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Benton County Superior Court Cause No. 15-2-02562-2

WASHINGTON STATE COURT OF APPEALS
DIVISION III

PEYOTE CANYON, LLC, a Washington Limited Liability Company, and
JERRY VAN ZUYEN, d/b/a PEYOTE CANYON, LLC,

Appellants,

vs.

COUNTY OF BENTON,
a Political Subdivision of the State of Washington,

Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

I. **INTRODUCTION** 1

II. **ARGUMENT AND AUTHORITY** 2

A. Peyote Canyon sufficiently raise the issue of that an emergency declaration was required 2

1. The failure to assign error to the conclusion of the trial court that no emergency declaration was required is not a bar to the legally determinative issue 2

2. Peyote Canyon has raised the issue that emergency declaration was required. 3

3. An emergency declaration was required 3

4. No case supports the County's position that a moratorium may be imposed without notice absent an emergency declaration 6

B. The emergency declaration is not Supported on its face 7

1. The legal presumptions governing emergency zoning moratoria are not at issue 8

2. The County acted with false pretense 9

3. The County provided no emergent "facts," just subjective concerns when the May 12, 2015 moratorium was adopted 10

4. The June hearing added no facts which justified or validated the enactment of an emergency 11

5. Generalized fears and community displeasure do not justify emergency moratoria 13

6. Appeal of the emergency moratorium is not moot 13

a. Under *Swartout* if the moratorium is successfully challenged, it is of no effect 13

b. Challenge to the emergency moratorium is not subject to LUPA 14

c. Even if the Court finds the appeal moot, it must be heard 16

III. CONCLUSION 17

TABLE OF AUTHORITIES

Page

Washington State Supreme Court Cases:

Biggers v. City of Bainbridge Island,
162, Wn.2d 683, 169 P.3d (2007).....6

Chelan County v. Nykreim,
146 Wn.2d 904, 52 P.3d 1 (2002).....15

Cockle v. Dept. of Labor and Industries,
142 Wn.2d 801, 807, 16 P.3d 583 (2001).....2

Dep't of Ecology v. Campbell & Gwinn, LLC
146 Wash.2d 1, 9, 43 P.3d 4 (2002).....5

In re Cross, supra,
99 Wash.2d at 377, 662 P.2d 828.....16

Schnitzer West, LLC v. City of Puyallup,
382 P.3d 744, 748 (2016).....14

Sorenson v. Bellingham,
80 Wash.2d 547, 558, 496 P.2d 512 (1972).....16

State v. Ervin,
169 Wn.2d 815, 820, 239 P.3d 354 (2010).....5

Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson,
87 Wash.2d 417, 419, 553 P.2d 113 (1976).....17

Weyerhaeuser v. Pierce County,
124 Wn.2d 26, 36, 873 P.2d 498 (1994).....12

Washington State Appellate Court Cases:

Jablinske v. Snohomish County,
28 Wn. App. 848, 851, 626 P.2d 543 (1981).....6

Matson v. Clark Co. Board of Commissioners,
79 Wn. App. 641, 649, 904 P.2d 317 (1995)..... 5, 6, 7, 8, 9

Scheib v. Crosby,
160 Wn. App. 345, 349, 350, 249 P.3d 184 (2011).....2

Swartout v. City of Spokane,
21 Wn. App. 665, 673, 586 P.2d 135 (1978)..... 6, 10, 13

Revised Code of Washington:

RCW 36.70.790..... 1, 2, 4, 5, 6, 9

RCW 36.70.795.....3, 4, 5, 6, 7

RCW 36.70A.390.....3, 4, 6, 7

RCW 37A.390..... 3

RCW 37.70A.390..... 4

RCW 35.63.200..... 7

RCW 36.70C.020(2)(a).....14

RCW 36.70B.020(4).....14

Secondary Sources:

Merriam-Webster On-Line Dictionary.....10

Ordinance 561.....7, 11, 15

Ordinance 561, Section 2.....11

I. INTRODUCTION

It is undisputed that Benton County ("the County") specifically declared an emergency when it imposed the interim moratorium. Not until this lawsuit was filed did the County suggest it had authority to adopt interim moratorium without declaring an emergency.

Appellants, Peyote Canyon and Jerry Van Zuyen, maintain an emergency declaration supported by facts was mandatory. The authority to adopt a moratorium arises out of RCW 36.70.790 and requires three things: (1) to act in good faith, (2) adopt as an emergency a temporary interim zoning map to protect public health, safety, and welfare, and (3) to regulate uses and matters that constitute the emergency. The stringent basis for declaring an emergency is rooted in the fact that action is being taken without notice or a public hearing.

There is no evidence the County adopted the emergency moratorium because of general county-wide concerns for marijuana production and processing in the RL-5 zoning designation. The County essentially concedes the moratorium was imposed out of a specific concern related to Peyote Canyon's pending operation. This, among other things, shows the County did not act in good faith.

The County's reply also demonstrates it relied upon general information involving conflicts allegedly created by marijuana based uses

rather than any specific risks associated with continued approval of marijuana processing or production in its RL-5 zoning designation. In its reply, the County did little, if anything, to tie the testimony, letters, and news clips it relied upon as alleged evidence constituting an emergent condition in the RL-5 zoning designation.

II. ARGUMENT AND AUTHORITY

A. PEYOTE CANYON SUFFICIENTLY RAISED THE ISSUE THAT AN EMERGENCY DECLARATION WAS REQUIRED.

1. The Failure to Assign Error to the Conclusion of the Trial Court that No Emergency Declaration was Required is not a Bar to the Legally Determinative Issue.

Where an appellant does not assign error to the trial court's specific conclusions of law but assigns error in general to the trial court's ultimate conclusion, the omission is not a bar to review of the determinative legal issues. *Scheib v. Crosby*, 160 Wn. App. 345, 349, 350, 249 P.3d 184 (2011). Statutory construction is a question of law and reviewed de novo. *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

This appeal is straight forward. The County was either required to declare an emergency or was free to do so without an emergency declaration. If an emergency declaration was required, it was due to RCW 36.70.790 and the cases cited by Peyote Canyon. Further, if an emergency declaration is required, the record does not support such a declaration.

2. Peyote Canyon has Raised the Issue that Emergency Declaration was required.

The County argues Peyote Canyon fails to assign error or provide authority related to whether an emergency declaration was required. Peyote Canyon specifically argued that to impose the moratorium the County was required to (1) act in good faith, and (2) could only *declare an emergency based upon public health, safety and welfare concerns.* (*See* Appellant's Brief, pages 16-17). The County was clearly on notice of the issue and dedicated four pages of its reply to that issue. (*See* County's Reply Brief, Section A.4).

3. An Emergency Declaration was Required.

The County argues an emergency declaration is not required under RCW 36.70.795 or RCW 36.70A.390. Nonetheless, the record is clear at the time it initiated the interim zoning it expressly declared an emergency existed which necessitated the immediate adoption of its zoning moratorium. (CP 407).

The County states an emergency declaration is not required by RCW 36.70.795 and RCW 36.70A.390. (County's Reply Brief, p. 13). However, both relate to the requirements imposed on local government after it adopts a moratorium. These two statutes provide:

> A county or city governing body that adopts a moratorium,. . . without holding a public hearing on the proposed moratorium, . . . shall hold a public hearing on the adopted

> moratorium, . . . within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. . .

RCW 36.70A.390.

> A board that adopts a moratorium, . . . without holding a public hearing on the proposed moratorium, . . . shall hold a public hearing on the adopted moratorium, . . . within at least sixty days of its adoption, whether or not the board received a recommendation on the matter from the commission or department. If the board does not adopt findings of fact justifying its action before this hearing, then the board shall do so immediately after this public hearing.

RCW 36.70.795. The statutory obligations set forth above are post-adoption and are triggered when a moratorium is adopted without holding a public hearing. In fact, the County specifically acknowledges that RCW 36.70A.390 requires a hearing within 60 days of the emergency declaration. (CP 411). The two above cited sections do not address what is required to adopt the initial moratorium.

The only statutory authority for adopting the initial emergency moratorium is RCW 36.70.790, which provides:

> If the planning agency in *good faith*, is conducting or *intends to conduct studies* within a reasonable time for the purpose of, or is holding a hearing for the purpose of, or has held a hearing and has recommended to the board the adoption of any zoning map or amendment or addition thereto, or . . . the

> board, in order to protect the public safety, health and general welfare may, after report from the commission, *adopt as an emergency measure a temporary interim zoning map* the purpose of which shall be to so classify or regulate uses and related matters as constitute the emergency.

(Emphasis added). This language is clear and unambiguous in requiring an emergency measure to regulate uses related to matters that constitute the emergency.

When interpreting a statute, the court's objective is to determine the legislature's intent. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, courts "give effect to that plain meaning." *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). In determining the plain meaning of a provision, courts look to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Ervin*, 169 Wn.2d at 820. Accordingly, RCW 36.70.795 must be read in concert with RCW 37.70.790.

The authority to impose emergency moratoria necessarily includes consideration of RCW 36.70.790 which requires an emergency declaration and the analysis set forth in *Matson v. Clark Co. Board of Commissioners*,

79 Wn. App. 641, 904 P.2d 317 (1995) and *Swartout v. City of Spokane*, 21 Wn. App. 665, 586 P.2d 135 (1978).

Finally, the County disregards the significance of adopting an interim moratorium when notice and hearing rights are not provided. Our courts have held that the Planning Enabling Act's notice and hearing requirements do not apply to emergency ordinances enacted pursuant to RCW 36.70.790. *Jablinske v. Snohomish County*, 28 Wn. App. 848, 851, 626 P.2d 543 (1981). *Jablinske* makes clear that if notice and public hearing requirements are not provided, an emergency declaration is required.

4. No Case Supports the County's Position that a Moratorium may be Imposed without Notice Absent an Emergency Declaration.

There are no annotated cases for RCW 36.70.795. For RCW 36.70A.390 there are two annotated cases. Only one relates to the imposition of emergency moratoria, *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007). *Biggers* addressed the authority to impose a moratorium on shoreline master programs and shoreline management regulations.

The Court held, among other things, RCW 36.70A.390 did not apply to shoreline management. *Id.* at 697. Further, it was specifically held in *Biggers* that there is no implied powers to impose a moratorium. *Id.* at 699.

Finally, the County argues that *Matson v. Clark Co. Board of Commissioners,* holds there is express authority under RCW 35.63.200, RCW 36.70.795, and RCW 36.70A.390 to adopt moratoria. (County's Reply Brief, p. 19). However, in *Matson*, the Court of Appeals specifically scrutinized whether an emergency existed. *Matson*, 79 Wn. App. at 649. That Court ultimately held "the ordinances in question are not conclusionary in nature; they contain facts which support the Board's determination that an emergency existed." *Id.* at 650. Accordingly, *Matson* affirms the proper framework for determining the County's authority includes the requirement of declaring an emergency and scrutiny of the alleged facts supporting the emergency declaration.

B. THE EMERGENCY DECLARATION IS NOT SUPPORTED ON IT'S FACE.

The County admits it did not determine whether the citizen's concerns were actually valid prior to the adoption of Ordinance 561. (County's Reply Brief, p. 34). Additionally, the "concerns" expressed were general. No specific concern was tied to the RL-5 zoning designation. The County utterly fails to explain how their stated concerns, although general in nature, only created an emergency in the RL-5 zoning designation.

A pungent smell exists irrespective of zoning. Concerns for pesticides, the possible attraction of criminal activity, aesthetic considerations, and property values are all unrelated to zoning. For all of

these alleged concerns, the County never demonstrates how or why these concerns are only emergencies in the RL-5 zone.

1. The legal presumptions governing emergency zoning moratoria are not at issue.

There is little dispute regarding the presumptions applied to declarations of an emergency. However, the County misleads this Court when it states *Matson* held "The trial court did not err in refusing to inquire into the facts supporting these two emergency ordinances." (County's Reply Brief, p. 23). The full quote provides:

> Second, in repealing the plat review exemption for large lot subdivisions, the Board found that such subdivisions fail to provide for adequate road networks and in some cases may block future arterial routes. Sewage disposal and drainage systems may be inadequate to support future construction of these subdivisions, and proper fire protection could not be assured. Finally, emergency action was necessary because of the acceleration in growth of such subdivisions and because property owners would propose further developments prior to the enactment of any new regulations, thereby undermining the effectiveness of the regulations. Accordingly, sufficient facts are present on the face of the large lot subdivision ordinance to justify the conclusion of an emergency. The trial court, therefore, did not err in refusing to inquire into the facts supporting these two emergency ordinances.

Matson, 79 Wn. App. at 650. The *Matson* Court construed the face of the ordinance. That Court did not grant a blanket deferral to Clark County. Further, unlike Benton County, Clark County did not cite "concerns". Rather, it cited specific examples and actual findings of adverse impacts.

The County further argues Peyote Canyon never alleged any of the County's findings were false. That is rather disingenuous. Peyote Canyon argues that "concerns" as identified by the County are not facts. The fact that a neighboring property owner has a subjective opinion that a concern exists cannot be disproved.

2. The County acted with false pretense.

The County suggests Peyote Canyon's assertions about false pretense show an inherent misunderstanding of the purpose of interim zoning. (County's Reply, p. 25). A legislative declaration of an emergency is conclusive and must be given effect unless it is on its face obviously false and a palpable attempt at dissimulation. *Matson*, 79 Wn. App. at 649.

At the same time, RCW 36.70.790 requires the County to act in good faith. The events leading up to the emergency moratorium and after the moratorium shows the County acted to prevent Peyote Canyon from vesting. The record does not show the County was inundated, or about to be inundated, with marijuana processing and production permits. Rather, one application was in the process of being completed, the neighboring property owners aggressively campaigned the County to do something, and the County did so. The record is void of some other entity or person coming forward to complain about the moratorium because they had an active application.

3. The County provided no emergent "facts," just subjective concerns when the May 12, 2015 moratorium was adopted.

The County suggests the trial court's findings on the state of emergency and non-emergent options substantiated the County's findings. (County's Reply, p. 28). Since review is de novo, the trial court's findings are immaterial.

As stated in its opening brief, a "fact" is defined as "something that truly exists or happens; something that has actual existence." *Merriam-Webster On-Line Dictionary.* The County did cite concerns. The inquiry is not whether it is factually true that the County cited concerns. The inquiry is whether those concerns were factually existent.

As observed in *Swartout*,

> We hold that the "statement of urgency" required in the charter of the City of Spokane must be construed to mean a statement of the basic facts that create the emergency. Otherwise, the right of referendum guaranteed in the charter would be at the whim of the city council.

Swartout, 21 Wn. App. at 672. Under the County's recitation of law, whims of local government can be overcome by merely citing to various community "concerns" without confirming whether they actually exist. At no time did the County identify which, if any pesticides are used in the production of marijuana let alone whether they posed a harm. The County never identified whether odors could even be detected by neighbors. The County, who has a department which provides property valuations, never

asked any staff from the Assessor's Office if marijuana operations reduced property values. Even though the County has its own law enforcement agency and code enforcement department, the County introduced no police or code enforcement reports which legitimized concerns about crime.

Finally, the County suggested in Ordinance 561, Section 2, the possibility that marijuana operators "will flood the County with applications for permit for marijuana production buildings." (Ordinance 561, County's Reply, p. 29). Again, the County never once cited the permit history for such establishments to legitimize this concern.

The County acknowledges that it believed "incompatibility concerns might be valid and might result in increased risks to health and safety of residents as well as result in an increased need for law enforcement." (County's Reply Brief, p. 31). It never assessed the probability of such an event and apparently never bothered to consult with law enforcement. This demonstrates the whimsical nature of its decision to impose the moratorium. By the County's rationale, any time a handful of neighbors do not like a nearby project they can express concerns and counties can rely upon the mere expression of a concern, state the fact of the concern without any effort to validate the concern, and adopt interim zoning moratoria without notice or a public hearing.

4. The June hearing added no facts which justified or validated the enactment of an emergency.

The County suggests that since it received written or verbal testimony from over 60 people, the June hearing validated the general concerns. (County's Reply, p. 34-35). As a preliminary comment, the May 12, 2015 emergency ordinance must stand on its own. Additionally, the same flaws from the initial hearing remain and were addressed in Peyote Canyon's opening brief. The County consulted no appraiser on property values, no expert on odor or pesticides, no law enforcement or code enforcement reports or general statements from the Sheriff's or Code Enforcement departments about the alleged concerns for criminal activity in Benton County's RL-5 zoning designation.

Findings must be made on matters which establish the existence or nonexistence of determinative factual matters. *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 36, 873 P.2d 498 (1994). Finally, statements of the positions of the parties, and the summary of the evidence presented, with findings which consist of general conclusions drawn from indefinite, uncertain, un-determinative narration of general conditions and events, are not adequate. *Id.* *Weyerhaeuser* relates to a quasi-judicial proceeding. Nonetheless, it provides strong guidance as to what constitutes a finding of fact. Statements of position of the parties is not a fact nor are narrations or general conditions.

5. Generalized fears and community displeasure do not justify emergency moratoria.

Peyote Canyon's reference to zoning case law, pages 25-26 of its Opening Brief, were provided as additional support for the proposition that zoning decisions, like declarations of an emergency cannot be made based upon general complaints just like the decision to impose an emergency moratorium cannot be at the whim of local government. The neighbors of Peyote Canyon provided nothing more than generalized fears, stereotypes, and prejudices. Those justifications have been rejected in related contexts and must be rejected for the County's emergency declaration.

6. Appeal of the emergency moratorium is not moot.

a. Under *Swartout* if the moratorium is successfully challenged, it is of no effect.

Appellant acknowledges that if the moratorium is upheld, the issue of whether Peyote Canyon was vested is otherwise conceded. However, under *Swartout*, a void legislative act is of no effect. *Swartout*, 21 Wn. App. at 674. In *Swartout*, the City of Spokane argued that Mr. Swartout did not initiate his lawsuit until after he had paid taxes due for the first three quarters of the challenged ordinance. *Id.* at 668. The Court of Appeals found this delay and the payment of the taxes did not constitute a waiver and ordered the repayment of his taxes with interest. *Id.* at 675-76. If this Court

invalidates the moratorium, it must be given no effect and be viewed retroactively.

The County determined Peyote Canyon's building permit was complete in its letter dated June 6, 2015. (CP 333). The application was denied solely because it was not submitted prior to the emergency moratorium adopted May 12, 2015. *Id.* Peyote Canyon sought declaratory relief with respect to whether the emergency declaration was valid. (CP 1-11). If it is not valid either (1) the County must review the permit without consideration of the moratorium, or (2) the permit must be approved.

b. Challenge to the emergency moratorium is not subject to LUPA.

The issue of whether the County made the requisite factual findings to justify a zoning moratorium was not subject to the Land Use Petition Act. LUPA excludes from its review legislative approvals such as area-wide rezones and annexations. RCW 36.70C.020(2)(a). Under RCW 36.70B.020(4), "project permit" means a permit required from a local government for a project action. A public agency does not apply for a permit to itself nor does it apply for approval of its own action. *Schnitzer West, LLC v. City of Puyallup*, 382 P.3d 744, 748 (2016). Read together with RCW 36.70C.020(2)(a), an application is required from someone other than the public entity. *Id.* In *Schnitzer*, no specific party applied for a change in the zoning classification of the Schnitzer property. Instead, out of

concern for the special character of an overlay zone, the City initiated procedures to consider extending the area of that zone. *Id.* This was not a land use decision subject to LUPA. Thus, the County's imposition of the moratorium cannot be deemed a land use decision.

Finally, the County's reliance upon *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) is not dispositive. First, *Nykreim* does not address the effect of an invalidated moratorium. Second, in Nykreim the court had to resolve the timeliness of a lawsuit where the following occurs:

1. a boundary line adjustment ("BLA") was approved in October of 1997;
2. the applicant filed for a Conditional Use Permit in May of 1998;
3. in August of 1998 a neighbor advised the County staff of his belief the BLA was illegal and violated the Chelan County Code;
4. in December of 1998 Chelan County filed a declaratory judgment act to determine the validity of the BLA.

Nykreim, 146 Wn.2d at 911-14. The court noted that the BLA, "despite its questionable legality, 'became valid once the opportunity to challenge it passed.'" *Id.* at 925-26.

In this case, the permit was challenged in a timely manner as both (1) a LUPA appeal alleging the building permit was vested, and (2) a declaratory judgment act stating the ordinance which prevented vesting was

unlawful and of no effect. If Ordinance 561 was not valid, this Court must decide the status of the building permit on June 16, 2015, when it was denied solely because of an invalid ordinance.

c. Even if the Court finds the appeal moot, it must be heard.

For the reasons above, this issue is not moot. Even if this Court found the issue to be moot, the issue of whether an interim zoning ordinance can be imposed without notice and a public hearing without an emergency declaration should be resolved.

"It is a general rule that, where only moot questions or abstract propositions are involved, ... the appeal ... should be dismissed." *Sorenson v. Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972). In 1972, the State Supreme Court adopted criteria to consider in deciding whether a matter, though moot, is of continuing and substantial public interest and thus reviewable. *See Sorenson v. Bellingham, supra* (constitutional challenge to ordinance requiring property ownership as a qualification for certain elected offices). The three factors considered essential are: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. *In re Cross, supra,* 99 Wn.2d at 377, 662 P.2d 828 (citing *Sorenson v. Bellingham,* 80 Wn.2d at 558, 496 P.2d 512). Arguably a fourth factor exists, that being the level of genuine adverseness and the

quality of advocacy of the issues. *See Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson,* 87 Wn.2d 417, 419, 553 P.2d 113 (1976). This dispute is clearly public, an authoritative determination is desirable, and it could easily recur. Accordingly, the Court should reject the County's claims that appeal is moot.

III. CONCLUSION

For the reasons set forth above and as stated in Appellant's opening brief, this appeal must be granted.

DATED this 30th day of December, 2016.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on December 30, 2016, I electronically filed the foregoing document with the Court of Appeals, Division III. On December 30, 2016, I also caused a true and correct copy of the foregoing document to be served on the following counsel, via Inter-City Legal Messenger to:

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DATED this 30th day of December, 2016, at Richland, Washington.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

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