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Division III
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Court of Appeals No. 346005-III
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.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellant, Peyote Canyon, obtained a Washington State license from the Washington State Liquor and Cannabis Board to operate a marijuana production and processing business at 28505 S. Clodfelter Rd., located in Benton County (“County” and “Respondent”). The property was zoned Rural Lands Five District (“RL-5”). This designation, among other things, requires minimum lot sizes of five acres. Effective February 25, 2014, marijuana processing and production was an approved use in this zoning designation.

Peyote Canyon submitted pre-operation permits to Benton County, which primarily consisted of a building permit for modest modifications to an existing pole building. Neighbors eventually learned of this proposed use and began to aggressively campaign for Benton County officials to take action to stop Peyote Canyon from operating. In reaction, the County adopted an emergency moratorium on processing building permits in the RL-5 zoning designation.

A moratorium enacted before a complete building permit is submitted prevents the permit applicant from conducting business. However, under the vested rights doctrine, a completed application preserves a building permit applicant’s right to operate under the laws existing at the time a complete permit is submitted. In this case, the County

deemed Peyote Canyon's building permit incomplete as of the passage of its moratorium and denied Peyote Canyon the right to operate.

Peyote Canyon first filed an appeal to the Mid-Columbia Building Appeals Commission ("Building Commission") to exhaust its rights under the Land Use Petition Act ("LUPA") on the issue of whether Peyote Canyon established a vested right prior to the emergency ordinance. The Building Commission denied Peyote Canyon's appeal. Peyote Canyon then filed an appeal under LUPA along with a suit for declaratory relief:

- (1) Asserting that Peyote Canyon had established a vested right to operate as a marijuana processor and producer at its Clodfelter location because (a) its application was complete before the moratorium was adopted; or (b) because the County frustrated Peyote Canyon's attempt to file a complete application;
- (2) Seeking Declaratory relief that under legislation adopted after the moratorium, the County had lacked authority to prohibit marijuana production or processing in the in the RL-5 zoning designation which governs Peyote Canyon's parcel; and
- (3) Seeking Declaratory relief that the County completely failed to justify an emergency to establish the moratorium rendering the moratorium invalid which would allow Peyote Canyon to vest

when it subsequently submitted all information requested by Benton County.

Benton County Superior Court denied the LUPA appeal and granted summary judgment in Benton County's favor on all remaining claims. Peyote Canyon appeals the Superior Court's summary judgment ruling that held Benton County enacted a valid emergency moratorium.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it determined an emergent condition existed to justify an emergency moratorium.

2. The trial court erred to the extent it determined the evidence in support of the emergency declaration was sufficient to justify the emergency moratorium.

III. STATEMENT OF THE CASE

Benton County adopted Resolution 2014-167 on February 25, 2014, which, among other things, authorized the production and processing of marijuana in its RL-5 zoning designation. (CP 135). The County acknowledges that "during that process the County was not informed of any concerns about the negative effects of allowing marijuana production, i.e., growing, in the RL5 District." (CP 276).

On or about August 4, 2014, Benton County received LLV Green's notice of marijuana application from the State of Washington for its

property located at 28505 S. Clodfelter Rd. (CP 97-99). LLV Green is owned by Appellants.

Peyote Canyon's property is approximately 4.4 acres and contained an 80' x 60' preexisting pole building. (CP 293). Within the pole building, Peyote Canyon framed in an area measuring 20' x 20' for an office and breakroom ("office"). (CP 61-2). The office construction was not structural. It attached two walls to the existing pole building and constructed two new walls with a ceiling that did not attach to the roof. (CP 156).

In April of 2015 Peyote Canyon's neighbors began contacting the County to complain about Peyote Canyon's plans to convert its property to marijuana production. (CP 100-10). The County staff directed the County's Code Enforcement Officer to investigate the complaints. (CP 111). The County Commissioners also reacted by looking for options to stop the application. (CP 105-06, 111-15). In one reply to a neighbor, the County stated it was looking at "all options" to assist the neighboring property owners to see "if anything can be done." (CP 105).

Peyote Canyon filed a building permit application on May 4, 2015. (CP 61-2). It contained a scaled drawing of the framed-in office within the pole building which showed a breakroom and office. *Id.*

As a result of the neighbor complaints and call for action as well as Commissioner requests, on May 5, 2015, the County's attorney made a request to the City of Kennewick attorney to "quickly get copies" of the City's zoning moratoriums which the City enacted to prevent marijuana businesses from operating in its jurisdiction. (CP 116).

On May 6, 2015, Peyote Canyon filed a fence permit. (CP 64-9). Based on materials submitted, the County issued a letter dated May 7, 2015 requesting the following:

- A floor plan for the building indicating the use of all areas in the building;
- A septic permit; and
- A water availability letter.

(CP 71).

The three items requested are not specifically required under the Benton County Code. Rather, the County Code's authority for additional information provides:

- (4) The information specified for the desired permit, license or approval as required by the applicable provisions of the Benton County Code; and
- (5) Any supplemental information or special studies as required by the Planning Director.

(Benton County Code 17.10.090).

On May 6, 2015, neighbor Jill Hedgpeth specifically voiced her concern in an email to one of the Benton County Commissioners as to whether the Petitioner could be “vested and able to proceed with his business”. (CP 117). A day later, the County’s attorney asked the County Commissioner to call him to discuss how to respond. *Id.* On May 6, 2015, Mr. Van Zuyen filed a water availability notification indicating the well on the property had been in use since 2006. (CP 73-4).

On May 12, 2015, without notice to Peyote Canyon, the County adopted Resolutions 2015-357 and 2015-358. (CP 275 & 488-9). Resolution 2015-357 adopted Ordinance 561 which imposed an immediate emergency interim zoning amendment to prohibit the production of marijuana in the Rural Lands Five District (“RL-5”). (CP 276-81).

It supported the resolution as follows:

BE IT RESOLVED, that ordinance no. 561, an ordinance adopting an immediate emergency interim zoning amendment to prohibit the production of marijuana in the rural lands 5 district; setting a date for a public hearing; establishing determination for the interim zoning amendment, *declaring an emergency necessitating immediate adoption of this ordinance*; and temporarily amending ordinance 488, section 4 and BCC 11.16A.030 is hereby adopted and will take effect and be in full force upon its passage and adoption.

Dated this 12th day of May, 2015.

(CP 275) (emphasis added).

Ordinance 561, in support of the moratorium, contains the following findings relevant to the alleged emergency necessitating the moratorium:

Whereas, during the process, the County was not informed of *any concerns* about negative effects of allowing marijuana production, i.e., growing in the RL 5 district;

Whereas, the County recently has received a great number of comments expressing *concerns* related to marijuana production and the proximity of the many residential areas within the RL 5 district;

Whereas, in particular, some of the *concerns* raised relate to the pungent aroma of a marijuana crop, the nature and use of the pesticides in connection with growing marijuana, the *possible attraction* of criminal activity to areas where marijuana is grown, and *aesthetic concerns* regarding lighting and other security measures either required by a state license or electively installed by growers of marijuana;

Whereas, based on the above, *it appears that marijuana production may not be compatible* with the allowed uses in the RL 5 district and *may result* in an increased risk to health and safety of residents in those areas, as well as increased code enforcement and law enforcement activities.

(CP 276-81) (emphasis added).

Resolution 2015-358 rescinded Resolution 2014-167 and re-defined those zoning designations where marijuana may be grown, processed, or sold and eliminated RL-5 as one of the County's approved zoning designations for marijuana production and processing. (CP 488-9).

Peyote Canyon was not given notice of this emergency resolution. (CP 164). However, neighbors in opposition to Peyote Canyon's business

plans appeared before the Mid-Columbia Building Appeals Commission and specifically testified they were at the moratorium hearing. (CP 181).

Two days after adopting the moratorium, the County issued a letter to Peyote Canyon stating:

Per our phone conversation 5/14/2015 you may bring in information requested on the correction letter of May 7, 2015 as it becomes available or wait until you have all the information requested and submit one at a time. (CP 76). However, the letter did not mention to Peyote Canyon that the moratorium was adopted.

Peyote Canyon submitted the requested revised floor plan on May 14, 2015. (CP 78-9). It also filed an already existing well water report dated May 19, 2005. (CP 73-4).

On June 3, 2015, all three (3) County Commissioners were emailed by Peyote Canyon neighbors Linda and Jim Bauers who stated, "Please do not vest him on this property." (CP 125). This was forwarded to the County legal staff. *Id.* Commissioner Delvin replied that "vested rights" would be discussed with the County's attorneys. (CP 126).

On June 12, 2015, Peyote Canyon filed its septic permit. (CP 127-34).

The County originally set a hearing for June 2, 2015 to consider the emergency moratorium. It was continued to June 16, 2015. (CP 135-6). The staff report for that meeting makes no reference to additional evidence

to support the moratorium. *Id.* The June 2nd and June 16th staff reports make no reference to any studies. (CP 137-8). However, the staff report states, “Most of the applications to the state for marijuana producer’s licenses in Benton County have been in Rural Lands 5.” (CP 135). Nonetheless, the County cited no existing marijuana based business in the RL-5 zone as an example of a problem posed by virtue of being located in that zoning designation.

Ordinance 562, was adopted June 16, 2015. (CP 459-63). That Ordinance was for the purpose of

adopting findings and conclusions to support the previously adopted emergency interim zoning amendment to prohibit the production of marijuana in the Rural Lands Five Acre (“RL 5”) District and confirming the maintenance of the emergency interim zoning amendment.

Id.

This ordinance does not disclose any underlying emergent facts to support the emergency act. Section 2(a) re-adopts findings from Ordinance 561. Section 2(b) adopts eleven new findings. The County argued to the trial court these findings contain seven “more relevant findings”. (CP 228-29). In reality, there is one new finding that in any way comments on the facts constituting an emergency:

7. The Board finds that those who spoke and submitted written comments in favor of *maintaining Ordinance 561* stated valid *concerns* regarding the pungent aroma of a marijuana crop, the nature and use of

pesticides in connection with the growing of marijuana, the increased traffic generated by marijuana production business, the attraction of criminal activity to areas where marijuana is grown, and aesthetic *concerns* regarding lighting, fencing and/or other security measures either required by a State license or electively installed by growers of marijuana.

Id. (Emphasis added).

These findings were made to support the continuation of Ordinance 561. They make no mention of actual facts which justify the emergency enactment of a moratorium. Second, as stated above, these are not facts but mere concerns that the County itself clearly stated were necessary to investigate. Finding No. 11 provides, in part:

The Board of County Commissioners hereby finds and concludes that an emergency still exists and that Ordinance 561 should continue in effect to preserve the public peace, health, and safety. Non-emergent options would not be adequate to prevent new marijuana production operations from commencing in neighborhoods where they *may* be detrimental to the public peace, health and safety. Without the interim amendment . . . marijuana production operations *could* commence and/or additional building applications for structures in which marijuana production would operate *could vest*, leading to development that *could* be incompatible with the permanent code provisions eventually adopted by the County . . .

(CP 459-63) (Emphasis added).

At trial the County also argued the record contained examples of “facts” in support of the June hearing which purportedly justified the emergency enactment. These include:

- a letter citing an opinion that marijuana in general should be banned (CP 417-19);
- a letter stating “our opinion” concerning marijuana grow facilities (CP 421);
- a letter/petition citing general concerns (CP 423-429);
- a letter to State Liquor Control, citing “concerns about safety and security, potential environmental impacts, and aesthetic impacts” (CP 430-33);
- a letter to County Commissioners “to express our serious concerns about potential growing and processing in our neighborhood.” (CP 434-35);
- a press release by the Attorney General’s office regarding a judicial ruling preventing a marijuana business from opening in Kennewick where they are banned, without reference to any emergent fact (CP 436-7);
- KEPR article, “Pot farmer gets burgled, cameras catch culprit” (CP 538-9);
- an article, “Suspect Identified in Pot Plant Theft” (CP 440);

- an article “Brothers accused of selling pot to Prosser High Students” (CP 442-3);
- photos with no reference to location or zoning (CP 445-7); and
- a letter complaining that “the Commissioners have effectively opened carte blanche nearly all the land mass in Benton County . . .” (CP 449-51).

Not one “fact” related to an existing marijuana processing or production facility was cited. Likewise, there is nothing that ties any of these comments or articles to the RL-5 zoning designation.

On June 16, 2015 at 10:38 a.m., the Bauers again contacted all three Commissioners, the County Administrator, and Prosecuting Attorney and stated, “We continue to ask you do not vest LLV Green (Peyote Canyon LLC...)”. (CP 139). That day, the County issued a letter notifying Peyote Canyon of the County’s position that its application was denied because they did not have a vested right to have its application considered under the pre-May 12, 2015 moratorium ordinances in effect which authorized growing marijuana in the RL-5 zoning designation. (CP 140-41).

Peyote Canyon filed an appeal to the Mid-Columbia Building Appeals Commission on June 30, 2015 (“Building Commission” or “Commission”). (CP 142-3). That appeal was a required step to exhaust Peyote Canyon’s administrative remedies to have standing to appeal

certain issues subject to LUPA. For purposes of the current appeal, Peyote Canyon does not take the position it was vested on May 12, 2015. Rather, it argues the moratorium is invalid. With its invalidation, Peyote Canyon would vest.

IV. ARGUMENT AND AUTHORITY

In a period of less than fifteen months, Benton County went from admittedly being uninformed of any concerns about the negative effects of allowing marijuana production in the RL-5 zoning designation to a perceived need to declare an emergency to immediately prohibit any new marijuana production and processing businesses in the RL-5 zone.

A line has been blurred by the County as to the problem and the facts that support its moratorium. In its June 2, 2015 staff report in support of its effort to make findings to justify the emergency moratorium, the County admitted that most of the applications for marijuana processing were in RL-5. Accordingly, the County had specific businesses in RL-5 that presented ample opportunities to identify actual existence of the alleged conflicts which justified the emergency, if one truly existed. It presented no analysis or evaluation of how existing approved establishments were creating a conflict.

By all appearances, the only “emergency” was Peyote Canyon’s application and the concerns voiced by a handful of neighbors. This appeal

must be granted because the displeasure of Peyote Canyon's neighbors does not constitute an emergent fact which justifies an emergency moratorium.

1. Standard of review.

When reviewing an order granting summary judgment, the appellate court engages in a de novo review, taking all facts and inferences in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007).

A void legislative act is of no effect and may be successfully attacked at any time. *Swartout v. City of Spokane*, 21 Wn. App. 665, 673, 586 P.2d 135 (1978). Whether laws passed are truly emergent is a judicial question. *Id.* at 670.

2. An Emergency Ordinance Void of Facts Evidencing an Emergency Cannot Be Presumed Valid.

Courts may review legislative declarations of an emergency. *Matson v. Clark Co. Board of Commissioners*, 79 Wn. App. 641, 649, 904 P.2d 317 (1995). Such a legislative declaration is conclusive and must be given effect unless it is on its face obviously false and a palpable attempt at dissimulation. *Id.* "Dissimulation" is defined as "a hiding of a false appearance; concealment by feigning, false pretension." *Webster's On-Line Dictionary*.

A. *The County's "emergency" was a false pretense.*

The staff report for Ordinance 561 provides that most applications for marijuana producer's licenses in Benton County were in Rural Lands 5. Nonetheless, the record before this court makes clear that the original moratorium was void of any specific facts which demonstrated an emergency related to harm caused by existing marijuana processing or production operations in the County's RL-5 zoning designation. Rather, the record only reflects "concerns" about the pungent aroma of a marijuana crop, the nature and use of the pesticides even though no pesticide was identified by name, the possible attraction of criminal activity, and aesthetic concerns regarding lighting and other security measures. Notably, none of these concerns came from neighbors of existing marijuana operations.

Equally damning, once the moratorium was adopted, the neighbors continuously made pleas to the County to find Peyote Canyon was not vested. Under these facts, it is clear the "emergency" was general concerns about Peyote Canyon and that it would vest rather than any factual based concerns that existing marijuana business were creating an emergency in the RL-5 zoning designation.

Finally, the pre-moratorium flurry of emails from neighbors to the County and subsequent lack of any specific examples of conflict in the RL-5 zones presents overwhelming evidence that the County's purpose in enacting the emergency zoning moratorium was to stop Peyote Canyon

from vesting. This is a clear example of false pretense, and this Court must find the County's emergency moratorium invalid on its face on this ground alone.

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

On review of emergency moratoria, to determine the truth or falsity of the declaration of an emergency, courts do not normally inquire into the facts, but must consider only what appears on the face of the act and its judicial knowledge. *Matson*, 79 Wn. App. at 648. Despite this limited review, the law is clear, "the ordinance must include a statement of the underlying emergent facts." *Id.* at 649. Without such a statement, an emergency declaration is invalid. *Id.* Courts have invalidated declarations of a state of emergency where they are conclusory in nature, merely stating an emergency exists, but contain no facts to justify the emergency. *Id.* at 649-50. In this case, at the May 12, 2015 hearing the County cited no more than what it repeatedly labelled "concerns" expressed by Peyote Canyon's neighbors.

Additionally, under the statutory scheme, the County was required to act in good faith in adopting an emergency ordinance. RCW 36.70.790, which governs emergency moratoria, provides:

If the planning agency, in good faith, is conducting or intends to conduct studies within a reasonable time for the purpose of above, or is holding a hearing for the purposes of, or has held

a hearing and has recommended to the board the adoption of any zoning map or amendment or addition thereto, or in the event that the new territory for which no zoning may have adopted as set forth in RCW 36.70.800, may be annexed through a county, the board, in order to protect the public safety, health and general welfare, may, after report from the commission, adopt as an emergency a temporary interim zoning map, the purpose of which shall be to as classify or regulated uses and related matters as constitute the emergency.

The County conducted no studies. However, even if the County simply wanted to recommend an adoption of a zoning amendment, it was required to (1) act in good faith, and (2) could only declare an emergency based upon public health, safety and welfare concerns.

A “fact” is defined as “something that truly exists or happens; something that has actual existence.” *Merriam-Webster On-Line Dictionary*. The County did not cite facts which showed an emergency because it failed to identify any event which truly existed or happened. Rather, concerns about compatibility were expressed; concerns about aroma, pesticide use, attraction of criminal activity, and aesthetics; and the County found it “appropriate” to prevent “additional” marijuana growing operations. Again, the County failed to find that these “concerns” actually existed with respect to the already established marijuana operations in RL-5.

In the text of Ordinance 561, whereas clause sixteen, the County specifically represented it needed to complete an investigation regarding compatibility of marijuana operations in the RL-5 designation. One was

never conducted. Rather, the County held a subsequent hearing which was no more than a popularity contest where the generalized evils of marijuana were deemed sufficient rather than actual incidents in the County's RL-5 zones. Facts related to actual instances of conflict with marijuana operations in the RL-5 zone were never presented. This does not constitute good faith.

In *Swartout*, the Spokane city council adopted an ordinance imposing a tax on social card games. Because of an emergency provision the ordinance was effective immediately upon adoption. 21 Wn. App. 666. The emergency declaration allowed the City to bypass a 30-day period where citizens could exercise their right of referendum to challenge the ordinance. *Id.* at 670. Section 16 of the Ordinance provided:

An urgency and emergency is hereby declared to exist of this ordinance, such urgency and emergency consisting of the need to provide funds urgently and immediately needed in the interest of the public health, safety, welfare, and morals.

Id. at 668. Dennis Swartout filed a lawsuit to declare the ordinance invalid. The Court of Appeals held the above statement to be conclusory in nature. *Id.* at 671. Further, the ordinance did not present any facts that justified the emergent nature of the conclusions. *Id.* The Court of Appeals further observed:

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.

Id. at 672. Like *Swartout*, there is no statement of basic facts that create an emergency in the present case. Thus, to deny this appeal is to allow the County to declare an emergency on the whim of the County Commissioners every time a handful of industrious neighbors lodge a complaint about a business locating near their home.

As stated in *Matson*, the court may use its judicial knowledge. *Id.* at 649. The County has its own law enforcement and code enforcement divisions. Nonetheless, no one from the Sherriff's Office testified. No Code Enforcement Officer testified, and no actual police or code enforcement reports were presented to the County which validated any of the alleged "concerns" specific to marijuana production or processing in the RL-5 zoning designation. Simply stated, nothing presented by the County when it adopted Ordinance 561 even resembles a "fact." Equally disturbing, there is no nexus between the concerns of Peyote Canyon's neighbors and a county-wide ban on marijuana businesses in RL-5.

Simply put "concerns" are not facts. "Possible criminal activity" are not facts. "Aesthetic concerns regarding lighting and other security measures" are not facts, nor are any of these emergencies relating to the general health, safety, and welfare of the citizens. The assertion that marijuana production "may result in an increased risk to health and safety

. . . as well as increased code and law enforcement activities” are not facts. These are all conclusory statements. Even if these are facts, the County does not indicate how the concerns create an emergent condition because it would have to admit the emergent condition was preventing Peyote Canyon from obtaining a vested right to operate. That constitutes anything but good faith. Accordingly, Ordinance 561 must be deemed invalid.

C. The June hearing added no facts which justified the enactment of an emergency.

The County argued to the trial court that Ordinance 562, adopted June 16, 2015 contained additional facts which justified the adoption of Ordinance 561. The County specifically cited the declaration of Planning Manager Mike Shuttleworth, Exhibits 6-10 as its supporting evidence. (CP 416-455). Most comments are dated after May 12, 2015. These cannot be used to justify Ordinance 561. The County does not get to use “facts” adopted a month after Ordinance 561 was adopted to uphold the emergency that it claims existed on May 12, 2015.

This Court must look at “the face of the act” and the underlying facts adopted that day to find the emergency existed on May 12, 2015. Finally, the recitation of personal opinion does not constitute (1) a study of the issue, or (2) retroactively bolster the declaration of an emergency.

Even if the County could create facts after May 12, 2015, its additional evidence is largely public opinion, and is void of actual facts

which would show a need to declare an emergency in the RL-5 zoning designation. Examples cited by the County from the June, 2015 hearing include:

- an opinion that marijuana in general should be banned;
- a letter stating “our opinion” concerning marijuana grow facilities;
- a letter/petition citing general concerns;
- a letter to State Liquor Control, citing “concerns about safety and security, potential environmental impacts, and aesthetic impacts”;
- a letter to County Commissioners “to express our serious concerns about potential growing and processing in our neighborhood.”
- a press release by the Attorney General’s office regarding a judicial ruling preventing a marijuana business from opening in Kennewick where they are banned without reference to any emergent fact.
- a KEPR article, “Pot farmer gets burgled, cameras catch culprit.”
- an article, “Suspect Identified in Pot Plant Theft.”

- an article “Brothers accused of selling pot to Prosser High Students.”
- photos; and
- a letter complaining “the Commissioners have effectively opened carte blanche nearly all the land mass in Benton County ...”

The County’s emergency resolution was to ban marijuana production and processing in the RL-5 zoning designation. It is not a county-wide ban. Thus, the County needed to demonstrate the problem associated with marijuana production and processing in the RL-5 zone. The County failed to do so despite its reference to there being existing marijuana operations in RL-5 at the time. The cited examples do not demonstrate anything related conflicts with marijuana businesses in the RL-5 zone.

Ordinance 562 adds nothing which discloses the underlying emergent facts. Section 2(a) readopts findings from Ordinance 561. Section 2(b) adopts eleven new findings. While the County suggested at trial there are seven “more relevant findings”. *Id.* In reality, there is one new finding that in any way comments on the facts constituting an emergency:

7. The Board finds that those who spoke and submitted written comments in favor of *maintaining Ordinance*

561 stated valid *concerns* regarding the pungent aroma of a marijuana crop, the nature and use of pesticides in connection with the growing of marijuana, the increased traffic generated by marijuana production business, the attraction of criminal activity to areas where marijuana is grown, and aesthetic *concerns* regarding lighting, fencing and/or other security measures either required by a State license or electively installed by growers of marijuana.

(Ordinance 562) (Emphasis added).

The County's flaw is made clear in Finding No. 11 which provides, in part:

The Board of County Commissioners hereby finds and concludes that an emergency still exists and that Ordinance 561 should continue in effect to preserve the public peace, health, and safety. Non-emergent options would not be adequate to prevent new marijuana production operations from commencing in neighborhoods where they *may* be detrimental to the public peace, health and safety. Without the interim amendment . . . marijuana production operations *could* commence and/or additional building applications for structures in which marijuana production would operate *could vest*, leading to development that *could* be incompatible with the permanent code provisions eventually adopted by the County . . .

(Ordinance 562) (Emphasis added).

Again, these "findings" are all pure speculation. In fact, the County never used the time between Ordinance 561 and 562 to determine if there was a pesticide danger, increased crime, light pollution, or change in property values. The County does not even provide on a more probable

than not basis the likelihood that any of these concerns were true or would ever come to fruition. It is also clear the County is all but referencing Peyote Canyon as the entity that could vest. At the end of the day it is clear, no specific emergency was ever declared. The emergency was that Peyote Canyon was about to vest and its neighbors were upset.

There is a critical distinction between a legislative preference or whim which justifies a non-emergent amendment a zoning code versus facts which demonstrate an emergency condition exists which justifies the imposition of immediate interim zoning controls. While local governments exist to provide necessary public services to those living within their borders and to avoid harms in the protection of the public's health, safety, and general welfare, exercise of this authority must be reasonable and rationally related to a legitimate purpose of government such as avoiding harm or protecting health, safety and general welfare, not local or parochially conceived, welfare. *Norco Const., Inc. v. King County*, 97 Wn.2d 680, 685, 649 P.2d 103 (1982).

Preferences and concerns may show a need to change zoning to fit the expectations and interests of the community, but do not show an emergent need. The County cannot show an emergency by citing the general evils of marijuana or a handful of instances of marijuana theft. This is particularly true when the County had ample opportunity to assess how

these concerns were playing out with already established marijuana operations in RL-5. Thus, the June evidence did nothing to bolster the claim of an emergency and the County is again left with merely stating an emergency exists. That level of justification fails under *Matson*.

D. *Generalized fears and community displeasure do not justify emergency moratoria.*

Zoning case law has addressed the impact, if any, related to general, unsupported, public fears. In *Ferry v. City of Seattle*, 116 Wash. 648, 200 P.336 (1921), property owners complained that a proposed reservoir would constitute a nuisance for the reason it “would constantly menace their lives and property.” *Id.* at 662. This is similar in nature to the complaints of the Peyote Canyon neighbors. However, the *Ferry* neighbors also presented expert testimony that the embankment containing the reservoir could fail and cause loss of life. *Id.* That court held, “the question of the reasonableness of the apprehension turns . . . , not only on the probable breaking of the reservoir, but the realization of the extent of the injury which would certainly ensue.” *Id.* Further, “The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real.” *Id.* at 665. Thus, the probability of the fear is an important factor which the County entirely ignored in the present case. Whether the fear was founded in science was relevant, but ignored. Finally, the magnitude of the injury is important, but was never quantified.

The few Washington cases that have considered the relevance of community fears to zoning decisions have required that the fears be substantiated before the zoning authority may use them as a basis for its decision. *Washington State Dept. of Corrections v. City of Kennewick*, 86 Wn. App. 521, 532, 937 P.2d 1119 (1997).

In *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2s 986 (1995), neighbors testified that issuing a special use permit for a group home for troubled teens would impair property values. Sunderland argued, and the State Supreme Court agreed, that there is a distinction between well founded fears and those based on inaccurate stereotypes and popular prejudices. *Id.* at 794. This Court must bear in mind, the principles applied in *Sunderland* and *Dept. of Corrections*, were for non-emergent zoning cases. There should be a higher scrutiny in this instance where the County claims an emergency and prevents the exercise of a lawful property right without notice and based solely upon generalized fear and prejudice.

Under the above cited cases, such fears are highly questionable in non-emergent zoning decisions. These cases, coupled with *Matson* and *Swartout* make clear that general fears and prejudices are not enough to adopt or support an emergency moratorium. This Court must find the County's emergency moratorium invalid.

V. CONCLUSION

The County requested the City of Kennewick's emergency moratorium on May 5, 2015 and adopted its emergency moratorium on May 12th. The County acted in haste to neighborhood complaints and relied upon borrowed work. In appeasing the neighbors, the County simply made errors that mandate invalidating the emergency moratorium. Accordingly, this appeal must be granted so that Peyote Canyon can vest and operate at its permitted location.

DATED this 27th day of October, 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 October 27, 2016, I electronically filed the foregoing document with the Court of Appeals, Division III. On October 28, 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:

Ryan K. Brown
Benton County Prosecutor's Office
7122 W. Okanogan Place, Bldg. A
Kennewick, WA 99336

DATED this 27th day of October, 2016, at Richland, Washington.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: 
Kristi Flyg, Legal Assistant