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NO. 355446

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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

Appellants,

vs.

CHELAN COUNTY, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT CHELAN COUNTY

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The central focus of this land use appeal is the claim that San Juan Sun Grown, LLC, obtained vested rights to operate a business engaged in the production and processing of marijuana notwithstanding ordinances of Chelan County prohibiting this use.

A consideration of the key factual events of this case in light of Washington's law on vested rights leads to the straightforward conclusion that San Juan was not authorized to conduct its marijuana business at this site.

First, the earliest possible event by which San Juan might have acquired vested rights was the date it filed a complete building permit application, which occurred on October 30, 2015. At this time, however, a moratorium on the production and processing of marijuana was in effect, having been established by Chelan County Reso. No. 2015-94, which was adopted on September 29, 2015.

Second, even at the time that San Juan was issued a building permit, on November 19, 2015, it had not yet been issued a license for its proposed marijuana production and processing operation by the Washington State Liquor and Cannabis Board (“WSLCB”). This license was not issued until April 14, 2016.

Drawing attention away from this elementary chronology, San

Juan Sun’s brief on appeal, like its arguments below, delves into an array of events, communications, and justifications. These are offered by San Juan in an effort to defeat the now-settled view that Washington's vested rights doctrine should not be applied in a variable manner depending on claims of reliance, mistake, or other allegation of inequitable result.

Because the hearing examiner committed no procedural error and because San Juan did not acquire vested rights to its unlawful marijuana production and processing land use, the County correctly issued a notice and order of violation against San Juan. The County properly required that San Juan cease its unlawful activities. The decisions below should be affirmed.

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL

- A.** When a municipality adopts a zoning law before a landowner has acquired a vested right to use his or her land notwithstanding the zoning law, is the landowner subject to the duly adopted zoning law?
- B.** Where a landowner has not submitted a complete application for a building permit prior to a change in a municipality's zoning laws, will Washington courts apply equitable considerations to excuse the landowner's non-compliance?
- C.** Do admitted facts—and substantial evidence—support the hearing examiner's decision upholding Chelan County's notice and order of violation?

III. COUNTER-STATEMENT OF THE CASE

- A. Circumstances of the notice and order of violation.**

Beginning in February 2016, the County received complaints of possible code violations occurring at the site of San Juan's marijuana business near Edgemont Road in the Wenatchee Heights area of the County. CP 327-CP 345. These complaints alleged that San Juan's marijuana business operations were an unlawful use of the land under the zoning code and noted an offensive odor emanating from the property. CP 332, 335. These complaints were confirmed by the County the week of April 14, 2016, when a building official conducted an inspection at the request of San Juan and observed marijuana plants in a structure. CP 56.

On a subsequent visit to the site by a code enforcement officer on June 30, 2016, extensive site development work devoted to marijuana production and processing was observed. CP 56. The code enforcement officer noted marijuana plants being grown on site, several growing structures, a couple of semi-trailers outside an enclosed structure, a new building recently constructed, a couple of small sheds, and a fence that had been newly constructed in violation of the County's minimum setback distances. CP 56. Based on these observations, the County sent an initial notice to Alex Kwon, the owner of the property. CP 57-CP 60.

In a site visit conducted on August 23, 2016, code enforcement officers observed that the marijuana plants had grown significantly, to the point that they were above the 8-foot perimeter fence. CP 55. On

August 26, 2016, a formal notice and order to abate zoning and building code violations was issued to Mr. Kwon. CP 1176-CP 1213. The notice and order required Mr. Kwon to "immediately, and in any case no later than thirty days, cease all activities associated with use of the property for the production and/or processing of marijuana or cannabis" CP 1177. The notice and order also required Mr. Kwon to take action to remove the presence of growing structures used in conjunction with the production and processing of marijuana, relocate the perimeter fence to meet the relevant setback distances prescribed by the County's code, and reduce the number of semi-trailers and other vehicles at the site. CP 1178-CP 1179.

An appeal of the notice and order was filed on September 8, 2016. CP 104-CP 105. Mr. Kwon's appeal was forwarded to the Chelan County hearing examiner's office for further handling. CP 632.

B. History of Chelan County marijuana regulations.

Initially after the passage of Initiative 502, Chelan County declined to adopt local regulations adding to state statutes and regulations governing recreational marijuana production, processing, and retail sales. CP 368. Following enactment of HB 2136 and SB 5052, which the County believed removed or lessened some of the regulations contained originally in I-502, the County determined that it was

necessary to enact a moratorium on the siting of all recreational marijuana production, processing, and retail sales land uses within its jurisdiction. CP 368. The moratorium was adopted on September 29, 2015, and was designated Reso. No. 2015-94.

Reso. No. 2015-94 imposed a six-month moratorium on recreational marijuana businesses. CP 369. The resolution stated as follows:

2. Chelan County does hereby adopt a six month moratorium on the siting of licensed recreational marijuana retail stores, production, and processing, and on implementation of SB 5052 and HB 2136, which shall expire unless renewed or otherwise extended as provided in RCW 36.70.795 and 36.70A.390.
3. While this moratorium is in effect, no application for a building permit, occupancy permit, tenant improvement permit, fence permit, variance, conditional use permit, or other development permit or approval shall be accepted as either consistent or complete by any county department. CP 369.

The six-month moratorium was renewed in Reso. No. 2015-102, which was adopted on November 16, 2015. CP 365-CP 367. Prior to adopting Reso. No. 2015-102, the County conducted a public hearing, which included the submission of public testimony and documentary materials. CP 365. The Board of County Commissioners adopted findings of fact detailing impacts that the County had experienced as a result of the lack of adequate regulation of marijuana-related businesses.

CP 365-CP 367. The operative effect of the moratorium was unchanged as compared to Reso. No. 2015-94. CP 367.

Prior to the expiration of the moratorium period, the Board of County Commissioners adopted a permanent prohibition on recreational marijuana production and processing as Reso. No. 2016-14, which was passed on February 16, 2016. CP 352-CP 358. This action was taken following further public hearings conducted by the County's Planning Commission and the Board of County Commissioners during early 2016. CP 352. Additional findings of fact were adopted in support of Reso. No. 2016-14. CP 353-CP 354. According to the County, the impacts of marijuana production and processing facilities, and the influx of such business into the County prior to the adoption of the moratorium, were incompatible with existing uses. CP 354. In part, the resolution stated as follows:

Whereas, because the impacts of marijuana land uses are notably negative, such uses should not be sited in any zone in Chelan County.

Whereas, never before has the county experienced a new use so inconsistent with existing uses to the extent that there is true concern for the ability of preexisting non-marijuana businesses and uses to co-exist and for the ability to maintain current quality of life standards in the county. CP 354.

Pursuant to Reso. No. 2016-14, "any and all marijuana or cannabis production, processing, collective gardens or cooperatives, is

permanently prohibited in unincorporated Chelan County and all said uses are hereby declared public nuisances and nuisances per se." CP 356. The resolution provided for an amortization period for uses that were lawfully established prior to the moratorium. This clause stated as follows:

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. Structures associated with nonconforming uses shall also cease, abate, and terminate as of the same date. CP 356.

Minor changes were made to Reso. No. 2016-014 to address potential ambiguities, which resulted in the subsequent adoption of Reso No. 2016-32 on March 29, 2016. CP 359-CP 364.

C. History of San Juan's permit-related activity with Chelan County.

San Juan first began production and processing of marijuana on San Juan Island after it was licensed by WSLCB in August 2014. CP 866-CP 867. In February 2015 San Juan submitted an application for change of location to the WSLCB in order to move its operation from San Juan Island to Chelan County. CP 866-CP 867. Principals with San Juan made preliminary inquiries about the suitability of land in Chelan County. CP 867. One owner of San Juan, Alex Kwon, purchased the subject land on October 15, 2015. CP 51-CP 53; CP 868. The property

consisted of approximately 14.43 acres and was zoned Commercial Agricultural Lands. CP 23. At the time of this purchase, Reso. No. 2015-94 had been in effect for approximately two weeks. CP 368-CP 369. Mr. Kwon learned of the possibility of the County enacting a moratorium on marijuana-related activities in September 2015. CP 880.

Representatives of San Juan had several interactions with County officials and obtained a copy of Reso. No. 2015-94 on October 1, 2015. CP 868. In separate conversations with representatives of San Juan, County commissioners were asked how the moratorium would affect San Juan's proposed marijuana business operations. CP 1316-CP 1326. The commissioners stated their understanding of the effect of the moratorium under particular circumstances depending, for instance, on whether a business had already obtained all necessary licenses and permits and was in compliance with County development regulations, including zoning and building permits. CP 1317, 1320, 1324. San Juan representative David Rice acknowledged that the thrust of the commissioners' statements was that they did not believe the moratorium would affect marijuana producers and processors who were "already in business." CP 869.

Although Commissioner Ron Walter was unclear on the specific status of San Juan's license with the WSLCB, and was also unclear on

whether San Juan had actually begun business operations in Chelan County, he believed that WSLCB would take action on San Juan's application to transfer its license from San Juan Island to Chelan County independent of the moratorium. CP 1323-CP 1324. Because Commissioner Walter had no general objection to the license transfer "subject to San Juan Sun Grown otherwise fully complying with the County's development regulations on matters such as zoning, building permits, and any other required licenses or approvals," he signed WSLCB's notice of marijuana license application on October 5, 2015. CP 298; CP 1324. Earlier on the same date Commissioner Walter had been provided assurances from San Juan principal Adam Andrews that San Juan was already operating. CP 1043. Similarly, San Juan principal David Rice had stated to each of the commissioners that San Juan was "a currently operating company." CP 869.

Perceiving ambiguity over Commissioner Walter's approval of the notice of marijuana license application and the effect of Reso. No. 2015-94 on their proposed new operations in Chelan County, San Juan representatives asked Commissioner Walter via email for further clarification. CP 1044-CP 1045. Commissioner Walter replied that "all work will have to be compliant with county code and zoning." CP 1045. Mr. Andrews indicated that he understood Commissioner Walter's

position but wished for further clarification that the moratorium "will not in and of itself change the permitting process for us." CP 1045.

Commissioner Walter responded that "that would be my understanding [sic]." CP 1045.

The next day, October 6, 2015, San Juan representatives continued to seek assurances from the County regarding the recently-enacted moratorium. CP 1046. Mr. Andrews stated that "clarification on this point is critical to our ability to move forward" CP 1046. The County's director of community development provided a copy of correspondence from the County commissioners to the State of Washington and stated that he would respond "more concretely" to San Juan's inquiry when he was "able to clearly understand this situation and have a discussion with Commissioner Walter." CP 1047.

On October 12, 2015, the community development director emailed Mr. Andrews to state that "I am receiving your calls and will get you information when received. Sorry for any delay." CP 1048.

Against this background, San Juan closed on the purchase of the subject property on October 15, 2015. CP 51-CP 53; CP 897. San Juan filed a commercial building permit application with the County on October 30, 2015. CP 388-CP 392. The permit application made no mention of marijuana production or processing. CP 388. The structure's

proposed use was identified as "office for the storage of agricultural records, bathroom for employees to use, with all other rooms for post harvest processing and storage of plants and fruits, including sorting, grading, extracting, and storing as well as storage for hand tools and farm implements during the winter." CP 388. The application continued by stating that "the room with the vehicle access door is for loading and unloading of agricultural products, plants, fruits and tools and equipment related to the cultivation of plants and fruit trees." CP 388. The application also indicated a proposed 8-foot perimeter fence at the site. CP 388.

On November 19, 2015, the County issued a building permit for San Juan's new proposed commercial structure. CP 490-CP 492. Between January and April of 2016, building officials inspected and approved various components of San Juan's new structure. CP 418-CP 438. On June 30, 2016, code enforcement officials observed marijuana plants being grown at the premises in conjunction with several growing structures. CP 56. Shortly thereafter, the County issued its initial letter to Mr. Kwon warning of likely code violations. CP 57-CP 60. No certificate of occupancy was ever issued for San Juan's building permit. CP 43.

D. Proceedings below.

Following San Juan's appeal of the County's notice and order, a hearing was scheduled before the Chelan County hearing examiner. CP 19. The hearing occurred on November 16, 2016. CP 19. The hearing examiner allowed the introduction of new documentary evidence and testimony of the parties but did not allow general public comment. CP 19-CP 20; CP 1441.

The hearing examiner issued a decision containing findings of fact and conclusions of law on December 9, 2016. CP 19-CP 30. The hearing examiner upheld the County's notice and order in its entirety. CP 30.

The hearing examiner found that San Juan did not have a license to engage in marijuana production and processing on the property until April 14, 2016. CP 25-CP 26.¹ The hearing examiner found that photographs and site visit observations confirmed the presence of marijuana being grown on the property in June 2016. CP 26.² The hearing examiner found that the activities on the property were in violation of the Chelan County Code and constituted a nuisance. CP 27.³

The hearing examiner considered evidence submitted by San Juan regarding the various verbal and written statements that San Juan

¹ Finding of fact no. 45.

² Findings of fact nos. 47 and 52.

³ Findings of fact nos. 55 and 56.

attributed to Chelan County officials. CP 27.⁴ The hearing examiner found that the "oral and/or written statements by staff or the Chelan County Commissioners do not modify the vesting date or the terms and effectiveness of the valid moratorium." CP 27.⁵

The hearing examiner observed that San Juan did not own the property prior to September 29, 2015, and found that San Juan "was not in actual physical operation of a marijuana production and/or processing facility" before that date. CP 27-CP 28.⁶ The hearing examiner found that a marijuana production and processing facility was not lawfully established on the subject property prior to September 29, 2015, and further found that no marijuana production and processing facility on the property prior to April 14, 2016, could be lawful as that was the date of the WSLCB license issued to San Juan for its Chelan County location. CP 28.⁷

Based on these findings of fact, the hearing examiner concluded that San Juan's facility was not lawfully in operation prior to the enactment of the moratorium. CP 28.⁸ This conclusion was warranted because a "marijuana license applicant cannot exercise the privileges of a marijuana license (such as producing, processing, or selling marijuana)

⁴ Finding of fact no. 61.

⁵ Finding of fact no. 61.

⁶ Findings of fact nos. 64 and 65.

⁷ Findings of fact nos. 66 and 67.

⁸ Conclusion of law no. 12.

until the LCB has approved a license application.” CP 28.⁹ Further, because San Juan's business permit application followed, rather than preceded, the effective date of the County's moratorium, neither the submittal of the building permit application nor its approval could grant vested rights to a use that the moratorium prohibited. CP 29.¹⁰

The hearing examiner ruled that the building permit issued by the County vested San Juan as to those "uses allowed in the underlying zoning, with the exception of those uses prohibited by the moratorium." CP 29.¹¹ For vesting purposes, the hearing examiner found the applicable date to be the date the building permit application was submitted, October 30, 2015. CP 29.¹²

The hearing examiner affirmed the County's notice and order regarding the presence of unpermitted buildings on the property, the violation of applicable zoning setbacks due to San Juan's perimeter fence, and the presence of excess vehicles. CP 30.

Aggrieved by the hearing examiner's decision, San Juan filed a LUPA petition in superior court on December 23, 2016. CP 1-CP 30.

San Juan's LUPA petition was heard by the trial court on May 26, 2017. CP 1714. The court issued a memorandum opinion on August 4,

⁹ Conclusion of law no. 13.

¹⁰ Conclusions of law nos. 19 and 20.

¹¹ Conclusion of law no. 21.

¹² Conclusion of law no. 27.

2017. CP 1714-CP 1725. The court considered the chronology of pertinent events and observed that "both the filing of the [building permit] application on October 29, 2015 as well as the date the application was deemed complete on November 16, 2015, occur well after September 29, 2015, the date Chelan Co. enacted the six month moratorium." CP 1719-CP 1720.

The court rejected San Juan's "fallback position" that even if the moratorium was in effect at the time it filed its building permit application, the moratorium nevertheless did not govern San Juan's land use rights. CP 1720. The court commented that "SJSG's argument ignores that Washington courts have consistently recognized temporary moratoriums as valid techniques designed to preserve the status quo so that the government's ability to enact new plans and make long term planning decision will not be rendered moot by intervening development." CP 1720. The court found that the moratorium contained in Reso. No. 2015-94 "clearly prevents the vesting of any new lawful ability to produce or process marijuana and as such acts as a restriction on the use of land. Simply put, SJSG at the time of application on October 29, 2015 vested a right to engage in agriculture that did not include producing or processing marijuana." CP 1721.

As to San Juan's claimed right to a nonconforming use for the

production and processing of marijuana, the court noted that it was "not until April 14, 2016, two months after the permanent prohibition [i.e., Reso. No. 2016-14] was enacted, that SJSG obtained a license from the LCB to produce and process marijuana in Chelan county." CP 1722. The court rejected San Juan's claim to have legal nonconforming use rights because it was precluded from lawfully producing marijuana prior to the issuance of the LCB license, nor did "SJSG present any evidence that it actually produced or processed marijuana in Chelan county prior to the September 29, 2015 six month moratorium." CP 1722.

The court concluded that only by ignoring the effect of Reso. No. 2015-94 could it find in San Juan's favor. CP 1722. The court also noted that "[f]urthermore, SJSG previous actions admitted the moratorium's prohibitive effects by its attempts to seek an exemption by corresponding with the Chelan Co. Commissioners and the DCD director." CP 1722.

The court ruled that the County's notice and order was correctly issued for the failure of San Juan to obtain building permits for its 16 growing structures. CP 1722-CP 1723. The court also agreed with the County that San Juan had improperly installed its perimeter fence within the applicable setbacks prescribed by the Chelan County Code. CP 1724.

Because of the presence of zoning and building violations found by the court to exist at the site, the court agreed that San Juan had maintained a nuisance on the property. CP 1724.

An exception to the court's ruling upholding the hearing examiner related to the County's allegation of excess stored vehicles. CP 1723. The court reversed the hearing examiner on this subject. CP 1725.

An order of dismissal was entered by the court on September 21, 2017. CP 1727-CP 1742. The hearing examiner was reversed solely as to the issue of excess stored vehicles. CP 1728. The order stated that "[r]espondent Chelan County is the prevailing party herein and may present judgment accordingly."

IV. ARGUMENT

A. Standard of review.

In an appeal from a judicial review of an administrative decision, the appellate court bases its review on the administrative record. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998), *review denied*, 137 Wn.2d 1004 (1999). Factual findings are reviewed under the substantial evidence standard and conclusions of law are reviewed de novo. *Biermann*, 90 Wn. App. at 821. Questions of mixed law and fact are reviewed under the "clearly erroneous" standard. *City of Federal Way v. Town & Country Real*

Estate, LLC, 161 Wn. App. 17, 42, 252 P.3d 382 (2011).

San Juan failed to specifically list any assignments of error for any of the findings of fact of the hearing examiner as required by RAP 10.3(g). Throughout its brief, San Juan cites the hearing examiner's findings of fact, but never specifies that any of them were error for lack of substantial evidence. *E.g.*, Br. at 25, 29, 32, 35, 39. Those findings are now verities on appeal. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999) (failure to assign error to findings of fact of trial court resulted in verities on appeal); *ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 282, 348 P.3d 1222 (2015).

B. San Juan did not obtain vested rights to conduct a marijuana production or processing business at the site.

The most important issue in this case is whether San Juan can establish that it had vested rights to operate its marijuana-related business notwithstanding the County's moratorium. If this basic premise is established, then it follows that San Juan's business was not unlawful. But in the absence of vested rights, the notice and order was properly issued.

Incidentally, but importantly, San Juan has a glaring defect in its main theory on appeal. Even if this Court were to find that San Juan obtained vested rights or that the moratorium otherwise did not apply, then San Juan would nevertheless be at best a nonconforming use due

to the prohibition on all marijuana-related land uses contained in Reso. No. 2016-14. Based on the text of that resolution, nonconforming marijuana land uses are required to "cease, abate, and terminate no later than March 1, 2018. Structures associated with the nonconforming uses shall also cease, abate, and terminate as of the same date." CP 356. This issue was not ripe during the proceedings below. The issue below, and in this appeal, is whether the notice and order was correct in citing a violation of applicable codes. There has been no "retroactive application" of any County code because San Juan never obtained vested rights to a marijuana-related land use. San Juan does not have nonconforming use rights.¹³

San Juan's basic argument depends on the theory that vested rights accrued as a result of a series of actions and statements that San Juan attributes to Chelan County officials. Br. 25-29. In San Juan's terms, it became lawfully established not due to a timely application for a type of permit that confers vested rights under Washington law, but because of the various "authorizations and representations" allegedly made by the County. Br. 24. San Juan extends this theory by claiming that a "multitude of previous correspondences" confirmed the County's

¹³ Even if this Court should wish to reach this issue, there was no record developed below regarding how a reasonable amortization period would be calculated for San Juan. In *Northend Cinema v. Seattle*, 90 Wn.2d 709, 585 P.2d 1153 (1978), a 90-day termination period for nonconforming uses was upheld.

knowledge of the purpose to which San Juan intended to put the property. Br. 25.

Contrary to the main point of San Juan's appeal, Washington has adopted a bright-line test for vested rights and has repudiated any expansion of the vested rights doctrine based on claims of reliance.

1. The facts germane to San Juan's vesting claim are not in dispute.

Unlike many vested rights cases this one presents a streamlined factual pattern. The relevant facts and associated chronology can be simply stated as follows:

- September 29, 2015: The County adopted Reso. No. 2015-94, which "adopt[ed] a six month moratorium on the siting of licensed recreational marijuana retail stores, production, and processing" CP 369.
- October 30, 2015: San Juan submitted a building permit application identified as BP 150650 for its proposed structure. CP 388-CP 392.
- November 16, 2015: The County adopted Reso. No. 2015-102, which extended the 6-month moratorium of Reso. No. 2015-94. CP 365-CP 367.
- November 19, 2015: The County issued to San Juan building permit 150650 for its proposed structure. CP 487-CP 489.
- February 16, 2016: The County adopted Reso. No. 2016-14, permanently prohibiting recreational marijuana production and processing. CP 352-CP 358.

- April 14, 2016: San Juan received from WSLCB approval to operate as a marijuana producer and processor at its location in Chelan County. CP 1037.

San Juan can hardly deny that the extent of any vested rights that it may claim is determined by the zoning and land use controls in place at the time of its building permit application. As the above chronology shows, this point was fixed as of October 30, 2015. In the absence of any dispute as to the chronology of events, and recognition that the bright line event for San Juan's claim to vested rights was its submittal of a building permit application, the only remaining question is a determination of the pertinent law to which San Juan vested.

2. Current state of the law on vested rights.

The basic statement of the law for vesting of building permit applications is found at RCW 19.27.095, quoted in pertinent part as follows:

- (1) A valid and fully complete permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of the application, and the zoning or other land use control ordinances in effect on the date of application.

Washington's vested rights doctrine, originally developed at common law, states that "once a building permit application is filed, it will be considered under the then-current ordinances and regulations governing the land." *Alliance Inv. Group of Ellensburg, LLC v. City of*

Ellensburg, 189 Wn. App. 763, 766, 358 P.3d 1227 (2015).

The vested rights doctrine has been the subject of recent appellate decisions. In *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014), the Supreme Court stated that the vested rights doctrine is now statutory in nature. Expansion of the doctrine to other types of permits aside from building permits and subdivision applications has been rejected. *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 198, 334 P.3d 1143 (2014), *review denied*, 182 Wn.2d 1004 (2005). Retrenchment of the doctrine, rather than expansion of its applicability, has become the norm. See *Snohomish County v. Pollution Control Hearings Bd.*, 187 Wn.2d 346, 358, 386 P.3d 1064 (2016) (recognizing statutory basis of doctrine with regard to building permits).

For purposes of the statutory vested rights doctrine, a "land use control ordinance" is any regulation that exerts a "restraining or directing influence on land use and affects the physical aspects of development." *Snohomish County*, 187 Wn.2d at 366 (internal quotations omitted). The present inquiry shifts to whether Reso. No. 2015-94 exerts a restraining or directing influence over the development of land. To understand the effect of the resolution, it is helpful to consider the moratorium powers of Washington counties.

3. Overview of Washington law on moratoria.

"Under Washington law, moratoria and interim regulations are valid zoning tools." *Sprint Spectrum, LP v. City of Medina*, 924 F. Supp. 1036, 1039 (W.D. Wash. 1996) (citing *Matson v. Clark County Bd. of Comm'rs*, 79 Wn. App. 641, 644, 904 P.2d 317 (1995)); *see also*, *Jablinske v. Snohomish County*, 28 Wn. App. 848, 850-51, 626 P.2d 543 (1981) (recognizing validity of emergency zoning measures to preserve the status quo).

The enabling statute authorizing moratoria by Washington counties lists moratoria in parallel status with related concepts including an "interim zoning map, interim zoning ordinance, or interim official control." RCW 36.70A.390. A simple definition of "moratorium" from the online Merriam-Webster dictionary is "a time when a particular activity is not allowed." *See* "moratorium." *Merriam-Webster.com* 2018. <https://www.merriam-webster.com> (22 Feb. 2018).

The role of moratoria was discussed in *Matson v. Clark County*, 79 Wn. App. at 644. In *Matson*, the court stated that "moratoriums and interim zoning are generally recognized techniques designed to preserve the status quo so that new plans and regulations will not be rendered moot by intervening development." *Id.* The *Matson* court

noted that "[r]ecognizing the emergency, temporary, and expedient nature of such regulations, the courts have tended to be more deferential than usual to the local legislative body." *Id.*

Matson also discussed the relationship between moratoria and vested rights. *Id.* at 647-49. Because Washington law allows rights to vest merely upon filing a complete building permit application, there is a risk of frustrating long-term planning if moratoria are not given due effect. *Id.* at 647-48. For these reasons, moratoria prevail over the vesting of rights and are not unlawful even when enacted without notice. *Id.* at 648.

4. The extent of any vested rights acquired by San Juan with its building permit application was constrained by Reso. No. 2015-94.

Both the hearing examiner and the trial court correctly concluded that the County's moratorium must be applied to San Juan in a way that gives effect to Reso. No. 2015-94. The hearing examiner noted that "[a] building permit application cannot lawfully vest in uses prohibited by a legally effective moratorium." CP 28. As put by the trial court, "[p]reserving the status quo *is* a restraining influence over land use." (emphasis in original). CP 1704.

The trial court further stated that Reso. No. 2015-94, by "prohibiting the acceptance of applications for the production and

processing of marijuana provides no grounds for finding that the moratorium as enacted was not a restraint." CP 1704. The County's intent in Reso. No. 2015-94 is plainly stated as precluding the siting of marijuana-related land uses so that the County might undertake and complete "research and analysis" to identify "the level and types of regulations which may be necessary to address impacts." CP 368. The moratorium, which was never appealed to either superior court or the Growth Management Hearings Board, precluded any new marijuana-related land uses. CP 369. It precluded acceptance of permit applications for marijuana-related land uses. CP 369.

In summary, pursuant to Reso. No. 2015-94 a moratorium on marijuana production and processing land uses was in effect in Chelan County as of September 29, 2015. Mr. Kwon did not own the property until mid-October 2015, and San Juan obtained no approval of its producer and processor license application at this location from the WSLCB until April 14, 2016. CP 51-CP 53; CP 1037. Even the application for San Juan's building permit was not submitted until a month after the moratorium went into effect. CP 388-CP 392.

C. San Juan's arguments against the effect of Reso. No. 2015-94 are unavailing because they contradict its terms or require that the vested rights doctrine be expanded to encompass equitable reliance-type theories.

San Juan argues that although it is clear "that Resolution 2015-

94 was intended to prohibit the siting of new operations," the resolution is nevertheless "opaque as to how other I-502 businesses that had already made a siting decision would be handled." Br. 30. San Juan makes this argument partly to provide an introduction to its theme of San Juan's purported reliance upon representations of County officials. San Juan was "unclear of the intended meaning of Resolution 2015-94." Br. 30. San Juan also suggests that the moratorium by its own text did not apply to its business. Br. 6, 30.

1. Equitable theories cannot subvert the vested rights doctrine.

San Juan claims that vested rights are justified because County officials acquiesced in San Juan's "interpretation of how the moratorium should be applied" Br. 30-31. Other sections of San Juan's brief are premised on the same notion that San Juan "should be allowed to continue to operate on the Property" because of representations it allegedly obtained "from Chelan County along the way." Br. 24. San Juan's argument is legally erroneous and inconsistent with the factual record as found by the hearing examiner.

Washington has repudiated any reliance-based exemption to the vested rights doctrine, instead opting for the date certain standard of RCW 19.27.095. *Hull v. Hunt*, 53 Wn.2d 125, 130, 331 P.2d 856 (1958) (adopting date certain rule for vesting); *Abbey Road Group*,

LLC v. City of Bonney Lake, 141 Wn. App. 184, 199, 167 P.3d 1213 (2007) ("Washington abandoned a detrimental reliance analysis for vesting development rights long ago . . ."). This proposition from *Abbey Road Group* has never been disputed in any subsequent case. San Juan simply ignores this issue and in doing so flies directly in the face of *Abbey Road Group* and related case law. On the final page of its brief, San Juan makes passing reference to an equitable estoppel case in which the (former) Liquor Control Board reversed a final decision to grant a liquor license, but this was not a land use case and it says nothing about the vested rights doctrine or the zoning authority of municipalities. *State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 140-43, 401 P.2d 635 (1965).

As a factual matter, the record provides substantial evidence to support the hearing examiner's finding that the representations San Juan attributes to Chelan County officials "do not modify the vesting date or the terms and effectiveness of the valid moratorium." CP 27.¹⁴

Chelan County Commissioner England gave no assurances that San Juan would be allowed contrary to the moratorium, but acknowledged that a business in full operation, with all necessary permits and approvals, would be allowed to continue. CP 1317.

¹⁴ Finding of fact no. 61.

Similarly, Commissioner Goehner stated to San Juan only that an already established business would be considered the same as licensed growers operating in compliance with applicable regulations at that time. CP 1320. Commissioner Walter stated in his declaration that the moratorium would not alter San Juan's permitting process, subject to full compliance with the County's development regulations "on matters such as zoning, building permits, and any other required licenses or approvals." CP 1324.

San Juan's reliance theory is belied by other sources in the record. San Juan acknowledges in its opening brief that its representatives were "unclear of the intended meaning of Resolution 2015-94" and that the resolution "raised many practical questions about how it would be applied by the County." Br. 30. Internal communications between San Juan representatives indicate that this "unclear" prompted them to request additional confirmation from Commissioner Walter. CP 1044-CP 1045. But even as this email transpired, Commissioner Walter continued to insist that "all work will have to be compliant with county code and zoning." CP 1045. San Juan representative Adam Andrews indicated his acknowledgment of Commissioner Walter's stipulation, and with this proviso received Commissioner Walter's subsequent statement that it would be his

"understanding" that the "moratorium will not in of itself change the permitting process for us." CP 1045. San Juan overstates its case in claiming that these communications were "an unambiguous decision" made by County officials "that the moratorium did not conflict with prohibit San Juan's building permit application." Br. 10. The hearing examiner was entitled to consider the evidence and find the facts contrary to San Juan's claims.

But even if San Juan had a compelling case of reliance, and if the hearing examiner had not found the facts adversely to San Juan's theme, the issue would be foreclosed as a matter of law under the vested rights doctrine. *See Abbey Road Group*, 141 Wn. App. at 199.

2. The moratorium applied to San Juan's marijuana production and processing business.

Although not clearly articulated in its brief, San Juan appears to claim that Reso. No. 2015-94 (the moratorium) as well as subsequent Reso. No. 2016-14 (the permanent ban) do not apply to San Juan under the circumstances of this case. San Juan argues that the moratorium's prohibition on "siting" of such businesses was inapplicable to San Juan because it was already "sited" or had "made a siting decision" and therefore "was entitled to proceed because it had initiated the process to transfer its license to the property prior to the moratorium going into effect." Br. 30-31. This argument fails because it is based on the

untenable view that the resolution intended to affect only the inchoate *siting* of facilities but not the actual production or processing of marijuana. This argument is nonsensical because it would mean that any subjective intention to locate a marijuana operation in Chelan County could evade the moratorium's prohibitory purpose. San Juan attempts to bootstrap its way out of the moratorium's applicability by claiming it had, through various steps preliminary to lawfully commencing operations in Chelan County, already become "sited."

San Juan's argument should be rejected. It subverts the vested rights doctrine by ignoring the requirement that a complete building permit application be submitted in order for any vesting to occur. *See* RCW 19.27.095. And even the actions that San Juan claims created ambiguity over the terms of the moratorium—such as the phone calls between representatives of San Juan and Chelan County and Commissioner Walter's endorsement of the WSLCB notice—occurred after the effective date of Reso. No. 2015-94. CP 298; CP 993-CP 995; CP 51-CP 53; CP 368-CP 369.

3. The County had no obligation to appeal the building permit.

San Juan argues that Washington's Land Use Petition Act, Ch. 36.70C RCW ("LUPA"), imposed an obligation on the County to appeal the building permit issued to San Juan because otherwise it

"operated as a waiver of the County's ability to seek revocation of the permit, deny its lawful existence or the vested rights created there under." Br. 27. This argument is fallacious for several reasons.

First, this is merely another attempt to evade the effect of the vested rights doctrine, despite the fact that Washington courts have insisted on the bright-line standard of RCW 19.27.095.

Second, San Juan's argument misperceives the focus of the County's notice and order. The County has never claimed that the building permit issued to San Juan was issued in error or is invalid. But San Juan may not put the building to a use that was expressly prohibited by the moratorium in effect at the time of permit issuance. The hearing examiner correctly found that the building permit "vested as to all uses allowed in the underlying zoning, with the exception of those uses prohibited by the moratorium." CP 25.¹⁵

The rights that vested as a result of the building permit application were the rights to construct the building and fence and to use the same for all lawful purposes allowed by the land use and zoning regulations in place at that time. Since Chelan County had enacted a moratorium on marijuana production and processing, no rights vested with respect to those uses. The County has no grievance with San

¹⁵ Finding of fact no. 37.

Juan's use of its permitted structure for lawful purposes. There has never been anything for the County to appeal.

To support its argument San Juan cites *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 385 P.2d 372 (1963). *Craven* is a mandamus case and has nothing to do with a jurisdiction's obligation to appeal a building permit as a condition to enforcing land use laws against a violator. San Juan provides no developed argument based on *Craven*. San Juan also cites *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960-61, 954 P.2d 250 (1998), but again San Juan does not explain how this case actually supports its arguments. The case contains nothing suggestive of a duty to appeal a land use permit prior to taking action to enforce a zoning code violation.

San Juan cites *Chelan County v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002), but the only point that San Juan draws from this case is a generalized statement of the policy of finality in land use decisions. Br. 27-28. The County does not dispute this point, but the matter has nothing to do with the unlawfulness of San Juan's use of the structure and the premises for marijuana production and processing.

D. San Juan's marijuana activities have never been a legal nonconforming use.

A nonconforming use is one 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 zoning restrictions applicable to the district in which it is situated.” *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 648, 30 P.3d 453 (2001). Chelan County also addresses nonconforming uses in its code, specifically Chapter 11.97 CCC. “Nonconforming” is defined to mean a use “which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails by reason of such adoption, revision or amendment to conform to the current requirements of the zoning district.” CCC 14.98.1300.

It is a legitimate policy of zoning legislation to phase out a nonconforming use. This is because “[n]onconforming uses are not favored in law, and it is only to avoid injustice that zoning laws except them.” *Andrew v. King County*, 21 Wn. App. 566, 570, 586 P.2d 509 (1978).

Reso. No. 2016-14 addressed nonconforming uses. Marijuana production and processing uses “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.”

Before qualifying as legally nonconforming, a use must actually be established prior to adoption of a zoning ordinance. *Anderson v.*

Island County, 81 Wn.2d 312, 321, 501 P.2d 594 (1972) (mere purchase of property and occupation are not sufficient to establish a nonconforming use); *see also King County Dep't of Dev. & Envtl. Servs. v. King County*, 177 Wn.2d 636, 646-47, 305 P.3d 240 (2013) (processing facility not a legal nonconforming use since all stages required for implementation of materials processing did not occur prior to change in regulations).

It is illegal to engage in the production or processing of marijuana without a valid license issued by WSLCB. *See* RCW 69.50.363-.366 (license required); WAC 314-55-015 (same). Issuance of a marijuana license is not to be “construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements.” WAC 314-55-020(15).

San Juan had no license to conduct marijuana production or processing at the site until April 14, 2016. CP 25-CP 26.¹⁶ Because San Juan could not have been in lawful operation at a time when the County allowed marijuana-related land uses, San Juan cannot have been a legal nonconforming use.

E. The hearing examiner committed no procedural errors.

¹⁶ Finding of fact no. 45.

San Juan argues that the hearing examiner erred in two procedural respects. First, San Juan claims that the hearing examiner wrongly placed the burden of proof on San Juan to show that the notice and order was erroneously issued. Br. 16-20. Second, San Juan argues that the hearing examiner decision is defective because of a lack of legal citations. Br. 21-23.

1. The hearing examiner properly allocated the burden of proof.

San Juan's argument regarding the burden of proof is devoid of any citation to precedent. For instance, San Juan claims without any authority whatsoever that the "burden of proof is always on the person who brings a claim in a dispute." Br. 17. San Juan argues that this represents a "basic principal of due process" but again cites nothing to support this contention. Br. 19.

The proper allocation of burden of proof in this matter was raised sua sponte by the hearing examiner in an email directed to the parties. CP 1228. The hearing examiner invited the parties to share their views on the issue. CP 1229-CP 1232. The hearing examiner decided that San Juan would have the burden proof. CP 1235. At the hearing, the hearing examiner reaffirmed his ruling. CP 1474-CP 1476. He commented that "[i]n every – in every scenario that I can think of, appellants who are challenging a decision of a court or decision of the

County has [sic] the responsibility of showing the decision was erroneous – and that's why I went to that – I went there." CP 1475.

The hearing examiner also pointed to applicable rules of procedure. CP 1475. "[T]hose also clearly establish that the appellant has the burden of proof in appeals." CP 1476.

San Juan's argument that the hearing examiner's allocation of burden proof violates due process standards is incorrect. The fundamental requirements of procedural due process are notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Procedural due process is not a fixed standard, but a relative concept changing in form, providing that process of law which is due in each circumstance. *Reilly v. State*, 18 Wn. App. 245, 250, 566 P.2d 1283 (1977). A notice of violation, even if final, "is not the type of encumbrance that constitutes a significant property interest giving rise to procedural due process." *Cranwell v. Mesec*, 77 Wn. App. 90, 111, 890 P.2d 491 (1995), *review denied*, 127 Wn.2d 1004.

Based on *Cranwell*, the notice and order itself did not deprive San Juan of any property interest. And the hearing examiner proceedings provided ample opportunity for San Juan to present evidence and raise its arguments. Due process requires no more. Different rules govern the burden of proof in the criminal context

because the state cannot require a defendant to disprove any fact that constitutes the crime charged. *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). This rule has no applicability here.

The hearing examiner followed the Chelan County Code, which states that "the appellant shall have the burden of proving the decision is erroneous." *See* CCC 14.12.010(2)(C). CP 1701. The hearing examiner rules of procedure are in accord: "[t]he applicant or appellant shall have the burden of proof to show compliance with applicable laws and regulations of Washington State and Chelan Co." CP 1701. San Juan simply ignores these provisions.

San Juan likens the notice and order to an infraction and argues that other counties have allocated the burden of proof to the governmental entity to demonstrate that the violation was committed. Br. 18-19. San Juan also, in passing, draws an analogy to the Rules for Enforcement of Lawyer Conduct. Br. 20.

Different burdens of proof may compatibly exist in different settings. This is not the equivalent of showing any due process violation here. San Juan's citations to the codes of other counties relate to those counties' infraction processes, not their notice and order of violation processes. There has been no infraction issued in this case. The notice and order of violation may lead to infraction citations, but

the County has not imposed any such penalty. Should the County pursue a civil infraction against San Juan, a different burden of proof may govern.

Also missing from San Juan's argument on this point is any explanation of how a change in the burden of proof impacted the result. The hearing examiner's findings of fact would have been equally justifiable if the burden of proof had rested with the County. The facts in this matter were not in dispute. His decision nowhere faults San Juan for failing to meet the burden of proof but, rather, finds San Juan's position unpersuasive mainly based on issues of law under the vested rights doctrine.

San Juan's failure to assign error to any of the hearing examiner's findings of fact is a fatal flaw in its burden of proof argument. San Juan cites no factual finding that would have been decided differently under a different burden of proof. This Court will review the decisions below on issues of law de novo. If the hearing examiner or the trial court erred as a matter of law, this Court will be able to implement an appropriate remedy. If there was no error of law on a substantive issue, then the allocation of burden of proof is irrelevant.

2. The hearing examiner's decision was sufficient for purposes of review.

San Juan also raises as procedural error the absence of legal citations in the hearing examiner's decisions. Br. 21-23. In support of its argument San Juan cites cases that generally describe the standards for granting relief under LUPA. Br. 22.

None of these cases indicates that a land use decision is erroneous for failure to supply legal citations, however, as opposed to committing an actual erroneous interpretation of the law. Both before the hearing examiner and the trial court, and now once again, San Juan has had ample opportunity to identify legal error and state its argument. No authority is cited for the proposition that the decision below constitutes reversible error for the reasons stated by San Juan.

San Juan argues that the lack of legal citations in the hearing examiner's decision did not conform to a provision in the hearing examiner's own rules of procedure. Br. 21. The hearing examiner's findings of fact, along with the evidentiary record, imposed no impediments on San Juan in its ability to seek review in its LUPA petition.

Further, there is no basis to criticize the hearing examiner's decision on this matter. The hearing examiner did cite to Chelan County resolutions and included code provisions as well as statutory references. CP 23-CP-29. The hearing examiner explained his legal

reasoning in clear sentences. The trial court clearly articulated the legal precedent upon which it relied. CP 1698-CP 1709. Any error on this issue committed by the hearing examiner was harmless. This Court is fully capable of evaluating San Juan's arguments on appeal and assessing their merit.

F. San Juan was required to obtain building permits for construction of its growing structures.

The main focus of the County's notice and order was San Juan's illegal marijuana production and processing business. The hearing examiner found substantial evidence that such operations were indeed underway and correctly ruled as a matter of law that San Juan had acquired no vested rights contrary to the County's moratorium. Because these rulings were correct, the remaining arguments raised by San Juan are of secondary importance.

Nonetheless, the hearing examiner was also correct to find that the 16 growing structures located on the property did not have valid building permits despite the requirements of the Chelan County Code. CP 26.¹⁷

The trial court concluded that San Juan was required to obtain permits for the structures and affirmed the hearing examiner. CP 1707.

There is no dispute that the building permit obtained by San

¹⁷ Finding of fact no. 53.

Juan did not relate to the growing structures. CP 388-CP 392. In fact, nothing on the face of the building permit application gave any indication of the intended construction of the 16 growing structures. Within two days after Chelan County's building inspector observed the growing structures being erected, San Juan was informed that the structures were unpermitted and could not be used for marijuana purposes. CP 25.¹⁸ Subsequently, on June 27, 2016, Chelan County received an aerial photograph of the subject property depicting 17 large growing structures notwithstanding its prior warning to San Juan. CP 26.¹⁹ The aerial photograph can be found in the record at CP 1139.

The State Building Code, adopted by the Chelan County Code, in turn adopts the International Building Code. *See* CCC 3.04.010 (adopting State Building Code); RCW 19.27.031(1)(a) (State Building Code adoption of International Building Code). Pursuant to the 2012 International Building Code, a permit is required to "construct . . . a building or structure."²⁰ IBC 105.1. Structure is defined as "that which is built or constructed." IBC 202. The State Building Code contains an exception to the permit requirement for "temporary growing structures

¹⁸ Findings of fact nos. 42 and 43.

¹⁹ Finding of fact no. 47. The discrepancy between 16 and 17 growing structures is unexplained in the record below.

²⁰ At the time these structures were constructed or erected, the 2012 edition of the IBC was in effect. Chelan County later adopted the 2015 edition of the IBC on July 18, 2016, in Reso. No. 2016-67.

used solely for the commercial production of horticultural plants including ornamental plants, flowers, vegetables, and fruits." RCW 19.27.065; WAC 51-50-007.

In an interpretation issued by the state Building Code Council on March 12, 2015, the council advised that structures used year round and provided with certain additional features would not be exempt under the building code. CP 1221. The interpretation also pointed out that marijuana "is not considered an agricultural product which would not classify it as an ornamental plant, flower, vegetable, or fruit," citing RCW 82.04.213. CP 1221. *See* RCW 82.04.213(1) ("agricultural product' does not include marijuana, useable marijuana, or marijuana-infused products . . .").

The Building Code Council's interpretation cited to the exclusion of marijuana from the definition of "agriculture," "farming," "horticulture," "horticultural," and "horticultural product" contained at RCW 82.04.213, as follows:

The terms 'agriculture,' 'farming,' 'horticulture,' 'horticultural,' and 'horticultural product' may not be construed to include or relate to marijuana, useable marijuana, or marijuana-infused products unless the applicable term is explicitly defined to include marijuana, useable marijuana, or marijuana-infused products.

This language was the result of Washington Senate Bill 6505, "AN ACT Relating to clarifying that marijuana, useable marijuana, and

marijuana-infused products are not agricultural products.” Laws of 2014, ch. 140. The legislation also amended other Washington statutes resulting in the exclusion of marijuana from various agricultural definitions and provisions including RCW 15.13.270 (excluding marijuana production from nursery dealer licensing), RCW 15.17.020 (11) (excluding marijuana from definition of “fruits and vegetables”), RCW 15.49.061 (excluding marijuana from Chapter 15.49 RCW, Seeds), RCW 84.34.410 (excluding marijuana land uses from provisions of Chapter 84.34 RCW, Open Space, Agricultural, Timberlands – Current Use – Conservation Futures). *Id.* at § 2, 27-28, 31-34.

Since the interpretation was first issued in 2015, the permit exception has not been amended by the Building Code Council. Neither has the definition of marijuana been amended by the legislature to indicate that it is a horticultural or agricultural product.²¹

The growing structures have been used only in connection with marijuana production. CP 1268-CP 1269. San Juan argues that it had been advised by County representatives that building permits for the

²¹ The hearsay email exchanged between Mr. Rice and a person with the Building Code Council is inconclusive at best. It provides no context for the person’s authority to speak for the agency and merely states that certain structures would be classed as temporary growing structures without addressing the further definitional exclusion of “marijuana” as not an “agricultural product.” CP 1053-CP 1054.

structures would not be required. Br. 35. In support of this argument, San Juan cites hearsay statements that San Juan attributed to a different marijuana producer. CP 1268. San Juan also cites an email exchange with a Chelan County code enforcement officer. CP 1055. The email does not provide any assurances to San Juan on the applicability of the building permit exception for marijuana growing structures. CP 1055. The email did little more than direct San Juan to the applicable WAC regulation and suggest that San Juan contact the County's building official/fire marshal if San Juan needed "further clarification." CP 1055.

This email communication, which is the only communication that San Juan attributes to any County official on the subject, cannot support equitable estoppel. Equitable estoppel against a government entity requires clear, cogent, and convincing evidence of several discrete elements, including a specific admission or statement, reasonable reliance, injury, and the absence of impairment of governmental functions. *Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 775-76, 102 P.3d 173 (2004). San Juan makes no attempt to show that the requirements of equitable estoppel are met under the facts of this case. The email does not constitute a statement inconsistent with any claim later asserted by the County, because the County gave

San Juan no confirmation that its proposed large-scale marijuana growing structures were exempt from the building permit requirement.

The issuance of building permits for these structures would directly contravene the County's lawful exercise of land use control over marijuana-related activities in Reso. No. 2015-94.

San Juan also makes arguments relating to due process and equal protection on the topic of the building permit requirement for its growing structures. Br. 37-38. San Juan supplies no citation to authority for either contention and the arguments are meritless.

G. San Juan's request for a variance due to its encroaching fence is not relevant to the validity of the notice and order.

San Juan's property is surrounded by an eight-foot high fence. CP 23.²² A survey shows the fence encroaching on applicable zoning setbacks from adjacent streets and property lines. CP 26²³; CP 27²⁴; CP 1174. San Juan submitted a request to the County for an administrative modification to the setback requirements. CP 26.²⁵ The administrative modification to the setback is needed in conjunction with San Juan's use of the property for marijuana production and processing operations.

As San Juan acknowledges "[t]his issue is tied inexplicably to

²² Finding of fact no. 21.

²³ Finding of fact no. 50.

²⁴ Finding of fact no. 54.

²⁵ Finding of fact no. 51.

the dispute of whether San Juan's underlying use of the property was lawfully established." Br. 40. What San Juan fails to acknowledge is that the County has made clear that it is willing to process an administrative modification promptly upon San Juan completing an application and paying the necessary fee. CP 829. In an email dated May 3, 2016, Chelan County informed San Juan that it would indeed process such an application and that San Juan could expect a decision within approximately two and a half weeks. CP 829.

The truth of the matter is that San Juan cannot properly support an application for an administrative modification because doing so would require San Juan to confirm that the requested permit would not be used for the furtherance of marijuana-related activities. Br. 13. Because San Juan cannot sign the statement of purpose in good faith, no variance application has been pursued. The necessary statement is an integral part of the County's prohibition on marijuana-related land uses at Reso. No. 2016-14, which states in pertinent part as follows:

No application for a building permit, occupancy permit, tenant improvement permit, fence permit, variance, conditional use permit, or other development permit or approval as either consistent or complete by any county department related to marijuana or cannabis production, processing, collective gardens or cooperatives. CP 356.

In any event, the issue is not ripe for review here. The County issued the notice and order based on evidence that the fence violated

the setback. CP 69. The hearing examiner and the trial court affirmed. CP 30; CP 1708. As the trial court observed, "granting the variance for the fence to enable a commercial marijuana grow operation would be directly contrary" to the County's restrictions on marijuana-related land uses. CP 1708.

There was no error below.

H. Request for costs and reasonable attorneys' fees.

Pursuant to RCW 4.84.370, the County requests its costs and reasonable attorneys' fees incurred herein. The County was the prevailing party in proceedings before the hearing examiner and the trial court. Even though the trial court reversed the hearing examiner on the sole issue of excess stored vehicles, the County nevertheless prevailed or substantially prevailed, as specifically found in the court's order of dismissal, because all other aspects of the notice and order were upheld. CP 1728.

Should the County prevail in this appeal, the necessary requirements of RCW 4.84.370 would be fulfilled. This would be the second court to affirm the hearing examiner on a matter relating to a development permit. *Durland v. San Juan County*, 175 Wn. App. 316, 325-26, 305 P.3d 246 (2013), *affirmed at*, 182 Wn.2d 55 (2014). The application of a moratorium is a matter relating to a "land use decision"

for purposes of this statute. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 701-02, 169 P.3d 14 (2007). A challenge to a denial of legal nonconforming use status also invokes this statute, as does a challenge to a citation for code violations. *First Pioneer Trading Co. v. Pierce County*, 146 Wn. App. 606, 618, 191 P.3d 928 (2008) (nonconforming use); *Mower v. King County*, 130 Wn. App. 707, 720-21, 125 P.3d 148 (2005).

V. CONCLUSION

For the forgoing reasons, the trial court's decision should be affirmed. This Court should direct further proceedings to determine the amount of costs and reasonable attorneys' fees in favor of the County.

RESPECTFULLY SUBMITTED this 7th day of March, 2018.

MENKE JACKSON BEYER, LLP

By:



Kenneth W. Harper, WSBA #25578
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Chelan County*

DECLARATION OF SERVICE

On the day set forth below, I emailed and deposited in the U.S. Mail a true and accurate copy of: Brief of Respondent Chelan County in Court of Appeals, Division III, Cause No. 355446 to the following parties:

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Electronic filing by JIS Portal to:

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Court of Appeals, Division III
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Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED THIS 7th day of March, 2018, at Yakima, Washington.



Julie Kihn

MENKE JACKSON BEYER, LLP

March 07, 2018 - 11:41 AM

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