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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

No. 355446

SAN JUAN SUN GROWN, LLC, a Washington limited liability company;
and ALEX KWON, an individual;

Appellants,

v.

CHELAN COUNTY, a municipal corporation.

Respondent.

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii.
1. INTRODUCTION	1
2. ASSIGNMENT OF ERRORS	2
2.1 Assignment of Errors	2
2.2 Issues Pertaining to Assignment of Errors	3
3. STATEMENT OF CASE	4
4. STANDARD OF REVIEW	15
5. ARGUMENT.....	16
5.1 Chelan County Bears The Burden of Proof When Alleging Land Use Violations.	16
5.2 The Hearing Examiner’s Conclusions of Law Lack Citations And Must Be Amended To Be Useful To The Parties And The Court.	21
5.3 San Juan’s Use Of The Property For Cannabis Production And Processing Was Lawfully Established.	23
5.3.1 San Juan vested the right to build and operate a cannabis production and processing facility despite the moratorium implemented through Resolution 2014.	25
5.3.2 San Juan has nonconforming rights to continue to operate through a reasonable amortization period.	29
5.3.3 Resolution 2016-14 cannot be applied retroactively to extinguish San Juan’s vested rights.	32
5.4 San Juan’s Temporary Growing Structures Don’t Require Building Permits.	34

5.5	San Juan Has A Lawful Right To Request A Dimensional Variance For The Location Of It's Fence.....	39
6.	CONCLUSION	40

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Allenbach v. City of Tukwila</i> , 101 Wash.2d 193, 676 P.2d 473 (1984)	26
<i>Chelan County v. Nykreim</i> , 146 Wn.2d 904, 929, 52 P.3d 1 (2002)	27, 28
<i>Citizens to Preserve Pioneer Park, LLC vs. City of Mercer Island</i> , 106 Wn.App.461, 473, 24 P.3d 1079 (2001)	16
<i>City of Redmond v. Cent. Puget Sound GMHB</i> , 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)	16
<i>Craven v. City of Tacoma</i> , 63 Wash.2d 23, 385 P.2d 372 (1963)	27
<i>First Pioneer Trading v. Pierce County</i> , 146 Wash.App. 606, 614, 191 P.3d 928 (2008)	30, 32
<i>Gillis v. King County</i> , 42 Wash.2d 373, 378, 255 P.2d 546 (1953)	33
<i>Isla Verde Int'l Holdings Inc. v. City of Camas</i> , 146 Wash.2d, 740, 751, 49 P.3d 867 (2002)	16
<i>Jefferson County v. Lakeside Industries</i> , 106 Wash.App. 380, 385, 23 P.3d 542 (2001)	30
<i>Johnston v. Beneficial Management Corp.</i> , 85 Wash.2d 637, 641, 538 P.2d 510 (1975)	33
<i>Lakeside Industries v. Thurston County</i> , 119 Wash.App. 886, 894, 83 P.3d 433 (2004)	22
<i>Lau v. Nelson</i> , 92 Wash.2d 823, 826, 601 P.2d 527 (1979)	33

<i>Macumber v. Shafer</i> , 96 Wash.2d 568, 570, 637 P.2d 645 (1981)	33
<i>Mission Springs, Inc. v. City of Spokane</i> , 134 Wash.2d 947, 960–61, 954 P.2d 250 (1998)	26
<i>Northend Cinema vs. Seattle</i> , 90 Wn.2d 709, 720, 585 P.2d 1153 (1978)	34
<i>Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc.</i> , 151 Wn.2d 279, 288, 87 P.3d 1176 (2004)	15
<i>Poenix Development, Inc. v. City of Woodinville</i> , 171 Wash.2d 820, 256 P.3d 820 (2011)	22
<i>Rhod–A–Zalea & 35th, Inc. v. Snohomish County</i> , 36 Wash.2d 1, 6, 959 P.2d 1024 (1998)	29
<i>State ex rel. Shannon v. Sponburgh</i> , 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965)	42
<i>Van Sant v. City of Everett</i> , 69 Wash.App. 641, 648, 849 P.2d 1276 (1993)	30
<i>Washington State Dept. of Transp. v. City of Seattle</i> , 1 92 Wash.App. 824, 368 P.3d 251 (2016)	23
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wash.2d 169, 175, 4 P.3d 123 (2000)	27
<i>West Main Associates v. City of Bellevue</i> , 106 Wash. 2d 47, 50-51, 720 P.2d 782 (1986)	26

STATUTES

Page

RCW 36.70C.130(1)	15
RCW 36.70C.130(1)(b)(c)(d)	15

RCW 36.70C.130(1)(b)	16, 17
RCW 36.70C.130 (1)(c)	16
RCW 7.80.005	19
RCW 7.80.050	20
RCW 7.80.100(3)	20
RCW 36.70C.130	22, 23, 41
RCW 19.27.065	35
RCW 19.27.015	35
RCW 19.27.031	37

ADMINISTRATIVE AUTHORITIES

Page

Chelan County Code 16.04.010	18
Chelan County Code 16.18.010	18
Chelan County Code 16.18.020	18
Chelan County Code 16.06.070	18
Chelan County Code 11.30.020(6)(B).....	40
Kittitas County Code 18.02.040(b)(vii).....	18
Snohomish County Code 30.85.120	19
King County Code 23.20.080(D)	19
Pierce County Code 1.16.100(C).....	19
Chelan County Res. 2014-5	26
Chelan County Res. 2014-38	5, 26
Chelan County Res. 2015-94	6, 9, 24, 25, 28, 30
Chelan County Res. 2016-14	3, 10, 11, 14, 24, 25, 31, 32, 33, 34, 41
WAC 172-121-123	22
WAC 51-50-007	35, 37, 38
WAC 51-04-060	37

OTHER CITATIONS

Page

Rules for Enforcement of Lawyer Conduct, ELC 10.14(b)..... 20

Rules Of Procedure For Proceedings Before
The Chelan County Hearing Examiner, 1.23(B)(3)..... 21, 23

WA State Building Code Council Interpretation No. 15-04 34, 37

Black's Law Dictionary 21

1. INTRODUCTION

Chelan County expressly authorized appellant San Juan Sun Grown (“San Juan”) to produce and process cannabis on real property located at 625 E. Edgemont Dr., Wenatchee, WA (the “Property”). Specifically, the County approved of the transfer of San Juan’s State of Washington Tier III Cannabis License from San Juan County to the Property, issued a building permit for a structure that it knew was to be used to produce and process cannabis, and continued to issue various other construction permits for the development of the Property (including the issuance of permits after the ban on all cannabis related business imposed by Resolution 2016-14).

Despite Chelan County’s September 29, 2015 moratorium against the siting cannabis facilities and acceptance of new cannabis-related construction permits being in effect, the County nonetheless authorized San Juan to move forward with the development of its site because the County expressly believed that San Juan had initiated its move to the Property before the moratorium went into effect.

Notwithstanding these prior regulatory approvals, and after San Juan had invested significant time, money and energy into the Property,

Chelan County reversed course and attempted to undo land use decisions already made by delivering a Notice and Order of Abatement (the “Notice and Order”) to San Juan asserting various land use violations – alleging, among other claims, that the Chelan County Code did not allow San Juan to operate on the Property at all.

Chelan County’s legal positions defy Washington law, which does not allow it to explicitly authorize a land use for the Property, approve building and construction permits, and then terminate that use without observing San Juan’s established nonconforming and vested rights to continue to use the Property through a reasonable amortization period.

2. ASSIGNMENT OF ERRORS

2.1 Assignment of Errors

1. The Hearing Examiner erred by holding that the Appellants had the burden of proof in the appeal of the County’s enforcement action.
2. The Hearing Examiner erred by failing to include citations or analysis to legal precedence in his Conclusions of Law.
3. The Hearing Examiner erred by failing to recognize and acknowledge San Juan’s nonconforming rights.

4. The Hearing Examiner erred by failing to recognize and acknowledge San Juan's vested rights.
5. The Hearing Examiner erred by failing to recognize and acknowledge the fact that Appellants growing structures don't require permits and/or the County has no permitting process for such a structure.
6. The Hearing Examiner erred by failing to recognize and acknowledge the lawful right of Appellants to request a variance for its fence alignment.

2.2 Issues Pertaining to Assignment of Errors

1. Whether the Chelan County Hearing Examiner inappropriately placed the burden of proof on Appellants to disprove the County's claims contained in the Notice and Order.
2. Whether the Chelan County Hearing Examiner's Conclusions of Law need to cite legal authority.
3. Whether Appellants established vested rights by the filing of a complete building permit application.
4. Whether Appellants established nonconforming rights through their activities on the Property prior to the enactment of Resolution 2016-14.
5. Whether Resolution 2016-14 may be applied retroactively to extinguish Appellants' vested rights.

6. Whether temporary growing structures require a building permit under Chelan County Code.
7. Whether Appellants have a right to submit a dimensional variance request.

3. STATEMENT OF THE CASE

On November 6, 2012, Initiative-502 passed with 55.7% approval in Washington State (51.9% approval in Chelan County), legalizing possession and private consumption of non-medical cannabis and establishing a licensing system for the production, processing, and retailing of cannabis for recreational use. Initiative Measure 502, Wash. Laws of 2013, ch. 3 (codified as amended as part of RCW 69.50). The Washington State Liquor and Cannabis Board (the “WSLCB”) subsequently adopted rules governing the licensing and operation of cannabis producers, processors and retailers.

In 2013, Chelan County initially responded to the passage of I-502 by adopting interim land use regulations and official controls through Resolutions 2013-73 and 2013-88 (which also imposed a moratorium on cannabis related activities). However, after a review of State procedures, on January 14, 2014 the County adopted Resolution 2014-5 terminating the prior resolutions, lifting the moratorium, and acknowledging the

State's licensing process as the sole means of implementing land use controls for the production, processing and retailing of marijuana. Furthermore, the County amended the District Use Chart and agricultural definitions to clarify types of agricultural activities (see Resolution 2014-38). In sum, the County determined that production and processing of cannabis under I-502 would be regulated as any other form of agriculture, and allowed to proceed on land with zoned for agricultural uses.

In reliance upon the County permissive approach to cannabis regulation, on July 31, 2015 Appellant Alex Kwon entered into a contract to purchase the Property. CP 880, at Paragraph 9. As a licensed, Tier 3 Producer/Processor operating in San Juan County, San Juan was required to notify the Washington State Liquor & Cannabis Board of a proposed change of location to Chelan County, which process it had begun earlier in 2015. The notification of the location change arrived at Chelan County on September 21, 2015. CP 1906. The public notice for that location change was posted at the Property on September 22, 2015. CP 930. The notification process is the formal means by which the LCB asks local government to inform the State as to whether a proposed location for an I-502 business is consistent with local land use rules and zoning.

On September 29, 2015, the County adopted an emergency

moratorium prohibiting the siting of new I-502 businesses in the County (Resolution 2015-94). CP 1654. Importantly, this Resolution left existing operations unaffected and did not enact any regulations regarding the actual operation of existing I-502 businesses. The Resolution did, however, place a six month moratorium “on the siting of licensed recreational marijuana retail stores, production, and processing . . .” Cultivation and processing of cannabis were still treated as agricultural activities under the County’s existing code; only the siting of new businesses was prohibited.

On October 1, 2015, San Juan learned of the moratorium. Unsure of whether it would be affected by the moratorium, San Juan immediately reached out to the Community Development Department, whose personnel informed San Juan that they did not know anything about the moratorium and directed San Juan to the Commissioners. CP 868. On October 1, San Juan spoke with all three Commissioners at length explaining San Juan’s position in great detail. CP 868 – 869. After conferring with the other commissioners, Chairman Ron Walter explained that the Commissioners had not anticipated a situation like San Juan’s, and confirmed that San Juan would be permitted to proceed under existing zoning and permitting rules because San Juan had already been licensed by the LCB, and

because San Juan had initiated its change of location prior to the moratorium going into effect. CP 869.

Consistent with Commissioner Walter's verbal commitments, on October 5, 2015 the Commissioners explicitly approved San Juan's Change of Location Application. In response to the application question "Do you approve of applicant?" Commissioner Walter marked "Yes." In response to the question "Do you approve of this location?" the Commissioner also marked "Yes." Commissioner Walter included the hand-written note: "Even though we have enacted a moratorium, we have no objection to this relocation." In the same approval a County official stated in relevant part:

Marijuana License 413078-71 - San Juan Sun Grown - 625 E Edgemont Dr., Wenatchee This property (22-20-26-925-497) is in the Commercial Agricultural Lands (AC) zoning district which allows for agricultural activities. I have found no violations for this parcel.

CP 906 - 907.

To be absolutely sure that San Juan would be allowed to proceed under the zoning and permitting rules in effect when the moratorium was passed, Adam Andrews of San Juan initiated the following email exchange with Commissioner Walter:

1. Commissioner Walter to Mr. Andrews/ San Juan: "Your notice came through our office today, we signed it with a note to the LCB that we had no objection to the approval of the move."
2. Mr. Andrews/ San Juan to Commissioner Walters: "Thanks Ron. That's a relief. I take this to mean that we will be able to pull permits and move forward with other County functions without any issues. Could you please confirm my understanding is correct?"
3. Commissioner Walter to Mr. Andrews/San Juan: "All work will have to be compliant with county code and zoning. Thanks."
4. Mr. Andrews/San Juan to Commissioner Walters: "Understood. But just trying to be clear that the moratorium will not in of itself change the permitting process for us."
5. Commissioner Walters to Mr. Andrews/San Juan: "That would be my understanding [sic]."

CP 892; CP 1044 - 1045. Chelan County did not revisit or attempt to undo its decision to approve the transfer of the license to the Property.

On October 28, 2015 San Juan was instructed by Chelan County that the temporary green house structures it planned on building were exempt from building permit requirements under the Uniform Building Code. CP 1055.

Based upon these official reassurances, San Juan submitted an application for a commercial building permit on October 29, 2015. The permit application and site plan included detailed information regarding the planned use of the agricultural processing building and associated

infrastructure (e.g. the propane tank, fence, septic system, 8' high fence etc.). The application did not include certain temporary growing structures now located on the Property because San Juan had received direction from the County that no permits were required. CP 1055. The County knew this building was to be used for the cannabis industry, as evidenced by a notation on the building permit itself. CP 487.

Upon receipt of the building permit application, the planning officials were concerned that the permit might violate the terms of the moratorium because it prohibited the siting of marijuana related businesses. On November 2, 2015, Hank Lewis, the County's Planning Director, conveyed the Board of Commissioners' decision to his staff that the moratorium did not apply because San Juan's had sited its operations before the effective date of the moratorium:

1. Ben Stanton to Hank Lewis: "Do we have any commissioner correspondence authorizing the "go-ahead" to process building permit 150650? I need to add it to the green sheet and smartGOV since allowing this to be processed contradicts Resolution 2015-94."
2. Hank Lewis to Ben Stanton: "The application requesting this building permit is permitted per the BOCC to proceed with this one permit request as their application to the BOCC for establishment preceded the establishment of the moratorium. Please allow this application to progress."

CP 134.

At this point, an unambiguous decision was made by both the highest ranking officer of the County's legislative body and the highest ranking executive officer of the County's Planning Department - that the moratorium did not conflict with or prohibit San Juan's building permit application. CP 299; CP 134. On November 16, 2015 Chelan County issued San Juan its building permit for a pole building on the Property, which is in the Commercial Agricultural Zone, with the full knowledge and blessing that it was intended to be used for the cultivation and processing of cannabis, and did not appeal this issuance within 21 days under the Land Use Petition Act (Chapter 36.70C RCW). CP 487.

After receiving this building permit, San Juan began to quickly develop the Property in order to ensure it would be operational in time for the coming growing season. To that end, San Juan constructed the building and associated mechanical elements; installed power, water, septic and irrigation lines; graded the site and constructed other site improvements required by the Washington Liquor Control Board. Chelan County conducted seven separate building permit inspections on San Juan's property, including three that occurred AFTER the adoption of Resolution 2016-14. CP 833 – 885; see generally CP 451 – 508.

As site development accelerated at the Property, and

correspondingly at other licensed sites across the County, cannabis opponents began to voice their dissatisfaction with the presence of I-502 businesses. Public sentiment came to a head, and on February 9, 2016, Chelan County conducted a public hearing regarding the moratorium, the result of which was the adoption of Resolution 2016-14, which terminated all I-502 related businesses in Chelan County using a single, uniform two-year termination date of March 1, 2018. CP 1656. Resolution 2016-14 also purports to retroactively apply back to the moratorium date of September 29, 2015:

Uses herein declared permanently prohibited that were lawfully established and in actual physical operation prior to September 29, 2015, are nonconforming and must cease, abate, and terminate no later than March 1, 2018.

CP 1656.

On March 25, 2016, Chelan County cancelled San Juan's final building permit inspection hours before it was scheduled to take place. This was the first time San Juan became aware that there was any alleged issue with its permits, the use of its property or the potential it would not be appropriately treated as an existing nonconforming use under the County's new standards. CP 885.

On March 28, 2016, Chelan County adopted Resolution 2016-32,

which amended various sections of the County Code pertaining to agricultural activities and uses. CP 359. These amendments applied primarily to definitions in Chapter 14.98 of the County Code and had the effect of excluding facilities or uses associated with cannabis from being considered an agricultural structure or use.

On April 16, 2016 Chelan County performed its final building inspection on San Juan's pole building, but, inexplicably, despite repeated requests, has yet to provide San Juan a certificate of occupancy for the building.

On or about April 16, 2016, Chelan County notified San Juan that its fence was located in the County's setback (CCC 11.88.170) by as much as 5 feet in certain locations. Under Chelan County Code 11.30.020(6)(B), the County has the authority to modify, by administrative action, the required setback for parcels zoned commercial agricultural (AC) by up to twenty percent. Through a letter dated April 21, 2016 from San Juan's counsel, San Juan officially requested that the County consider such variance and/or to inform it if any additional forms or administrative formalities needed to be recognized. CP 826.

On May 3, 2016 Chelan County responded to this letter via email

by stating that there was a fee of \$575 to be paid for the administrative request and that “upon receipt of application fees, it can be expected a decision will require approximately 2.5 weeks to verify information and render decision [sic].” CR 829.

On July 2, 2016 San Juan attempted to pay this fee and was told for the first time that more information was needed to finish the variance application. CP 831.

On July 4, 2016 Chelan County responded via email to San Juan’s inquiry of this event by confirming the need for a survey of the location of the fence and also stating for the first time that “any and all building permit related applications require an owner signing on our Marijuana disclosure statement upon submittal.” CP 831. The marijuana disclosure statement, which was attached to the above-referenced email, requires an applicant to affirm and attest that the building permit would not be used for furtherance of marijuana related activities; which, obviously, is the only reason San Juan has the fence in the first place. In another example of the Catch 22 San Juan finds itself in, since San Juan cannot sign the form in good faith, it apparently can’t request a variance to address the County’s concerns.

On August 26, 2016, the County delivered a Notice and Order asserting the following violations on the Property:

- a. production and/or processing of marijuana or cannabis that was not “lawfully established” prior to September 29, 2015;
- b. the use of unpermitted buildings;
- c. construction of a fence that extends, in certain places, roughly five feet into the required fifty-five foot setback,
- d. maintenance of a nuisance in derogation of Resolution 2016-14, and
- e. the presence of excess vehicles on the property.

CP 67.

On September 8, 2016 San Juan appealed this Notice and Order to the Chelan County Hearing Examiner. CP 254. On November 16, 2016, a public hearing was held on this matter before the Chelan County Hearing Examiner, who issued his Findings of Fact, Conclusions of Law and Decision on December 9, 2016 denying the appeal and affirming every citation raised in the August 26, 2016 Notice and Order. CP 19 - 30.

On May 26, 2017 the Chelan County Superior Court held a Final Hearing on the Merits, and on September 21, 2017 an Order from the Court was entered upholding the Hearing Examiner’s decision, except with regard to the claim of excess vehicles on the Property, which was

overturned. CP 1727 – 1742.

4. STANDARD OF REVIEW

Under LUPA, this Court stands in the same position as the Superior Court and limits its review to the record created before the Hearing Examiner. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); RCW 36.70C.120.

Appellants generally bear the burden of meeting one of the standards in RCW 36.70C.130(1), and in this case rely upon the following:

- (a) The body or officer that made the land use decision engage in unlawful procedure or failed to follow a prescribed process, unless the error was harmless; and
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; and
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; and
- (d) The land use decision is a clearly erroneous application of the law to the facts; and
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(b)(c)(d).

The appellate court's review of any claimed error of law in the

Hearing Examiner's interpretation of a Chelan County ordinance is undertaken de novo, and deference is given to the County's expertise. *Isla Verde Int'l Holdings Inc. v. City of Camas*, 146 Wn.2d, 740, 751, 49 P.3d 867(2002); RCW 36.70C.130(1)(b). The Hearing Examiner's decision may be reversed where the Hearing Examiner's application of the law to the facts is clearly erroneous. Under the "clearly erroneous application" test, the court applies the law to the facts and will overturn the land use decision if the court is left with a "definite and firm conviction" that the decision maker committed a mistake. *Citizens to Preserve Pioneer Park, LLC vs. City of Mercer Island*, 106 Wn.App.461, 473, 24 P.3d 1079 (2001).

Findings on issues of fact are reviewed under the substantial evidence test. RCW 36.70C.130 (1)(c). Evidence is substantial when it is of sufficient quality of evidence in the record to persuade a fair-minded person of the truth or correctness of the decision. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

5. ARGUMENT AND AUTHORITIES

5.1 Chelan County Bears The Burden of Proof When Alleging Land Use Violations.

The Hearing Examiner placed the burden of proof regarding the validity of the claims in the County's Notice and Order on the San Juan, in essence denying that the County has any burden of proof in its enforcement actions. CP 29, at Paragraph 18; *see also*, CP 1233; and *see* CP 1235 – 36.

The “burden of proof” is the duty of a party to produce evidence that will shift the conclusion away from the default position, to that party's own position. The burden of proof is always on the person who brings a claim in a dispute. This matter arrives before the Hearing Examiner pursuant to Chelan County Code Title 16. Critically, Title 16 does not contain any standards related to burden of proof. This is an enforcement action, not a permitting action where the local jurisdiction would be given deference to its expertise or interpretation. *See e.g.* RCW 36.70C.130(1)(b). In this situation, Appellants were not approaching the County asking for it to make a determination on a land use permit or application – as they would under Title 14, but rather the County is unilaterally condemning the actions of Appellants through its enforcement powers.

Per the Chelan County Code, the Notice and Order is a “written notice that a code violation(s) has occurred.” Chelan County Code

16.04.010. A “civil code violation” is an “act or omission contrary to any ordinance, resolution or regulation” or “a notice and order”, among other things, and “*shall constitute a separate infraction for each and every day . . . during which a violation is continued.*” *Id.* (emphasis added). Further, civil fines “shall be assessed” for code violations (see CCC 16.16.010), the County “shall have a lien for any civil penalty imposed . . . against the real property” (see CCC 16.18.010), and the administrator “shall cause a claim for a lien to be filed for record,” (see CCC 16.18.020).

All of these provisions use the word “shall,” denoting that no discretion is present and each item follows the previous one with no further process or proof necessary. *See also* CCC 16.06.070 (authorizing civil penalties for failure to abide by a Notice and Order). As such, according to the Hearing Examiner’s burden shifting, the failure to comply with a Notice and Order in Chelan County could result in monetary fines and a lien recorded against private property without the County ever having demonstrated any threshold level of evidence.

Fortunately, many Washington jurisdictions have also drafted similar appeal provisions into the enforcement sections of their land use codes:

Kittitas County Code 18.02.040(b)(vii)

“ . . . the burden is on the county to establish that the infraction was committed by preponderance of the evidence”

Snohomish County Code 30.85.120

“The applicable county department has the burden of proof by a preponderance of the evidence to prove: (a) The person named on the citation is the responsible party for causing the violation or is the property owner; and (b) The violation listed on the citation occurred.”

King County Code 23.20.080(D)

“The burden of proof is on the county to establish by a preponderance of the evidence that the violation was committed.”

Pierce County Code 1.16.100(C)

“The burden of proof is upon the County to establish the commission of the civil infraction by a preponderance of the evidence.”

This basic principal of due process appears in analogous illustrations in other areas of Washington law as well. For example, the Washington legislature acknowledged this basic principal of due process when it drafted rules for civil proceedings. Civil infraction proceedings (recall that Chelan County Code Title 16 calls violations in the Notice and Order “infractions”) are held to establish whether a civil misdemeanor violation has occurred. RCW 7.80.005. These proceedings are initiated and conducted much like a proceeding under a Notice and Order of

Abatement with the issuance, service, and filing of a notice of civil infraction. RCW 7.80.050. At the hearing for a civil infraction “[t]he burden of proof is upon the state to establish the commission of the civil infraction by a preponderance of the evidence.” RCW 7.80.100(3). Additionally, in the Rules for Enforcement of Lawyer Conduct, ELC 10.14(b) states: “[d]isciplinary counsel has the burden of establishing an act of misconduct by a clear preponderance of the evidence.”

The American system of jurisprudence establishes that any alleged violation of law must have a corresponding burden of proof placed initially upon the alleged, otherwise violations of law could be asserted without the need for support or corroboration. Assigning the government the initial burden of proof ensures that private citizens affected by government action understand the basis of that action, and necessarily allows citizens to challenge that basis. The Chelan County Hearing Examiner erred when he chose to place the burden of proof upon the recipient of an alleged land use violation, and Appellants request that this case be remanded back to the Hearing Examiner to produce a decision consistent with this basic legal requirement.

5.2 The Hearing Examiner's Conclusions of Law Lack Legal Citations And Must Be Amended To Be Useful To The Parties And The Court.

The Chelan County Hearing Examiner's Conclusions of Law and Decision (the "HE Decision") contain absolutely no citations to the law, ignoring the statutory requirement to do so, and frustrating the statutory remedies available to Appellants.

Chelan County Code 1.61.070 states that the Hearing Examiner has the obligation to "enter findings of fact *and conclusions of law* based upon the facts in the record of decision." *Emphasis supplied.*

"Conclusions of Law" are defined by Black's Law Dictionary as a "[s]tatement of court as to law applicable on basis of facts found by jury. Finding by court as determined through application of rules of law." The *Rules Of Procedure For Proceedings Before The Chelan County Hearing Examiner*, 1.23(B)(3), state:

Whenever practicable, the conclusions shall be referenced to specific provisions of the law and regulations or both, together with reasons and precedents relied upon to support the same. The conclusions shall make reference to the effect of the decision with reference to carrying out and conforming to the comprehensive plan and the County's development regulations.

There is no reason that it was not "practicable" to conform the HE Decision to this requirement. The requirement to provide legal authority

supporting a conclusion of law is a common requirement in administrative law. *See e.g.* WAC 172-121-123.

This case contains a multitude of legal issues, all of which include nuanced legal arguments based upon the unique application of the facts of this situation to Washington case law. The problem is that a party who seeks relief under the Land Use Petition Act (LUPA) carries the burden of meeting one of the statutory standards outlined in RCW 36.70C.130. *Lakeside Industries v. Thurston County*, 119 Wn.App. 886, 894, 83 P.3d 433 (2004). RCW 36.70C.130 provides the Court with a standard of review for decisions that are either (a) “a clearly erroneous application of the law to the facts,” and/or (b) “an erroneous interpretation of law.” A land use decision is a *clearly erroneous application of the law to the facts*, so as to warrant reversal of the decision under the Land Use Petition Act (LUPA), when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 829, 256 P.3d 1150 (2011). And a court may overturn a land use decision that is an *erroneous interpretation of the law*, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise. *Washington State Dept. of Transp.*

v. City of Seattle, 192 Wn.App. 824, 838-39, 368 P.3d 251 (2016).

The Conclusions of Law portion of the HE Decision should contain citations to Washington law, reasons and precedents relied upon to support the decision, and references to the effect of the decision with regard to conformity to the County's planning documents, so that the parties and the Court have some way of understanding the Hearing Examiner's "application" and "interpretation" of the law to the facts. Without those citations, reasons and references, Appellants and the Court are deprived of two statutory standards of review, thus compromising the appeal rights established by the Washington Legislature.

Appellants respectfully request that the Court remand this matter back to the Chelan County Hearing Examiner for a modification of his Decision consistent with his obligations outlined in the Hearing Examiner Rules 1.23(3) and RCW 36.70C.130.

5.3 San Juan's Use of the Property for Cannabis Production and Processing Was Lawfully Established.

Despite the September 29, 2015 moratorium being in place, Chelan County welcomed San Juan to do business in the County by approving of its location on October 5, 2015, issuing it a building permit on November 16, 2015, and confirming that San Juan's growing structures would not need to be permitted under the Chelan County building code. CP 906; CP

487; CP 1055. San Juan developed its Property based upon these authorizations and representations, and obtained the required approvals from Chelan County along the way:

1. January 13, 2016: County approved setbacks and footings
2. February 3, 2016: County approved the ground work and foundation
- [February 2, 2016 – passage of Resolution 2016-14 banning cannabis production and processing in Chelan County]
3. February 19, 2016: County approved the plumbing and mechanical
4. February 25, 2016: County approved the framing, walls and gas piping
5. February 29, 2016: County approved the insulation
6. March 2, 2016: County approved the wall board nailing
7. March 10, 2016: County approved the trenching for the gas pipes
8. March 25: County conducted its final inspection

CP 883, at Paragraph 13 (CP 883 – 885).

Subsequently, the County brought an enforcement action to halt growing and processing on the Property. San Juan should be allowed to continue to operate on the Property because:

1. San Juan vested the right to build and operate a cannabis production and processing facility despite the moratorium implemented through Resolution 2015-94.
2. San Juan Has Nonconforming Rights to Continue to Operate Until At Least the Termination Date Described in Resolution 2016-14.

3. Resolution 2016-14 may not be applied retroactively to extinguish San Juan's vested rights to produce and process marijuana.

5.3.1 San Juan vested the right to build and operate a cannabis production and processing facility despite the moratorium implemented through Resolution 2015-94.

The Chelan County Hearing Examiner found that Appellants failed to establish vested rights to continue to operate their business on the Property. *See CP 19- 30 (specifically, Findings of Fact Paragraph 33, 34, 35, 36, 37, 38, 46, 62, 63; Conclusions of Law Paragraph 11, 12, 19, 20, 21, 22, 23, 25, 26, 27; and Decision Paragraph 4).*

San Juan applied for a commercial building permit on October 29, 2016 for the processing facility now located at the Property. CP 346. The permit application and site plan included information regarding the planned use for the building and associated infrastructure (e.g. the propane tank, fence, septic system, 8' high fence etc.), and, based upon a multitude of previous correspondences, Chelan County knew the purpose to which the Property was to be put. CP 299 (signed license transfer to the Property); CP 129 (November 2, 2015 email approving of building permit despite its known use for cannabis production); CP 487 (issued building permit containing notation cross referencing November 2, 2015 email). The building permit was issued by Chelan County on November 16, 2015

(CR 0861) granting San Juan the right to construct a commercial building for purposes permitted outright in the zone.

Under the vested rights doctrine, developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application. *W. Main Associates v. City of Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782, 785 (1986). The Washington doctrine protects developers who file a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. *See, e.g., Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). Once a developer complies with these requirements a local jurisdiction cannot frustrate the development by enacting new zoning regulations. *W. Main Associates*, 106 Wash. 2d 47, 50-51 (1986).

Consequently, San Juan vested to the underlying zoning of the property at the time of its application submittal (Resolution 2014-5 and Resolution 2014-38 allowed for the production and processing of cannabis on land zoned commercial agricultural).

Moreover, LUPA applies to ministerial land use decisions such as building permits. *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002). And because building permits are subject to review under LUPA the Court in *Nykreim* held that: “approval of [ministerial determination] in this case, despite its questionable legality, became valid once the opportunity to challenge it passed.” *Id.* at 925-26 (citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wash.2d 169, 175, 4 P.3d 123 (2000)). Thus, the failure by Chelan County to promptly appeal the building permit issued to San Juan under the Land Use Petition Act became a de facto approval of the permit and operated as a waiver of the County’s ability to seek revocation of the permit, deny its lawful existence or the vested rights created thereunder. *See also Craven v. City of Tacoma*, 63 Wash.2d 23, 385 P.2d 372 (1963); *Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947, 960–61, 954 P.2d 250 (1998).

In support of its holding the *Nykreim* Court spoke at length about the public policy supporting finality of land use decisions:

Applying LUPA and following this court's decision in *Wenatchee Sportsmen* in this case is consistent with this court's stringent adherence to statutory time limits. This court has also recognized a strong public policy supporting administrative finality in land use decisions.

...

Following this policy of finality of land use decisions, this court in *Wenatchee Sportsmen Association* held that an untimely petition under LUPA precluded collateral attack of the land use decision and rendered the improper approval valid.

[I]f this court allows local government to rescind a previous land use approval without concern of finality, innocent property owners relying on a county's land use decision will be subject to change in policy whenever a new County Planning Director disagrees with a decision of the predecessor director.

Nykreim, 146 Wash. 2d at 926 (2002) (*Citation omitted*).

On September 29, 2015, Chelan County passed Resolution 2015-94, which placed “a six-month moratorium on the siting of [new] licensed recreational marijuana retail stores, production, and processing.” CP 1654. During the pendency of this moratorium Chelan County (1) explicitly approved the location of San Juan’s operations on October 5, 2015 (CP 298 – 299); (2) gave verbal and written assurances that the moratorium would not apply to San Juan (CP 134; CP 1044 – 1045; CP 907); (3) approved San Juan’s building permit on November 16, 2016 and subsequently failed to appeal it within 21 days under LUPA (CP 487); (4) conducted seven separate inspections of permits related to San Juan’s operations (CP 883 – 885; CP 451 – 508); and (5) generally allowed San Juan to proceed with site preparation, construction of a building and a

fence, planting activities and general operations. Those actions, and particularly the acts of approving the building permit (along with all its associated uses) and not subsequently appealing it, mean that San Juan vested to the right to produce and process cannabis on the Property.

5.3.2 San Juan has nonconforming rights to continue to operate through a reasonable amortization period.

The Chelan County Hearing Examiner found that Appellants failed to establish nonconforming rights to continue to operate their business on the Property. *See* CP 19 – 30 (*specifically, Findings of Fact Paragraph 65, 66, 67; Conclusions of Law Paragraph 10, 11, 12, 28, 29, 30, 31; and Decision Paragraph 4*).

San Juan’s production and processing use of the Property should be treated as a preexisting, non-conforming use entitled to continue. A nonconforming use is “a use that lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the [current] zoning restrictions applicable to the district in which it is situated.” *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998); see also Chapter 11.97 Chelan County Code. A landowner “asserting a prior legal, nonconforming use bears the initial burden to

prove that (1) the use existed before the county enacted the [contrary] zoning ordinance; (2) the use was lawful at the time; and (3) the applicant did not abandon or discontinue the use for over a year [prior to the relevant change in the zoning code].” *First Pioneer Trading v. Pierce County*, 146 Wn.App. 606, 614, 191 P.3d 928 (2008) (citing *Jefferson County v. Lakeside Industries*, 106 Wn.App. 380, 385, 23 P.3d 542 (2001)). Once the landowner establishes that a legal nonconforming use existed, the burden shifts to the municipality asserting that the nonconforming use was abandoned to show that the landowner abandoned or discontinued the use after the enactment of the relevant zoning ordinance. *Van Sant v. City of Everett*, 69 Wash.App. 641, 648 (1993).

Resolution 2015-94 (enacting the moratorium) is very short and raised many practical questions about how it would be applied by the County. It was clear that Resolution 2015-94 was intended to prohibit the siting of new operations, but opaque as to how other I-502 businesses that had already made a siting decision would be handled. CP 1654.

Unclear of the intended meaning of Resolution 2015-94, San Juan discussed at length with the commissioners its situation and the fact that it’s operations had already been “sited” with the commissioners at length. From the County’s internal communications it is clear that San Juan was

indeed already “sited” and was entitled to proceed because it had initiated the process to transfer its license to the property prior to the moratorium going into effect. CP 134. The County reinforced this interpretation of how the moratorium should be applied to San Juan by issuing San Juan a building permit on November 16, 2015 when it knew that the building would be used for cannabis production and processing. CP 487.

Chelan County’s decision to continue to process San Juan’s building and construction applications beyond the date of the September 29, 2015 moratorium demonstrates that San Juan lawfully established its use on the Property while the moratorium was in place. Chelan County approved San Juan’s location on October 5, 2015 (CP 907) and issued it a building permit on November 16, 2015 (CP 487). Shortly thereafter, and in reliance upon these approvals, San Juan began to conduct site preparation and construction activities. By February 7, 2016 Chelan County had approved of San Juan’s use of the site, and San Juan was fully under construction and site preparation to ready itself for the coming 2016 growing season. In fact, even after the passage of Resolution 2016-14, which sought to eventually terminate all I-502 businesses in Chelan County, Chelan County nonetheless continued to conduct seven additional construction-related inspections and approvals on San Juan’s facility. CP

883, at Paragraph 13.

In short, the foregoing demonstrates that (a) San Juan used the Property for cannabis production and processing prior to the implementation of Resolution 2016-14 in February 2016 that terminated all I-502 businesses in Chelan County, (b) San Juan's use of the property was lawful at the time vis-à-vis the existing development regulations (e.g. zoning etc.) related to the cultivation and processing of cannabis, and (c) San Juan has not abandoned or discontinued the use for over a year prior to Resolution 2016-4. As such, San Juan's use of the property established nonconforming rights to continue this use through a reasonable amortization period. See e.g. *First Pioneer Trading v. Pierce County*, 146 Wn.App. 606, 614, 191 P.3d 928 (2008).

5.3.3 Resolution 2016-14 may not be applied retroactively to extinguish San Juan's vested rights.

The Chelan County Hearing Examiner found that Appellants' operations were not in existence on the Property prior to September 29, 2015 (the moratorium date) and therefore not lawfully established. See CP 19 - 30 (*specifically, Findings of Fact Paragraph 65, 66; Conclusions of Law Paragraph 28, 29, 30, 31; and Decision Paragraph 4*).

Resolution 2016-14 purports to be retroactively applied: “Uses herein declared permanently prohibited that were lawfully established and in actual physical operation prior to September 29, 2015, are nonconforming and must cease, abate, and terminate no later than March 1, 2018.” CP 1656. In determining whether a statute applies prospectively or retroactively the court looks to the legislative intent. *Lau v. Nelson*, 92 Wn.2d 823, 826, 601 P.2d 527 (1979). Statutes are generally presumed to apply prospectively only. *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). But, if a statute is remedial, its effects may be retroactively applied, *Id.*, **unless the statute affects a vested right.** *Johnston v. Beneficial Management Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975), **or existing right.** *Gillis v. King County*, 42 Wn.2d 373, 378, 255 P.2d 546 (1953).

Under Washington law, Resolution 2016-14 cannot be applied retroactively to eliminate or impinge the vested rights of San Juan. That doesn't mean that the County can't declare San Juan's use as non-conforming. Nor does it mean that the County is blocked from terminating a non-conforming use. However, under *Northend Cinema vs. Seattle*, 90 Wn.2d 709, 720, 585 P.2d 1153 (1978) one-size-fits-all termination provisions that don't accommodate an individual business' needs to

amortize its costs are not enforceable, and the issue of whether the uniform termination period expressed in Resolution 2016-14 is legally sufficient is currently under review by the Federal District Court Eastern District of Washington in Cause No. 2:17-cv-00026. CP 939.

It does mean, however, that Chelan County cannot grant San Juan's development applications, thus giving it vested rights and the possibility of future nonconforming rights, and then enact a regulation that purports to eliminate these rights because it is retroactive to a date prior to those commitments.

In sum, because San Juan vested its rights to use the Property prior to the ban coming into effect, the ban cannot be applied to it retroactively to suddenly extinguish those rights, and it is entitled to a reasonable amortization period.

5.4 San Juan's Temporary Growing Structures Don't Require Building Permits.

The Hearing Examiner upheld the County's Notice and Order by finding that the temporary structures on the property needed building permits, pursuant to guidance offered by Washington State Building Code Interpretation No. 15-04. *See* CP 19 - 30; *(specifically, Findings of Fact*

Paragraph 27, 53; Conclusions of Law Paragraph 17; and Decision Paragraph 2).

This position reverses the County's previous guidance to San Juan as evidenced by the email from Angel Hallman and verbal instructions provided to San Juan from the County Planning Department. CP 1055. The County provided the same guidance - that no permit was required for soft-sided growing structures - to other cannabis producers. See CP 1267 - 1268. In fact, San Juan's building permit application did not include its soft-sided growing structures because San Juan was told by Chelan County that such structures did not require building permits. CP 1268.

Washington State Building Code (RCW 19.27.065) and the Washington Administrative Code (WAC 51-50-007) make clear that the requirements contained therein do not apply to "temporary growing structures" used solely for the commercial production of horticultural plants including ornamental plants, flowers, vegetables, and fruits. A "temporary growing structure" is not considered a building under RCW 19.27.015:

Temporary growing structure' means a structure that has the sides and roof covered with polyethylene, polyvinyl, or similar flexible synthetic material and is used to provide plants with either frost protection or increased heat retention.

The Washington State Building Code makes clear that temporary growing structures are not considered buildings and do not require building permits. The growing structures utilized by San Juan are seasonal, used in the spring for frost protection and increased heat retention, and in the summer as shade structures. After fall harvest the structures remain unused through the winter until needed again in the spring. See CP 1286 – 1297 for photos of the growing structures following the harvest showing that they are empty and David Rice's declaration generally at CP 1267.

It is important to note, that the above-cited State statute and administrative code are the only regulations that Chelan County has officially adopted on the subject of soft-sided growing structures. The County's claim that San Juan is out of compliance with the County's code due to its lack of building permits for its growing structures is pure fiction since Chelan County has yet to adopt regulations regarding the need for a building permit or building permit standards for soft-sided greenhouses. How can San Juan be out of compliance with a regulation that Chelan County has yet to adopt?

Chelan County apparently changed its position on this issue in February 2016 in reliance on an interpretation from the Washington State

Building Code Council issued March 12, 2015 (“Interpretation No. 15-04”). CP 349; CP 1268, at Paragraph 4. The Washington State Building Code Council is an independent body that advises the Governor and legislature regarding State building code issues. RCW 19.27.031 and WAC 15-04 authorize the Council to issue interpretations addressing questions raised by local building officials. Nothing in either of those code sections declares that the interpretations are “binding” in any way. In fact, the Council’s website explicitly states that the “[t]he final interpretations are the opinions of the Council and are advisory only.” As a result, the County’s assertion that San Juan’s soft-sided growing structures require building permits under SBCC Interpretation No. 15-04 amounts to unauthorized rule-making in deprivation of San Juan’s due process rights.

Despite the County’s misplaced reliance on Interpretation No. 15-04, it does merit discussion because San Juan’s temporary hoop houses do not fit any of the definitions utilized by Interpretation No. 15-04.

Interpretation No. 15-04 provides in relevant part:

“QUESTION: [Text of WAC 51-50-007]

Does [the exception for temporary growing structures in WAC 51-50-007] apply to large scale greenhouses built from polycarbonate panels? These greenhouses in question will be used for the year round production of marijuana.

These structures will be equipped with mechanical ventilation, grow lights, and a supplemental heat source for winter growing.

ANSWER: No. The exception applies only to temporary structures, with a flexible temporary covering used for passive retention of heat and protection of plants from frost. For structures used year round and provided with other services and structural elements other than those addressed in WAC 51-50-007, this exception would not apply. In addition, RCW 82.04.213 states that marijuana is not considered an agricultural product which would not classify it as an ornamental plant, flower, vegetable, or fruit.”

CP 349.

First, San Juan’s growing structures do not employ rigid “polycarbonate panels.” Instead, they are covered with flexible polyethylene. Polyethylene has a limited useful life because it gradually degrades when exposed to sunlight and the elements. Its very nature is temporary. Second, San Juan’s growing structures have no foundations. Instead they have moveable metal hoops. Third, San Juan’s growing structures are not used year-round. All of these design elements can be observed in the photos submitted to into the record (see e.g. CP 1267; CP 1286 – 1297).

And, interestingly, Chelan County failed to place any evidence in the record before the Hearing Examiner demonstrating the established practice of requiring permits for soft-sided greenhouses, raising Equal Protection concerns for San Juan.

In an effort to get current, specific guidance from the Washington State Building Code Council based on the actual characteristics of San Juan's soft-sided growing structures, San Juan reached out to the State Building Code Council in October 2016. In that email exchange San Juan asked Joanne McCaughan, a Code Specialist with the State Building Code Council: "How would softsided greenhouses that are not used year round be classified?" Ms. McCaughan responds: "They would be described as a temporary growing structure" Ms. McCaughan's guidance is consistent with the County's original guidance on this topic and San Juan's legal position. CP 1053 – 1054; CP 1269 – 1270.

5.5 San Juan Has A Lawful Right To Request A Variance For the Location Of Its Fence.

The Chelan County Hearing Examiner upheld the County's Notice and Order finding that Appellants fence is inside of the County's required setbacks. *See* CP 19 – 30 (*specifically, Findings of Fact Paragraph 50, 51, 52, 54; and Decision Paragraph 4*).

As required by State law, San Juan constructed an 8-foot fence around its cannabis production and processing areas. San Juan became aware that the fence may have been inadvertently built within the required setback following Chelan County's inspection of the property on April 15,

2016. Because the encroachment of the fence is minor (not exceeding 6.5 feet on the north side and 3.1 feet on the west side), and because the cost of relocating the fence will be substantial (up to approximately \$70,000), through a letter dated April 21, 2016 San Juan requested an administrative modification to the setback under Chelan County Code 11.30.020(6)(B). CP 826. The County refused to process that request, and continues to thwart San Juan's attempts to file for the administrative modification with an ever-changing list of filing requirements.

It's worth noting also that the subject property is located in an agricultural zoning district that is subject to 5-acre minimum densities. The County does not argue that the fence line impacts anyone in a meaningful way nor does it demonstrate the public benefit to enforcing a strict 55-foot setback. This issue is tied inextricably to the dispute of whether San Juan's underlying use of the property was lawfully established. However, regardless of how the property is used, San Juan has a right to seek a dimensional variance to address this issue. Other issues, related to the use of the property, should be dealt with separately, the outcome of which should have no influence on the location of the fence on the Property.

6. CONCLUSION

Chelan County authorized San Juan's use of its property for production and processing cannabis prior to enacting its ban under Resolution 2016-14. The County did this with the full awareness of San Juan's intended use of the property and notwithstanding its moratorium on accepting cannabis-related permits. This authorization came in the form of: approving of San Juan's state license transfer, approving its building permit application, providing multiple inspections of related construction permits, and otherwise verbally reassuring San Juan that the moratorium did not apply to it because San Juan had already "sited" on the Property.

These authorizations allowed San Juan to undertake construction and operational activities on the Property and qualify as a nonconforming use. At each critical juncture, San Juan communicated with the County about its plans and use for the property and received assurances upon which San Juan reasonably relied. Therefore, Appellants respectfully request the following relief from the Court:

1. That the Court first remand this matter back to the Chelan County Hearing Examiner for a modification of his Decision consistent with his obligations to produce a decision that can be analyzed according to RCW 36.70C.130.

2. That the Court remand this matter back to the Hearing Examiner to reissue a decision consistent with the correct burden of proof.
3. That the Court review the decisions of the Chelan County Hearing Examiner and the Superior Court and determine that the decisions made: are an erroneous interpretation of law, are not supported by substantial evidence, are a clearly erroneous application of the law to the facts, followed unlawful procedure, violated Appellants' constitutional rights, were outside the authority of the Hearing Examiner; and therefore must be reversed.
4. That Appellants be awarded their costs and attorneys fees incurred herein.
5. That Appellants be granted such further relief as the Court may deem just, equitable and proper.

Such a ruling from the Court would be consistent with Washington land use law, which emphasizes and honors necessary safeguards aimed to keep government from changing its rules and regulations to the detriment of developers and property owners who have relied on previous assertions and ordinances. *State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965).

Respectfully submitted this 9th day of February, 2018.

PARSONS | BURNETT | BJORDAHL | HUME, LLP



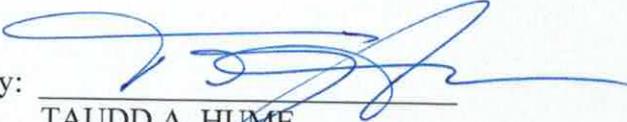
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Attorneys for Appellants

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare under penalty of perjury and the laws of the State of Washington that on the 9th day of February, 2018, I caused a true and correct copy of the of the APPELLANTS' OPENING BRIEF, to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following:

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April D. Hare Deputy Chelan County Prosecuting Attorney PO Box 2596 Wenatchee, WA 98807 April.Hare@CO.CHELAN.WA.US	<input checked="" type="checkbox"/> US Mail & Email <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax)

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