

FILED
SUPREME COURT
STATE OF WASHINGTON
7/30/2020 4:14 PM
BY SUSAN L. CARLSON
CLERK

SUPREME COURT NO. 98730-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEVEN HILLS, LLC, a Washington limited liability company;
and WATER WORKS PROPERTIES, LLC, a Washington
limited liability company,

Petitioners,

v.

CHELAN COUNTY, a municipal corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners Seven Hills, LLC, and Water Works Properties, LLC, (collectively “Seven Hills”) do not identify any decision of this Court or the Court of Appeals that conflicts with the unpublished decision below. Rather, Seven Hills claims that the Court of Appeals erred in applying well-settled law to the specific facts of this case. The petition for review offers the usual citations to Washington’s law of nonconforming uses. Although Seven Hills emphasizes certain points to respond to the decision of the Court of Appeals here, it essentially only repeats the same claims rejected by the Court of Appeals. Mere repetition of Seven Hills’ arguments—or repetition with slight variations of earlier themes—is not a persuasive way to show that any of the criteria of RAP 13.4 have been met.

Indeed, Seven Hills appears to outright agree that the key case on point is *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998), just as the Court of Appeals found in its opinion. Op. at 6. Far from demonstrating a conflict in decisions pursuant to RAP 13.4(b)(1) or (2), Seven Hills demonstrates harmony between the Court of Appeals’ decision and existing law.

Seven Hills makes no attempt to claim that the Court of Appeals’ decision raises a significant question of constitutional law or involves an

issue of substantial public interest. RAP 13.4(b)(3) and (4). To the contrary, the Court of Appeals affirmed the hearing examiner's upholding of a code enforcement order on specific factual grounds (to which Seven Hills assigned no error). The practical effect is that this decision is of little interest to anyone other than the parties. The petition should be denied.

II. IDENTITY OF RESPONDENT

Respondent is Chelan County (the "County"), also respondent in the proceedings below.

III. STATEMENT OF THE CASE

The County incorporates by reference the statement of facts in the decision of the Court of Appeals. Op. at 1-4. The material facts in this case may be deemed undisputed because Seven Hills assigned no error to any finding of fact made by the hearing examiner. Op. at 4 ("Seven Hills assigns no error to any finding of fact, nor does it suggest that the burden of proof mattered in this case."). The County provides the following factual summary for additional context.

A. Chelan County enacted a moratorium to prohibit marijuana-related land uses before Seven Hills engaged in legal marijuana production and processing at the site.

Pertinent dates that bear on Seven Hills' claims are the following:

- September 29, 2015 – The County enacted a moratorium on marijuana production and processing. CP 445-446.

- January 26, 2016 – A marijuana license was issued legally allowing for the first time marijuana production and processing on the Seven Hills property. CP 496, 609.
- February 16, 2016 – The County prohibition against marijuana production and processing was made permanent. CP 450-456.

Based on these facts, it was clear to the Court of Appeals that marijuana production and processing at the Seven Hills property prior to issuance of the marijuana license was illegal under state law. Op. at 6-7. By the time a marijuana license had been issued by the Washington State Liquor and Cannabis Board (“WSLCB”) for the Seven Hills property, the County’s moratorium on marijuana production and processing had been in effect for several months as a result of the adoption of Chelan County Resolution 2015-94 on September 29, 2015. Op. at 1-2. The moratorium’s prohibition was made permanent on February 16, 2016. CP 450-456. Only shortly prior to the permanent ban, and well after the initial moratorium, did Seven Hills commence marijuana production and processing. Op. at 3.

But even after Seven Hills had obtained its marijuana production and processing license from the WSLCB, it still did not have a lawful marijuana-related land use. This is because Seven Hills continued to lack permits and authorizations for its marijuana greenhouse structures and the related propane tanks. Op. at 3, 7.

B. Seven Hills has lost in all prior proceedings in this case.

After the County learned of Seven Hills' unlawful and unpermitted activities, it issued a notice and order for four violations of local code. Op. at 3; CP 56-58. The hearing examiner affirmed the order. Op. at 3; CP 13-18. The Superior Court affirmed the hearing examiner. Op. at 3; CP 865-873. The Court of Appeals identified "the sole substantive issue in this case" as "whether Seven Hills began marijuana production before the county law changed to prevent it" Op. at 4-5. The Court of Appeals observed that Seven Hills did not obtain a license to produce marijuana until January 26, 2016, and that because the County's temporary moratorium was already in place, "there could be no valid nonconforming use at that time." Op. at 7. The Court of Appeals also observed that "[u]nlawfully operating a greenhouse without the necessary permits to do so simply does not establish a lawful use." *Id.* The Court of Appeals concluded that "[t]he evidence supported each of the four violations" and affirmed the hearing examiner and the trial court. Op. at 8-9.

IV. ARGUMENT

A. The decision of the Court of Appeals is consistent with, and involves a straightforward application of, this Court's precedent regarding the law of nonconforming uses.

Seven Hills scarcely even argues that the Court of Appeals created a significant question of law by relying upon *Rhod-A-Zalea* to dispose of the one substantive issue in this case. Op. at 6. Instead, Seven Hills states that the decision below raises two so-called “potential problems.” Pet. at 12-13.

First, without citing any precedent whatsoever, Seven Hills provides a confusing one-paragraph argument claiming that the Court of Appeals did not appreciate the relationship between a moratorium and a nonconforming use. Pet. at 12-13. Second, Seven Hills faults the Court of Appeals for finding that the absence of several required permits and approvals precluded Seven Hills from having a lawful nonconforming use prior to the moratorium. Pet. at 13-14.

The problem with Seven Hills’ first argument is that it is only a renewal of its three-time losing legal argument made previously. Seven Hills provides this Court no reason to believe that the Court of Appeals’ decision applied the law of nonconforming uses and moratoria in a way contrary to any Washington precedent. There is nothing for this Court to consider pursuant to RAP 13.4(b)(1) or (2) because Seven Hills does not—or cannot—identify any conflicting precedent. Pet. at 12-13. Seven Hills claims that its expenditures on site-development activities in anticipation of a future lawful marijuana operation “allowed [it] to

establish...nonconforming rights” but cites nothing for this proposition. Pet. at 6. The real purpose of this claim may be to imply that the County should be estopped from enforcing its moratorium, but this cannot support the petition because the matter was previously waived. Op. at 6, n.5.

In its second point, Seven Hills makes passing reference to a prior decision of the Court of Appeals, *Van Sant v. City of Everett*, 69 Wn. App. 641, 651-52, 849 P.2d 1276 (1993). Pet. at 13. But Seven Hills misapplies the holding of *Van Sant* and again fails to demonstrate any actual conflict between the decision below and *Van Sant*.

The issue before the court in *Van Sant* was regarding abandonment of a nonconforming use, not establishment. *Van Sant*, 69 Wn. App. at 651-654. The *Van Sant* court held that a license or other regulatory permit not related to land use approval is not *per se* determinative of the *continuance* of a nonconforming use. *Id.* at 651-52. The issue in the present case, however, is whether Seven Hills *established* a nonconforming use in the first place.

Washington law has long held that nonconforming uses are disfavored and that the nonconforming use doctrine “is a narrow exception” to otherwise plenary local land use regulatory power. *King County Dep’t of Dev. & Envtl. Servs. v. King County*, 177 Wn.2d 636, 646, 305 P.3d 240 (2013) (*citing Rhod-A-Zalea*, 136 Wn.2d at 6-7). In

turn, the basis of this Court's 1998 decision in *Rhod-A-Zalea* can be traced at least as far back as the 1952 decision of *State ex. rel. Miller v. Cain*, 40 Wn.2d 216, 221, 242 P.2d 505 (1952). The continuity of the law speaks for itself.

Since the time that this Court first articulated the law of nonconforming uses, and particularly as the law was summarized and restated in *Rhod-A-Zalea*, Washington has always required that in order to possess lawful nonconforming use status a land use must be lawfully existing in all respects prior to the enactment of a contrary land use regulation. *Rhod-A-Zalea*, 136 Wn.2d at 6.

It would be sufficient merely to point out that Seven Hills' marijuana operation indisputably was not a lawful use even at the time of the County's permanent ban on February 16, 2016, when the County adopted its permanent ban in Resolution 2016-14. CP 450-456. This is because, as the Court of Appeals observed, Seven Hills actually "never obtained" approvals to lawfully operate its greenhouses or the associated propane tanks. Op. at 7.

The more pertinent date for consideration of nonconforming use rights is September 29, 2015, the date of the County's initial moratorium. On this date Seven Hills did not even possess a valid license to produce marijuana from the WSLCB. Op. at 7.

The Court of Appeals correctly understood that the moratorium prevented the establishment of any vested nonconforming uses before the County had a reasonable opportunity to evaluate its land use regulations and adapt them to the novel and virtually unprecedented new activities allowed pursuant to I-502. The Court of Appeals' decision is consistent with precedent holding that moratoria are "recognized techniques designed to preserve the status quo so that new plans and regulations will not be rendered moot by intervening development." *Matson v. Clark County Bd. of Comm'rs*, 79 Wn. App. 641, 644, 904 P.2d 317 (1995). Because there is a risk of frustrating long-term planning if moratoria are not given due effect, moratoria prevail over vesting of rights. *Matson*, 79 Wn. App. at 647-648. Seven Hills' claim that that the moratorium did not alter the County's existing zoning regulations is wrong, because that was precisely the point of the moratorium. Pet. at 9; CP 445.

In attempting to show that the Court of Appeals' decision is incompatible with *Van Sant*, Seven Hills itself departs from precedent. This is because the same argument made by Seven Hills was considered and rejected in *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn. App. 606, 616-17, 191 P.3d 928 (2008), *review denied*, 165 Wn.2d 1053 (2009). The decision in *First Pioneer* correctly characterized *Van Sant* as a case relating to the continuance or abandonment of a vested preexisting

use. *First Pioneer*, 146 Wn. App. at 616-17. Because First Pioneer could not show that its industrial use of the subject property was fully lawful at the time the Pierce County Code changed, it could not establish a prior legal nonconforming use. *Id.* at 617.

The Court of Appeals' decision is consistent with this Court's decisions regarding the law of nonconforming uses.

B. Seven Hills' petition does not raise an issue of constitutional significance or substantial public interest.

Seven Hills focuses its argument on the purported existence of a conflict in precedent. In reality, the petition shows only that Seven Hills disagrees with the outcome in this case and seeks to relitigate the merits of its claims before this Court.

The petition does not develop any argument claiming unconstitutionality. The petition does not suggest that the decision below raises an issue of substantial public interest that should be determined by this Court. No grounds for review under RAP 13.4(b)(3) or (4) are provided by Seven Hills.

V. CONCLUSION

Because Seven Hills' petition meets none of this Court's criteria for granting review, the County respectfully requests that it be denied.

RESPECTFULLY SUBMITTED this 30th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington, that on this 30th day of July, 2020, I filed the foregoing Answer to Petition for Review with the Supreme Court of the State of Washington, and arranged for the service of a copy of the same on the parties to this action as follows:

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DATED at Yakima, WA this 30th day of July, 2020, at Yakima, Washington.

Cindy Maley

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July 30, 2020 - 4:14 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 98730-1
Appellate Court Case Title: Seven Hills, LLC, et al v. Chelan County
Superior Court Case Number: 17-2-00698-4

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