**From:** Scott Lange
**Sent:** Friday, February 13, 2015 3:17 PM
**To:** mwinborn@co.clallam.wa.us
**Cc:**
**Subject:** Suggestions for Code and Permit Enforcement Within the SMA Jurisdiction

Dear Ms. Winborn,

I am directing this message to you because under the Clallam County Charter you are the official charged with enforcing land use statutes. I am copying Commissioner Peach because of our dialogue yesterday following the SMP hearing in Sekiu. I am also copying the Shoreline Commission because my comments are a follow up to the public comments I made during the hearing. The intent of this message is to make constructive suggestions regarding the critical need to address code enforcement issues associated with the pending SMP revision.

Let me first clarify my intentions. While I value the largely undeveloped state of Clallam County (marine) shorelines, I do favor and support the necessity of both commercial and residential development. In the Sekiu area I believe true commercial development in the urban center areas, and perhaps even beyond, are critical to the public's access to the shoreline resource and to the economic viability of the community. I am not a tree hugger or whale saver – I understand the practical realities of expanding populations and the public's increasing desire to access Clallam County shorelines. I am also an advocate of individual property rights.

I am also well aware of the profile of your various constituencies. Most, I suspect, would prefer to do what they please with their shoreline properties without governmental interference and restrictive codes. The reality, however, is that unfunded State mandates impose a duty on Clallam County to regulate despite the preferences of its residents. Public officials obviously must continually balance the equities here and at times it can be enormously difficult to impose the duties of law on citizens who just want their small place in paradise.

My interest in shoreline codes started with the ongoing and egregious infractions across from my Clallam Bay residence. Those infractions became much more personal when they caused substantial damage to my natural adjacent shoreline property in late 2006. This damage set in motion a quest for justice and compliance that has consumed years of my life and hundreds of thousands of dollars in legal fees. Along the way I've learned the law and also learned that Clallam County would rather fight in court than make a simple acknowledgement that violations have occurred. More recently, as I've participated in the Hamilton matter along with fellow local citizens, I've realized that not only does the County not enforce the law, it rolls out the red carpet for those clever individuals who think they can lie and circumvent it.

As I stated yesterday, the Shoreline Management Act requires local governments to "ensure that no uses are made of shorelines that are inconsistent with the SMA and/or the local SMPs". This is not a discretionary standard. By failing to prevent such uses, local government itself violates the Act and becomes subject to fines and penalties as well as potential damages. Unlike criminal statutes which are constructed and construed differently, the SMA requires compliance and response by local government when violations are confirmed. Prosecutorial discretion is not available, in part because prosecutorial discretion by case law first requires investigation of the alleged violation. Under Washington's

Constitution, Clallam County is obliged to follow the "general law". From what I have directly observed it has not done so.

"Lack of resources" has often been cited as the basis for the County's inaction in response to violations. The Act does not make compliance contingent on availability of resources. Each time the County asserts enforcement impotence due to lack of funds it risks payment of damages and civil penalties for allowing violations to persist or by aiding and abetting those who would violate the law. Statutes of limitations do not extinguish SMA violations. The Act states that each day a violation persists is a new violation. They continue until abated. And, through the terms of CCC Title 20, any code or permit violation is a public nuisance, therefore subject to public nuisance law and RCW 7.48.190, which precludes any such nuisance from becoming legal regardless of the passage of time. Clallam County passed Ordinance 812 (Title 20) for the primary purpose of circumventing the restrictions on enforcement that RCW 36.70C would otherwise impose. In doing so, it enabled enforcement of even long standing violations, but also condemned itself to unending liability for its own SMA violations.

For my own situation; in the interest of the citizens of Clallam County and the State in general; and in the interest of compliance with the Washington and US Constitutions, Clallam County must address the enforcement issue. It's time to think outside the traditional box. Without credible enforcement, the County is the target of litigation that could snowball badly, and there is no deterrent to the continued abuse of applicable public standards that has reached acute proportions.

If in fact the County does not have the resolve or the resources to enforce State laws and its own codes, it should revise its code to empower citizens to pursue the injunctive relief for such violations that currently vests solely with the County. In my review of County codes throughout the state I found two approaches that would be preferable to reliance on an underfunded and/or apathetic enforcement standard. In Island County residents may file a complaint that alleges a code or permit violation with the County building official. Notice is provided to the alleged violator and a hearing before the hearing examiner is scheduled within 30 days to resolve the matter. (See ICC 17.03.250). In Kitsap County, adjacent property owners are granted the direct right to seek injunction to address alleged violations. (See KCC 17.530.030). Both of these approaches provides aggrieved parties the ability to directly initiate action that will address the alleged violation. The Island County approach obviously involves the hearing examiner which may increase that individual's case load and associated County expense, but the Kitsap County approach grants access to injunctive relief at the aggrieved party's expense.

While the SMA provides explicit authority for private citizens to pursue damages arising out of SMA violations, injunctive relief under the Act is restricted to local jurisdictions, the State AG, and in some cases the Department of Ecology. A citizen can pursue injunctive relief via public nuisance law, but only if that individual can establish they have been "specially" affected by the public nuisance. Citizens in Clallam County can file a code complaint under Title 20 but then must rely on the County to take action. The County has incorrectly asserted that its duty to enforce the SMA is discretionary, notwithstanding the explicit requirements of CCC 20.28, and Title 20 has been effectively useless as a means of addressing shoreline violations. In my own case, the County has actually exacerbated my ability to address the violations by asserting RCW 36.70C (Land Use Petition Act or LUPA) as the basis for inaction, providing cover and special privilege to the violators. This is why my legal action has gone on for over six years now at an expense of over $150,000. It is unconscionable that an individual citizen should have to fight local government to enforce the public interest.

Because the SMA imposes a duty upon Clallam County to enforce its provisions, the County's current failure to enforce violations is a liability time bomb waiting to go off. Something needs to be done. The County's duties under the SMA are distinguishable from its duties in connection with non-shoreline jurisdictions, where the County's enforcement authority and duty IS discretionary. It makes sense then in order to address the current lack of land use enforcement the County start with an enforcement process that is limited to the shoreline (and perhaps critical areas) jurisdictions. Constituents opposed to infringement of property rights can understand the necessity of State law compliance but for the approximately 90-95% of County lands not in the shoreline jurisdiction they will appreciate the County's discretionary standard. There seems to be little political risk in this approach.

By limiting the enforcement emphasis to State mandated compliance, the County can manage its limited enforcement resources. At the same time, it can elect to broaden citizen rights to pursue direct injunctive relief to further enhance compliance and deterrence against cheaters. As the SMA provides "zone of interest" rights to landowners within a specified distance of proposed land use developments and activities, it would be logical to afford those same individuals access to direct injunction rights to pursue violations. If shoreline residents are truly to be considered "shoreline stewards" the right to contribute to enforcement seems quite logical.

Reliance on a system of allowing direct injunctive relief to citizens within the SMA "zone of interest" would also facilitate better community policing of shoreline jurisdictions. In general, if adjacent landowners do not have a problem with a shoreline use, no action will be taken, even when those uses or activities actually conflict with the applicable standards. Only when adjacent landowners or the County have objections to shoreline uses or developments will the enforcement authority be invoked and exercised. This provides for an elegant "balancing of the equities" and while not a situation of total "laissez faire" as to land use compliance it does provide a common sense acknowledgement of private property rights that may conflict with the written standards.

If the system of citizen driven compliance is initiated the County's right and duty to initiate enforcement is not compromised or diminished. With the adoption of Title 20 the County retains indefinite ability to address violations and can initiate abatement when it so pleases. While this may conflict with LUPA's public policy objective of "finality", the hard reality is that "finality" went out the window when the County, like almost all other Washington counties, implemented the public nuisance standard for enforcing code and permit violations.

There are multiple pieces to this puzzle and an adequate resolution of the lack of enforcement problem requires some understanding of each element. What I have suggested here does not address all aspects of the current problem. After observing DCD staff in the Hamilton hearings it is clear that enforcement won't occur if the County continues handing out shoreline permits like candy canes at Christmas. County permitting officials should not grovel and waive code requirements to satisfy incomplete and highly questionable permit requests when they clearly don't conform to code and SMP requirements. If an applicant wants the privilege of use of shoreline property they should not expect that privilege to come with the added special privilege of exemption from public standards. And when an applicant misrepresents or omits important information to obtain approvals they should not expect the County to defend their permit rights just because they hold a signed piece of paper. Honest efforts will only come when applicants are held to the public standard and further realize enforcement continues beyond the approval process.

To conclude I note that it is the codes and regulations we promulgate that establish fair and equal standing in society. As Americans we derive predictability and order based on knowledge of public standards as written in the ordinances we pass. The values of properties we own are established by the rules that attach to those properties. An honest person should not have to bear witness to another unscrupulous person buying the same property and tripling its value by deception and dishonesty. When different rules apply to different individuals the entire order of society is thrown into disarray. Life reverts to a feudal state where entitlement is granted arbitrarily and capriciously the privileged few rather than equally to all. There is no point in making new regulations if the will to enforce them is absent. Fairness dictates we live equally by the rules we enact.

Thank you for listening.

Sincerely,
Scott Lange
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