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No. 45726-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

v.

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

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR CLALLAM COUNTY

No. 09-2-01301-1

APPELLANTS' REPLY BRIEF

RANDY M. BOYER, WSBA# 8665
RANDY M. BOYER, INC. P.S.
7017 196TH Street SW
Lynwood, WA 98036
(425) 712-3107
Attorney for Appellants

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I. INTRODUCTION

David A. Cebelak and Krisanne R. Cebelak in their Brief ask that the entire action brought by the Langes be dismissed (Cebelak's Brief P-30)¹. Cebelaks never filed a cross appeal of the Trial Court's denial of the majority of the issues raised in their summary judgment. They cannot argue these issues without filing a cross appeal. A notice of cross review is essential if the Cebelak "seeks affirmative relief as distinguished from the urging of additional grounds for affirmance." *Robinson v. Khan*, 89 Wash.App. 418, 420, 948 P.2d 1347, 1348 (Wash.App. Div. 1,1998)

The portions of Cebelak's Brief arguing for all of Lange's claims to be dismissed should be disregarded.

Cebelak's brief contains an extensive and significantly distorted account of the nature of Lange's action and the facts associated with this case. We point out below the salient facts pertaining to this Appeal. The trial court, not the Court of Appeals, needs to sort out the facts. If allowed to present all facts at trial, Langes are confident the preponderance of evidence will confirm the violations of law asserted.

¹ For clarity, the Respondents are referred to herein as "Cebelaks" and Appellants referred to as "Langes"

Cebelaks repeatedly note that Langes failed to file a LUPA claim when governmental agencies issued permits to them. They note further “Cebelak’s position is that Mr. Lange’s claims that the Cebelaks misrepresented facts, while untrue, *is irrelevant because his non-compliance with LUPA bars all claims.* This action should be dismissed.” (emphasis added). Cebelaks apparently believe Lange’s failure to file such LUPA appeals render the Langes totally impotent to challenge at law the multiple violations of law Cebelaks have perpetrated. They recite their argument made to the trial judge that even tort claims such as nuisance, trespass and injunctive relief are barred by LUPA. The trial court in a reasoned opinion denied the Cebelak argument below. Cebelak failed to appeal the Judge's ruling.

II. SALIENT FACTS

The extensive record of this case contains a limited number of salient facts upon which this action rests.

- 1) Cebelaks have never provided an accurate or credible location of the OHWM on their property (CP 417 L 13 - 25). The location of the OHWM is a critical compliance element in Clallam County Shoreline Master Program. The State Shoreline Management Act of 1971, RCW 90.58; the Clallam County Shorelines Code, Title

35; and the Clallam County Shoreline Master Program (“SMP”) collectively constitute the regulatory regime applicable to the Cebelak developments (hereafter “SMA requirements”.) By State law, no uses of the shoreline are allowed that violate the SMA requirements (RCW 90.58.140 (1)). The Clallam County SMP requires a minimum setback from OHWM of 35 feet for all residences and accessory structures. (CCSMP 5.08 (B)(2) and (C)(4)). CP 249, 250, 225, 228 & 255)

- 2) Notwithstanding Bob Martin’s 5/12/97 letter (CP 186), the record supports the conclusion that the County never inspected the Cebelak property or made an OHWM determination at the Cebelak property (CP 229; 231; 256). The official record indicates County officials first visited the Cebelak property on 6/17/97, weeks after the Martin letter. No evidence has been provided by Clallam County or Cebelaks to conclude anything other than that Martin’s letter was a knowingly fraudulent response to Lange’s 5/11/97 land use complaint and enforcement request. (CP 229; 231; 256) (CP 461-462). By law, at the time of permit issuance, and at the time of Lange’s 5/11/97 land use complaint, lacking an accurate

location of OHWM Cebelak's building permit application remained incomplete.

- 3) On 1/22/98, in response to Cebelak's 1/6/98 application for an HPA to construct a bulkhead (CP 260-262), a qualified WDFW representative visited Cebelak's property and performed an OHWM determination. The field notes indicate the applicant was present. (CP 279). The determination established the location of the OHWM at the property as a line running through two points, one 21 feet seaward of the NW corner of the foundation of the "storage building" and the other 26 feet seaward of the NW corner of the foundation of the single family residence. These findings were documented by the WDFW's 1/22/98 field notes and are reflected on the HPA ultimately issued by WDFW on 6/22/98 (CP 276-280).
- 4) There being no evidence that a conflicting OHWM determination was made by a qualified expert prior to the WDFW determination, the WDFW determination is dispositive (CP 276-280; 417 L 13 - 25). If such evidence exists, it has been illegally withheld from disclosure. The WDFW finding, made by a qualified public official in response to a formal permit request by Cebelak, is a

“final land use decision” (technically, under Washington law, a “final administrative decision” under APA). That decision was not appealed or challenged by Cebelaks or Clallam County. ***Langes can assert this land use decision as fact and Cebelaks are barred by LUPA/APA from claiming otherwise.*** That determination confirmed that a) the 35 foot shoreline setback required by SMA requirements was not met for both the cabin and residence, and b) the cabin and residence were both in non-compliance with the 35 foot shoreline setback specified in all permits issued to Cebelaks. Condition a) constitutes a SMA requirements violation, and condition b) constitutes a permit violation. To be compliant with SMA requirements, Cebelaks are required to obtain a shoreline setback variance, which must be approved by the Washington State DOE and is appealable to the SHB (WAC 173-27-040(1)(b)). To date they have not obtained such a variance. Until such variance is obtained, an ongoing use of shorelines not allowed by SMA requirements exists. The building setback violations noted are demonstrated succinctly in the survey commissioned by Langes (CP - 337 Exhibit A to Declaration of Thomas D. Roorda at page 343).

- 5) Lange was never notified of the OHWM finding in 1998 (CP 182-185). Clallam County was aware of the OHWM determination in 1998 but did not pursue an enforcement action. Langes first became aware of this protected land use decision in late March, 2007 – long after the 2007 bulkhead reconstruction was complete.
- 6) Cebelaks submitted applications for a shoreline exemption and HPA to construct a bulkhead at the OHWM on 1/6/98. The exemption was denied by Clallam County on April 9, 1998 on the basis of causing possible erosion to adjacent shorelines (CP 264-268). On April 17, 1998, Cebelak submitted a revised application proposing to locate the “sea wall” 20 feet landward of the OHWM. In the attached site plan to the revised proposal, however, Cebelak misrepresented the location of the OHWM to be approximately 20 seaward of its actual location determined by WDFW (CP 270). To avoid SMA requirements to obtain a Shoreline Substantial Development Permit (SSDP) Cebelak also misrepresented the cost of the structure to be under \$2,500. Further, Cebelak represented the height of the structure to be “approximately 4 feet” when in fact it was much larger (CP 260-263). All misrepresentations were material as all were made to avoid obtaining the SSDP and

building permits otherwise required for such a project. The misrepresentations allowed Cebelaks to obtain permission to construct developments that were otherwise prohibited by the regulations in place when the fraudulent applications were submitted. Per *Lauer v. Pierce County*, the permits issued for the sea wall confer no rights on applicant. Based on the true conditions at the site, and the actual cost of the “sea wall”, under SMA requirements a SSDP is required for the structure. Cebelaks did not obtain a SSDP. The SMA violations are ongoing. The survey commissioned by Langes succinctly indicate the permitted versus “as built” location of the sea wall (CP - 337 Exhibit A to Declaration of Thomas D. Roorda at page 343).

- 7) Clallam County approved the revised “sea wall” exemption application on June 19, 1998. (CP 272-277) The language of the approval contains multiple references inaccurately citing the shoreline setback requirements contained in SMA requirements to the “mean high tide” rather than the actual standard of “ordinary high water mark” (CP 272-277). Compared to other approvals during the same time period the Cebelak exemption stands out as highly unusual.

- 8) Counsel for Cebelaks has repeatedly asserted the bulkhead constructed in May 1999 was inspected by both Clallam County and WDFW following completion. These assertions are self-serving and inaccurate. After extensive Public Record Act inquiry to both agencies, no evidence has been produced that indicates any coordination or inspection was performed following issuance of the 1998 exemption and HPA to Cebelaks. Cebelaks have similarly provided no evidence of coordination or inspection in response to discovery requests.
- 9) Cebelaks also constructed on the site a purported “storage building”. Claiming the building to be “exempt” from permits under the Clallam County building code, they did not obtain a permit for the structure. Instead, the only permit obtained was for a \$300 project for “plumbing fixtures” for an exempt storage building. (CP 223-224; 227-291). No drawings of the proposed “storage building” were provided to local officials, nor were cost estimates provided. Cebelaks then constructed a \$40,000 (as valued by the Clallam County Assessor) cabin (as described by the Clallam County Assessor (CP 233-237) and by David Cebelak in his 2007 bulkhead rebuild application (CP 287) with kitchen,

bathroom, sleeping loft, full carpeting, full electrical and heat, and large insulated windows with blinds. In fact, it is an accessory dwelling unit, neither an “exempt storage building” as defined in the Clallam County building code or “appurtenance” as defined in the Clallam County SMP. By SMA requirements, it is a shoreline substantial development and requires a SSDP (RCW90.58.030 (3)(e)), which Cebelaks did not obtain. Also by SMA requirements, because the “cabin” requires a SSDP, each other development on the site also requires a SSDP (WAC 173-27-040 (1)(d)). In violation of SMA requirements, Cebelaks did not obtain a SSDP. This is an ongoing violation. Even if the structure is “exempt from permits” as claimed by Cebelaks, the specific exemption claimed also requires compliance with “other ordinances” and “setback requirements”. As noted in 4) above, the structure is located 21 feet from the OHWM, not the 35 feet required by code and the plumbing permit issued. This violates applicable shoreline setbacks and requires a variance (WAC 173-27-040(1)(b)). These violations are ongoing.

- 10) Cebelaks constructed the single-family residence without obtaining a SSDP, claiming instead a shoreline exemption as provided in

RCW 90.58.030 (3)(vi). Cebelaks have admitted following completion of the single-family residence they never occupied the residence. Instead, they rented to three successive unrelated tenants from completion of the structure to mid-2008 (CP 48-56). Under SMA requirements, the single-family residence exemption from SSDP requirements is available only when the owner, contract purchaser or lessee uses or occupies the home (CP 49 L 1-8; CP 51-54). SMA requirements allow the construction of rental homes, but a SSDP is required. Cebelaks did not obtain a SSDP for the residence. (See *State v. CITY OF SPOKANE VALLEY*, 275 P. 3d 367 - Wash: Court of Appeals, 3rd Div. 2012, also *Ecology v. Pacesetter Constr.*, 571 P. 2d 196 - Wash: Supreme Court 1977).

11) In 2007 Cebelaks were required to submit an accurate plot plan in support of their applications requesting Clallam County and WDFW approvals. Cebelak's again misrepresented the location of the OHWM in their application to create the appearance the original structure had been constructed 20 feet landward of the OHWM as permitted in the 6/19/98 shoreline exemption (CP 272-277). In fact, measurements of the existing structure indicated the

West end of the bulkhead was located 24.5 feet seaward of the NW corner of the “storage building” – seaward of the OHWM and 4.5 feet further seaward than originally permitted (CP - 337 Exhibit A to Declaration of Thomas D. Roorda at page 343). Emergency repair and maintenance permits are available only for “lawfully established” structures.

I. ARGUMENT

A. Langes' claims are not barred by LUPA

Let us be clear here. Langes seek injunctive relief in this matter, preferably and principally through Clallam County properly exercising and fulfilling its mandatory duty to enforce the law by requiring abatement of the violations that have occurred. To protect against the possibility that Clallam County will continue to shirk its legal duty, however, Langes have filed direct actions against Cebelaks. Those actions seek injunctive and other relief, as provided by law, and monetary damages and compensation.

Multiple laws provide the basis for Langes claims for relief, a few as follows:

- Shoreline Management Act of 1971 – (RCW 90.58.230 – monetary damages, compensation and attorney’s fees)

- Clallam County Shorelines Code – (CCC 35.01.130 – monetary damages, compensation and attorney’s fees)
- Nuisance – (RCW 7.48.010-020 – damages and other and further relief)
- Public Nuisance – (RCW 7.48.010-020; RCW 7.48.210 – damages and other and further relief)
- Trespass – (common law of torts – damages and injunctive relief)
- Loss of Lateral Support – (common law of torts – damages and injunctive relief)

It is important to elaborate here on the importance of preserving the claims Langes have filed regarding the buildings constructed by Cebelaks.

The most problematic aspect of Cebelak’s buildings is that by constructing them closer to the shoreline than allowed created a necessity for shoreline armoring to protect the structures and mitigate the obvious safety risks to inhabitants of the structures. However, with the buildings too close to the shoreline, shoreline protection structures must necessarily also be too close to the water, creating inevitable and ongoing erosion risks to adjacent unprotected shorelines. Unless the buildings are relocated or removed, a perpetual grant of special privilege to install such

shoreline hardening is created under RCW 90.58.030 (3)(e)(ii). Neither Langes nor Clallam County can regulate such structures when they are necessary to protect existing single-family residences and accessory structures. Langes therefore must attack the violation of permit conditions (setback) of the buildings as constructed or any effort to address the destructive and erosive effects of the bulkhead will be nullified. By law, both of Cebelak's buildings violate applicable codes and the permits issued to construct them and are therefore prohibited structures and a public nuisance.

We now note RCW 36.70C.030, which states the following:

“(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* (emphasis added):.....(c) Claims provided for *by any law* (emphasis added) for monetary damages or compensation.”

Cebelak's persistent re-characterizations aside, *the claims pursued by Langes are clearly and expressly excluded from LUPA.* This simple recital of the nature of Lange's claims and reading of LUPA itself should resolve this appeal. LUPA can't be the basis for dismissal of Lange's claims regarding the permit violations in constructing the buildings

because LUPA expressly excludes claims provided for under the laws cited above.

B. Application of the LUPA statute of limitations must not be interpreted to prevent examination and determinations of violations of permit conditions and/or land use codes.

Regardless of Lange's direct right to challenge the legality of Cebelak's permits, there is little doubt the violations have occurred, continue to exist, and remain subject to enforcement even today. Clallam County Code categorically classifies all land use code and permit violations to constitute a public nuisance (CCC 20.08.020(1)). As a public nuisance, those violations are subject to actions and other aspects of RCW 7.48, including the right of directly affected individuals to bring private actions for public nuisance (RCW 7.48.210). Under RCW 7.48.190, a public nuisance is deemed to persist until abated, not becoming legal with passage of time. Washington law has long recognized the right of local government to pursue enforcement action of zoning violations deemed to be nuisances. "It is generally held that in respect of the enforcement of zoning ordinances, neither laches nor estoppel applies. Consequently, even though a building permit, ... may have been issued, ... indicating the validity of the structure or use, this does not serve ... to create an estoppel which would prevent the municipality from revoking the permit *at any*

time (emphasis added) on the ground of invalidity of the structure of the use or from otherwise enforcing the ordinance. Injunctive relief is available against zoning violations which are declared by ordinance to be nuisances.” (*Mercer Island v. Steinmann*, 9 Wash.App. 479; 513 P. 2d 80 - Wash: Court of Appeals, 1st Div. 1973).

Moreover, State law precludes shoreline uses that are in conflict with SMA requirements. Until Cebelak’s obtain the required shoreline permits they have thus far avoided, Cebelak’s developments remain ongoing violations of SMA requirements subject to mandatory enforcement action.

It should be clear here that nothing has yet been laid to rest. There are no statutes of limitation that can be applied that cure the multiple violations of law that exist at Cebelak’s property. At any time, Clallam County may change its mind and it will have full authority, regardless of how much time passes, to pursue enforcement action against Cebelaks. When such enforcement occurs, Lange will have standing under LUPA to appeal that enforcement decision. Until the violations are abated, there is no finality, and even LUPA’s 21-day jurisdictional window has not been triggered.

Case law on LUPA, as cited in our initial brief, clearly does not restrict local government from pursuing enforcement of permit violations. We also noted there that under the provisions of the UBC, all code violations are also permit violations. When such violations exist, the permits are invalidated. They remain invalid until the violations are corrected, regardless of whether the local jurisdiction pursues enforcement or not. LUPA does not magically cure those deficiencies. They persist until local authorities decide to act on them or individuals assert their legal rights in the absence of government action.

That Clallam County has not as yet acted to enforce the law in regard to the ongoing code and permit violations should not improperly limit Lange's rights to pursue due process in the interest of protecting his property interests. Clallam County undoubtedly understands Cebelak's developments are in conflict with both codes and permits issued, and has taken the erroneous position that "prosecutorial discretion" allows them to ignore the violations, making the developments legal by inaction. Unfortunately, this position violates SMA and other requirements and exposes the County to potential liability and civil penalties for permitting a nuisance. And the County's inaction certainly does not free the violations from future enforcement action.

A simple analogy is an example where a Clallam County police officer stops and cites a driver for expired license tabs. The County may elect to ignore the citation, not prosecute, or dismiss the charges. That doesn't mean ten minutes later the driver is exempt from a subsequent stop, or that the driver is exempt in other Counties for the same violation of State law. Until the license tabs are made current, the driver remains subject to legal penalties.

That being said, close review of the *Chelan County v. Nykriem*, 146 Wn.2d 904, 52 P.3d 1 (2002) case provides two significant revelations. First, the boundary line adjustment in *Nykriem* was made under Chelan County's land division code, which does not have International Building Code permit validity language. Second, Chelan County promptly updated its code to include code violations being deemed public nuisances. These two points are discussed below.

Lange's rights to pursue action against Cebelaks for the violations noted arises from Cebelak's failure to comply with multiple laws each with their own set of requirements and remedies enabling such action. The SMA and Clallam County Shorelines code both provide express rights for Langes to pursue claims for damages arising out of violation of SMA requirements. RCW 7.48.210 provides specific authority for individuals

to pursue actions for public nuisance. The issuance of permits does not preclude actions for nuisance if such nuisance can be established and causes actionable damages. (See *Grundy v. Thurston County*, 117 P. 3d 1089 - Wash: Supreme Court 2005).

Cebelaks naively or disingenuously assert that LUPA and 21 days eliminates all of Lange's legal rights as established under Washington law and renders un-actionable all of the violations committed by them. This is a very broad claim of LUPA immunity but Cebelaks provide no credible legal support for it.

At best, if LUPA applies at all here, its application is limited to challenges involving the original permits issued – if those permits can be construed as valid and final land use decisions. In view of the multiple elements of law that invalidate those permits, and Cebelak's wide scale failure to obtain the proper permits required by law, this is a highly questionable proposition. LUPA most assuredly does not, however, protect Cebelaks from the following:

- Enforcement of permit violations committed by Cebelaks (“Ecology, for example, would not be prevented from taking action against a party who completely ignores the shoreline permitting process or one who obtains a permit and then proceeds to violate

the conditions of the permit”. *Samuel's Furniture, Inc. v. STATE, DEPT. OF ECOL.*, 54 P. 3d 1194 - Wash: Supreme Court 2002. Also, *Lauer v. Pierce County*, 267 P. 3d 988 - Wash: Supreme Court 2011.²). (ongoing);

- Invalidation of the building permits issued by application of the State building code RCW 19.27.031 (1)(a), Clallam County Title 21 “Building Code” and the UBC/IBC provisions incorporated by reference and code enforcement under RCW 36.43.030. (ongoing);
- Invalidation of the building permits and exemptions issued on the basis of material misrepresentations made by Cebelaks to allow developments prohibited by regulations in place at the time (*Lauer v. Pierce County*, 267 P. 3d 988 - Wash: Supreme Court 2011; *Town of Woodway v. Snohomish County*, 180 Wash.2d 165, 180, 322 P.3d 1219, 1226 (Wash.,2014);
- Nuisance claims (RCW7.48.020)(ongoing);

² It is also important to highlight the facts from *Lauer v. Pierce County* here. In that case, the initial permit was issued around March 2004. In October 2004 the permit was suspended by Pierce County based on code enforcement. On August 9, 2007 applicants filed for a variance. Lauer filed a motion for reconsideration when the variance was issued – this motion denied March 4, 2008. Lauer, et al. filed a LUPA petition on March 27, 2008. Note a) LUPA petition filed nearly 4 years after issuance of initial permit, and b) enforcement action by Pierce County well past 21 days was not barred by LUPA. The LUPA 21 day appeal limit clearly does not apply to enforcement actions, and a LUPA petition can be filed well beyond 21 days of permit issuance if enforcement activity alters the “finality” of the initial permits.

- Public nuisance claims (RCW 7.48.190 and 7.48.210)(ongoing); or
- SMA (RCW 90.58)/CCC Title 35 claims for shoreline act violations (ongoing).

For LUPA to have such effect in providing legal protection to Cebelaks, the legislation would have to contain specific language, per Article 2, Section 37 of the Washington State Constitution, indicating that the legislature intended RCW 36.70C to pre-empt, amend or repeal all other legislation in conflict, including the legislation noted above. The LUPA legislation does not contain this language, and therefore can't be construed to be pre-emptive of other applicable state and local laws.

Cebelaks cite *Asche v. Bloomquist*, 132 Wn. App. 784, 796, 133 P.3rd 475 (2006) in support of their argument that LUPA bars nuisance claims. Cebelak's assertions are incorrect. In *Asche* the Court cited *Grundy v. Thurston County*, 155 Wn. 2d 1, 7-8 fn.5 (2005) noting LUPA did not preclude private nuisance claims if substantial damage is involved. However, in *Asche v. Bloomquist* the Asches were unable to establish violations of Kitsap County Code building code that would have established a protected property right to unobstructed views, or the applicability of Kitsap County code designating code and permit violations to be public nuisances. No basis for a nuisance action – private

or public – was established. Consequently, the original Bloomquist permits were validated, deemed final, and LUPA’s 21 day appeal limitation was properly applied to bar Asche’s claims. This case is highly distinguishable. Unlike in *Asche*, multiple violations by Cebelak of both applicable codes and the permits issued are clearly evident. Under Clallam County code, the violations are a public nuisance, and, unlike the *Asches*, Lange has proper standing to pursue the remedies available under RCW 7.48.210 and RCW 7.48.230.

Cebelaks state *Town of Woodway v. Snohomish County*, 180 Wash.2d 165, 180, 322 P.3d 1219, 1226 (Wash.,2014) does not support the Langes' arguments. That is a misstatement of the holding of that case. There the Court stated: "Only one bad faith consideration applies to developers—they must not make knowing misrepresentations in their permit applications". *Lauer v. Pierce County*, 173 Wash.2d 242, 262, 267 P.3d 988 (2011)

One of the principal arguments of Lange is that Cebelak's made knowing misrepresentations in applying for their permits. Our Supreme Court in *Woodway* acknowledged *Lauer* as the law of the land. A permit obtained by knowing misrepresentations is not protected by LUPA.

As we have already noted, RCW 36.70C expressly excludes the compensation and damage claims from LUPA's scope. Notwithstanding the clever manipulations and maneuverings by Cebelaks, the multiple ongoing violations of law are not cured by LUPA – they remain violations subject to indefinite enforcement by Clallam County. In Langes' other case pending before this Court (Court of Appeals Cause No. 44476-3-II), Langes have sought to reinstate the writ of mandate issued by Jefferson County Superior Court to compel Clallam County to enforce applicable law. If enforcement occurs, by order of this Court or by regained consciousness by Clallam County, all prior land use decisions will be rendered not “final”, and Langes may challenge the revised land use decisions themselves in the course of those proceedings by way of a land use challenge when the jurisdictional window does open. This, of course, is exactly how the process worked in *Lauer v. Pierce County*. Only in this case, because the SMA precludes land uses in the shoreline jurisdiction that are in conflict with SMA requirements and because enforcement will require shoreline variance and substantial development permits, any challenge by Langes of permits issued will be via the Shoreline Hearings Board and once again outside the scope of LUPA.

C. Attorney's Fees are not available to Cebelaks.

Cebelaks seek an award of attorney fees under RCW 4.84.370 - "Appeal of land use decisions --Fees and Costs". There is no appeal of a land use decision in this matter. Langes have already cited the reasons why an appeal was not possible and not required. The Complaint in this action seeks compensation, damages and other relief under the legislative authority cited and the torts of trespass, nuisance, loss of lateral support. Nothing in the Complaint sought to appeal the prior land use decisions of Clallam County.

Cebelaks raised LUPA as a defense to the claims Langes have asserted. They filed a Motion for Summary Judgment seeking to dismiss all of the claims stating LUPA barred all.

Contrary to the repeated assertions of Cebelaks, Langes substantially prevailed on the Motion for Summary Judgment. The Honorable Ken Williams, Judge, Clallam County dismissed only certain claims based upon LUPA and applicable statutes of limitations. With respect to the statute of limitations, the ongoing nature of the torts and violations were acknowledged and the dismissal based on statute of limitations was limited to past damages recoverable and not the subjects of action. He did not dismiss the claim against the bulkhead or claims based on trespass, continuing nuisance or injunctive relief. Cebelaks did not

substantially prevail at the trial court level despite their continued assertions to the contrary.

Langes argue that Cebelaks made misrepresentations in obtaining permits and did not comply with the express conditions of the permits. The merits of this matter and the question of attorney's fees in this matter should be resolved at trial when all facts can be presented.

IV. CONCLUSION

The facts in this case reflect the egregious abuse of LUPA by both Cebelaks and Clallam County. The actions and failures to act by the parties in this case reflect the poster case for how LUPA can be used to abuse equal treatment under the law and enable local officials to manipulate land use decisions. The exemption from multiple land use codes applicable to all citizens and permit conditions applicable to specific projects can be described as nothing less than a special privilege by those who manipulate LUPA to achieve it.

Lange's appeal asks for nothing more than for this Court to allow testimony relating to the unlawfully constructed buildings at the Cebelak property. The testimony will show an intentional misrepresentation in obtaining permits. Due process demands that Appellants have the opportunity to present the facts in Superior Court before a jury and allow fellow citizens to judge the merits based on the evidence presented.

The Cebelaks can resolve all claims made by Langes by simply complying with the conditions of the permits issued. If the structures can be relocated to where the permits issued authorized them, Langes will have no basis for challenge. Or, if this option is not possible, Cebelaks can obtain the necessary permits and variances to become compliant with SMA requirements and again all issues will be resolved. LUPA, however, is not the silver bullet that Cebelaks claim allows them to do nothing.

This court faces a critical decision regarding LUPA. Uphold LUPA as the eviscerating sword imagined by Cebelaks, and expose the special privilege that treatment creates, or evolve LUPA to work in conjunction with other laws. Simple recognition of when finality occurs is the evolution LUPA needs. Finality does not occur 21 days after a permit is issued, it occurs when a land use decision complies with the codes and permits that enable it.

The Order Granting Partial Final Summary Judgment should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randy M. Boyer". The signature is stylized and cursive.

Randy M. Boyer
Attorney for Langes.
WSBA # 8665

124 JUL -7 11 51 AM
CJ

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

SCOTT K. LANGE, Trustee and ELIZABETH
R. LANGE, Trustee, Trustees of the Lange
Family Trust,

Appellants,

v.

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

Respondents.

Appeal No. 45726-1-II

APPELLANT'S PROOF
OF SERVICE REPLY BRIEF
OF APPELLANTS

Randy M. Boyer, Counsel of Record for Appellant SCOTT K.
LANGE and ELIZABETH R. LANGE, husband and wife, and Trustees of
the Lange Family Trust, (hereafter "Lange") states and declares that:

I caused a copy of the Appellant's Reply Brief be served on Defendants
by First Class US Mail:

Gregory J. Wall, Law Offices of Gregory J. Wall PLLC,
1521 SE Piperberry Way, Suite 102, Port Orchard, WA 98366,

and via email to:

Gregory J. Wall at: gregwall@gjwlaw.com.

And I caused the original of the Appellant's Reply Brief be sent by First Class US Mail for filing:

Court of Appeals of the State of Washington

Division II

950 Broadway Suite 300

MSTB 06

Tacoma WA 98402-4454

Dated this 2nd day of July, 2014.

A handwritten signature in black ink, appearing to read 'Randy M. Boyer', written over a horizontal line.

Randy M. Boyer, WSBA #8665
Law Offices of Randy M. Boyer Inc. P.S.
7017 196th St. S.W., Lynnwood, WA 98036
425-712-3107
Counsel of Record of Appellant Lange