the Statute of Limitations.....	26
E.	The Trial Court's Award of Attorneys' Fees Was Proper Under RCW 4.84.185 and CR 11.....	28
F.	Morgans are Entitled to Attorney's Fees on Appeal	32
V.	CONCLUSION.....	33

## APPENDICES

Appendix A.....	RAP 10.3(g)
Appendix B.....	RAP 18.9
Appendix C.....	Civil Rule 11
Appendix D.....	RCW 4.16.080
Appendix E.....	RCW 4.84.185
Appendix F.....	RCW 36.70C.010
Appendix G.....	RCW 36.70C.020
Appendix H.....	RCW 36.70C.030
Appendix I.....	RCW 36.70C.040
Appendix J.....	WCC 20.92.210
Appendix K.....	WCC 20.92.610

## TABLE OF AUTHORITIES

### Washington Supreme Court

<i>American Nursery v. Indian Wells</i> , 115 Wn.2d 217, 797 P.2d 477 (1990).....	12
<i>Benchmark Land Co. v. Battle Ground</i> , 146 Wn.2d 685, 49 P.3d 860 (2002).....	14
<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992).....	29
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	13
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	31
<i>Fluke Capital &amp; Management v. Richmond</i> , 106 Wn.2d 614, 724 P.2d 356 (1986).....	13
<i>In re Hews</i> , 108 Wn.2d 579, 741 P.2d 983 (1987).....	11
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002).....	12
<i>Kruse v. Hemp</i> , 121 Wn.2d 715, 853 P.2d 1373 (1993).....	13
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995).....	20
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002)	11, 12
<i>Twin Bridge Marine Park v. Ecology</i> , 162 Wn.2d 825, 175 P.2d 1050 (2008).....	17
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 730 P.2d 45 (1986)...	11, 12

<i>Woldson v. Woodhead</i> , 159 Wn.2d 215, 149 P.3d 361 (2006).....	26
---	----

**Washington State Court of Appeals**

<i>Asche v. Bloomquist</i> , 132 Wn.App. 784, 133 P.3d 475 (2006).....	18, 19
<i>Buechler v. Wenatchee Vall Coll.</i> , 174 Wn.App. 141, 298 P.3d 110 (2013).....	13
<i>Burrill v. Burrill</i> , 113 Wn.App. 863, 56 P.3d 993 (2002), <i>rev. denied</i> , 149 Wn.2d 1007 (2003).....	12
<i>Crisman v. Crisman</i> , 85 Wn.App. 15, 931 P.2d 163 (1997)...	27
<i>Durland v. San Juan County</i> , 175 Wn.App. 316, 305 P.3d 246 (2013).....	16
<i>Ensley v. Pitcher</i> , 152 Wn.App. 891, 222 P.3d 99 (2009).....	22
<i>Eugster v. City of Spokane</i> , 110 Wn.App. 212, 39 P.3d 380 (2002).....	30
<i>Ferguson v. City of Dayton</i> , 168 Wn.App. 591, 277 P.3d 705 (2012).....	19
<i>Kelly-Hansen v. Kelly Hansen</i> , 87 Wn.App. 320, 941 P.2d 1108 (1997).....	21
<i>King Aircraft v. Lane</i> , 68 Wn.App. 706, 846 P.2d 50 (1993)...	12
<i>Layne v. Hyde</i> , 54 Wn.App. 125, 773 P.2d 83 (1989).....	29
<i>Legal Foundation v. TESC</i> , 44 Wn.App. 690, 723 P.2d 483 (1986).....	29

<i>Martin v. Wilbert</i> , 162 Wn.App. 90, 253 P.3d 108 (2011).....	21
<i>McNeil v. Powers</i> , 123 Wn.App. 577, 97 P.3d 760 (2004).....	31
<i>Prosser Hill Coalition v. County of Spokane</i> , 2013 WL 4478227, at 2, WESTLAW (2013).....	14
<i>Skimming v. Boxer</i> , 119 Wn.App. 748, 82 P.3d 707 (2004)...	29
<i>Stiles v. Kearney</i> , 168 Wn.App. 250, 277 P.3d 9 (2012).....	33
<i>Tiger Oil v. Dep't of Licensing</i> , 88 Wn.App. 925, 946 P.2d 1235 (1997).....	13, 30
<i>Wellman &amp; Zuck v. Hartford Fire</i> , 170 Wn.App. 666, 285 P.3d 892 (2012).....	32
<i>Zink v. City of Mesa</i> , 137 Wn.App. 271, 152 P.3d 1044 (2007).....	29, 30

### Rules

CR 11.....	13, 28 30, 32
RAP 10.3(g).....	3, 4
RAP 18.9.....	32
RAP 18.9(a).....	32
RCW 4.16.080.....	26
RCW 4.16.080(2).....	27
RCW 4.84.185.....	13, 28 29, 30

RCW 36.70C.010.....	18
RCW 36.70C.020.....	14
RCW 36.70C.020(2).....	15, 16
RCW 36.70C.030(1).....	14
RCW 36.70C.040.....	14, 18
RCW 36.70C.040(2)&(3).....	17
RCW 36.70C.040(3).....	17
RCW 36.70C.040(4).....	18
WCC 20.92.210.....	14
WCC 20.92.610.....	14

## **I – INTRODUCTION**

David and Joan Cottinghams' (Cottinghams) present appeal (Cottinghams' fourth appeal) stems from a second lawsuit arising out of a dispute between neighbors. The first lawsuit is currently being reviewed by this Court under cause numbers 68202-4-I (consolidated with No. 68402-7-I) and 68900-2-I. In this second lawsuit, Cottinghams attempted to re-litigate, by way of declaratory judgment against Ron Morgan and Kaye Morgan (Morgans), legal and factual issues Cottinghams' lost in their first lawsuit. CP 6. In their Land Use Petition and Complaint for Declaratory Judgment (Complaint), Cottinghams asked the trial court to determine, in part, that in spite of the first lawsuit, the trial court should reconsider and:

- "[O]rder Morgans to stake area of the complete extent of their lot Eleven . . ."; (CP 28)
- Determine that "Morgans proceeded to trial [in the first lawsuit] without good faith . . ."; (CP 29)
- Determine that "Morgans' use of the condemnation counterclaim [in the first lawsuit] was abusive use of process"; (CP 29)
- "Declare the duty of the applicant [Morgans] with regard to demonstration of the entirety of the lot dimension"; (CP 29) and,

- Recognize that Cottinghams' actual property boundaries are contrary to the findings and rulings of the trial court in the first lawsuit. (CP 30).

Cottinghams also attempted to bring an untimely Land Use Petition Act (LUPA) Petition against Whatcom County and Whatcom County Building Services Division of Planning and Development Services (Whatcom County).

In this matter, the trial court made and entered certain findings of facts and conclusions of law. The relevant findings and conclusions entered on March 13, 2013, were:

7. Cottinghams' LUPA Petition, brought under RCW 36.70C is not timely.

9. This Court does not have subject matter jurisdiction over Cottinghams Land Use Petition.

13. This Courts' findings and conclusions entered in Cause Number 09-2-01773-1 demonstrate that all issues raised and claims made by Cottinghams in this matter, were raised by Cottinghams litigated by Cottinghams and Morgans, previously decided by Judge Meyer and are now the subject matter of several appeals.

14. If any new claims are raised in this matter by Cottinghams those claims while difficult if not impossible to determine from their pleadings, would be subject to a three year statute of limitations and would have been known to Cottinghams by December 30, 2007 and clearly would have been known to Cottinghams, under any conceivable factual situation, by June 30, 2009, a date after which Cottinghams' Compliant was filed and

served in Cause Number 09-2-01773-1, and therefore should have been raised in the prior matter.

CP 747-48. Findings 7, 9, 13, and 14, entered on March 13, 2013, were not given separate assignments of error for each finding by Cottinghams in their Opening Brief as required by RAP 10.3(g). App. Opening Brief, p. 5.

On June 19, 2013, the trial court made and entered (filed June, 20, 2013) additional findings of fact related to attorney's fees, terms and costs. CP 871. On June 19, 2013, the trial court found:

1. Cottinghams' Land Use Petition and Complaint for Declaratory Judgment was filed and advanced in violation of CR 11 and is not supported by any fact or law or reasonable argument for any extension of existing law.
2. Cottinghams have attempted, in this matter, to re-litigate the issues raised and decided against Cottinghams in the previous litigation under Whatcom County Superior Court Cause No. 09-2-01773-1, which matter resolved after a four-day bench trial.
3. This Court previously entered Findings and Conclusions as follows and incorporates that finding into this order:  
*13. The Courts' findings and conclusions entered in Cause Number 09-201773-1 demonstrate that all issues raised and claims made by Cottinghams in this matter, were raised by Cottinghams, litigated by Cottinghams and Morgans, previously decided*

*by Judge Meyer and are now the subject matter of several appeals.*

. . . .

5. Cottinghams' pleadings in this matter have been chaotic, convoluted, and difficult to understand, which pleadings required a substantial amount of time to understand and thoughtfully respond.

6. Cottinghams' arguments in this matter have not been supported by fact or law.

. . . .

8. Cottinghams' pleadings in this matter, which pleadings are not supported by fact or law, were filed at least in part to harass and/or annoy Morgans.

9. Cottinghams' pleadings in this matter were frivolous and advanced without reasonable cause in violation of RCW 4.84.185.

10. Attorneys Shepherd and Allen's time, rates and costs as submitted, inclusive of staff time and rates, are reasonable and appropriate less any and all time spent and costs advanced on defendants' counterclaims, totaling \$721, and by reducing the total Legal Intern rate billed by \$850. . . .

None of the above findings of fact, entered on June 19, 2013, were assigned error by Cottinghams in their Opening Brief, again in violation of RAP 10.3(g).

Similar to what happened in the trial court, Cottinghams, in their Opening Brief, continue to reargue matters argued in the first

lawsuit and arguments already made in the earlier appeals. Cottinghams ask this Court to allow a second inquiry into Morgans' alleged misconduct. Cottinghams, in this matter, argue Morgans' installation of their driveway "wasted" Cottinghams' improvements. The waste argument is repeated by Cottinghams in their Opening Brief on pages 1, 21, and 41 as "waste", and on pages 1, 3, 6, and 12 as "wrongful waste." Then Cottinghams argue that the first civil trial "unearthed remarkable evidence" of Morgans' alleged misconduct. App. Opening Brief, at p.2. This theme of Morgans' misconduct from the first trial is repeated by Cottinghams. For example: "Trial also uncovered Morgan's septic planning issues." *Id.* at p. 2. The apparent purpose of the argument is to ask this Court, in equity, to undo matters resolved in the first lawsuit because Cottinghams have a "need for equity." *Id.* Cottinghams conclude their Opening Brief with the following complaint: "Equity in avoidance of review showed bad faith and frivolous use of a motion. Need of review and defense of Cottinghams' home remains caused by Morgans' erratic use of condemnation and necessity, confounding to notions of permit validity . . ." *Id.* at p. 49.

Cottinghams describe their LUPA argument as follows: The Whatcom County [Agency] approval of the building permit “ceased upon Morgans’ wrongful waste” and therefore, because of Morgan’s tortious conduct, “its [Whatcom County] jurisdiction continued while Morgans provoked Cottinghams’ civil quiet title action [the first lawsuit].” *Id.* at p. 1. Nowhere in their Opening Brief can one find complaints by Cottinghams of misconduct by Whatcom County; all complaints are directed towards Morgan.

The trial court found that Cottinghams’ pleadings and arguments were “chaotic, convoluted, and difficult to understand.” CP 874. Cottinghams continue that same conduct in this appeal. For example, Cottinghams in their Opening Brief, write:

- “A Land Use Petition seeking review of Morgan’s compliance with a special Shoreline Ordinance-Exempting Condition denying driveway with a setback followed waste of Cottinghams’ improvements and stands summarily dismissed.” *Id.* at p. 1.
- “Exemption from full shoreline management program ordinance procedure, notices and open record hearings was granted to Morgans with the required attachment of a special condition [citations to record omitted] asserted as violated by a substantive change in performance with wrongful waste and installations upon Cottinghams’ title and improvements.” *Id.* at p. 6.

- "Occasion for review arose by Morgans' unpermitted conduct well after the building permit issued, once the first notice issued of any agency decision on Morgan's compliance decisions." *Id.* at p. 11
- "No pronouncement of litigations' effect in administrative proceedings has entered." *Id.* at p. 18.
- "The building footing [citations to record omitted] was not at issue unless its permit proceeded from misrepresentation regarding title, and no record yet reveals agency approval of Morgans' post-permit waste and driveway project placement activity." *Id.* at p. 21.
- "The ability to prevent disorder already inspires zoning, development and permitting restrictions." *Id.* at p. 30.
- "Dismissal of declaratory relief was for untenable prior opportunity-to-litigate reasons, and prior proceedings regarding which Morgans requested immunity for their representations offered no support for dismissal of Declaratory relief." *Id.* at p. 32.
- "Equity in avoidance of review showed bad faith and frivolous use of a motion." *Id.* at p. 49.
- "A discretionary fee award should deter this abusive title-after-permitting and without disclosure approach." *Id.*

## **II – ISSUES**

1. Whether the trial court's findings are supported by substantial evidence?
2. Whether Cottinghams' LUPA arguments are difficult to follow, understand and respond to?

3. Were the attorneys' fees and costs awarded Morgans an abuse of discretion?

4. Whether Morgans are entitled to attorneys' fees and costs on appeal?

### **III – STATEMENT OF THE CASE**

Morgans own Lot 11 (3251 Northshore Road), which is adjacent to, and immediately south of Cottinghams' Lot 10. CP 47. On or about September 2, 2008, Cottinghams filed a lawsuit against Morgans to quiet title to a portion of Lot 11, alleging in part, that Cottinghams had acquired a portion of Lot 11 by adverse possession. CP 149-50; CP 256; CP 267-78. Trial was held in the earlier quiet title action on November 30, December 1, 6, 7 and 15, 2011. CP 150. Findings of Fact and Conclusions of Law were entered on December 30, 2011. CP 257; 284-93. Cottinghams and Morgans are presently parties in two separate appeals regarding the first lawsuit.

Before they purchased the lot, Morgans had surveyor Larry Steele (Steele) survey the north and south property line of Lot 11. CP 147. The Steele survey was filed of record in November of 2005. CP 259; CP 281-82. Morgans then purchased Lot 11 with

the intention of building a home on the lot. CP 147. Morgans applied for and were issued a building permit on August 17, 2006. CP 148; CP 156. Morgans moved into their new home on, or before November 1, 2007. CP 149.

At the first trial, Joan Cottingham testified, on cross examination, that David Cottingham had been corresponding with Whatcom County since 2007. CP 259; 298-99. She was not aware of David Cottingham ever expressing to her any frustration with any response of Whatcom County to his letters or demands, and she believed Whatcom County was cooperating with and providing information to David Cottingham. *Id.*

Also at the first trial, David Cottingham, on direct, disclosed that when he was employed as an attorney in the Whatcom County Prosecuting Attorney's office, he represented Whatcom County building and codes and public works department. CP 260; CP 301. Cottingham admitted that he had continued to send correspondence and documents to Whatcom County hoping to assist Whatcom County in avoiding any negligence in its dealings with Morgans and that he wanted to make sure Whatcom County

knew of Morgans' "active and passive misrepresentations." CP 260-61; CP 303-04.

At the first trial, Cottinghams' expert, Bruce Ayers, advised the court that he and Mr. Steele agreed on the bearing and distance of the common boundary line and that he had no dispute with Steele's survey. CP 261-62; CP 306-09. The trial court, in the first lawsuit, in its findings and conclusions determined that Steele's 2011 survey established the common property line. CP 257-59; CP 284-93.

On January 13, 2012, David Cottingham, in the first lawsuit, filed a motion and memorandum, which pleading contained the following written arguments:

- Identification of the area which may be regarded as, or quieted as, Lot Eleven is urged as seriously questionable and deserving of retrial following testimony regarding the corner-setting practice employed by defendants' surveyor, upon whose previous findings and opinion other Nixon Beach Tracts lot lines were surveyed as at variance with the original plat.
- Motion to Dismiss for indispensable parties, trigger consideration of such parties, and include parties interested in the area defendants did not include in their survey east of the private road, which area is considered as part of Lot Eleven according to Exh. [sic] 13 (1945 plat of Nixon Beach tracts).

- Additional parties interested in the matter include Whatcom County, for its interest in the continued jurisdiction under the permitting underway, complete representation of lot area with permit applications; enforcement of building conditions and zoning; permit revocation for misrepresentation; temporary occupancy permit compliance; complete representation of the lot's access to the county road; authority to require survey to determine the extent and adequacy of rights or way associated with development.

CP 264-65; CP 321-40.

Cottinghams' post-trial motions in the first lawsuit were all denied. Cottinghams filed their Complaint on November 15, 2012. CP 6.

## **IV – LEGAL ARGUMENT**

### **A. Standards of Review**

#### **1. Findings of Fact**

Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002). A finding of fact erroneously described as a conclusion of law is reviewed as a finding. *Willener v. Sweeting*, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law. *In re Hews*, 108 Wn.2d 579, 595, 741 P.2d 983 (1987). Findings of

fact which are properly challenged are reviewed for substantial evidence in the record. *Burrill v. Burrill*, 113 Wn.App. 863, 868, 56 P.3d 993 (Div. 1, 2002), *rev. denied*, 149 Wn.2d 1007 (2003).

## **2. Conclusions of Law**

An unchallenged conclusion of law becomes the law of the case. *King Aircraft v. Lane*, 68 Wn.App. 706, 716, 846 P.2d 550 (Div. 1, 1993). Challenged conclusions of law are reviewed *de novo*. *Robel*, 148 Wn.2d at 43. However, when an appellant challenges conclusions of law not based on the law itself, but in alleging insufficient evidence supports those conclusions, *de novo* review is not appropriate. Instead, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusions. *American Nursery v. Indian Wells*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990), *citing*, *Willener v. Sweeting*, 107 Wn.2d at 393.

## **3. Summary Judgment**

"The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45

P.3d 1068 (2002); *see also Buechler v. Wenatchee Valley Coll.*, 174 Wn.App. 141, 149, 298 P.3d 110 (Div. 3, 2013). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

#### **4. Award of Attorneys' Fees under CR 11 and RCW**

##### **4.84.185**

Awards of attorneys' fees under CR 11 and RCW 4.84.185 are reviewed under the abuse of discretion standard. *Tiger Oil v. Dep't of Licensing*, 88 Wn.App. 925, 937–39, 946 P.2d 1235 (Div. 2, 1997); *Fluke Capital & Management v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

#### **B. The Court Did not Have Jurisdiction Over Cottinghams'**

##### **Untimely LUPA Petition**

A superior court hearing a LUPA petition acts in an appellate capacity with the jurisdiction conferred by law. *Conom v. Snohomish County*, 155 Wash.2d 154, 157, 118 P.3d 344 (2005). '[B]efore a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal.' *Id.* RCW 36.70C.040(2)(b)(ii) states, 'a land use petition is barred, and the court may not grant review,

unless the petition is timely filed ... and timely served on the following persons who shall be parties to the review of the land use petition ... [e]ach person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue .'

*Prosser Hill Coalition v. County of Spokane*, 2013 WL 4478227, at 2, WESTLAW (Div. 3, 2013).

Land use decisions in Whatcom County are made by its administrative agency, Whatcom County Planning and Development Services (WCPD). Decisions made by WCPD are appealable to a Hearing Examiner. Whatcom County Code (WCC) 20.92.210. The Hearing Examiner's decision is appealable to the Whatcom County Council (Council). WCC 20.92.610. The Council's decision is appealable to the Superior Court, through a LUPA appeal within twenty-one (21) days. RCW 36.70C.040.

LUPA alone governs judicial review of land use decisions. *Benchmark Land Co. v. Battle Ground*, 146 Wn.2d 685, 693, 49 P.3d 860 (2002); RCW 36.70C.030(1). Pursuant to RCW 36.70C.020, a "land use decision" is defined as:

**“. . . 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 use, but excluding applications for permits to use, vacate, or transfer streets, parks and similar types of public property; excluding applications of legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(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. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(2). (Emphasis added.)

Here, Morgans' building permit was issued by Whatcom County on August 17, 2006. CP 148; CP 156. David Cottingham reviewed Morgans' permit file before October 4, 2007. CP 419. In October 2007, Cottinghams also wrote to Whatcom County Building Director Sam Ryan, objecting to Morgans' survey. *Id.*; CP 355-56. If Cottinghams had taken issue with Morgans' 2006 building permit, which Cottinghams had notice of; they were required to appeal the

building permit to a Hearing Examiner and/or the Whatcom County Appeals Board. Despite having notice of the 2006 building permit, Cottinghams never appealed the building permit to a Hearing Examiner or the Whatcom County Appeals Board. Instead, Cottinghams' LUPA petition was filed on November 15, 2012, more than six years after the Morgan's building permit was issued by Whatcom County and after years of protracted litigation regarding the same property. CP 6; CP 149-50; CP 256-65; CP 748.

The building permit, which was not appealed by Cottinghams to any of the available administrative appeals processes (Hearing Examiner and Whatcom County Appeals Board), was not "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination." RCW 36.70C.020(2); *see also Durland v. San Juan County*, 175 Wn.App. 316, 305 P.3d 246 (Div. 1, 2013). In *Durland*, this Court held that where there was failure to appeal a building permit issuance, the issuance of the permit did not constitute a land use decision under LUPA and the Superior Court did not have jurisdiction. *Id.*

Even assuming the issuance of the 2006 building permit was a final land use decision under LUPA, Cottinghams' 2012 Petition was not timely and is barred, as it was filed and served more than twenty-one (21) days and over six (6) years after the issuance of the building permit. RCW 36.70C.040(2) & (3). The LUPA statutes provide stringent deadlines, requiring that a petitioner file a petition for review within twenty-one (21) days of the date of the land use decision. RCW 36.70C.040(3). The Whatcom County building permit issued implicitly demonstrated that the building permit Morgans received was satisfactory. *Twin Bridge Marine Park v. Ecology*, 162 Wn.2d 825, 839, 175 P.2d 1050 (2008). Washington cases enforce the limited time for appeal because LUPA offers "protection to private property owners and finality to the decision of local government." *Id.* at 845. Anyone who believes that a building permit was improperly issued "is required to file an appeal under LUPA." *Id.* at 839. The date on which a land use decision is issued is defined in the statute as three days after a written decision is mailed, the date on which the County provides notice that written decision is available, the date of an ordinance or resolution, or, if none of these apply, on the date the decision is

entered into the public record. RCW 36.70C.040(4). As outlined above, it is not disputed that Cottinghams were on notice of Morgans' application for building and accompanying permits. CP 355-56; CP 419.

Morgans have been living in their home, next door to Cottinghams, for over five years. CP 149. The Whatcom County Superior Court correctly determined that it did not have jurisdiction over Whatcom County's issuance of Morgans' final occupancy approval under LUPA and dismissed Cottinghams' LUPA petition. CP 747, ¶¶ 8-10. The stated purpose of LUPA is to "provide consistent, predictable and timely judicial review" of land use decisions. *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (Div. 2, 2006); RCW 36.70C.010. Final occupancy approval is not a land use decision under LUPA. It is not a land disturbance decision. *Asche v. Bloomquist*, 132 Wn.App. at 796. Cottinghams have not provided any authority indicating that a final occupancy approval is a land use decision under LUPA, because no such authority exists.

Cottinghams' Complaint takes issue with Whatcom County granting Morgans a variance and reducing the setback to five feet,

both of which were decisions made by Whatcom County in the 2006 building permit. CP 156. Cottinghams' Opening Brief also alleges that Morgans made material misrepresentations to Whatcom County in order to obtain their building permit. Cottinghams further allege that Morgans' 2006 building permit, issued by Whatcom County, is invalid. Cottinghams did not, and cannot now appeal the 2006 building permit by way of an attempted appeal of Whatcom County's final occupancy approval.

"One of the requirements for standing to bring a LUPA action is that 'petitioner has exhausted his or her administrative remedies to the extent required by law.'" *Ferguson v. City of Dayton*, 168 Wn.App. 591, 595, 277 P.3d 705 (Div. 3, 2012) (quoting *Asche*, 132 Wn.App. at 792). Cottinghams have attempted, and failed, to remedy their unmet duty to exhaust their administrative remedies. Cottinghams have alleged that they filed two different administrative appeals in early November 2012, one to the Whatcom County Planning and Development Services and one to the Whatcom County Appeal Board. CP 347-53. Prior to receiving Cottinghams' Response to Whatcom County Memorandum Concurring in Morgan Motion, neither Morgans nor Whatcom

County received notice of said administrative appeals. CP 344-45; CP 497; CP 499. By David Cottingham's own admission, the county has no record of any pending appeals. CP 354-58. Assuming said appeals were filed, they were still untimely with regard to the issuance of the Morgans' 2006 building permit.

### **C. Cottinghams' Claims are Barred by Res Judicata**

Cottinghams' claims are barred by the doctrine of res judicata. Although the legal basis of Cottinghams' claims are far from clear in their Complaint, it is clear that Cottinghams simply continue their attack on Morgans, which attack was previously thoroughly litigated and which attack is the subject of two pending appeals and two rejected appeals.

Res judicata refers to "the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action." It is designed to "prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts".

*Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995).

[T]he Supreme Court has said that "res judicata acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding." The court has also said, on numerous

occasions, that res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, **exercising reasonable diligence**, might have brought forward at that time.

*Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App. 320, 329, 941 P.2d 1108 (Div. 2, 1997) (citations omitted) (emphasis in original). In other words:

[A]ll parts of a successful claim are merged in the final judgment; that all parts of an unsuccessful claim are barred by the final judgment; or that a party cannot “split” his or her claim, thus generating a multiplicity of actions.

*Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App. at 330 (citations omitted).

A claim is barred in a subsequent action by res judicata “where a prior final judgment is identical to the challenged action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.” *Martin v. Wilbert*, 162 Wn.App. 90, 95, 253 P.3d 108 (Div. 1, 2011). (Internal quotations omitted). The same subject matter depends on whether the two suits have identical legal questions.

*See Ensley v. Pitcher*, 152 Wn.App 891, 905, 222 P.3d 99, 105 (Div. 1, 2009). A determination for the same cause of action considers:

“(1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.”

*Id.* at 903.

Cottinghams, in their Complaint, argue for waste because Morgans destroyed Cottinghams improvements to their property. CP 21. In the first lawsuit, the court ruled in its Findings of Fact and Conclusions of Law that:

The laurel bushes removed by Morgans were clearly not theirs . . . Morgan committed the tort of conversion in taking them. The fair market value to replace the laurels is \$4,342.98.

CP 258.

Cottinghams previously argued the destruction of the laurel bushes was waste during the first trial; but the court concluded that the destruction of the bushes was considered conversion, not waste. CP 262. Cottinghams again clearly sue Morgans for the

destruction of the laurel bushes when they have previously received a remedy.

Next, Cottinghams argued the disclosures regarding the survey done by Steele did not adhere to the Washington's Surveyors Practices Act, thus, there is a subdivision of the lot that had not been previously surveyed or depicted. App. Opening Brief, p. 22 & pp. 25-26. However, the court in the first lawsuit, determined in its findings and conclusions:

- Title in the disputed property, and all of Lot 11 should be quieted in Morgan upon the payment of \$8,216.55 to Cottingham.
- The boundary line between the Cottingham property and the Morgan property should be as legally described as part of the north property line of the property acquired by the Morgans from Maksymetz.
- Title to Lot 11 should be quieted in Morgans, including that triangular portion of land set forth in red in Exhibit 29. That area extends essentially from the northeast corner of the Morgans' garage to the west side of the B.N.R.R Right-of-Way, less the square footage on the 10' private road, which is held in common ownership.

CP 258-59.

Claims from the previous case and the current case involve the same nucleus of facts and substantially the same evidence. The surveys at issue are the three Steele surveys admitted into

evidence in the prior litigation and used by the prior court to establish the common north/south boundary line between Lot 11 and Lot 10. CP 256-57. In the prior litigation, after Cottinghams repeatedly complained about the Steele surveys, all of Lot 11 was quieted in Morgans and the common boundary was established. CP 258. Cottinghams are clearly pursuing the same survey issues and arguments as advanced in the previous case.

Finally, the misrepresentation allegations were also repeatedly made and argued in the prior action. At trial, in the previous action, Cottingham argued about Morgans' misrepresentations to the Court:

- The Health Department had no way of knowing that there was **an active misrepresentation** of the failure, the timing of it, and the conditions that were found at that time, the high ground water conditions. So it had no way of exercising discretion unless, of course, it was to define that that is **a brand of misrepresentation** that should make it stop and cause the evacuation of the premises, et cetera.
- And if it wasn't for the Health Officer when he was contacted in October '05 before the purchase of this property, we wouldn't know that the Health Officer felt that there was a **misrepresentation** of the size of this property.

CP 263. (Emphasis added.)

Cottinghams again are trying to reallege these claims in their

Complaint:

- 3.11 Defendants Morgans' directed a surveyor's preparation of a false survey document and thereby caused misrepresentation of the north and eastern dimension of their projects' boundaries to the WCPDS by withholding disclosure of the only stake and survey which located and reported the northeast corner of Nixon Beach Tracts Lot Eleven.
- 3.12 August, 2006, Morgans were granted a side yard setback variance and a Project Permit including land disturbance and driveway grading as a result of their application, submittals and misrepresentation.
- 3.21 Defendant Morgans' use of surveyor-prepared documents violated Washington State's Surveyor Practices Act as follows and the following misrepresentations and omissions from disclosure were material to discharge of WCPDS exercise of variance decision discretion and a mandatory duty to protect private property from unauthorized development after warning of misrepresentation by ensuring inspection of the location and obedience to boundaries through the device of a fully completed permit application and staking for inspection of setback distances.
- 3.22 Disclosures required and misrepresentations prohibited under the Washington State Surveyor Practices Act include the following. . . .

CP 12; CP 14.

////

#### **D. Cottinghams' Claims are Barred by the Statute of Limitations**

The statute of limitations is three years on all of Cottinghams' additional allegations and requested relief against Morgans. Claims of trespass, nuisance, waste and misrepresentation are limited to three years. RCW 4.16.080.

With most torts, a single isolated event begins the running of the statute of limitations. With most torts, past damages are those damages that accrued from the tortious event until trial or judgment. A continuing trespass tort is different; the "event" happens every day the trespass continues. Every moment, arguably, is a new tort. Thus, the statute of limitations does not prevent recovery for a continuing trespass that "began" before the statutory period; instead the statute of limitations excludes recovery for any trespass occurring more than three years before the date of filing.

*Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006).

Cottinghams' only claims of trespass, nuisance and waste occurred when Morgan crossed Cottinghams property line and removed six laurel bushes on Cottinghams property before September 30, 2007. CP 747. No continuing claims of trespass, nuisance or waste have been alleged. Thus, the tort claims are based on a "single isolated event." This was alleged in, and done prior to, Cottinghams filing their Amended

Complaint to Quiet Title, in the previous litigation. Cottinghams have not alleged any different or new facts in their current Complaint, filed November 15, 2012.

Cottinghams claims of misrepresentations are barred by the statute of limitations. Acts of affirmative misrepresentations are subject to the three year statute of limitations in RCW 4.16.080(2). *Crisman v. Crisman*, 85 Wn.App. 15, 22-23, 931 P.2d 163 (1997). Cottinghams allege, in their Complaint, that Morgans' misrepresentations were made during the staking and surveying of property lines and permitting process. CP 10-14; CP 18-20; CP 22-23; CP 25. Further, it is not disputed that Cottinghams were on notice of Morgans' application for building and accompanying permits. David Cottingham reviewed Morgans' permit file before October 4, 2007. CP 419, ¶ 11. In October 2007, Cottinghams also wrote to Whatcom County Building Director Sam Ryan, objecting to Morgans' survey. *Id.* Morgans' obtained their building permit in 2006.

////

**E. The Trial Court's Award of Attorneys' Fees Was Proper Under RCW 4.84.185 and CR 11**

Morgans established, by way of summary judgment and after much expense, that Cottinghams' pleadings in this matter were without merit and should not have been filed. CP 742-50; CP 871-75. On June 19, 2013, the trial court entered an Order on Defendant Morgans' Motion for Fees and Terms – RCW 4.84.185 and CR 11 (Order on Fees and Terms) and awarded Morgans \$25,432.30 for their reasonable attorney fees and costs in the defense of Cottinghams' claims. CP 871-75.

RCW 4.84.185 authorizes a trial court to award a prevailing party its reasonable expenses, including attorney's fees.

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the

nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order. The provisions of this section apply unless otherwise specifically provided by statute.

RCW 4.84.185.

Such expenses are usually awarded against the party, not the party's attorney. *Skimming v. Boxer*, 119 Wn.App. 748, 756, 82 P.3d 707 (2004). However, in this matter, Mr. Cottingham is both a party and his own attorney. "The frivolous lawsuit statute has a very particular purpose: that purpose is to discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992).

"A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts." *Layne v. Hyde*, 54 Wn.App. 125, 135, 773 P.2d 83 (1989) (citing *Legal Foundation v. TESC*, 44 Wn.App. 690, 696-97, 723 P.2d 483 (1986)). The decision regarding whether to award such fees is within the trial court's sound discretion and will only be overturned based on a finding of an abuse of discretion. *Zink v. City of Mesa*,

137 Wn.App. 271, 276, 152 P.3d 1044 (Div. 3, 2007); *Tiger Oil v. Dep't of Licensing*, 88 Wn.App. at 937–39.

There was no such abuse of discretion here. The trial court entered specific findings that Cottinghams' pleadings were "not supported by any fact or law or reasonable argument for any extension of existing law," as well as findings that this matter was an attempt by Cottinghams to re-litigate the previous case. CP 871-75. Clearly, the trial court determined that this matter was frivolous and warranted an award of fees under RCW 4.84.185. CP 874, ¶ 9.

CR 11 sanctions were appropriate because David Cottingham's pleadings were (1) not well grounded in fact, (2) were not warranted by existing law, and/or (3) were filed for improper purpose(s). CR 11. Similar to RCW 4.84.185, fees under CR 11 are left to the sound discretion of the trial court and will only be overturned based on a finding of an abuse of discretion. *Zink v. City of Mesa*, 137 Wn.App. at 276; *Tiger Oil v. Dep't of Licensing*, 88 Wn.App. at 937–39. "The rule allows sanctions against anyone who signs a document that is either not well-grounded in fact or warranted by law, or interposed for an improper purpose." *Eugster*

*v. City of Spokane*, 110 Wn.App. 212, 231, 39 P.3d 380 (Div. 3, 2002). "The Court of Appeals therefore correctly determined that a complaint must lack a factual or legal basis before it can become the proper subject of CR 11 sanctions." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

CR 11 was violated because the action was wholly unsupported by fact or law, and Harrington failed to conduct a reasonable inquiry into the factual or legal basis for his claims. It is not enough that Harrington believed, after exhaustive research of law review articles, that his claim was meritorious. The reasonableness of an attorney's inquiry is evaluated by an objective standard, see *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 220, 829 P.2d 1099 (1992), and no reasonable attorney would have made the wholly unsubstantiated allegations contained in this case.

*Id.* at 911.

In assessing terms, the trial court considered and evaluated David Cottingham's conduct by determining what was reasonable for him to believe were the facts and the law at the time he filed any of Cottinghams' pleadings. When imposing such sanctions the court must specify which conduct is sanctionable and make a finding regarding the propriety of filing the claim. *McNeil v. Powers*, 123 Wn.App. 577, 590-91, 97 P.3d 760 (Div. 3, 2004). The trial court did this and entered specific findings that

Cottinghams' arguments and pleadings were not supported by fact or law, that Cottinghams' pleadings were filed at least in part to harass and/or annoy Morgans, and that Cottinghams' Petition/Complaint was filed and advanced in violation of CR 11. CP 373-74. The trial court's grant of terms in favor of Morgans was proper and should be affirmed.

#### **F. Morgans are Entitled to Attorney's Fees on Appeal**

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(a). Under RAP 18.9, this court may award sanctions against an opposing party who files a frivolous appeal. *Wellman & Zuck v. Hartford Fire*, 170 Wn.App. 666, 681, 285 P.3d 892 (Div. 1, 2012). An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and there is no possibility of reversal. *Id.* Not only does this appeal present no debatable issues upon which reasonable minds could differ, but it is nearly impossible for reasonable minds to understand what Cottinghams

are attempting to appeal. Moreover, sanctions should be awarded if a party's arguments could not have resulted in reversal because "they either lack merit, rely on a misunderstanding of the record, require a consideration of evidence outside the record, or are not adequately briefed." *Stiles v. Kearney*, 168 Wn.App. 250, 268, 277 P.3d 9 (2012).

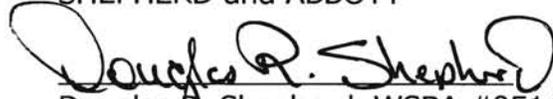
Cottinghams continue to bring multiple lawsuits and appeals simply for an opportunity to harass Morgans and rant. The "arguments" set forth by Cottinghams lack merit, rely on misunderstandings of the record, require consideration of evidence outside the record, and are not adequately briefed, making them incomprehensible and a waste of this Court's time. Morgan respectfully requests that this Court require Cottinghams to pay sanctions both to this court and to Morgans for their frivolous appeal.

## **V – CONCLUSION**

The trial court's March and June 2013, rulings in this matter should be affirmed. Cottinghams should be ordered to pay Morgans' reasonable attorneys fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED THIS 25<sup>th</sup> day of September  
2013.

SHEPHERD and ABBOTT

A handwritten signature in black ink that reads "Douglas R. Shepherd". The signature is written in a cursive style with a large initial "D" and a stylized "S".

Douglas R. Shepherd, WSBA #9514

Bethany C. Allen, WSBA #41180

Of Attorneys for Respondents Morgans

## Appendix A

### **RAP 10.3(g) – CONTENT OF BRIEF**

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

## Appendix B

## **RAP 18.9 – VIOLATION OF RULES**

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

(b) Dismissal on Motion of Commissioner or Clerk. The commissioner or clerk, on 10 days' notice to the parties, may (1) dismiss a review proceeding as provided in section (a) and (2) except as provided in rule 18.8(b), will dismiss a review proceeding for failure to timely file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review. A party may object to the ruling of the commissioner or clerk only as provided in rule 17.7.

(c) Dismissal on Motion of Party. The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review, or (2) if the application for review is frivolous, moot, or solely for the purpose of delay, or (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review.

(d) Objection to Ruling. A counsel upon whom sanctions have been imposed or a party may object to the ruling of a commissioner or the clerk only as provided in rule 17.7.

## Appendix C

## **CIVIL RULE 11 - SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS**

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

## Appendix D

### **RCW 4.16.080 – Actions limited to three years**

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

## Appendix E

**RCW 4.84.185 – Prevailing party to receive expenses for opposing frivolous action or defense**

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

## Appendix F

### **RCW 36.70C.010 – Purpose**

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

## Appendix G

## **RCW 36.70C.020 – Definitions**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Energy overlay zone" means a formal plan enacted by the county legislative authority that establishes suitable areas for siting renewable resource projects based on currently available resources and existing infrastructure with sensitivity to adverse environmental impact.

(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, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(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. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

(3) "Local jurisdiction" means a county, city, or incorporated town.

(4) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

(5) "Renewable resources" has the same meaning provided in RCW 19.280.020.

## Appendix H

**RCW 36.70C.030 – Chapter exclusive means of judicial review of land use decisions — Exceptions**

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board 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. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

## Appendix I

## **RCW 36.70C.040 – Commencement of review — Land use petition — Procedure**

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

## Appendix J

## **WCC 20.92.210 – Final decisions**

The hearing examiner shall conduct open record hearings and prepare a record thereof, and make a final decision upon the following matters:

(1) Appeals from any orders, requirements, permits, decisions or determinations made by an administrative official or committee in the administration of this title, WCC Title 16, Environment, WCC Title 21, Land Division Regulations, or WCC Title 24, Health Regulations.

(2) Appeals from a decision of the administrator of the Shoreline Management Program.

(3) Applications for zoning ordinance conditional use permits.

(4) Applications for variances from the terms of the zoning ordinance.

(5) Applications for shoreline management substantial development permits not accompanied by a major project permit when an open record hearing is required.

(6) Applications for variances from the terms of the Whatcom County Shoreline Management Program.

(7) Applications for variances from the terms of Chapter 16.16 WCC, Critical Areas.

(8) Applications for reasonable use permits under the terms of Chapter 16.16 WCC when an open record hearing is required.

(9) Applications for Shoreline Management Program conditional use permits.

(10) Applications for flood damage prevention variances.

(11) Appeals from SEPA determinations of significance, determinations of nonsignificance, and mitigated determinations of nonsignificance.

(12) Preliminary subdivisions and subdivision variances.

(13) Preliminary binding site plan proposals.

(14) Application for variances from the provisions of WCC Title 22.

(15) Revocation proceedings involving previously approved zoning conditional use permits, shoreline management substantial project permits and shoreline conditional use permits.

(16) Applications to continue operations of nonconforming adult businesses pursuant to WCC 20.83.015.

(17) Appeals of decisions relating to water service issues under Section 9.2 of the Coordinated Water System Plan.

(18) Appeals from any orders, requirements, permits, decisions or determinations made by an administrative official relating to essential public facilities.

## Appendix K

### **WCC 20.92.610 – Applicant appeal**

The applicant, any party of record or any county department may appeal any final decision of the hearing examiner to the county council. The appellant shall file a written notice of appeal at the county council office within 10 business days of the final decision of the hearing examiner. Any parties of record from the hearing examiner's proceedings who wish to continue to be considered parties of record must register with the county council in writing no later than 10 days after the date of the notification of appeal letter which is sent from the hearing examiner's office. The notification of appeal letter will be sent from the hearing examiner's office within three working days of receiving written notification from the county council office that an appeal has been filed.

STATE OF WASHINGTON  
2013 SEP 26 PM 1:26

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

DAVID COTTINGHAM and JOAN  
COTTINGHAM,

Appellants,

vs.

RONALD MORGAN and KAYE  
MORGAN,

Respondents.

**Case No. 70218-1-I**

**Whatcom County  
Superior Court  
Case No. 12-2-03029-1**

**DECLARATION OF SERVICE**

I, Heather Shepherd, declare that on September 25, 2013, I  
caused to be served a copy of the following document:

**Respondent Morgans' Response Brief;** and a copy of this  
**Declaration of Service**, in the above matter, on the following  
person, at the following address, in the manner described:

David C. Cottingham, Esq.	<input checked="" type="checkbox"/>	U.S. Mail
Cottingham Law Office, PS	<input type="checkbox"/>	E-Mail
103 E. Holly Street	<input type="checkbox"/>	Fax
Suite 418	<input type="checkbox"/>	Messenger Service
Bellingham, WA 98225	<input type="checkbox"/>	Personal Service

DECLARATION OF  
SERVICE  
Page 1 of 2.

**SHEPHERD AND ABBOTT**  
ATTORNEYS AT LAW  
2011 YOUNG STREET, SUITE 202  
BELLINGHAM, WASHINGTON 98225  
TELEPHONE: (360) 733-3773 ♦ FAX: (360) 647-9060  
[www.saalawoffice.com](http://www.saalawoffice.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25<sup>th</sup> day of September 2013, at Bellingham, Washington.

  
\_\_\_\_\_  
Heather Shepherd