

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

v.

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

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

REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The County seeks to be excused from doing code enforcement and investigation by arguing that Lange's code enforcement complaint at issue here is a challenge to the previously issued permits and land use decisions merely "styled" as a writ of mandamus action. Tellingly, Clallam County does not even mention the words "code enforcement" or "compliance" in its briefing. In recasting Lange's land use complaint regarding code violations and the writ of mandamus as a challenge to prior approvals, the County erroneously concludes that past communications were impermissible challenges to the prior approvals when Lange was pointing out misrepresentations by the Cebelaks. Likewise, in pointing to the relief Lange was requesting in some communications as a challenge and not code enforcement, the County overlooks its own code, and case law, that allows (but does not necessarily always require) rescission of permits through code enforcement when conditions of those permits are being violated. While conditions of approval are being violated, and must be enforced, LUPA likewise doesn't offer any protection to a dishonest applicant with misrepresentations pursuant to *Lauer v. Pierce County*, and code enforcement is the proper mechanism to address such allegations of misrepresentations, permit violations and code violations. Any

interpretation of LUPA that supports the County's position would eviscerate code enforcement, violate constitutional rights, and is untenable.

As no passage of time can cure code violations or public nuisances, Lange respectfully requests that this Court reverse Order quashing the writ, and that a writ enter commanding the County to provide a final written decision after fully investigating the code enforcement complaint in its enforcement pursuant to Title 20.

## II. REPLY

### **A. Mandamus Is An Extraordinary Remedy Which Applies In These Circumstances Because There Is No Plain, Speedy, and Adequate Way To Compel Code Enforcement After Lodging A Formal Land Use Code Complaint And The County Has Taken No Final Action Thereon.**

The County seeks to be excused from investigating and enforcing the land use complaint, by arguing that a writ of mandamus does not apply "in these circumstances." (Br. of Resp. at 6). The County concludes: "Because Lange failed to file a timely LUPA petition within 21 days after the permits were issued to Cebelak, he is precluded from seeking mandamus relief some five to 15 years later." (Br. of Resp. at 6).

The County's argument, however, failing to recognize it never provided a final code enforcement decision when requested, only

describes the effect of being barred by LUPA, but does not analyze whether the principle applies here to a code enforcement request, i.e. whether the code enforcement complaint based upon violations of permit and approval conditions is a collateral challenge to those land use decisions. As stated so aptly in *Chaney v. Fetterly* “[b]efore the effect of a doctrine can be material, however, the doctrine must apply.” *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000).

- 1. The County cites to no authority for the proposition that code enforcement is a collateral challenge to previously issued permits or approvals and is barred by LUPA. LUPA does not apply where there has been no final code enforcement decision.**

As pointed out in the Opening Brief, and not addressed by the County in their brief, *Samuel's Furniture* plainly articulates that permit conditions that are being violated can be enforced notwithstanding LUPA statute of limitations. *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 456, 54 P.3d 1194 (2002) *as amended on denial of reconsideration* (2003)(Recognizing that LUPA does not bar code enforcement “against a party . . . who obtains a permit and then proceeds to violate the conditions of the permit.”). Likewise, *Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011) also involved code enforcement by a county after it made a land use decision, where the applicant made misrepresentations

regarding set-backs, more than 21 days had passed from the building permit decision, construction had commenced, and it was determined through code enforcement the applicant was missing a county level approval that was a precondition to the permit previously issued.

Further, in *HJS Development v. Pierce County*, 148 Wn.2d 451, 61 P.3d 1141 (2003), code enforcement based upon violations of the conditions of approval on a land use decision resulted in the proper revocation of the land use determination. Lastly, the only principle authority that the County attempts to address is *Chaney v. Fetterly* which plainly distinguishes between exhaustion requirements preceding appeals subject to LUPA, and enforcement actions *based* upon the previously issued approvals and conditions of approval. *Chaney v. Fetterly*, 100 Wn. App. at 145 fn.8 (explaining the remedy of appealing and challenging a permit through the administrative procedure is not necessary when the issue is compliance with land use approvals, rather than a challenge to them).

The County's argument that *Chaney v. Fetterly*, 100 Wn. App. 140, 995 P.2d 1284 (2000) is irrelevant and does not apply to this matter is without merit. The County attempts to discredit *Chaney v. Fatterly*, and in so doing, fails to address the distinction between a challenge to a permit,

and an action seeking compliance with a permit through code enforcement. (Br. at 11-12). The court in *Cheney* explained there was no reason to appeal the land use decisions because they were not objecting to what the building permits allowed in the action, only compliance with the conditions of those approvals. *Chaney*, 100 Wn. App. at 145 fn.8. This distinction between an appeal of a permit and enforcement of the terms and conditions of a permit that *Chaney v. Fatterly* highlights is relevant to this mandamus action, because the duty sought to be enforced (here a code enforcement decision) must be analyzed in evaluating whether another remedy is available in the plain, speedy, ordinary course of the law to achieve compliance with the terms and conditions of approval. RCW 7.16.170. In a mandamus action “*the remedy issue turns on whether the duty the plaintiff seeks to enforce ‘cannot be directly enforced’ by any means other than mandamus*” *Eugster v. City of Spokane*, 118 Wn. App. 383, 414, 76 P.3d 741 (2003) *review denied*, 151 Wn.2d 1027 (citations omitted)(emphasis added).

*Chaney v. Fatterly* distinguishes between the enforcement of the terms of a permit, from a subsequent challenge to a permit itself, in its discussion of “original jurisdiction” as opposed to appellate jurisdiction. Accordingly, the Court of Appeals in *Chelan County v. Nykreim* 105 Wn.

App.339, 360, 20 P.3d 416 *overruled by Chelan County v. Nykriem*, 146 Wn.2d 904, 52 P.3d 1 (2002) improperly cited *Chaney v. Fatterly* for original jurisdiction to *challenge* a permit outside of LUPA (there was no challenge in *Chaney v. Fatterly*), and so was properly overruled by the Supreme Court.

Remarkably, Chelan County in the *Nykriem* action overlooked this distinction to improperly *avoid* LUPA convincing the Court of Appeals (which had to be and was properly reversed), and now Clallam County is overlooking that same fundamental distinction to improperly *apply* LUPA convincing the Superior Court in this matter (which must be reversed).

Accordingly, even though *Chaney v. Fetterly* is not a mandamus action itself, it is plainly material and relevant to this action, and it is dispositive, together with *Samuel's Furniture* and *Lauer v. Pierce County*.

**2. The threshold issue of disagreement between the County and Lange in the analysis of this writ of mandamus action is the characterization of Lange's land use code complaint as seeking code enforcement, or whether it is a collateral challenge barred by LUPA.**

The County relies on *Brotherton v. Jefferson County*, 160 Wn. App. 699, 249 P.3d 666 (2011), for the proposition that Lange's formal request for code enforcement and subsequent writ of mandamus petition/complaint is a disguised appeal of previously issued permits, and

therefore LUPA bars the writ of mandamus. (Br. at 9). The County overlooks that the relief available under code enforcement in Title 20 and the Shoreline Code is the same relief that Lange has always requested.

First off, *Brotherton* is not a code enforcement case. In *Brotherton*, when asked for a land use decision, the County provided a final decision (a denial of the waiver request) albeit an unfavorable determination to Brotherton, and Brotherton was able to and did in fact appeal to the Jefferson County Board of Health which rendered a final land use determination. *Brotherton*, 160 Wn. App. 703-05. Because Brotherton did not timely appeal that final land use determination (a denial of a waiver request) under LUPA, a subsequent superior court complaint challenging the constitutionality of an ordinance seeking the reversal of the *same* land use determination (waiver request denial) was barred. 160 Wn. App. at 705.

In *Brotherton*, the Court examined the Complaint filed in Court, and the relief sought in the Complaint to determine whether it was an impermissible challenge. The court held that a “Complaint [seeking] to reverse the County’s [final land use determination] and require the County to *re-review* of [the decision] under state law” was a impermissible challenge of the County’s final land use determination. *Brotherton*, 160

Wn. App. at 705(emphasis added). Importantly, the Complaint by its terms and request for relief sought a change to the same decision. *Id.*

So in *Brotherton*, unlike here, the challenge depended upon a change to the same land use determination. Here, the petition for the writ of mandamus action does not depend upon a reversal of a permit or land use decision, and the writ that was issued does not compel a “re-review,” only investigation and enforcement of the code complaint as per Title 20. (CP 1-15, 49-50). A code enforcement land use complaint is a new land use determination *applying the conditions of previous approvals*, not challenging them as unlawful. *Brotherton* does not help the County.

While not demanded or commanded in the actual writ of mandamus at issue, Lange’s historical requested relief of revocation of permits is available under code enforcement. *Whether* the County must enforce is not open to question, they cannot do nothing, but *how* they enforce to achieve compliance is guided by Title 20. The County points to some of the relief Lange is seeking in his requests for code enforcement (but does not look to the writ itself), and summarily concludes the relief necessarily involves a challenge to the permits. (Br. at 9). But the requested relief is not inconsistent with enforcement of the terms of the prior approvals under County Code. Relief provided by the Clallam

County Code from 1992 onward to a code enforcement matter in the shorelines of the state include rescission of permits or approvals, where there is no compliance with those conditions of approval. CCC 35.01.090(rescission); CCC 35.01.130 (mandatory enforcement in the shoreline jurisdiction); Ordinance 388, CCC 35.01.150 (1992)(enforcement predecessor to Title 20)(See Appendix E); CCC 20.08.020; CCC 20.20.050 (suspension or revocation of permit for code violations). Further, in some circumstances, a violation of permit conditions may trigger rescission or revocation of permits. *HJS Development*, 148 Wn.2d 451. Seeking compliance with permit conditions of approval is not a challenge barred by LUPA. *Samuel's Furniture* 147 Wn.2d at 456.

LUPA itself does not bar a writ of mandamus *compelling* a final land use decision enforcing permit conditions, in contradistinction from a writ of mandamus *challenging* a final land use decision. RCW 36.70C.030(1)(b) (excluding coverage of LUPA from judicial review of writs of mandamus).

*Stafne v. Snohomish County*, for the same reasons as *Brotherton*, is likewise inapposite to this mandamus action and is distinguishable as that case involved the writ of mandamus being used to attempt a change or

re-review of a docketing decision by forcing the County to docket a proposal in its comprehensive plan amendments, after the County declined to docket in a written decision. *Stafne v. Snohomish County*, 156 Wn. App. 667, 234 P.3d 225 (2010), *aff'd on other grounds*, 174 Wn.2d 24 (2012). *Stafne v. Snohomish County* does not hold otherwise.

The County further erroneously relies upon *Asche*. The County cites to *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d at 1005 for the proposition that it is excused from code enforcement of alleged violations of permit conditions. (Br. at 11). The County argues Lange is complaining of “faulty inspection and code interpretation.” (Br. at 11). The County later also cites *Asche* for the proposition that Lange cannot “avoid the strict procedural requirements of LUPA by arguing that the Cebelaks’ structures constitute a public nuisance.” (Br. at 13). Both arguments by the County are based upon the false premise that a Title 20 land use complaint asking for investigation and enforcement of alleged violations of permit conditions and missing permits is a “challenge” to prior final land use determinations. The public nuisance argument by the County overlooks that violations of permit conditions is a civil code violation CCC 20.08.10(3), and in turn a public nuisance, CCC 20.08.020 (1), which can be abated at anytime as no

passage of time can cure a code violation/public nuisance. RCW 7.48.190.

There was no alleged violation of a permit condition in *Asche*. The public nuisance argument in *Asche* only failed because the calculation of the permissible height of the building was determined within permit issuance to be consistent with the applicable code. There was no allegation that the height of the building as constructed exceeded the height allowed in the permit. Here, the public nuisance argument is premised on violations of the permit conditions and conditions of approval, not upon the issue of whether the permit itself violates the code. Cebelak nor the County appealed the permit conditions requiring maintenance of the set backs from the Ordinary High Water Mark, nor the permissible location for the bulkhead relative thereto. Accordingly, *Asche* is not helpful to the County's position.

Here there are prima facie ongoing code violations in the record. Here, for example, there is a permit that was issued that requires a 35' set back from the Ordinary High Water Mark. (CP 159, 167). The 1998 Washington Fish and Wildlife Decision (CP 189-190), which was not appealed by the Cebelaks or the County, definitively established the location of the OHWM, and shows it to be within 21 feet of the building

that is supposed to be constructed and maintained at 35' set back. (CP 162, 166, 167). Likewise, the approvals conditioning the location of the wall to be set back from the OHWM are likewise enforceable as code violations where the Cebelaks did not build the wall where it was approved and where they said they would (CP 182), especially when it was built in the location on a permit application that was originally denied (CP 175-176), and then the paperwork was changed to show the appearance of compliance. (CP 171, 178, 182). So the alleged violations of the permit conditions constitute continuing code violations, which in turn are continuing public nuisances. Both code violations and public nuisances, continuing in nature, are not subject a statute of limitations for injunctive abatement relief. RCW 7.48.190. Lange is seeking code enforcement, not a challenge to permits barred by LUPA

**B. Because The Petition And Land Use Code Complaint Filed By Lange Allege Violations Of Permit Conditions, Misrepresentations, And Missing Permits, LUPA Does Not Excuse The County From Completing A Code Enforcement Action.**

Lange is seeking to compel code enforcement of permit and approval/exemption conditions, through the investigation and enforcement procedures of Title 20 of the Clallam County Code and the Charter. (Petition) (CP 1-16); (Alternative Writ) (CP 49-50). Because the County

fails to examine the material portions of the land use complaint in Exhibit A, fails address the language of the Petition, wholly fails to examine the material language of the Writ that was actually issued in this matter, and fails to consider the remedies available under Title 20 in a code enforcement action, it erroneously concludes the writ of mandamus action is an impermissible challenge to prior approvals or land use decisions. (Br. at 9). Because the Superior Court made the same error and did not take all inferences in favor of Lange as true.

**a. The command of the writ that was issued does not command a re-review of permits or approvals, nor does the petition for the Writ.**

“WE COMMAND YOU, immediately upon receipt of this ALTERNATIVE WRIT to complete the investigation of Petitioners’ code complaint, attached to the Petition as EXHIBIT A filed in this matter and provided herewith, pursuant to Clallam County Code (“CCC”) 20.08.060, and applicable ordinances, and the Clallam County Charter, and issue a final decision thereon, providing notice and a copy thereof to Petitioner, as soon as reasonably possible but in no event later than 45 days from the date of this WRIT[.]” (CP 50).

The petition also requests specific relief of investigation and enforcement which is not a challenge or re-review of permits or approvals. (CP 7).

**b. Exhibit A to the Petition specifically requests investigation and enforcement of violations of permit setbacks and conditions of approval/exemption:**

The permits issued have conditions that plainly require the owner to “maintain zoning setbacks and critical area setbacks and buffers” (CP 159, 167). Exhibit A to the Petition makes allegations regarding violations of permit conditions and missing permits or approvals:

- With respect to the cabin/residence:

“b. Construction of unpermitted cabin that violates the setbacks and buffers – majority of structure does not meet shoreline setback from OHWM and is built within designated critical areas and buffers.” (CP 12.)

- With respect to the bulkhead:

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

Lange also points out in his Declaration that the wall when exposed by the storm was approximately 8 feet tall, rather than the approved 4 feet, which was subsequently hidden and covered up by the Cebelaks during their “emergency” rebuild. (CP 111); (CP 144).

- With respect to other structures such as the so called storage building:

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

The misrepresentations are with respect to the location of the Ordinary High Water Mark and therefore material, and the setbacks from it to the structures and the wall—in other words, while they even appear inconsistent upon close examination on paper, when built in fact, the structures violate their approved set back conditions of 35 feet (CP 159, 167) and 20 feet (CP 182); (CP 175-176). *See also*, (CP 114).

- c. The historical communications also point out that Lange consistently differentiated between challenges to the permits, and enforcement of the conditions of the permits and approvals and enforcement based upon misrepresentations.**

Lange has consistently sought the County to do investigation and enforcement, *in addition* to requests that the County investigate the knowing misrepresentations by Cebelak. The County appears to be construing those allegations of knowing misrepresentations at first blush as impermissible challenges to permits. The County cites to the record that Lange has been complaining about structures since 1997 (Br. at 9) citing CP 123 and 129 where Lange requested: “effective immediately suspend all building and development permits that have been issued for the subject site” (CP 129). However, in the same letter, Lange requests an investigation into compliance with the permits and code:

“Conduct an on-site inspection to measure the site.  
Actual site measurements – including the particular

distance from the high water mark, site boundaries, and the county road abutting the property - should be reviewed against construction plans to confirm compliance with all applicable set back requirements, construction and building codes, and with the requirements of the Shoreline Management Act.” (CP 131).

Even if the historical requests are material to the character of the writ, the requests for relief are provided in the code enforcement scheme in Clallam County. CCC 35.01.090; CCC 20.20.050. In 2007 the County started investigating a formal code complaint filed by Lange to investigate compliance of the wall and the structures (CP 197) with the land use and shoreline code and permits, and Lange met with County officials and was promised a full response. (Decl. of Lange ¶1.16) (CP116-117). No decision was provided. Lange kept inquiring, and the County kept promising a decision. (CP 119); (CP225-232). The County selectively quotes from Lange’s layman’s attempt at an offer of compromise to compel some kind of final decision, trying to cast Lange in an unfavorable light (Br. at 3). But, because the County never provided a final decision on the code enforcement, the communication is relevant to show the County’s arbitrary and capricious conduct.

The code complaint filed in 2007 states in many places that the structures were not building in compliance with the conditions of approval

or permits, and constituted nuisances for failure to comply with the conditions.

“The storage building also fails to meet the 35’ ordinary high water mark setback on the water side. This fact is documented in writing in Washington Department of Fisheries and Wildlife HPA 00-C9840-01 which indicates the approximate setback at only 21 feet.” (CP 193); (CP 167).

“I should note that I have a fairly good photographic record of what the Cebalak beach looked like when he installed his initial bulkhead. When you overlay the location of the rip rap exposed by the storm, it becomes apparent the Cebalak’s violated the terms of the exemption permit that was granted them.” (CP 194).

“Based upon the foregoing, the bulkhead is illegal because it required a substantial development permit that was never obtained and because its construction violated numerous requirements of the HPA and exemptions granted to the Cebelaks for its construction.” (CP 195).

These excerpts show that Lange’s land use code complaint alleged issues regarding compliance with terms and conditions of permits and exemptions, and therefore is not a challenge to the permits barred by LUPA. The land use complaint is not an impermissible “challenge” to the permits, but relies upon them to show violations. Unlike in *Brotherton*, here, Lange is seeking an enforcement of the terms and conditions of land use determinations, *not* a facial challenge to those decisions - even if they

were “illegal.” The County’s characterization of the code enforcement request as a challenge is without merit.

**C. The Policy Of Administrative Finality Does Bar Code Enforcement Investigation And Enforcement Of Conditions Of Approval That Are Not Being Met, And Does Not Apply Code Enforcement Regarding Permits or Approvals Obtained With Misrepresentations.**

The County seeks to be excused from conducting investigation and enforcement of the code complaint alleging violations of conditions of permits and approvals, because the County asserts, this would violate the strong public policy of administrative finality. (Br. at 10). The County states that had the writ of mandamus been granted, “it would have been in violation of LUPA’s strong public policy supporting administrative finality” (Br. at 11).

There is no doubt that administrative finality is a fundamental tenant to LUPA. Though cited by the County the proposition of strong administrative finality of vesting rights in property owners, *Samuel’s Furniture* goes on to indicate that such finality does not bar the enforcement of permit conditions which are being violated. *Samuel’s Furniture v. Ecology*, 147 Wn.2d at 456.

Complimenting the strong public policy in favor of administrative finality of final land use determinations made upon valid and complete

applications, there is likewise strong public policy in favor of not allowing knowing misrepresentations to vest *any* rights. *Lauer v. Pierce County*, 173 Wn. 2d at 263 (“A permit application that is not allowed under the regulations in place at the time it is submitted and is issued under a knowing misrepresentation or omission of material fact confers no rights upon the applicant”).

It is one thing for a decision maker to make an illegal land use determination based upon valid and honest representations, *Chelan County v. Nykriem*, 146 Wn.2d 904 (2002) (en banc), and it is quite another to make an illegal land use decision based upon knowing and material misrepresentations by the applicant. *Lauer v. Pierce County*, 173 Wn.2d 242 (2011) (building permit issued based upon misrepresentations, and LUPA did not bar enforcement action by County where landowners were required to obtain missing county fish and wildlife variance which was a prerequisite to making the building permit valid and complete). Subsequent approvals based upon original applications or approvals that vested no rights, likewise do not vest any rights. *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 484-486, 513 P.2d 36 (1973) (rejecting equitable defenses to code violations being cured by

subsequent approvals, where the original applications and permits vested no rights).

But, at issue here, is that the approvals as granted by the County, whether final land use determinations protected by LUPA or not due to misrepresentations, have conditions of approval that are being violated as shown by the prima facie evidence presented in the Petition for Writ of Mandamus and land use code complaint in Exhibit A thereto. The County must investigate and provide an enforcement decision on the code complaint in Exhibit A. The County nor the Cebelaks appealed the conditions of the permits or approvals.

The County likewise states that after the 2007 bulkhead repair, it had no duties other than to inspect the repair work in July of 2007 and May of 2008 and issue after the fact permits thereon (Br. at 22). These statements regarding the County's duties are not true because Lange filed a formal land use code violation complaint in 2007 regarding the structures and wall, which the County never provided a final decision on. The County had the duty to investigate that land use code complaint, and provide a final decision thereon, which it never completed. The County had a duty to supply Lange with any land use decisions with respect to the investigation of the enforcement complaint and regarding Cebelaks'

developments. CCC 26.10.560. It didn't do that. Any subsequent purported approvals based upon prior approvals that vest no rights due to misrepresentations by the applicant, likewise vest no rights. *Eastlake*, 82 Wn.2d at 484-486; *Lauer v. Pierce County*, 173 Wn.2d 242. Without providing Lange with a final decision on code enforcement, Lange had no standing to challenge *any* decisions or non-decisions by the County regardless under LUPA. RCW 36.70C.060 (2)(d).

**D. LUPA Cannot Be Interpreted To Bar A Mandamus Action Which Seeks To Compel A Final Land Use Determination Where The County Is Under A Duty To Issue One, And Has Not Provided A Final Decision.**

The County argues that LUPA bars mandamus actions arising in the land use context. (Br. at 14). This not only overstates LUPA, it ignores the exemptions within LUPA, and, if true, would render LUPA unconstitutional. RCW 36.70C.030(1)(b) (judicial review of writs of mandamus excepted).

The County's failure to fully investigate and provide a code enforcement decision based upon LUPA is arbitrary and capricious in this case. There is a fundamental right to have the land use code enforced and complied with, which would include the conditions of approval on land use decisions. If enforcement of the code is not uniform and allows violations of permit conditions to go unabated, it results in de facto spot

zoning and is violative of Article 1 Section 8 and Section 12 of the Washington Constitution as applied here by conferring a benefit or advantage upon one or a few, with no offsetting public advantage or justification. *See, Smith v. Skagit County*, 75 Wn.2d 715, 743-744, 453 P.2d 832 (1969). *Asche* nor *Stafne* excuse the County from investigating whether the Cebelaks' structures violate the terms and conditions of the permits and approvals, nor investigating whether there were misrepresentations in obtaining approvals. Rather, *Asche* compels code enforcement through investigation and enforcement under Title 20, because Langes have a property right and accordingly constitutional due process rights in the protections of the land use and zoning code as applied. *See, Asche v. Bloomquist*, 132 Wn. App. at 798 ("A property right is protected by the United States Constitution when an individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source such as state law") *citing Wedges/Ledges of CA v. City of Phoenix*, 24 F.3d 56, 62 (9<sup>th</sup> Cir. 1994). A writ of mandamus is proper to force the County to do its duty, rather than conferring special privilege upon one by refusing to act.

If the County's interpretation of LUPA is correct, that code enforcement actions must be brought within 21 days of a final land use

decision (or that someone without notice of a permit or exemption decision must administratively appeal it), LUPA is unconstitutional as applied here. An applicant could simply obtain a permit or exemption with or without misrepresentations, begin no construction for the allotted appeal period, not notify anyone, and construct the development in violation of the permit, approval, or exemption, spend \$40,000.00 on the storage structure, rather than the exemption limit of \$2,300.00, and then maintain violations of those permits or approvals in perpetuity. It would be impossible for Lange (or anyone except the dishonest applicant) to divine a construction violation before it even occurred. LUPA should not, and cannot be construed as barring Lange's requests for code enforcement.

**E. Collateral Estoppel Is Not A Valid Basis To Affirm,  
And Does Not Apply To This Writ Of Mandamus  
Action.**

The County argued collateral estoppel as a basis for quashing the writ for the first time in its rebuttal brief in front of the Superior Court. (CP 61, 273).<sup>1</sup> Accordingly, it was not a proper basis for granting the motion to quash and is impermissible content in the County's Brief. RAP 1.1; RAP 10.3(b); *Davidson Serles & Associates v. City of Kirkland*, 159

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<sup>1</sup> Lange objected to this argument in front of the Superior Court as untimely and raised for the first time in a reply, and requested more time if the Court was going to consider this issue. (VRP at 6, 12). The Court indicated it was not going to consider it (VRP 6).

Wn. App. 616, 637, 246 P.3d 822, 834 (2011) (it is error for a court to consider arguments raised for the first time in rebuttal materials). Moreover, the County cannot prove that collateral estoppel applies because the decision is a non-final partial summary judgment ruling, and moreover the County misquotes and over reads Judge William's ruling.

“For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.”

*Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn. 2d 299, 307, 96 P.3d 957, 961 (2004).

The County argues that Judge Williams' decision indicates Lange cannot challenge the permits or the structures. (Br. at 18-19). But the decision does not bar the County from exercising its administrative jurisdiction to investigate and abate violations of *permit conditions*, which was not at issue, though it does suggest a bar a challenge to the permits themselves. (CP 90). Tellingly, nuisance abatement and injunctive relief was not barred by the statute of limitations or otherwise, only certain damages claims (CP 92, 95, 97).

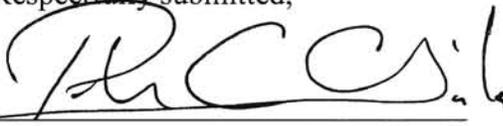
Moreover, the County directly misquotes Judge Williams' decision to say Lange cannot demand compliance with the permit conditions by removing the word "issue" and changing the word "permitted" to "permit." *Compare* (Br. at 19) to (CP 90). Because conditions of a permit or land use approval necessarily control what was *permitted*, Judge Williams' decision does not prevent code enforcement when properly quoted. Lange is not challenging what was validly applied for and permitted, but is seeking enforcement by the County so that what exists on the ground is actually what was "permitted"- illegally granted or not. Collateral estoppel does not bar this Writ of Mandamus.

### III. CONCLUSION

The writ of mandamus commands a final land use determination on a code enforcement complaint investigating and enforcing the terms of previous land use determinations –not a challenge to them. Accordingly, the Superior Court erred in quashing the writ.

Dated this 9th day of August, 2013.

Respectfully submitted,



Peter C. Ojala, WSBA #42163  
Carson Law Group, P.S.  
Attorney for Appellants

**IV. APPENDIX E**

Ordinance No. 388, 1990

ORDINANCE NO. 388, 1990

An ordinance of the Board of County Commissioners of Clallam County amending Chapter 35.01 of the Clallam County Code and establishing criteria for determining when a public hearing on shoreline permit applications is required; granting final shoreline permit authority to the shorelines committee; granting authority for administrative approval of certain shoreline permit applications; adding a procedure for appeal of shoreline committee and administrator's action on shoreline permits to the Board of Commissioners; and repealing reference to establishment of the shoreline committee and the committee's authority in this chapter.

Amending C.C.C. 35.01.020, 35.01.070, 35.01.080, 35.01.090, 35.01.100, 35.01.110, 35.01.120, 35.01.130, 35.01.140, 35.01.155, and 35.01.160; and adding new sections C.C.C. 35.01.095 and 35.01.125.

All new material shall be underlined, material deleted shall be placed within double parentheses and scored through.

BE IT ORDAINED BY THE BOARD OF CLALLAM COUNTY COMMISSIONERS:

Chapter 35.01

Shoreline Management

Sections:

35.01.010	Purpose
35.01.020	Definitions
35.01.030	Permits Required for Substantial Development
35.01.040	Exemptions from Permit Requirements
35.01.050	Prohibitions
35.01.060	Statement of Exemption
35.01.065	Non-Conforming Development Standards
35.01.070	Time Requirements of a Permit
35.01.080	Notice
35.01.090	Permit Applications
<u>35.01.095</u>	<u>When Public Hearing is Required</u>
35.01.100	<del>((Shoreline Advisory Committee Established Responsibilities))</del> <u>Administrative Action on Shoreline Permits Authorized</u>
35.01.110	Public Hearing; <del>((Notice, Advisory))</del> <u>Shorelines Committee</u> <del>((Recommendations))</del>
35.01.120	<del>((Board))</del> <u>Shorelines Committee or Administrator's Actions</u>
<u>35.01.125</u>	<u>Appeal of Shoreline Committee or Administrator's Action</u>
35.01.130	Granting or Denial of Permits; Conditions Attached to Permit; Other Permits
35.01.140	Review by Shorelines Hearing Board
35.01.150	Rescission; Service of Notice, Hearing
35.01.155	Appeal of Administrator's Decision on Exemptions to the Board
35.01.160	County Master Program
35.01.180	Criteria for Conditional Use and Variance Permits

35.01.190	Inspection
35.01.200	Environmental Impact Determination
35.01.210	Revisions to Shoreline Permits
35.01.215	Civil Penalties - Review
35.01.220	Criminal Penalties; Civil Liability
35.01.230	Conflicts - Master Program with other County Land Use Regulations
35.01.240	Real Property Assessments
35.01.250	Severability

**C.C.C. 35.01.010 Purpose.** The purpose of this chapter is to implement the Shoreline Management Act of 1971 (Chapter 286, Laws of 1971, 1st. Ex. Sess.), and to regulate development on the shorelines of the county in a manner consistent with the policy declared in section 2 of that Act and consistent with the Clallam County Shoreline Master Program.

**C.C.C. 35.01.020 Definitions.** As used in this chapter, unless the context otherwise requires, the following definitions and concepts apply:

- (1) "Administrator" means the Director of the Department of Community Development or his designee, who is responsible for carrying out the administrative duties set forth in this code.
- (2) "Advisory Committee" means the Clallam County Shorelines ~~((Advisory))~~ Committee.
- (3) "Board" means the Board of County Commissioners of Clallam County.
- (4) "Department" means the Washington State Department of Ecology.
- (5) "Department of Community Development" means the Department of Community Development of Clallam County.
- (6) "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals including the grading of land; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level.
- (7) "Conditional Use" for the purpose of this chapter is that defined pursuant to WAC 173-14-140.
- (8) "Extreme Low Tide" means the lowest line on the land reached by a receding tide.
- (9) "Hearings Board" means the State Shorelines Hearing Board.
- (10) "Master Program" shall mean the comprehensive shoreline use plan for Clallam County, and the use regulations together with maps, diagrams, charts or other descriptive material and text, a statement of desired goals and standards developed in accordance with the policies enunciated in Section 2 of the Shoreline Management Act of 1971.
- (11) "Ordinary High-water Mark" on all lakes, streams and tidal water is that mark which will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, or as it may naturally change thereafter: PROVIDED, that in any area where the ordinary high-water mark cannot be

found, the ordinary high-water mark adjoining saltwater shall be the line of mean higher high tide and the ordinary high-water mark adjoining freshwater shall be the line of mean high water.

- (12) "Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, or agency of the state or any local governmental unit however designated.
- (13) "Public Works Department" means the Public Works Department of Clallam county.
- (14) "Shorelines" means all of the water areas within the unincorporated portion of Clallam County, including reservoirs, and their associated wetlands, together with the lands underlying them except
- (a) shorelines of statewide significance;
  - (b) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and
  - (c) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes.
- (15) "Shorelines of State-wide Significance" means those shorelines described in Section 3(2)(e) of the Shoreline Management Act of 1971 which are within the unincorporated portion of Clallam County.
- (16) "Shorelines of the County" are the total of all "shorelines" and "shorelines of state-wide significance" within the county.
- (17) "Substantial Development" shall mean any development of which the total cost or fair market value exceeds two thousand, five hundred dollars (\$2,500.00), or any development which materially interferes with the normal public use of the water or shorelines of the County; except that the following shall not be considered substantial developments for the purpose of this chapter:
- (a) normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements;
  - (b) construction of the normal protective bulkhead common to single family residences;
  - (c) emergency construction necessary to protect property from damage by the elements;
  - (d) construction of a barn or similar agricultural structure on wetlands;
  - (e) construction or modification of navigational aids such as channel markers and anchor buoys;
  - (f) construction on wetlands by an owner, lessee or contract purchaser of a single family residence for his own use or for the use of his family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof other than requirements imposed pursuant to this chapter.
  - (g) construction of a dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee or contract purchaser of a single-family residence, the cost of which does not exceed two thousand five hundred dollars (\$2,500.00).
- (18) "Substantial Development Permit" means the shoreline management substantial development permit provided for in Section 14 of the Shoreline Management Act of 1971 (RCW 90.58.140).
- (19) "Statement of Exemption" - A written statement issued by the administrator that a particular development proposal is exempt from the shoreline substantial development permit requirements (pursuant to WAC 173-14-040) and is generally consistent with the Clallam County Shoreline Master Program, including the policies of the Shoreline Management Act, Chapter 90.58.020 RCW.
- (20) "Variance" is that defined pursuant to WAC 173-14-150.

(21) "Wetlands" or "Wetland Areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high-water mark; and all marshes, bogs, swamps, floodways, river deltas, and flood plains associated with the streams, lakes and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the Washington State Department of Ecology.

**C.C.C. 35.01.030. Permits Required for Substantial Development.**

(1) No development shall be undertaken on the shorelines of the county except those which are consistent with the policy of the Shoreline Management Act of 1971 and the Clallam County Shoreline master program.

(2) No substantial development shall be undertaken on the shorelines of the county without first obtaining a substantial development permit from the Board. A permit shall be granted only when the proposed development is consistent with:

- (a) the policies of the Shoreline Management Act and
- (b) the guidelines and regulations of the department;
- (c) the Clallam County Shoreline Master Program; and
- (d) all provisions of this chapter.

**C.C.C. 35.01.040. Exemptions from Permit Requirements.** A substantial development permit shall not be required for any project with a certification from the governor pursuant to Chapter 80.50 RCW.

**C.C.C. 35.01.050. Prohibitions.**

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

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

(3) No development shall be undertaken on the shorelines of the state except those which are consistent with the policies of the Shoreline Management Act of 1971 and, after adoption or approval as appropriate, the applicable guidelines, regulations or master program.

**C.C.C. 35.01.060 Statement of Exemption.**

(1) Any person undertaking a development within the shorelines of the state which involves dredging, land fill and shoreline protection structures, including bulkheads, must either apply to the Department of Community Development for a statement of exemption from the Shoreline Management Act substantial development permit requirements or apply for a substantial development permit.

(2) The administrator is hereby authorized to grant or deny requests for statements of exemption from the Shoreline Management Act permit requirements for substantial developments. Such statements shall be in writing and shall identify the reason(s) for the granting or denial of the exemption. The Administrator shall require a written description of a project, including a site plan, before issuing a determination. The

administrator's action on such matters are subject to appeal before the Board of Clallam County Commissioners pursuant to C.C.C. 35.01.155.

**C.C.C. 35.01.065 Non-Conforming Development Standards.** This ordinance incorporates by reference the non-conforming development standards, pursuant to Washington Administrative Code. (W.A.C.) 173-14-055.

**C.C.C. 35.01.070 Time Requirements of a Permit.** The following time requirements shall apply to all substantial development permits:

(1) Construction or substantial progress toward construction of a project, as defined pursuant to WAC 173-14-060(1), for which a permit has been granted pursuant to this chapter must be undertaken within two years after the approval of the permit by local government or the permit shall terminate. If such progress has not been made, a new permit will be necessary.

(2) No permit authorizing construction shall extend for a term of more than five (5) years. If a project for which a permit has been granted has not been completed within five years after the approval of the permit (~~by the Board, the Board~~), the administrator shall, at the expiration of the five-year period, review the permit, and upon a showing of good cause, extend the permit for one (1) year; otherwise, the permit terminates, PROVIDED that no permit shall be extended unless the applicant has requested such review and extension prior to the permit expiration date.

**C.C.C. 35.01.080. Notice.** Upon submittal of a proper application for a substantial development, conditional use, or variance permit to the shoreline permit administrator, the county shall publish a notice of application on the proposal at least once a week on the same day of the week for two (2) consecutive weeks in a newspaper of general circulation within the county. Additional notice shall consist of notice by mail to the owners of property within 600 feet of the boundary of said property, provided, however, that said property shall include all contiguous parcels under the same ownership. Said public notices shall be essentially in the format prescribed by WAC 173-14-070. The notice shall also state whether a hearing will be held on the application and if so, when and where it will be held and shall also indicate that a hearing before the shoreline committee may be requested if five or more persons with interest in the application request a hearing pursuant to C.C.C. 35.01.095. Documents of public record shall be controlling as to the status of legal ownership. The applicant is responsible for the costs of mailing said notice. Within thirty (30) days of the last publication of such notice, any interested person may submit his views on the application in writing to the ~~Advisory Committee Administrator~~ or may notify the ~~(Board)~~ Administrator of his desire to be notified of ~~((the Board's decision))~~ any action on the permit.

~~((if a public hearing is to be held on any shoreline permit application, at least ten days prior to the hearing the applicant shall be responsible for posting two notices of public hearing in conspicuous locations upon and near the subject property except when the subject property is entirely within aquatic areas; then, posting on the adjacent shoreline is permitted. The Administrator shall provide the applicant with public hearing notices.))~~

An affidavit that the notices have been properly published (~~(, posted)~~) or deposited in the United States mail, pursuant to this section, shall be affixed to the application.

The Administrator may waive the requirement for notice by mail for those projects not confined to a specific location, such as utility transmission lines.

**C.C.C. 35.01.090. Permit Applications.**

(1) Application for substantial development, conditional use, and variance permits shall be made with the Department of Community Development by the property owner, lessee, contract purchaser, other person entitled to possession of the property, or by an authorized agent.

(2) A filing fee in an amount as established under C.C.C. 3.30 shall be paid to the Department of Community Development at the time an application is filed.

(3) Application for a substantial development permit shall be made on forms supplied by the Clallam County Department of Community Development.

(4) This ordinance incorporates by reference the application permit requirements pursuant to Washington Administrative Code (WAC 173-14-110) as now or hereafter amended.

(5) Upon receipt of an application, the administrator shall review it for completeness, consistency or inconsistency with the Clallam County Shoreline Master Program and shall determine if a public hearing on the application is required pursuant to C.C.C. 35.01.095. If a hearing on the application is required, the administrator shall schedule a public hearing before the shorelines committee in accordance with the procedures for scheduling of hearings.

(6) At every stage of the shoreline permit application process, the burden of demonstrating that any proposed development is consistent with this ordinance, the shoreline master program and the shoreline management act, is upon the applicant.

**C.C.C. 35.01.095 When Public Hearing Is Required.**

(1) A public hearing before the shorelines committee shall be required for any development meeting the following criteria:

- (a) the proposed development or portions thereof are located within subtidal shorelines;
- (b) the proposed development or portions thereof are located within a natural or conservancy shoreline environment according to the shoreline master program;
- (c) the proposed development will require a shoreline conditional use permit;
- (d) the fair market value of the proposed development will exceed \$150,000;

(2) A public hearing shall be held before the shorelines committee whenever five or more persons with interest in the application make written request to the administrator within fifteen (15) days of first publication of the application in a newspaper of general circulation.

(3) A public hearing shall be held before the shorelines committee on any variance to the regulations of the shoreline master program except for single family residences as outlined in C.C.C. 35.01.100(1)(b).

**C.C.C. 35.01.100. Administrative Action on Permits Authorized.**

(1) The administrator is hereby authorized to take action on the following shoreline permit applications pursuant to this chapter and the shoreline master program:

- (a) any shoreline substantial development which is not located within subtidal shorelines, not located in a natural or conservancy shoreline environment, the fair market value of the development does not exceed \$150,000 and a hearing has not been requested pursuant to C.C.C. 35.01.095(2).

- (b) applications for a variance from setback requirements for single family residences on lots legally created prior to enactment of the Shoreline Management Act of 1971.

~~((C.C.C. 35.01.100. Shoreline Advisory Committee Established Responsibilities:))~~

~~((1)-----The Board shall appoint a Shoreline Advisory Committee and it shall consider applications and make recommendations regarding permits or amendments to the Master Program based on the policies contained in C.C.C. 35.01.030.))~~

~~((2)-----The Advisory Committee shall review an application for a permit based on the following: the application; the environmental impact document required by County Code 27.01, if any; written comments from interested persons, if any; information and comment from other county departments affected if any; independent study of the Advisory Committee; independent study of the Department of Community Development; and evidence presented at the public hearing, if any, held pursuant to C.C.C. 35.01.110.))~~

~~((3)-----The Advisory Committee shall transmit its recommendations in writing to the Board within a reasonable time after the public meeting upon which action is taken.))~~

~~((4)-----The burden shall be on the applicant to prove that the proposed development is consistent with the criteria set forth in this chapter. The Advisory Committee may condition a shoreline permit to assure a project's consistency with the Shoreline Master Program and the Shoreline Management Act.))~~

~~((5)-----The Committee shall consist of seven (7) members appointed by the Board of County Commissioners.))~~

~~((6)-----Four (4) members of the Committee shall constitute a quorum to conduct business and make recommendations. A majority of those present shall be required to make a recommendation, PROVIDED: that approval of amendments to the Master Program shall require a minimum of four (4) votes in the affirmative.))~~

~~((7)-----The Committee shall conduct a regular meeting at least once each month; however, when there is no business to be conducted, such regular meeting may be cancelled. Further, regular meetings may be continued when deemed appropriate and special meetings may be called at the discretion of the Committee. Meetings shall be conducted in accordance with Robert's Rules of Order and the Clallam County Ethics Ordinance, C.C.C. 3.01.))~~

~~((8)-----The Department of Community Development shall prepare an agenda of matters to be considered by the Committee. A copy of the agenda shall be mailed to persons who have expressed an interest in presenting their views on an application. The agenda shall state the time and place where the Committee will conduct its public meeting and the notice to interested parties shall be sent not less than six (6) days prior to the date of the public meeting.))~~

~~((9)-----The Committee shall consider and act on matters referred by the Board of County Commissioners.))~~

~~((10)-----The Committee may initiate amendments to the Master Program. Notification and authorization of the Board is required prior to proceeding with any amendment to the Shoreline Master Program.))~~

~~C.C.C. 35.01.110. Public Hearing; Notice; Advisory Shoreline Committee.~~

(1) Public hearings required on substantial development, conditional use, and variance permit applications shall be conducted by the ((Advisory)) Shorelines Committee.

(2) If, for any reason, testimony on any matter set for public hearing, or being heard, cannot be completed on the date set for such hearing, the ~~((Advisory))~~ Shorelines Committee may, before adjournment or recess of such matters under consideration, publicly announce the time and place of the continued hearing and no further notice is required.

(3) The ~~((Advisory))~~ Shorelines Committee shall have the power to prescribe rules and regulations for the conduct of hearings before it; to administer oaths and to preserve order.

~~((4)---Following completion of a public hearing, the Committee shall vote on a recommendation to the Board and shall make and enter written findings from the record and conclusions thereof which support its recommendations and the findings and conclusions shall set forth the manner in which the decision is consistent with:))~~

~~((a)---the policies as set forth in Chapter 90.58, RCW;))~~

~~((b)---the guidelines and regulations of the Department;))~~

~~((c)---the Clallam County Shoreline Master Program and all provisions of this chapter.))~~

~~((5)---Said decision on permits or amendments to the Master Program shall be a recommendation of approval, denial, or conditional approval.))~~

~~((6)---If appropriate, the Committee may defer action on an application for the purpose of obtaining additional information or revisions on applications to achieve consistency with the Master Program. An application shall not be deferred for any period exceeding thirty (30) days or until the next regular meeting, whichever is the greater period.))~~

**C.C.C. 35.01.120. Board Shoreline Committee or Administrator's Action.**

~~((1)---Upon receipt of the recommendation from the Advisory Committee, if the Board is in agreement with the findings and conclusions of the Advisory Committee, it shall prepare a final order based on said findings and conclusions. If the Board is in disagreement with any or all of the findings and conclusions of the Advisory Committee, it shall conduct a public hearing and after completion of said hearing shall enter its own findings and conclusions and order which shall be based upon any of the following: the application; the environmental impact document, if one has been prepared; written comments from interested persons; testimony from the public hearing information and comment from other interested county departments and from the Prosecuting Attorney; independent study of the Advisory Committee; independent study of the Department of Community Development. Said findings and conclusions shall set forth the manner in which the decision is consistent with the criteria set forth in C.C.C. 35.01.100. If a public hearing is required, notice shall be given in accordance with the applicable provisions of Clallam County Home Rule Charter, C.C.C. 3-10.))~~

~~((2)---The decision of the Board shall be the final decision of the county on all applications and the Board shall render a written decision including findings, conclusions and a final order, and transmit copies of its decision to the persons who are required to receive copies of the decision pursuant to Section .080 of this chapter.))~~

(1) The shorelines committee or administrator shall take action on applications based on the following: the application; an environmental checklist or environmental impact statement prepared as required by C.C.C. 27.01; the Clallam County Shoreline Master Program, Shoreline Management Act of 1971 and the Washington Administrative Code, as now or hereafter amended; the staff report prepared by the administrator, if any; written comments from interested persons if submitted within the time limitations as specified in this ordinance or at a public hearing, if one is held; information and comment from other county departments or state, federal and tribal agencies; independent study of the shoreline committee or administrator; or any other evidence presented at a public hearing, if required.

(2) The shorelines committee or administrator shall take action on the application and shall make and enter written findings from the record and conclusions thereof which support the action and the findings and conclusions shall set forth the manner in which the decision is consistent with:

- (a) the policies as set forth in Chapter 90.58, R.C.W.;
- (b) the guidelines and regulations of the Department;
- (c) the Clallam County Shoreline Master Program and all provisions of this chapter;
- (d) the State Environmental Policy Act and the Clallam County Environmental Policy Ordinance, C.C.C. 27.01.

(3) The shorelines committee shall take action on all shoreline permit applications brought before the committee within 30 days or until the next regular meeting, whichever is the greater period following conclusion of all testimony and hearings. A longer period for action on permits may occur if mutually agreed upon by the applicant and the shoreline committee. The secretary to the shorelines committee is authorized to sign and transmit final actions of the shorelines committee pursuant to this ordinance.

(4) The administrator shall take action on all shoreline permits under the authority of the administrator within five (5) working days following conclusion of the public notice requirements of this ordinance and the shoreline management act. The administrator is authorized to sign and transmit final actions pursuant to this section.

(5) The action of the shorelines committee or administrator shall be the final decision of Clallam County on the application unless an appeal is filed to the Board of County Commissioners within ten (10) days of the action as specified in C.C.C. 35.01.125.

#### **C.C.C. 35.01.125. Appeal of Shoreline Committee or Administrator's Action.**

(1) The action of the Shoreline Committee or Administrator on any permits granted or denied pursuant to this ordinance can be appealed to the Board of County Commissioners by an aggrieved person by filing a written notice of appeal setting forth the basis for said appeal with the Clerk of the Board of County Commissioners not later than ten (10) days following action on the permit.

(2) All appeals under this section shall be in writing and shall state specifically the issues that are the subject of the appeal focusing in on the specific inadequacies of the particular decision under dispute. The appeal shall be limited to consistency with the policies as set forth in Chapter 90.58, RCW; the guidelines and regulations of the Department of Ecology in administration of RCW 90.58; and the Clallam County Shoreline Master Program and all provisions of this chapter.

(3) The Board of Clallam County Commissioners shall call for a public hearing at their next regularly scheduled meeting following receipt of the appeal and shall either affirm or reverse the decision of the shorelines committee or administrator within thirty (30) days of the hearing at which the appeal is considered.

(4) Upon conclusion of the appeal hearing, the Board shall prepare a final order based on any of the following: the application; the environmental checklist or environmental impact statement prepared in accordance with C.C.C. 27.01; the record before the shorelines committee or administrator; the action, findings and conclusions of the shorelines committee or hearing examiner; the staff report prepared by the shorelines administrator; independent study of the Board; and testimony from the appeal hearing.

(5) The final order of the Board shall be a written decision including findings, conclusions and action. The Chair of the Board of County Commissioners shall be authorized to sign final orders held pursuant to this section.

**C.C.C. 35.01.130 Granting or Denial of Permits; Conditions Attached to Permit; Other Permits.**

(1) The ~~((Board))~~ administrator shall deliver to the following persons copies of the application and the approval, conditional approval or disapproval of a substantial development, conditional use, or variance permit application within eight (8) days of its final decision:

- (a) the applicant;
- (b) the Department;
- (c) the Washington State Attorney General;
- (d) any person who has written ~~((the Advisory Committee or the Board))~~ requesting notification.

(2) Development pursuant to a substantial development permit shall not begin and shall not be authorized until thirty (30) days from the date the ~~((Board))~~ administrator files the approved substantial development permit with the Department and Attorney General, or until all review proceedings initiated within thirty (30) days of the date of such filing have been terminated.

(3) In granting ~~((or extending))~~ a permit, the ~~((Board))~~ shorelines committee or administrator may attach thereto such conditions, modifications and restrictions regarding the location, character and other features of the proposed developments it finds necessary to make the permit compatible with the criteria set forth in C.C.C. 35.01.1~~((9))~~20. Such conditions may include the requirement to post a performance bond assuring compliance with other permit requirements, terms and conditions.

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

**C.C.C. 35.01.140. Review by Shorelines Hearings Board.** Any person aggrieved by the granting, denying or rescission of a substantial development, conditional use or variance permit ~~by the Board of County Commissioners~~ may seek review from the Hearings Board in accordance with those procedures provided for under Chapter 90.58.180 and those regulations adopted by the Shorelines Hearings Board.

**C.C.C. 35.01.150. Rescission: Service of Notice; Hearing.**

(1) Any permit granted pursuant to this chapter may be rescinded or modified upon a finding by the Board that the permittee has not complied with the conditions of the permit.

(2) The Board may initiate rescission and modification proceedings by serving written notice of noncompliance on the permittee.

(3) Before a permit can be rescinded or modified, a public hearing shall be held by the Board no sooner than ten (10) days following the service of notice upon the permittee. The Board shall have the power to prescribe rules and regulations for the conduct of such hearings.

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

**C.C.C. 35.01.155. Appeal of Administrator's Decision on Exemptions to the Board.**

(1) Any person aggrieved by the granting or denying of a statement of exemption by the administrator may appeal the administrator's decision to the Board of Clallam County Commissioners. The appeal shall

be in writing on a form supplied by the Planning Division, stating reasons for the appeal in specific terms and shall be filed with the Division within ((40)) 15 days of the administrator's decision.

(2) The Department of Community Development shall transmit to the Board, for its consideration at a regular public meeting, the aggrieved party's appeal, along with documents on file with the Planning Division which are specific and relevant to the administrator's decision.

(3) The Board's decision on an appeal of a statement of exemption shall be the final decision of the County. In its decision, the Board shall consider the facts of the situation and shall reverse the Administrator's decision if it is determined that the Administrator erred in granting or denying the exemption request.

**C.C.C. 35.01.160. County Master Program.**

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

(2) The ((Advisory)) Shorelines Committee shall periodically review the master program for Clallam County and recommend such amendments as are necessary. Such amendments shall be submitted to the Board of Clallam County Commissioners for their action prior to submittal to the Department in accordance with W.A.C. 173.19. No such amendment shall become effective until adopted by the Department.

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

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

**C.C.C. 35.01.180 Criteria for Conditional Use and Variance Permits.** Conditional uses and variances may be granted based upon satisfaction of the criteria in WAC 173-14-140 for conditional uses and WAC 173-14-150 for variances. W.A.C. 173-14-140 and 150 are incorporated herein, and as later amended, by reference.

**C.C.C. 35.01.190. Inspection.** The administrator may inspect properties as necessary to determine whether permittees have complied with conditions of their respective permits and, whenever there is reasonable cause to believe that development has occurred upon any premises in violation of the Shoreline Management Act of 1971 and this chapter, may enter upon such premises at all reasonable times to inspect the same. The building inspector or administrator shall present proper credentials before demanding entry. If such premises are unoccupied, a reasonable effort shall be made to locate the owner or tenant and demand entry. The Administrator shall then issue a notice and order to the owner or tenant of the premises advising such person(s) of any violations and requiring him to take whatever action is necessary to comply with the Act and this chapter. Subsequently, the administrator shall also, where appropriate, seek legal sanctions by the Board as provided in C.C.C. 35.01 and by the Clallam County Prosecuting Attorney as provided in C.C.C. 35.01.210.

**C.C.C. 35.01.200. Environmental Impact Determination.** Prior to the consideration of a shoreline permit application by the Shoreline Advisory Committee, an environmental impact determination of the proposal shall be undertaken in accordance with the requirements and procedures of the Clallam County Environmental Policy Ordinance C.C.C. 27.01.

**C.C.C. 35.01.210. Revisions to Shoreline Permits.**

- (1) Clallam County adopts, by reference, WAC 173-14-064 (Revisions to Substantial Development, Conditional Use, and Variance Permits) and any subsequent amendments adopted thereto.
- (2) Applications for revisions to shoreline permits shall be on a form prescribed by the administrator and shall be accompanied by a filing fee in the amount established under C.C.C. 3.30.
- (3) Upon receipt of a complete application for a revision to a shoreline permit and upon payment of the fees, the administrator shall make a written decision of approval, conditional approval or denial within ten working days of receipt of the application.
- (4) The action of the Administrator may be appealed to the Board of Clallam County Commissioners by an aggrieved person by filing a written notice of appeal setting forth the basis for said appeal with the Clerk of the Board of Clallam County Commissioners not later than fifteen (15) days following the Administrator's action. Consideration of the appeal by the Board of Clallam County Commissioners shall be limited to the record and criteria set forth in WAC 173-14-064. The Board of Clallam County Commissioners may reverse the Administrator's decision, remand the application back with instructions or affirm the decision. The Board of Clallam County Commissioners' decision is final and is subject only to appeal to a court of competent jurisdiction.

**C.C.C. 35.01.215 Civil Penalties - Review**

- (1) This ordinance adopts by reference Chapter 90.58.210. "Court actions to ensure against conflicting uses and to enforce - Civil Penalty - Review."
- (2) Where a notice in writing is served to require corrective action, the administrator shall specify that corrective action must be initiated within 30 days of notification and completed within 60 days of notification.

**C.C.C. 35.01.220. Criminal Penalties; Civil Liability.**

- (1) Any person found to have willfully engaged in activities on the shorelines of the county in violation of this chapter or the Shorelines Management Act of 1971 or in violation of the master program, rules or regulations adopted pursuant thereto shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment in the county jail for not more than ninety (90) days, or by both such fine and imprisonment; PROVIDED, that the fine for the third and all subsequent violations in any five-year period shall not be less than five hundred dollars (\$500.00) nor more than ten thousand dollars (\$10,000.00).
- (2) The Clallam County Prosecuting Attorney shall bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the county in conflict with the provisions and programs of this chapter or the Shoreline Management Act of 1971, and to otherwise enforce the provisions of this chapter and the Shoreline Management Act of 1971.

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

**C.C.C. 35.01.230 Conflicts - Master Program With Other County Land Use Regulations.** Where other county land use regulations are in conflict with the Master Program, the more restrictive regulation shall apply and such application shall extend only to those specific provisions which are more restrictive.

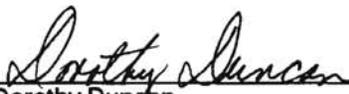
**C.C.C. 35.01.240 Real Property Assessments.** The restrictions imposed by the Shoreline Master Program shall be considered by the county assessor in establishing the fair market value of the property.

**C.C.C. 35.01.250 Severability.** If any provision of this chapter or its application to any person or legal entity or circumstances is held invalid the remainder of the chapter, or the application of the provision to other persons or legal entities or circumstances shall not be affected.

PASSED AND ADOPTED THIS 19 day of June, 1990.

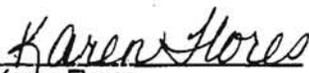
BOARD OF CLALLAM COUNTY COMMISSIONERS

  
Dave Cameron, Chair

  
Dorothy Duncan

  
Lawrence Gaydeski

ATTEST:

  
Karen Flores  
Clerk of the Board

cc: Community Development  
Minutes  
File  
Prosecutor (3)  
Code



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

DATED: ~~August~~ 9, 2013

Respectfully submitted,



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Dawn Misawic, Legal Assistant  
For Peter C. Ojala  
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Everett, WA 98201  
(425) 493-5000