

No. 34600-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BENTON COUNTY,

Respondent,

v.

JERRY VAN ZUYEN, d/b/a PEYOTE CANYON, LLC,

Appellant.

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

NO. 15-2-02563-2

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

RYAN K. BROWN, Deputy
Prosecuting Attorney
BAR NO. 19837
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii-iv
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT	13
A. Because Van Zuyen has not appealed one of the trial court’s dispositive rulings, his appeal must be denied.....	13
1. The trial court’s grant of summary judgment to the County was independently based on its holding that an emergency declaration was not required.....	13
2. Van Zuyen did not assign error to the trial court’s holding that an emergency declaration was not required or provide argument as to why that holding was incorrect.	14
3. Van Zuyen’s failure to assign error and provide argument as to why trial court Conclusion #3 is erroneous is dispositive of this appeal	16
4. The trial court correctly concluded that no emergency declaration was required.....	17
B. The trial court alternatively and correctly held that Ordinance No. 561 did set forth facts in support of its emergency declaration that were not false on their face, so the ordinance was valid even if an emergency declaration was necessary.	21
1. Interim zoning ordinances are presumed valid and must be given effect unless obviously false on their face.	22
2. Van Zuyen’s false pretenses argument fails to appreciate the purpose of interim zoning ordinances.	25
3. Contrary to Van Zuyen’s assertion, Ordinance No. 561 does set forth emergent facts justifying the emergency declaration and the ordinance adoption.	28

4.	While a finding of actual harm was not required at the time of adoption of Ordinance No. 561, the public hearing process subsequently validated the citizens' concerns of harm and the County's adoption of Ordinance No. 561.	33
C.	There are no reported cases where an interim zoning ordinance adopted under RCW 36.70.795, RCW 36.70A.390, or RCW 35.63.200 has been invalidated.	37
D.	Van Zuyen's appeal is moot.	41
E.	Jerry Van Zuyen is the sole appellant.	44
IV.	CONCLUSION	45

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Abbey Rd. Grp., LLC v. Bonney Lake</i> , 167 Wn.2d 242, 218 P.3d 180 (2009).....	25-26
<i>Charbonneau v. Wilbur Ellis Co.</i> , 9 Wn. App. 474, 512 P.2d 1126 (1973).....	17
<i>Chelan Cnty. v. Nykreim</i> , 146 Wn.2d. 904, 52 P.3d 1 (2002).....	42-43
<i>Christian v Tohmeh</i> , 191 Wn. App. 709, 366 P.3d 16 (2015), <i>review den.</i> , 185 Wn.2d 1035 (2016).....	15
<i>City of Federal Way v. King Cnty.</i> , 62. Wn. App. 530, 815 P.2d 790 (1991).....	23
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	15-16
<i>Erickson & Assocs., Inc. v. McLerran</i> , 123 Wn.2d 864, 872 P.2d 1090 (1994).....	26
<i>Ferry v. City of Seattle</i> , 116 Wash. 648, 203 P. 40 (1922).....	40
<i>Jackson v. Quality Loan Serv. Corp.</i> , 186 Wn. App. 838, 347 P.3d 487, <i>review den.</i> , 184 Wn.2d 1011 (2015)	42
<i>Joy v. Dept. Labor and Indus.</i> , 170 Wn. App. 614, 285 P.3d 187 (2012), <i>review den.</i> , 176 Wn.2d 1021 (2013)	16
<i>Matson v. Clark Cnty. Bd. of Comm'rs</i> , 79 Wn. App. 641, 904 P.2d 317 (1995).....	18-24, 26, 30-31, 33-34, 37-38
<i>McKee v. Am. Home Products, Corp.</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989).....	13, 17
<i>State v. Deskins</i> , 180 Wn.2d 68, 322 P.3d 780 (2014)	43
<i>Sunderland Family Treatment Servs. v. Pasco</i> , 127 Wn.2d 782, 903 P.2d 986 (1995).....	41
<i>Swartout v. City of Spokane</i> , 21 Wn. App. 665, 586 P.2d 135 (1978), <i>review den.</i> , 91 Wn.2d. 1023 (1979)	39-40
<i>Wash. State Dept. of Corrections v. Kennewick</i> , 86 Wn. App 521, 937 P.2d 1119 (1997), <i>review den.</i> , 134 Wn.2d 1002 (1998)	41

OTHER CASES

<i>Pederson v. Leahy</i> , 397 Mass. 689, 493 N.E.2d 486 (Mass. 1986).....	44
<i>Pinkerton's, Inc. v. Superior Court</i> , 49 Cal. App. 4th 1342, 57 Cal. Rptr. 2d 356 (1996).....	44

WASHINGTON STATUTES

RCW 4.84.370 42
RCW 19.27.095(1) 11
RCW 35.63.200 18-19, 22, 26, 37
RCW Chapter 36.70 18
RCW 36.70.580 25, 34
RCW 36.70.630 34
RCW 36.70.640 25
RCW 36.70.790 17, 19, 21
RCW 36.70.795 12-15, 18-20, 24, 26-27, 33-34, 36-39, 41
RCW Chapter 36.70A 18
RCW 36.70A.106 25
RCW 36.70A.390 12-15, 18-20, 22, 24, 26-27, 33-34, 36-39, 41
RCW Chapter 64.40 11
RCW 64.40.020(4) 43

REGULATIONS AND COURT RULES

RAP 10.3(a)(6) 15, 17, 21

OTHER AUTHORITIES

Benton County Code § 11.16A.030 2, 9, 29
Benton County Ordinance No. 561 (May 12, 2015)
..... 1, 3-4, 6-7, 10-14, 16-21, 24-25, 27-28, 30-35, 38-43, 45-46
Benton County Ordinance No. 562 (June 16, 2015) 4, 6, 8, 36
Benton County Ordinance No. 565 (October 27, 2015) 8, 10
Benton County Ordinance No. 566 (October 27, 2015) 10
Benton County Resolution No. 2015 357 (May 12, 2015) 2
Benton County Resolution No. 2015 442 (June 16, 2015) 6
Engrossed Subst. Senate Bill 5727, 52nd Leg., Reg. Sess. (Wash. 1991) .. 27
FINAL B.REP. on ESSB 5727, 52nd Leg., Reg. Sess. (Wash. 1992) 26
McQuillin Mun. Corp., § 25.64 (3rd Ed. 1999) 22
Merriam-Webster Online Dictionary 31
Richard L. Settle, *Washington Land Use and Environmental Law and
Practice* § 2.13 (1983) 22
Senate Bill 5727, 52nd Leg., Reg. Sess. (Wash. 1991) 27

I. INTRODUCTION

Peyote Canyon, LLC (“Peyote Canyon”) applied for a building permit, and it was denied. Peyote Canyon then filed a land use petition against Benton County (the “County”), asserting that the County erroneously denied that permit. Concurrently with the land use petition, Jerry Van Zuyen, d/b/a Peyote Canyon, LLC, filed a complaint for declaratory relief and for damages. The trial court dismissed the land use petition. That order has not been appealed. Both the County and Mr. Van Zuyen moved for partial summary judgment with respect to the complaint for declaratory relief pertaining to the validity of County Ordinance No. 561. The trial court granted the County’s motion on multiple bases and denied Van Zuyen’s motion. Van Zuyen has appealed some, but not all, of the trial court’s rulings regarding the dismissal of the complaint for declaratory relief. Van Zuyen’s claim for damages was not adjudicated by the trial court, but it did enter final judgment regarding the land use petition and claim for declaratory relief.

II. STATEMENT OF THE CASE

Adoption of Ordinance No. 561. In April of 2015, Van Zuyen began remodeling a building located on Peyote Canyon’s property in preparation for engaging in a marijuana grow business. CP 35. He did so without first obtaining a necessary building permit. CP 285; 287; 305.

Two neighbors requested investigation and numerous members of the community attended Benton County Board of Commissioners (“Board”) meetings on April 28, May 5, and May 12, 2015, to express concerns about the incompatibility of marijuana grows and residential and other uses allowed within the County’s Rural Land 5 (“RL 5”) zoning district. CP 35; 283-85; 403-04; 407. Specifically, community members stated concerns about the pungent aroma of marijuana crops, the use of pesticides by growers near residences, criminal activities associated with growing operations, and the aesthetic impacts of the security measures associated with such operations. CP 407; 411. Consequently, on May 5, 2015, the Board requested that the County Planning Department review the issue. CP 403. Later that day, County staff and legal counsel began working on a proposed interim zoning ordinance to temporarily prohibit marijuana grows in the RL 5 Zone. CP 35.

On May 12, 2015, under “Other Business” during the regular Board meeting, the Planning Director made a recommendation that the Board adopt an interim zoning ordinance to amend Benton County Code (“BCC”) § 11.16A.030 to *temporarily* prohibit the growing of marijuana in the RL 5 Zone. CP 403; 407. After Commissioner Jerome Delvin noted that Snohomish County had adopted a similar ordinance the prior week, Benton County Resolution No. 2015 357 and Benton County

Ordinance No. 561 were unanimously adopted by the Board. *Id.* No public hearing was held on May 12th, and consequently no public notice of any such hearing was given. CP 403-04. However, this was the third Board meeting in a row attended by numerous citizens advocating action by the Board. CP 404. It was announced at the conclusion of the May 12th meeting that on June 2, 2015, there would be a public hearing on Ordinance No. 561. *Id.*

Ordinance No. 561 had a simple substantive effect. It added marijuana growing, i.e., production, to a short list of “agricultural uses” not outright allowed in the RL 5 Zone.¹ CP 279-80. The explicit purpose of Ordinance No. 561 was to maintain the status quo, i.e., prevent additional marijuana growing operations from starting and prevent potential growers from flooding the County with applications to construct structures to use in such operations and obtain vested rights to conduct grow operations, while the County “analyze[d] the issue of the compatibility of marijuana production” with the prevalent existing uses in

¹ In 2014, the Board removed “marijuana processing” as a possible conditional use in the RL 5 Zone, but contrary to Van Zuyen’s assertion, it did not receive any input at that time about the possibility of prohibiting “marijuana production” in the RL 5 Zone nor did it take action to expressly authorize marijuana grows. The cultivation of marijuana was inherently allowed as an “agricultural use” prior to 2014 and until Ordinance No. 561 was passed. Unfortunately, Van Zuyen submitted an incomplete copy of the 2014 County ordinance to the trial court so as to prevent this court from being able to see the inaccuracy of his assertion that in 2014 the County took action to expressly allow marijuana grows. *See* Brief of Appellant (“Appellant’s Br.”) at 3; *see also* CP 93-94 (p. 1 of ordinance omitted); CP 135 (does not support assertion for which Van Zuyen cites it).

the zone and “examin[ed] whether marijuana production should be permitted outright, allowed as a conditional use or prohibited in the RL5 District” CP 279. Ordinance No. 561 was an *interim* ordinance that was “effective for up six months so long as a public hearing on [it was] held within sixty days after adoption” CP 277; 280.

Adoption of Ordinance No. 562. On June 2, 2015, the Board held the statutorily required public hearing, after appropriate public notice, and conducted the required public discourse on Ordinance No. 561. CP 82-88; 414. Van Zuyen did not participate. A memo submitted by the County’s Planning Director stated that the submissions he had received substantiated a need to “further investigate marijuana growing operations in the RL5 District.” CP 411. In connection with the June 2nd hearing, the Board also received oral and written testimony from roughly 60-70 constituents. CP 80-90; 416-55. Testimony included the following:

- Businesses that handle marijuana are under the constant threat of robberies, and in November 2014, a medical marijuana farmer “opened fire in Finley WA and wounded a man trying to steal his plants.” CP 418-19.
- One couple residing within the RL 5 Zone testified that they lived near a “huge, ugly, high particle board fence” surrounding an existing grow operation and that other negative impacts of such

grows are increased crime, reduction in neighboring property values, and a strong odor associated with such use. CP 421.

- More than a dozen Prosser area residents submitted voluminous materials indicating that several crimes occurred in Benton County in the prior year related to marijuana growing businesses; the high fences and other security measures required for grow operations are out of place and aesthetically displeasing in rural residential areas; and that the State Liquor Control Board's SEPA Environmental Checklist acknowledged areas with marijuana cultivation are inclined to experience home invasion robberies and thefts and can emit a distinctive odor far beyond boundaries of the grow area so as to interfere with neighboring owners' use and enjoyment of their property. CP 423-47.
- Regulatory review and approval had not been completed for herbicides, fungicides, or insecticides for use in growing marijuana. CP 449-50.
- Schools were being constructed by the Kennewick School District in the RL 5 Zone, and the Superintendent urged that marijuana grows be kept miles away from such schools. CP 455.

See also CP 83-87.

After receiving this testimony, the Board continued the public hearing to June 16, 2015, to allow for preparation of proposed written findings in support of a decision to continue the interim zoning ordinance. CP 457. The Board's action at the continued June 16, 2015, public hearing is illuminating.

On June 16, 2015, the Board adopted Benton County Resolution No. 2015 442 and Benton County Ordinance No. 562. CP 457. Ordinance No. 562 explicitly continued Ordinance No. 561

to allow the County [to] fully analyze the issue of the compatibility of marijuana production with the prevalent uses within the RL 5 District . . . while minimizing the additional marijuana production operations that may commence and preventing a potential flood of applications for permits for marijuana production buildings while a permanent zoning amendment is being considered

CP 459-60. Thus, Ordinance No. 561 was continued for the remainder of the interim six-month period to allow continued consideration of the issue, including the statutorily required reviews by the State of Washington and the Benton County Planning Commission of a possible permanent zoning amendment. CP 462.

In support of the continuation of the interim zoning ordinance, the Board readopted its earlier findings and adopted 11 new findings. CP 460-62. The Board found that existing marijuana grows in the County generated significant concerns for citizens about the compatibility of those

operations with residential and other uses within the RL 5 Zone, and additional growing operations would exacerbate any such valid concerns. *See* CP 460 (§2(a)(1)). Further, based on the evidence submitted subsequent to the adoption of Ordinance No. 561, *the Board found that citizens expressed valid concerns* regarding: (i) smells that emanate from neighboring marijuana crops; (ii) the use of pesticides by nearby growers; (iii) increased traffic in residential neighborhoods due to grow operations; (iv) increased criminal activity in areas with growing operations; and (v) poor aesthetics associated with nearby grow operations. CP 461 (§2)(b)(7)) (emphasis added).

The Board also found that Ordinance No. 561 prevented new grow operations from commencing while regulations to promote compatibility are considered, which was in the best interest of the citizens pending further consideration and public engagement on potential long-term regulatory changes. CP 460 (§2(a)(2)-(3)). The Board further found that non-emergent options would not prevent new marijuana grow operations from starting in neighborhoods where they may be detrimental to the public peace, health, and safety, and that without the interim prohibition, marijuana grow operations could commence and/or additional building applications for structures in which to grow marijuana could vest,

resulting in development incompatible with any permanent code provisions eventually adopted by the County.

As a result of these findings and because the State continued to issue permits to grow marijuana in the County's RL 5 Zone, the Board concluded that it should continue the interim prohibition to prevent additional grow operations from vesting or commencing in the RL 5 Zone while a permanent zoning amendment was considered. CP 461-62 (§2(b)(10)). And it decided that the interim amendment must continue as an emergency measure to protect public health, safety, and welfare. CP 462 (§2(b)(11)).

Adoption of Ordinance No. 565. In the months following the adoption of Ordinance No. 562, the Benton County Planning Department further examined the issue and proposed a permanent zoning amendment for consideration pursuant to the normal legislative process. As part of that process, the Benton County Planning Commission held a public hearing and considered a permanent amendment. CP 465-66. The Commission heard that most State licenses issued for marijuana production in the County were for operations located in the RL 5 Zone. CP 466 (second finding #7, incorporating CP 468). The Planning Commission also received written testimony that grow operations enticed criminal activity to their immediate vicinity, as evidenced by local

newspaper reports of shots fired at intruders at grow operations (CP 475); that due to the threat of criminal activity, State licensing requirements necessitated heightened security measures such as 8' fencing, lighting, and security cameras that negatively impact residential neighborhoods such as those in the RL 5 Zone (CP 477-78); and that the skunk-like smell of the crop interferes with the outdoor enjoyment of neighboring properties (CP 475).

Based on this evidence, the Planning Commission expressly found, just as the Board of Commissioners had found the previous June, that the citizen concerns regarding grow operations were *valid*. CP 466 (first finding #7). The Planning Commission ultimately concluded that a permanent amendment to BCC § 11.16A.030 prohibiting new marijuana grow operations in the RL 5 Zone would promote the public health, safety, and general welfare and therefore recommended approval of such by the Board. CP 466.

The Planning Department gathered additional information even after the Planning Commission adopted its recommendation. The Planning Department's October 19, 2015, memo advised the Board of additional facts and of the Department's conclusions. First, it advised that the RL 5 Zone had a large number of non-conforming lots of less than five acres, including clusters of lots of less than one acre each, and that most

existing licensed marijuana grow operations in the County are on lots of less than two acres. CP 472-73. Second, it advised that the 8' high fences, outdoor lights, and security cameras required by the State are incompatible with clustered residential housing. CP 472. Third, it advised that the pungent smells emanating from an *indoor* marijuana farm in Colorado significantly interfered with the neighbors' enjoyment of their property. CP 471-72. Fourth, it advised that gunshots were recently fired in the nearby City of Pasco in connection with an attempted theft of marijuana plants. CP 471. Finally, it advised that the pesticide usage in marijuana grow operations was still unregulated. CP 472.

All the information gathered by the Planning Commission and the Planning Department was brought before the Board at its public hearing on October 27, 2015, over five months after the passage of Ordinance No. 561. At the conclusion of that hearing, the Board agreed with the Planning Commission, adopted the Commission's Recommendation, Findings of Fact, and Conclusions as its own, and approved Benton County Ordinance No. 565 to *permanently* prohibit marijuana grow operations in the RL 5 Zone. CP 480-82. The Board then immediately adopted Ordinance No. 566 to repeal Ordinance No. 561. CP 484-86.

Denial of Building Permit. On May 6, 2015, Van Zuyen submitted an incomplete building permit application to the County. CP

305-14. Ordinance No. 561 was adopted on May 12, 2015. CP 281. Van Zuyen did not complete his building permit application until June 12, 2015. CP 333. Consequently, Peyote Canyon's application did not vest prior to the adoption of Ordinance No. 561 and was denied on June 16, 2015, because the proposed use was not allowed. CP 333; *see also* RCW 19.27.095(1). Peyote Canyon unsuccessfully argued to the Mid-Columbia Building Appeals Commission that its application was complete and therefore vested prior to May 12, 2015, and that its application therefore was improperly denied.² CP 308-12.

Trial Court Proceedings. After losing the administrative appeal regarding his vesting status and the building permit denial, Van Zuyen commenced an action in Benton County Superior Court by filing: a) a land use petition challenging the denial of the building permit application; and b) a complaint seeking both a declaratory judgment that Ordinance No. 561 was invalid and damages under RCW Chapter 64.40. CP 612-27. The complaint and land use petition identified "Jerry Van Zuyen, d/b/a Peyote Canyon, LLC," as the "Petitioner/Plaintiff." CP 612. However, the trial court ordered that the case caption be amended to reflect Peyote Canyon as the sole petitioner with respect to the land use petition (Van

² Van Zuyen no longer argues that his application was vested before May 12, 2015 Appellant's Br. at 13.

Zuyen was dismissed as a petitioner due to a lack of standing under the Land Use Petition Act (“LUPA”)) and “Jerry Van Zuyen, d/b/a Peyote Canyon, LLC,” as the sole plaintiff for the remaining causes of action. CP 628-30.

The trial court ultimately rejected Peyote Canyon’s vesting argument and dismissed the land use petition with prejudice. CP 602-04. That order has not been appealed. CP 605-06; *see also* Appellant’s Br. at 3-13. The trial court also denied Van Zuyen’s motion for partial summary judgment on his declaratory judgment claim regarding the validity of Ordinance No. 561 and granted the County’s cross motion for partial summary judgment on that issue. CP 600.

The trial court’s summary judgment order was based on three rulings. First, Ordinance No. 561 did set forth facts in support of the emergency declaration and could not be invalidated as an emergency ordinance, because the findings on which it was based were not false on their face. CP 599 (Conclusions #1 and #2). Second, Ordinance No. 561 “would be valid even if no emergency declarations were adopted by Benton County, because such a declaration is not required by RCW 36.70.795 or RCW 36.70A.390.” CP 599 (Conclusion #3). Third, the ordinance was not preempted by State law. CP 599 (Conclusion #4).

III. ARGUMENT

A. **BECAUSE VAN ZUYEN HAS NOT APPEALED ONE OF THE TRIAL COURT'S DISPOSITIVE RULINGS, HIS APPEAL MUST BE DENIED.**

1. **The trial court's grant of summary judgment to the County was independently based on its holding that an emergency declaration was not required.**

In his motion for partial summary judgment, Van Zuyen³ argued Ordinance No. 561 was invalid for two reasons. He argued the ordinance was invalid because: a) it was inconsistent with and therefore preempted under State law;⁴ and b) alternatively, Ordinance No. 561 was invalid because it allegedly failed to set forth facts justifying the emergency declaration therein. *See* CP 34; 40; 47-54. The County's partial summary judgment motion was based on the arguments that: a) Ordinance No. 561 and its emergency declaration were justified by the emergent facts outlined in the ordinance; b) alternatively, Ordinance No. 561 was valid even absent an emergency declaration, because such is not required by either RCW 36.70.795 or RCW 36.70A.390; and c) the ordinance was not preempted. *See* CP 231-45. In reply, Van Zuyen argued that the County's

³ Van Zuyen should be deemed the sole appellant in this matter. *See* Section III.E *infra* at 44-45.

⁴ Van Zuyen clearly has not assigned error to the trial court's rejection of his preemption argument, nor has he provided any argument with respect to that issue. Consequently, Van Zuyen's preemption claim may not be considered on appeal. *See, e.g., McKee v. Am. Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

interpretation of RCW 36.70.795 was wrong, and an emergency declaration was necessary. CP 516-17.

The trial court rejected *all* of Van Zuyen's arguments.

Importantly, the court expressly held that even if the County made no emergency declaration in Ordinance No. 561, the ordinance was valid because no such declaration is required by either of the two statutes under which the ordinance was authorized and adopted – RCW 36.70.795 and RCW 36.70A.390. CP 599 (Conclusion #3).

2. **Van Zuyen did not assign error to the trial court's holding that an emergency declaration was not required or provide argument as to why that holding was incorrect.**

Van Zuyen's Notice of Appeal was admittedly broad, simply seeking review of the trial court's grant of the County's motion for partial summary judgment and any related findings. CP 606. However, Van Zuyen only assigned the following two errors to the trial court's order: 1) the trial court erred in determining that an emergent condition existed; and 2) the trial court erred in determining the evidence in support of the emergency declaration was sufficient to justify the moratorium. Br. Appellant at 3. No error was assigned to the trial court's ruling that Ordinance No. 561 was valid absent *any* emergency declaration. Furthermore, even if Van Zuyen had assigned error to trial court

conclusion 3, that assignment would be waived by his failure to provide argument and legal authority demonstrating why he believes the trial court erred in that conclusion. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Instead, Van Zuyen's appeal brief merely implicitly assumes that an emergency declaration was legally required. He has not even cited to, much less discussed, the two statutes upon which the trial court expressly based its conclusion to the contrary. *See* Appellant's Br. at 3, 13-26. Van Zuyen's failure to even cite to RCW 36.70.795 and RCW 36.70A.390, much less provide any argument or citation to any legal authority to demonstrate how the trial court erred by concluding that an emergency declaration was not required, is clearly violative of RAP 10.3(a)(6). This strategy by Van Zuyen is unfair, is contrary to RAP 10.3(a)(6), and his actions should not be deemed sufficient to merit appellate review. *See Christian v Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015) ("We do not consider conclusory arguments. Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review"), *review den.*, 185 Wn.2d 1035 (2016).

3. Van Zuyen's failure to assign error and provide argument as to why trial court Conclusion #3 is erroneous is dispositive of this appeal.

Both of Van Zuyen's assignments of error and his entire appellate brief are based on the incorrect assumption that Ordinance No. 561 is valid only if the ordinance sets forth findings demonstrating an emergent condition justifying an emergency declaration. *See* Appellant's Br. at 3, 13-26. Van Zuyen provides no argument and cites no legal authority demonstrating an error regarding the trial court's conclusion that Ordinance No. 561 is valid without any emergency declaration.

Yet, Van Zuyen obviously knew of the County's argument. He briefed the issue to the trial court. CP 516-17. And while the trial court expressly agreed with the County on the issue, Van Zuyen's appellate brief ignores the issue, neglects to assign error to the trial court's conclusion, and fails to provide any argument or citation to any authority demonstrating why the trial court's conclusion is erroneous.

These failures are not something that Van Zuyen may remedy in his reply brief. *See Cowiche Canyon*, 118 Wn.2d at 809; *accord, Joy v. Dept. Labor and Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012) (court refused to review unsupported conclusory assertion in appellant's opening brief, as it was improper to withhold detailed argument and authority until reply brief), *review den.*, 176 Wn.2d 1021 (2013).

As a result of these omissions by Van Zuyen, the court should accept trial court Conclusion #3. *See McKee*, 113 Wn.2d at 705; *accord, Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 475 n.1, 512 P.2d 1126 (1973). Consequently, Van Zuyen's appeal must be denied even if the court were to agree with arguments Van Zuyen does make.

4. The trial court correctly concluded that no emergency declaration was required.

Even if this court were to overlook Van Zuyen's violation of RAP 10.3(a)(6) and elect to review the trial court's ruling that Ordinance No. 561 is valid without any emergency declaration, Van Zuyen's appeal must be denied. The trial court's conclusion is unequivocally correct.

Van Zuyen's argument to the trial court was based entirely on the wrong statute. He argued, and his entire appeal brief is implicitly premised on the assumption, that RCW 36.70.790 governs the adoption of Ordinance No. 561 and that such statute requires "good faith" and findings by the County justifying an emergency declaration. His assumption, however, is not supported by any legal authority. *See* CP 516-17.

The County did not purport to rely on RCW 36.70.790, and that statute has no application to Ordinance No. 561. RCW 36.70.790 was adopted in 1963 and applies to the adoption of interim zoning *maps*, not interim zoning ordinances.

The adoption of interim zoning *ordinances* are expressly authorized by three different statutes adopted in 1992. *See* RCW 35.63.200; RCW 36.70.795; and RCW 36.70A.390. Each of these three statutes sets forth an identical process for the adoption of interim zoning ordinances.⁵ These statutes have been held to provide independent authority for counties to adopt interim zoning ordinances. *See Matson*, 79 Wn. App. at 645-46 (the language “adopted under this section” authorizes enactment of interim zoning ordinances). Because Benton County plans under both chapter 36.70 RCW (Planning Enabling Act) and chapter 36.70A RCW (Growth Management Act), both RCW 36.70.795 and RCW 36.70A.390 authorize Ordinance No. 561 and were expressly identified by the County as authority for the ordinance. CP 275.

While Van Zuyen’s legal argument to the trial court at least acknowledged these statutes, in his appeal he inexplicably fails to cite or to even mention RCW 36.70.795 or RCW 36.70A.390. *See generally* Appellant’s Br. He fails to do so despite the trial court’s explicit ruling that those two statutes govern the adoption of Ordinance No. 561. CP 599, lines 18-20. Instead, Van Zuyen’s appeal arguments are all entirely

⁵ The consistency between these three statutes has been noted by the one appellate court that has considered the validity of an ordinance adopted under any of them. *Matson v. Clark Cnty. Bd. of Comm’rs*, 79 Wn. App. 641, 647 n.1, 904 P.2d 317 (1995). The language differences in the statutes are to simply reflect the different titles of the legislative bodies operating under each statute.

based on a mere assumption that RCW 36.70.790 governs the adoption of Ordinance No. 561. *See* Appellant's Br. at 16-17. Not only is this assumption insufficient to merit appellate review as explained above, but it is unequivocally wrong for several reasons.

First, Washington courts have expressly held that RCW 35.63.200, 36.70.795, and 36.70A.390 do provide independent authority to adopt interim zoning ordinances. *See Matson*, 79 Wn. App. at 644-47. Van Zuyen provides no contrary argument and certainly no legal authority to rebut the *Matson* holding on this issue.⁶

Second, a comparison of the language of RCW 36.70.795 and RCW 36.70A.390 to the language of RCW 36.70.790 demonstrates that RCW 36.70.790 could not possibly provide the authority or set forth the procedural requirements for the adoption of Ordinance No. 561. RCW 36.70.790 applies to "the adoption of any zoning map or amendment or addition thereto," whereas RCW 36.70.795 and RCW 36.70A.390 expressly apply to the adoption of an "interim zoning ordinance." Ordinance No. 561 has nothing to do with a zoning map, so RCW 36.70.790 does not apply. Further, RCW 36.70.790 only authorizes the

⁶ While Van Zuyen offers no argument as to why these statutes do not control in this case, his unsuccessful argument to the trial court merely consisted of a legally unsupported assertion that RCW 36.70.790 governs and that RCW 36.70.795 (no mention of RCW 36.70A.390) "must be read in concert with RCW 36.70.790 . . ." CP 516.

adoption of a temporary zoning map by a legislative body *after it receives a report from a planning commission*. Yet, the County did not receive a report from its Planning Commission prior to adopting the ordinance. Instead, the County followed the explicit legislative process set forth in RCW 36.70.795 and RCW 36.70A.390 and adopted Ordinance No. 561 without a referral from its Planning Commission.

Third, Van Zuyen's argument fails to appreciate that RCW 36.70.795 and RCW 36.70A.390 both contemplate that an interim zoning ordinance may be adopted without any supporting findings and that neither statute requires an emergency declaration. No doubt this is why other local government jurisdictions like the City of Kennewick have adopted interim zoning ordinances to prohibit marijuana production without any emergency declaration. *See e.g.*, CP 593-96.

Fourth, the legislative history of RCW 36.70.795 and RCW 36.70A.390 reflect that the legislature contemplated but rejected the idea of requiring a finding of a "land use emergency" for interim zoning ordinances adopted thereunder.⁷ *See* CP 240-42; 363-90.

Finally, Van Zuyen's reliance on *Matson* is misplaced because the necessity of an emergency declaration was not argued in *Matson*. The

⁷ *See infra* at 26-27.

parties and the court simply assumed that an emergency declaration was required and therefore did not address that issue. *See Matson*, 79 Wn. App. at 643, 650.

For the above reasons, Van Zuyen's conclusory argument to the trial court that RCW 36.70.790 controls is meritless and fails to provide a basis for reversal, even if the court elected to allow Van Zuyen to violate RAP 10.3(a)(6) and unfairly rely on his trial court briefing on this issue.

B. THE TRIAL COURT ALTERNATIVELY AND CORRECTLY HELD THAT ORDINANCE NO. 561 DID SET FORTH FACTS IN SUPPORT OF ITS EMERGENCY DECLARATION THAT WERE NOT FALSE ON THEIR FACE, SO THE ORDINANCE WAS VALID EVEN IF AN EMERGENCY DECLARATION WAS NECESSARY.

Van Zuyen's appeal is based solely on the argument that Ordinance No. 561 does not, as a matter of law, set forth facts supporting an emergency declaration.⁸ However, the trial court correctly concluded that Ordinance No. 561 did set forth facts in support of the emergency declaration, those facts were not false on their face, and the ordinance is therefore valid. *See* CP 599 (Conclusions #1 and #2).

⁸ No material facts were argued to be in dispute at the trial court level, nor has Van Zuyen argued material facts are in dispute in his appeal. *See generally*, Appellant's Br.

1. Interim zoning ordinances are presumed valid and must be given effect unless obviously false on their face.

There is only one reported case setting forth the standard of review of an interim zoning ordinance adopted under any of the three applicable 1992 statutes. That case recognizes that “[m]oratoriums and interim zoning are generally recognized techniques *designed to preserve the status quo* so that new . . . regulations will not be rendered moot by intervening development.” *Matson*, 79 Wn. App at 644 (emphasis added) (denying challenge to interim land use ordinances adopted under RCW 35.63.200 and RCW 36.70A.390). Due to the temporary and expedient nature of these interim regulations, the court in *Matson* held that judicial review of interim zoning ordinances is to be particularly “deferential.” *Id.* at 644, citing Richard L. Settle, *Washington Land Use and Environmental Law and Practice* § 2.13 at 73 (1983). As such, interim zoning ordinances are generally presumed valid. See *McQuillin Mun. Corp.*, § 25.64 (3rd Ed. 1999).

In *Matson*, Clark County declared an emergency without any public hearings and adopted two interim ordinances – one to amend its zoning code and one to amend its subdivision code. 79 Wn. App. at 643. Clark County’s ordinances stated that the “[e]mergency adoption of these ordinances was necessary . . . because during the normal adoption period

property owners would propose developments and obtain vested rights, thereby undermining the effectiveness of the [permanent] regulations.” *Id.* The appellant argued that the trial court erred in deferring to Clark County’s determination that an emergency existed rather than making an independent determination. *Id.* at 649. Clark County did not raise the issue of whether an emergency declaration was even required. *See generally, Matson, 79 Wn. App. 641.*

The court’s review of the emergency declarations began with a recognition that the court “may conduct only a very limited review” of an interim zoning ordinance and any associated legislative emergency declaration. 79 Wn. App. at 649. The court stated that so long as a statement of the underlying emergent facts is given, 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.””’” *Id.* at 649, quoting *City of Federal Way v. King Cnty.*, 62 Wn. App. 530, 536, 815 P.2d 790 (1991). Consequently, the appeals court held that the trial court “did not err in refusing to inquire into the facts supporting these two emergency ordinances” and that the ordinances were valid. *Matson, 79 Wn. App. at 650.*

Van Zuyen cites *Matson*, but fails to mention that the court *upheld* the interim zoning ordinances and *rejected* the argument that the trial court

erred in deferring to the County's emergency determination. Appellant's Br. at 16; *see also*, 79 Wn. App. at 649-50. The court reasoned that the ordinances in question did more than merely conclusively state "there was an emergency," but rather they set forth facts explaining Clark County's conclusion that an emergent situation justified the immediate effectiveness of the ordinances. 79 Wn. App. at 650 (the interim ordinance stated, *inter alia*, it "was necessary to prevent further developments in anticipation of proposed zoning changes").

Under *Matson*, the review of Ordinance No. 561 is very limited, and the court must presume Ordinance No. 561 is valid unless Van Zuyen demonstrates that the facts upon which the County's emergency declaration is based are obviously false. 79 Wn. App. at 649. Van Zuyen has not met and cannot meet that burden.

The County made numerous findings when it adopted Ordinance No. 561, despite not being required to do so under RCW 36.70.795 and RCW 36.70A.390. *See infra* at 26-27. And Van Zuyen has never alleged that any of the County's findings are false. Consequently, the trial court correctly ruled that Ordinance No. 561 did set forth facts explaining the County's emergency declaration and that no evidence was presented indicating that the statement of emergent facts was false on its face. CP

599, lines 4-5 and 14-16. Thus, the trial court's ruling that Ordinance No. 561 is valid must be affirmed.

2. Van Zuyen's false pretenses argument fails to appreciate the purpose of interim zoning ordinances.

Van Zuyen's argument that there are no emergent facts justifying the adoption of Ordinance No. 561 is premised on the fallacy that the only legitimate "emergent fact" would be a finding of an existing actual harm caused by an existing marijuana grow operation in the County's RL 5 Zone. *See* Appellant's Br. at 15. This argument reflects an inherent misunderstanding of the acknowledged purpose of interim zoning ordinances.

Permanent zoning regulations must undergo a lengthy legislative process that generally takes months to complete. *See* RCW 36.70.580-.640; RCW 36.70A.106. During that lengthy period of time, especially in Washington State with its lenient vesting doctrine,⁹ developers could flood a local government with applications to establish vested rights and subsequently establish non-conforming uses, which the State Supreme Court has recognized are inimical to the public interest.¹⁰ Consequently, a

⁹ "Washington's [vested rights] rule is the minority rule, and it offers more protection of development rights than the rule generally applied in other jurisdictions." *Abbey Rd. Grp., LLC v. Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009).

¹⁰ According to our Supreme Court: "The practical effect of recognizing a vested right is to potentially sanction a new nonconforming use. 'A proposed development which does

commonly accepted purpose of interim zoning ordinances is to prevent such situations by preserving the status quo so that subsequently adopted permanent ordinances are not rendered moot during their consideration. *See Matson*, 79 Wn. App. 648-49; *accord*, CP 363 (FINAL B.REP. on ESSB 5727, 52nd Leg., Reg. Sess. (Wash. 1992)).

To facilitate the use of interim zoning ordinances, in 1992 the legislature adopted RCW 36.70.795, RCW 36.70A.390, and RCW 35.63.200. These statutes explicitly outline the required legislative process for the adoption of interim zoning ordinances and provide local governments a tool “to preserve the status quo so that new . . . regulations will not be rendered moot by intervening development.” *Matson*, 79 Wn. App. at 644. This preservation of the status quo was precisely Clark County’s motivation behind its interim ordinances that were upheld in *Matson*. *See* 79 Wn. App. at 643, 650.

In fact, the legislature deemed the immediate adoption of interim zoning ordinances and the preservation of the status quo so important that it elected to authorize the adoption of such ordinances *without any findings of fact and without any prior public hearing*. *See* RCW

not conform to the newly adopted laws is, by definition, inimical to the public interest embodied in those laws.” Abbey Rd., 167 Wn.2d at 251 (emphasis added), *quoting Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) (a vested right too easily granted subverts the public interest).

36.70.795 and RCW 36.70A.390 (if no findings of fact are adopted when an interim zoning ordinance is initially adopted, such findings must be adopted immediately after the public hearing that must be held within 60 days after adoption). Further, the legislature expressly rejected a proposal to require that a “land use emergency” be found prior to the adoption of an interim zoning ordinance. *Compare* CP 374-90 (Senate Bill 5727, 52nd Leg., Reg. Sess. (Wash. 1991)), *with* CP 366-70 (Engrossed Subst. Senate Bill 5727, 52nd Leg., Reg. Sess. (Wash. 1991)).

Van Zuyen, however, ignores the purpose of interim zoning ordinances like Ordinance No. 561 when he argues that Ordinance No. 561 is invalid because it does not include any findings of past harm caused by existing marijuana growers to prove such use is incompatible with nearby residential uses. *See* Appellant’s Br. at 15, 19. His unsupported legal argument is belied not only by the accepted purpose of interim zoning ordinances to preserve the status quo, but also by the fact that the authorizing statutes do not require *any* findings when an interim zoning ordinance is initially adopted.

3. Contrary to Van Zuyen’s assertion, Ordinance No. 561 does set forth emergent facts justifying the emergency declaration and the ordinance adoption.

Although not statutorily required to declare an emergency or adopt *any* findings whatsoever prior to adopting Ordinance No. 561, the County did believe an emergent situation existed and set forth detailed legislative findings for the sake of transparency and to explain its action. As the trial court noted, the ordinance’s emergency declaration was supported by the County’s finding that “non-emergent options would not be adequate to prevent development that could be incompatible with permanent code provisions that were going to be considered.” CP 599, lines 5-8. The trial court’s ruling is substantiated by the findings set forth in Ordinance No. 561, which include the following:

WHEREAS, the County has decided that it is appropriate to prevent additional marijuana growing operations in the RL5 District that allegedly are incompatible with surrounding uses during the period of time necessary for the County to consider permanent zoning amendments; and,

WHEREAS, to accomplish that objective and prevent new growing operations from vesting or commencing in areas where they are incompatible with surrounding uses while the County completes its investigation, the County desires to adopt an immediate interim zoning ordinance . . . to disallow the growing of marijuana . . . in the RL5 District; and,

. . . .
SECTION 1. Findings. . . .

....
(b) . . . [T]he increased level of [grow] operations has generated significant citizen concerns about the impact that such operations can have in a residential neighborhood and on uses in general allowed in the RL5 District. Additional growing operations in residential neighborhoods in the RL5 District would exacerbate any valid concerns about the incompatibility of the use.

....
(d) It is in the best interest of Benton County to prohibit new marijuana production operations in the RL5 zone at this time, pending further consideration and public engagement on potential long-term regulatory changes.

....
(h) The intent of this Ordinance is to temporarily prevent potential new marijuana production operations

SECTION 2. Purpose. The purpose of this interim zoning ordinance is to allow the County to continue to analyze the issue of the compatibility of marijuana production with the prevalent uses within the RL5 District . . . without the possibility that additional . . . operations will commence or that operators will flood the County with applications for permits for marijuana production buildings allowed under the County's existing zoning. The County will be examining whether marijuana production should be permitted . . . or prohibited . . . , and additional time is needed to fully explore the issue.

....
SECTION 7. Declaration of Emergency. The Board of County Commissioners hereby finds, concludes and declares that an emergency exists necessitating that this Ordinance takes effect immediately upon passage by the Board of County Commissioners in order 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 this immediate interim zoning amendment to BCC 11.16A.030, marijuana production operations could commence and/or building applications

for structures in which marijuana production would operate could vest, leading to development that could be incompatible with the code provisions eventually adopted by the County. Therefore, the interim zoning must be imposed as an emergency measure to protect the public health, safety and welfare, and to prevent the possibility that operators will commence production operations or flood the County with applications for permits for production buildings under the County's existing zoning.

CP 277-79; 281.

These findings undeniably state that Ordinance No. 561 was adopted for the generally accepted purpose that interim zoning ordinances serve, to preserve the status quo by not allowing any additional marijuana growing operations in the RL 5 Zone while a possible permanent zoning amendment could be vetted and considered through the traditional legislative process. Consequently, Van Zuyen is correct when he states that Ordinance No. 561 was intended to prevent him and others like him from commencing operations and establishing non-conforming uses during the lengthy legislative process necessary to consider a permanent ordinance. This fact was not hidden by the County. The ordinance was not based on any "false pretense" as Van Zuyen argues. Nor was the ordinance based on facts false on their face, as required by *Matson* in order for this court to invalidate Ordinance No. 561.

Rather, over the course of several weeks numerous citizens raised a plethora of concerns about whether marijuana grows were compatible

with rural residential neighborhoods, schools, and other uses allowed within the RL 5 Zone. *See* CP 407. Van Zuyen admits these concerns were raised. Appellant's Br. at 17. But, he disingenuously argues that the expression of these concerns to the County were not "emergent facts." *Id.* at 16-17.

"Emergent" means "calling for prompt action." *Merriam-Webster Online Dictionary*. And Van Zuyen admits that a "fact" is "something that truly exists or happens; something that has actual existence." Appellant's Br. at 17. Consequently, "emergent facts" are those things that have happened that call for prompt action. The flaw in Van Zuyen's logic is his failure to appreciate that the expression of concerns by numerous citizens is something that actually happened and is therefore a fact. Further, Ordinance No. 561 states that the County believed that the incompatibility concerns may be valid and might result in increased risks to the health and safety of residents as well as result in an increased need for law enforcement services. CP 277. That the County held those beliefs is also a "fact" that must be accepted by the court, as it is not false on its face. *Matson*, 79 Wn. App. at 649. The County also believed that allowing new growing operations in the many residential neighborhoods within the RL 5 Zone "would exacerbate any valid concerns about the incompatibility" CP 278 (§1(b)). Again, that such belief was held by

the County is an uncontroverted fact. And the County found that the adoption of Ordinance No. 561 would “prohibit new . . . production operations . . . from commencing in the RL 5 District while regulations to promote compatibility are considered.” CP 278 (§1(c)). That too is an undisputed fact. Finally, the County made a legislative determination that these “facts” required prompt action. CP 281 (§7). Consequently, based on these “emergent facts” set forth in Ordinance No. 561, the County adopted the ordinance and took immediate action to prevent new growing operations from vesting or commencing while the County completed its consideration of more restrictive permanent zoning rules.

It defies logic for Van Zuyen to argue Ordinance No. 561 does not set forth events that happened that the County believed called for prompt action. The County believed that without immediate adoption, any number of potential growers, including but not limited to Van Zuyen, could have submitted applications over the course of the next few months to obtain vested rights to establish non-conforming uses. Such non-conforming uses would have been inimical to the public interest and render subsequent permanent zoning changes less effective or possibly moot.

When reviewing a legally required emergency declaration, the court’s role is simply to determine if emergent facts were stated and not to

independently evaluate whether it agrees that prompt action was necessary. *See Matson*, 79 Wn. App. at 645-50. The trial court correctly concluded emergent facts were stated, and its decision must be affirmed for that reason alone.

4. While a finding of actual harm was not required at the time of adoption of Ordinance No. 561, the public hearing process subsequently validated the citizens' concerns of harm and the County's adoption of Ordinance No. 561.

As mentioned above, Van Zuyen argues that Ordinance No. 561 should be invalidated because it is “void of any specific facts which demonstrate[] an emergency related to harm caused by existing marijuana processing or production operations in the County’s RL-5 zoning designation.” Appellant’s Br. at 15. That argument is not supported by any legal authority, however.

Moreover, Van Zuyen’s assertion is undeniably inconsistent with the governing statutes, RCW 36.70.795 and RCW 36.70A.390. They both expressly contemplate that counties may adopt interim zoning ordinances without *any* findings. So, when Ordinance No. 561 was adopted, no findings whatsoever were required. For reasons described above, it is logical that those statutes do not require findings or even reference an emergency declaration. The only statutory requirement is that findings justifying an interim ordinance be adopted at the conclusion of the public

hearing that must be held within 60 days *after the interim ordinance is adopted*.¹¹ See RCW 36.70.795; RCW 36.70A.390.

Furthermore, as also explained above, the only reported decision addressing a challenge to interim zoning ordinances adopted under either RCW 36.70.795 or RCW 36.70A.390 upheld those ordinances, which were adopted for the precisely the same reason as Ordinance No. 561 – to preserve the status quo pending consideration of permanent ordinances.¹² 79 Wn. App. at 643, 650.

Moreover, Van Zuyen’s assertion that Ordinance No. 561 was not adopted in “good faith” lacks credibility given that the concerns prompting its adoption were found to be valid by the Board just a few weeks later. After receiving written or verbal testimony from over 60 people, the Board

¹¹ This statutory framework is logical given that the purpose of interim zoning ordinances is to prevent permanent regulations from being rendered moot by intervening development while public hearings are held to enable local governments to assess the validity of concerns and determine whether permanent ordinances are appropriate. See 79 Wn. App. at 644. If, as Van Zuyen argues, the factual determinations on which to base a decision to permanently amend a zoning ordinance have to be determined *before* an interim zoning ordinance is adopted, then the subsequent public hearing required under RCW 36.70.795 and RCW 36.70A.390, as well as the public hearing required under RCW 36.70.580 and .630 prior to the adoption of a permanent amendment would be essentially superfluous.

¹² It is true that the County did not determine whether the citizen’s concerns were actually valid prior to the adoption of Ordinance No. 561, while Clark County in *Matson* arguably had already determined that the alleged incompatibility did in fact exist. See 79 Wn. App. at 650. However, the court in *Matson* did not state or even imply that a finding of an actual existing incompatibility was necessary in order for the interim zoning ordinances to be adopted. The court clearly noted that the interim zoning ordinances were supported by Clark County’s finding that the interim ordinances were necessary to prevent further development while permanent regulations were considered. *Id.*

expressly found on June 16, 2015, that the citizens' concerns about the problems with marijuana grows near residential uses were *valid*.

Specifically, the Board found:

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 growing marijuana, the increased traffic generated by a 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*

. . . .
10. The Board finds that the Washington State Liquor Control Board continues to process permits for production operations in the RL 5 District. The Board finds that to prevent new growing operations from vesting or commencing in areas where they may be incompatible with surrounding uses while the County completes its investigation and considers a permanent amendment to the RL 5 District, the County should maintain the interim amendment

11. The Board . . . 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 Without the interim amendment . . . , marijuana production operations could commence and/or additional building applications for structures in which marijuana production would operation could vest, leading to development that could be incompatible with the permanent code provisions eventually adopted by the County. Therefore, the interim amendment must continue as an emergency measure to protect the public health, safety and welfare, to prevent

additional production operations from commencing and to prevent a possible flood of building applications for permits for production related buildings.

CP 461-62 (§2(b)(7), (10), and (11)) (emphasis added).

Van Zuyen simply refuses to acknowledge that after a full blown public hearing, which he did not even participate in, the County concluded that the concerns about criminal activity, foul smells, poor aesthetics, increased traffic, and pesticide dangers associated with marijuana grows were *valid*. Given his failure to acknowledge this finding, he understandably also fails to acknowledge the ample evidence presented to the County to support it. *See supra* at 4-5.

For instance, testimony was presented that marijuana growers in both Benton and Franklin Counties have fired shots at would-be thieves, that the security fences associated with grows were aesthetically displeasing, that odors had been problematic for neighbors, and that a school administrator opined that grows should not be located near schools. *See, e.g.*, CP 418-19; 421; 423-47; 455.

Based on this evidence, it is not surprising that the County concluded, pursuant to the legislative process required under RCW 36.70.795 and RCW 36.70A.390, that there were valid incompatibility problems between marijuana growing and rural residential uses. Consequently, Ordinance No. 562 was adopted to continue the interim ban

on marijuana production in the RL 5 Zone pending processing of a permanent ordinance. CP 457. Van Zuyen's innuendo that the interim zoning ordinance was a sham and no incompatibility problems were found to exist is simply false and not supported by the record.

C. THERE ARE NO REPORTED CASES WHERE AN INTERIM ZONING ORDINANCE ADOPTED UNDER RCW 36.70.795, RCW 36.70A.390, OR RCW 35.63.200 HAS BEEN INVALIDATED.

Van Zuyen inaccurately implies that interim zoning ordinances adopted under RCW 36.70.795, RCW 36.70A.390, or RCW 35.63.200 have been invalidated by the courts. Appellant's Br. at 16. That is not accurate. *Matson* is the only case addressing the validity of an ordinance adopted under any of these three statutes, and the trial and appellate courts both upheld the two ordinances in question. *See* 79 Wn. App. at 650.

In *Matson*, the court rejected all four arguments made by the plaintiffs, three of which are also germane to Van Zuyen's appeal. The court rejected the argument that RCW 35.63.200 and RCW 36.70A.390 did not independently authorize the adoption of interim zoning ordinances. *Id.* at 644-46. The court also rejected the argument that an immediately effective interim zoning ordinance violates the vested rights doctrine. *Id.* at 648-49 (interim zoning ordinances cannot serve their purpose in a state with permissive vested right doctrine if their adoption is subject to time-

consuming notice and hearing requirements). And the court rejected the argument that the judiciary should independently determine whether an emergency justifies an interim zoning ordinance. *Id.* at 649-50.

Ordinance No. 561 was adopted for the same reason as the interim zoning ordinances in *Matson*. Contrary to the perception Van Zuyen tries to create, *Matson* undermines rather than supports his arguments. Both Clark and Benton counties wanted to consider permanent changes to zoning ordinances due to incompatibility issues. So, both counties adopted interim zoning ordinances to prevent developers from obtaining vested rights to propagate additional non-conforming uses pending the legislative process necessary to permanently amend the counties' zoning codes. In Benton County, the RL 5 Zone is where the incompatibility issues were identified and the area where marijuana growers were most looking to operate. CP 411.

Given the extremely deferential standard of review of a legislative decision to adopt an interim zoning ordinance designed to preserve the status quo while the traditional legislative process for a permanent zoning ordinance runs its course, it is not surprising that that no appellate court has invalidated an interim zoning ordinance in the 24 years since RCW 36.70.795 and RCW 36.70A.390 were adopted. Due to the lack of any

such case, Van Zuyen instead cites to cases that have nothing to do with these statutes or ordinances adopted thereunder.

Van Zuyen first cites a case where a court struck down an emergency gambling tax ordinance that was passed pursuant to a city charter and not pursuant to RCW 36.70.795 or RCW 36.70A.390. Appellant's Br. at 18-19. In *Swartout*, an emergency tax ordinance took effect immediately, without any explanation or justification of any emergency although such was required under the applicable city charter and the referendum provision of the state constitution. *Swartout v. City of Spokane*, 21 Wn. App. 665, 668-70, 586 P.2d 135 (1978), *review den.*, 91 Wn.2d. 1023 (1979).

Swartout is notably distinct both factually and legally from the County's case. First, a city charter required an emergency finding in *Swartout*. That case had nothing to do with interim zoning ordinances or the statutes authorizing these ordinances. Second, the city council's actions in that case were nothing like the County's actions with respect to Ordinance No. 561. In *Swartout*, the council's ordinance merely conclusively stated "[a]n urgency and emergency is hereby declared to exist . . . consisting of the need to provide funds . . ." 21 Wn. App. at 668. Consequently, the court invalidated the ordinance after it held that:

a) the city charter required some statement of facts supporting the

emergency declaration; and b) the council's action was not in response to an emergency but rather an attempt to circumvent the citizens' referendum rights. *See* 21 Wn. App. at 668-72.

The "emergent facts" expressed in Ordinance No. 561 are in stark contrast to the city council's single, conclusory statement in *Swartout*. The County adopted numerous findings and set forth in painstaking detail why the interim zoning ordinance should take effect immediately and why a declaration of emergency was appropriate. In fact, Van Zuyen's own conduct in rushing to submit an incomplete application shortly before the ordinance was adopted is a perfect example of why Ordinance No. 561 appropriately was made effective immediately.

In another futile attempt to portray his appeal as supported by some semblance of legal authority, Van Zuyen cites three cases where generalized fears or "concerns" were held not to be sufficient evidence to support a cause of action. Appellant's Br. at 25-26. The *Ferry* case, however, is nearly 100 years old, pertains to the evidence needed to support a nuisance claim, and pre-dates the statutes relied upon by the County by over 70 years. *Ferry v. City of Seattle*, 116 Wash. 648, 203 P. 40 (1922). The facts and law involved in *Ferry* have no bearing on this appeal.

The other two cases cited by Van Zuyen are ones in which community fears were held to be insufficient evidence to justify quasi-judicial decisions to deny special/conditional use permits. *See Wash. State Dept. of Corrections v. Kennewick*, 86 Wn. App 521, 937 P.2d 1119 (1997), *review den.*, 134 Wn.2d 1002 (1998); *Sunderland Family Treatment Servs. v. Pasco*, 127 Wn.2d 782, 903 P.2d 986 (1995). Those cases, however, are entirely irrelevant to Ordinance No. 561. They pertain to quasi-judicial findings and decisions to deny conditional use permit applications for unpopular activities. The cases have nothing to do with a legislative decision to adopt an interim zoning ordinance or the requirements of RCW 36.70.795 and RCW 36.70A.390.

D. VAN ZUYEN'S APPEAL IS MOOT.

Van Zuyen, or more accurately, Peyote Canyon, LLC, filed a land use petition with the trial court along with Van Zuyen's complaint for declaratory relief. CP 612-27. The land use petition, which sought an order requiring the approval of an application for a building permit to remodel a structure to facilitate a marijuana grow, was dismissed *with prejudice* by the trial court. CP 602-04. A final judgment was entered and the order has not been appealed. *See* CP 605-06; 631-32. Van Zuyen likely elected not to appeal that order, because his argument was clearly

meritless and he would be ordered to pay the County's attorneys' fees if he did not prevail. *See* RCW 4.84.370.

As a result, the denial of Van Zuyen's building permit application is unequivocally final. *See Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015) (trial court orders to which an appellant fails to assign error or support with legal argument are deemed final) *review den.*, 184 Wn.2d 1011 (2015). Van Zuyen, however, for some reason is under the mistaken impression that if Ordinance No. 561 were invalidated, then Peyote Canyon's 2015 building permit application would magically arise from the ashes and vest so as to allow him to operate a marijuana grow in the RL 5 Zone. *See* Appellant's Br. at 13, 27. That simply is not true.

His building permit application was denied. CP 333. That denial was appealed to Superior Court. CP 612-27. The Superior Court denied that appeal. CP 602-04. Van Zuyen's failure to appeal that ruling means the trial court's decision is final, and the denial of a 2015 building permit application is no longer open for review. *See Chelan Cnty. v. Nykreim*, 146 Wn.2d. 904, 925-26, 52 P.3d 1 (2002) (decision on application, despite its questionable legality, is final once opportunity to challenge it passes). Thus, even if the court were to invalidate Ordinance No. 561,

Van Zuyen's 2015 building permit application would not "vest" so as to allow him to grow marijuana on his property as a non-conforming use.

If Van Zuyen still wants to remodel the building in question, he will need to submit a new building permit application. That new application would be reviewed under the laws in effect at the time the new application is submitted, which would include the permanent zoning ordinance adopted by the County in October 2015 that prohibits marijuana grows in the RL 5 Zone. Thus, if Van Zuyen were to submit a new building permit application, it would necessarily be denied regardless of the validity or invalidity of Ordinance No. 561.

Consequently, Van Zuyen's attempt to invalidate Ordinance No. 561, which was repealed on October 27, 2015,¹³ serves no purpose. This appeal is moot¹⁴ and should be dismissed for that reason. *See, e.g., State v. Deskins*, 180 Wn.2d 68, 80, 322 P.3d 780 (2014) (appeal is moot and should be dismissed when relief sought cannot be provided); *see also, Nykreim*, 146 Wn.2d at 925-26 (declaratory action dismissed when underlying land use decision not subject to review under LUPA).

¹³ CP 484.

¹⁴ Not only would the invalidation of Ordinance No. 561 afford Van Zuyen no relief regarding his denied building permit application, but Van Zuyen's claim for damages cannot be based on any invalidation of Ordinance No. 561. *See* RCW 64.40.020(4).

E. JERRY VAN ZUYEN IS THE SOLE APPELLANT.

One final matter for the court is the identity of the actual appellant. Counsel has attempted to identify both Van Zuyen and Peyote Canyon, LLC, as appellants. *See* Appellant's Br. (cover sheet). A review of the trial court record, however, demonstrates that Peyote Canyon is not and cannot be an independent appellant.

The action was commenced in the trial court with "Jerry Van Zuyen, d/b/a Peyote Canyon, LLC" identified as the "Petitioner/Plaintiff." CP 612. The acronym "d/b/a" stands for "doing business as." When a natural person's name is followed by "d/b/a," the language after "d/b/a" is "merely descriptive of the person [named prior to the d/b/a designation] who does business under some other name." *See, e.g., Pinkerton's, Inc. v. Superior Court*, 49 Cal. App. 4th 1342, 1348, 57 Cal. Rptr. 2d 356 (1996). If the language following the "d/b/a" designation is an actual legal entity, the reference means that the natural person named before the "d/b/a" language is acting in his or her personal capacity and therefore undertaking personal liability. *See* 49 Cal. App. 4th at 1349; *accord, Pederson v. Leahy*, 397 Mass. 689, 691, 493 N.E.2d 486 (Mass. 1986).

The trial court dismissed Van Zuyen as a co-petitioner under LUPA. CP 629. It also determined that the sole plaintiff with respect to

the complaint for declaratory judgment was Jerry Van Zuyen, d/b/a Peyote Canyon, LLC. CP 629-30. The only matter currently under review is the dismissal of the complaint for declaratory judgment. CP 605-06. As a result, the only appropriate appellant in this matter is the sole plaintiff that sought declaratory relief, i.e., Jerry Van Zuyen, d/b/a Peyote Canyon, LLC. Peyote Canyon was determined by the trial court to only be an independent petitioner with respect to the land use petition. CP 629-30. As the land use petition was not appealed, Peyote Canyon is improperly identified in the appellant's brief as a second, independent appellant. There are not two independent appellants. The court should address this and hold that the natural person of Jerry Van Zuyen, who sometimes does business as Peyote Canyon, is the sole appellant.

IV. CONCLUSION

This appeal must be denied for several independent reasons. First, Van Zuyen failed to assign error to or present legal argument regarding the trial court's dispositive ruling that Ordinance No. 561 is valid without any emergency declaration. Second, even if an emergency declaration were legally required, such a declaration was made and was supported by statements of emergent facts regarding the need to preserve the status quo while permanent regulations were considered. Third, those findings are not false on their face, so the court is obligated to accept them and uphold

the ordinance. Fourth, the appeal is moot. Given Van Zuyen's failure to appeal the dismissal of his land use petition, he cannot obtain the building permit he desires even if Ordinance No. 561 were declared invalid.

DATED this day, November 23, 2016.

ANDY MILLER
Prosecuting Attorney

A handwritten signature in cursive script that reads "Ryan K. Brown". The signature is written in black ink and is positioned above a horizontal line.

RYAN K. BROWN,
Deputy Prosecuting Attorney
Bar No. 19837
Ofc Id No. 91004

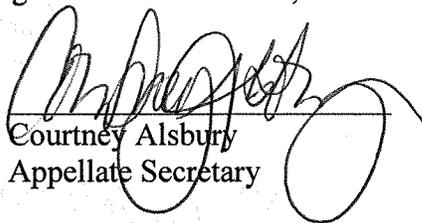
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

John S. Ziobro,
Telquist Ziobro Mcmillen Clare, PLLC
1321 Columbia Park Trail
Richland, WA 99352

U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on November 23, 2016.


Courtney Alsbury
Appellate Secretary