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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

Case No. 364399

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SEVEN HILLS, LLC, a Washington limited liability company; and  
WATER WORKS PROPERTIES, LLC, a Washington limited liability  
company;

Appellants,

v.

CHELAN COUNTY, a municipal corporation.

Respondent.

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APPELLANTS' REPLY BRIEF

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**TABLE OF CONTENTS**

|   | <b><u>Page</u></b> |
|---|--------------------|
| 1. INTRODUCTION .....   | 1                  |
| 2. FACTS .....  | 1                  |
| 3. ARGUMENT .....   | 1                  |
| 3.1 The Hearing Examiner Erred By Placing The Burden Of<br>Proof Upon The Appellants .....  | 1                  |
| 3.1.1 The Hearing Examiner Inappropriately Relied<br>Upon The Burden Of Proof Standard Found<br>Elsewhere In The Code .....   | 2                  |
| 3.1.2 The County Must Prove Allegations In Its Notice<br>And Order .....  | 4                  |
| 3.2 Appellants Established Nonconforming Rights For The<br>Production And Processing Of Cannabis .....  | 14                 |
| 3.2.1 Appellants lawful use of the Property for cannabis<br>production and processing was established before<br>the County enacted contrary regulations through<br>Resolution 2016-14 ..... | 15                 |
| 3.2.2 The County’s Moratorium Was Not Applicable to<br>Seven Hills .....  | 20                 |
| 3.3 Chelan County Cannot Enforce Regulations It Doesn’t<br>Have, And Should Be Estopped From Attempting To Do<br>So .....   | 22                 |
| 3.4 Appellants’ Actions Were At All Times Sanction By<br>Chelan County And Therefore Cannot Be Considered A<br>Nuisance .....   | 24                 |
| 4. CONCLUSION .....   | 24                 |

## TABLE OF AUTHORITIES

| <u>Case Law</u>   | <u>Page</u> |
|---|-------------|
| <i>ABC Holdings vs. Kittitas County</i> ,<br>187 Wn.App. 275, 348 P.3d 1222 (2015) .....                | 12          |
| <i>Armstrong v. Manzo</i> ,<br>380 U.S. 545 (1965) .....  | 7, 8        |
| <i>Anderson vs. Island County</i> ,<br>81 Wn.2d 312, 501 P.2d 594 (1972) .....                          | 17, 18      |
| <i>Bartlow v. Shannon</i> ,<br>399 Ill.App.3d 560, 927 N.E.2d 88 (2010) .....                           | 9           |
| <i>Carey v. Piphus</i> ,<br>435 U.S. 247 (1978) .....   | 4           |
| <i>City of Pierre v. Blackwell</i> ,<br>635 N.W.2d 581 (2010) .....                                     | 6, 7        |
| <i>Cook v. City of Buena Park</i> ,<br>126 Cal.App.4th 1, 23 Cal.Rptr.3d 700 (2005) .....               | 9           |
| <i>Cranwell v. Mesec</i> ,<br>77 Wn.App. 90, 890 P.2d 491 (1995) .....                                  | 10, 11, 12  |
| <i>Dailey vs. Sioux Falls</i> ,<br>802 N.W.2d 905 (2011) .....  | 5, 6, 8     |
| <i>First Pioneer Trading Co., Inc. v. Pierce County</i> ,<br>146 Wn.App. 606, 191 P.3d 928 (2008) ..... | 17, 18      |
| <i>Gillis v. King County</i> ,<br>42 Wn.2d 373, 255 P.2d 546 (1953) .....                               | 22          |
| <i>Jefferson County v. Lakeside Industries</i> ,<br>106 Wn.App. 380, 23 P.3d 542 (2001) .....           | 15          |

|   |            |
|---|------------|
| <i>Johnson v. Beneficial Management Corp.</i> ,<br>85 Wn.2d 637, 538 P.2d 510 (1953) .....                            | 22         |
| <i>King County Dep't of Dev. &amp; Envtl. Servs. vs. King County</i> ,<br>177 Wn.2d 636, 305 P.3d 240 (2013) .....    | 17, 19     |
| <i>Kramarevcky v. Dep't of Soc. &amp; Health Servs.</i> ,<br>122 Wn.2d 738, 863 P.2d 535 (1993) .....                 | 23         |
| <i>Macumber v. Shafer</i> ,<br>96 Wn.2d 568, 637 P.2d 645 (1981) .....  | 22         |
| <i>Mathews v. Eldridge</i> ,<br>424 U.S. 319 (1976) .....   | 4, 5       |
| <i>Marlow v. Douglas County</i> ,<br>177 Wn.App. 1017 (Oct. 22, 2013) .....   | 10, 12, 13 |
| <i>Pinecrest Homeowners Ass'n, v. Glen A Cloninger &amp; Associates</i> ,<br>151 Wn.2d 279, 87 P.3d 1176 (2004) ..... | 1, 2       |
| <i>Rhod-A-Zalea &amp; 35th, Inc. v. Snohomish County</i> ,<br>136 Wn.2d 1, 959 P.2d 1024 (1998) .....                 | 14, 22     |
| <i>Schenck v. Douglas County</i> ,<br>181 Wn.2d 1030, 340 P.3d 228 (2014).....  | 10, 12, 13 |
| <i>Skamania County v. Woodall</i> ,<br>104 Wn.App. 525, 16 P.3d 701 (2001) .....                                      | 15         |
| <i>Speiser v. Randall</i> ,<br>357 U.S. 513 (1958) .....  | 4, 8       |

| <b><u>Statutes</u></b> | <b><u>Page</u></b> |
|------------------------|--------------------|
| RCW 7.80.100(3) .....  | 11                 |
| RCW 36.70A.390 .....   | 18                 |
| RCW 36.70.795 .....    | 18                 |
| RCW 69.50.331(7) ..... | 16                 |
| RCW 90.58.140(7) ..... | 12                 |

**Administrative Regulations**

WAC 173-27-040(1)(c) ..... 8  
WAC 314-55-020(1) ..... 16  
WAC 314-55-160 ..... 16

**Municipal Authority**

**Page**

Chelan County Code 11.97 ..... 14, 20  
Chelan County Code Title 14 ..... 2, 3, 13  
Chelan County Code 14.02.005 ..... 3  
Chelan County Code 14.12 ..... 3  
Chelan County Code Title 16 ..... 2, 3, 5  
Chelan County Code 16.04.010 ..... 9, 10  
Chelan County Code 16.06.070 ..... 11  
Chelan County Code 16.12 ..... 2  
Chelan County Code 16.16.010 ..... 11  
Chelan County Code 16.18.010 ..... 9  
Chelan County Code 16.18.020 ..... 9, 11  
Resolution 2014-5 ..... 15  
Resolution 2014-38 ..... 15  
Resolution 2015-94 ..... 16, 20, 21  
Resolution 2016-14 ..... 17, 19, 20, 21, 22, 25

## **1. INTRODUCTION**

The primary focus of Appellants' Reply Brief will be to explain Appellants' positions on the correct burden of proof to be used in this matter and its vested and non-conforming rights. Resolving these issues will simultaneously resolve a number of other issues by either making them moot (e.g. nuisance claim and unlawful use of the property claim) or by authorizing Appellants' use, which will thus require the County to proceed with processing Appellants permits (e.g. greenhouse building permits, propound inspections etc.).<sup>1</sup>

## **2. FACTS**

The facts in this matter have been established through prior briefing by the parties and will not be further discussed here.

## **3. ARGUMENT**

### **3.1 The Hearing Examiner Erred By Placing The Burden Of Proof Upon The Appellants.**

The Hearing Examiner placed the burden of proof regarding the

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<sup>1</sup> As stated in the Appellant's LUPA Petition (CP 001-019), and pursuant to RAP 10.3(8)(g), Appellants specifically, but not exclusively, take issue with the following sections of the Hearing Examiner's decision (CUP 660-671):

- a. Findings of Fact: Paragraphs 33, 36, 37, 38, 39, 40, 41
- b. Conclusions of Law: Paragraphs 3, 4, 5, 6, 7, 8
- c. The Decision in its entirety.
- c. The Decision in its entirety.

validity of the claims in the County's Notice and Order on the Appellants, in essence denying that the County has any burden of proof in its enforcement actions. CP 663. This issue is reviewed by the Court de novo. *Pinecrest Homeowners Ass'n, v. Glen A Cloninger & Associates*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). 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. Respondent's arguments on this issue are technically flawed and present grave implications for theoretical application.

3.1.1 The Hearing Examiner Inappropriately Relied Upon The Burden Of Proof Standard Found Elsewhere In The Code.

Respondent is unexplainably comfortable with the fact that the Hearing Examiner applied a burden of proof from a completely separate section of the Chelan County Code (e.g. from Title 14 rather than Title 16) that is not related to this appeal. *County's Reply Brief*, at page 23. The Notice and Order itself specifically claims to be "[s]ubject to the appeal provisions of Chapter 16.12,"(CP 399-409) and is defined by the Chelan County Code as a "notice," to be processed under Title 16. Title 14, relied upon by the Hearing Examiner to develop a burden of proof, applies to "Development Permit Procedures and Administration" for land

development (e.g. building permits, zoning approvals, subdivision entitlements etc.). See e.g. CCC 14.02.005. These are radically different procedures, located in a completely separate title of the code, that relate to situations where an applicant is pursuing a land use entitlement. Title 14 provisions apply where an applicant is bringing a claim of right to the government, as opposed to Title 16 provisions which apply to persons having claims brought against it by the government. “Cherry picking” a standard found in Title 14 and applying to this Title 16 action was completely inappropriate.

In fact, the Superior Court recognized this analytical flaw by stating “[f]or reasons unknown to the court, the hearing examiner in this case cites to various provisions of CCC 14.12 as applicable herein . . . it appears that the hearing examiner has erroneously cited to CCC Title 14 as applicable to this dispute.” CP 824-827.

However, the Superior Court went on to find that such a mistake was harmless in light of the fact that Rule 1.21 of the Hearing Examiner Rules states that “the appellant shall have the burden of proof to show compliance with applicable laws and regulations . . . .” CP 824-827. The use of Rule 1.21 to establish a burden of proof in an enforcement action offends basic principles of due process and is therefore unenforceable.

Merely having notice and an opportunity to be heard is not enough. It's not enough to state that a putative litigant or appellant was sufficiently warned of and then given a forum to defend herself/himself. The government also has to justify its claims in some fashion, because "where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

3.1.2 The County Must Prove Allegations In Its Notice And Order.

"[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," . . . but rather it is "flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). *See also Carey v. Piphus*, 435 U.S. 247, 262 (1978) (One "purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly [.]").

Determining what process is due in a particular case requires consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.

In the factually similar case of *Dailey vs. Sioux Falls*, 802 N.W.2d 905 (2011), a property owner challenged citations issued by the city for a concrete extension he made to his driveway. Similar to Chelan County's argument here, the City of Sioux Falls argued that "the issuance of a citation by a City code enforcement officer establishes non-compliance and that an individual who appeals a citation bears the burden of proving that the City incorrectly issued it." *Id.* at 913. And, just as there is no burden of proof described in Title 16 of the Chelan County Code, there was no burden of proof described in the City of Sioux Falls municipal code either. *Id.* at 913. And, just like the hearing before the Chelan County Hearing Examiner, the hearing examiner in *Daily* conducted a hearing regarding the citations and proceed to place the burden of proof upon the property owner to disprove the City's allegations. *Id.* at 914.

Addressing the unconstitutional situation created, the *Daily* Court found that: "[t]he City issued Daily four citations for the concrete extension to his driveway and was therefore required to carry the appropriate burden of proof. (citation omitted.) Yet Daily, in his first and

only hearing on the factual basis of the citations, was charged with the difficult task of overcoming [the code compliance officer's] initial determination of non-compliance." The Daily Court held that "[b]ecause the hearing examiner in this case did not hold the City to its burden of proof, the City's administrative appeals process deprived Daily of a protected property interest without due process of law." *Daily*, 802 W.W.2d at 916. Similarly, the first opportunity Appellants had to contest the County's citations was before the Chelan County Hearing Examiner, and they were also saddled with the same impossible task of overcoming the County's assertions.

Similarly, in *City of Pierre v. Blackwell*, 635 N.W.2d 581 (2010) an animal control officer impounded Blackwell's dog because he determined that it was dangerous. *Id.* at 583. At trial, the trial court did not conduct an independent evaluation of the dog's dangerousness but "merely reviewed the animal control officer's determination for its legality." *Id.* Blackwell was convicted of non-compliance with the City's ordinance, and he subsequently appealed his conviction on the ground that his procedural due process rights had been violated. *Id.* at 584. Holding that Blackwell was not afforded a fair trial consistent with due process protections, the Court stated:

The City must be required to prove, as an element of the crime, that the dog was dangerous beyond a reasonable doubt.... The City ... chose to bring criminal charges against Blackwell and therefore must carry the appropriate burden of proof.

While evidence regarding the dangerousness of the dog was presented by both sides at trial, there was no independent evaluation of this evidence by the trial court. The court stated [that] “it is not a judicial function to try de novo a declaration of dangerousness by the City.” ... Here, there was no independent determination of dangerousness by a neutral judicial officer as part of the criminal proceeding.

In refusing to evaluate the evidence and make a finding of fact on the issue of the dog’s dangerousness, the trial court did not hold the City to its burden of proof. Because the trial court merely reviewed the animal control officer’s decision for its legality, we find that due process was not served by the trial court in this case.

*Id.* at 585 (emphasis supplied).

Allocation of the burden of proof is constitutionally significant. In *Armstrong v. Manzo*, 380 U.S. 545 (1965) a mother’s husband sought to adopt her child without the biological father’s consent. *Id.* at 547. The mother and her husband filed an affidavit alleging that the father failed to contribute to the child’s support. *Id.* When the father received notice of the adoption, he filed a motion to set the adoption aside. *Id.* At the hearing on the matter, the father bore the burden of establishing that he had contributed to the child’s support. *Id.* at 548. The United States Supreme Court found the post-adoption hearing constitutionally insufficient stating:

[T]here was placed upon [the father] the burden of affirmatively showing that he had contributed to the support of his [child] to the limit of his financial ability over the period involved. The burdens thus placed upon [the father] were real, not purely theoretical. For “it is plain that where the burden of proof lies may be decisive of the outcome.”

*Id.* at 551 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). The *Armstrong* Court remanded for a new hearing with the burden of proof placed on the mother and her husband to demonstrate the father’s failure to support the child. *Id.*

To apply the factors from *Mathews* to the instant case, it is instructive to return to the factually similar land use case of *Daily*. In *Daily*, the Court described its analysis of the factors from *Mathews* in the following way:

On the one hand, *Daily* has a significant private interest in avoiding the assessment of a civil fine. (citation omitted) On the other hand, the City has an interest in ensuring that its residents comply with its zoning ordinances and municipal code. (citation omitted) But in this case, we believe it is clear that properly allocating the burden of proof would reduce the risk of erroneously depriving individuals of protected property interests without placing substantial fiscal or administrative burdens on the City.

*Id.* at 915 (citing *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965)).

Consequently, the Court held that holding the City to its burden of proof was constitutionally required. *Daily*, 802 N.W.2d at 916.

Here, Appellants' private interests to be constitutionally protected are identified and defined by case law. Under the Chelan County Code civil fines "shall be assessed" for code violations. CCC 16.16.010. And the County "shall have a lien for any civil penalty imposed . . . against the real property," CCC 16.18.010, and the administrator "shall cause a claim for a lien to be filed for record," CCC 16.18.020. *See also* CCC 16.06.070 (authorizing civil penalties for failure to abide by a Notice and Order). Numerous courts, including the United States Supreme Court, have recognized that the assessment of a civil fine deprives an individual of a protected property interest. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("[E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."); *and see Cook v. City of Buena Park*, 126 Cal.App.4th 1, 23 Cal.Rptr.3d 700, 704 (2005) (recognizing that a landlord has an interest in avoiding fines imposed by a city ordinance); *see also Bartlow v. Shannon*, 399 Ill.App.3d 560, 339 Ill.Dec. 547, 927 N.E.2d 88, 98 (2010) ("The fines at issue, obviously, involve a protectable interest in property."). Moreover, as also held by the Court in *Daily*, the risk of an erroneous deprivation of Appellants' interest through the procedures used by Chelan County could be reduced, while applying the

correct burden of proof would not place a substantial fiscal or administrative burden onto Chelan County.

Chelan County attempts to cloud this issue by asserting that a notice and order does not by itself implicate a right to due process protections for an alleged violator, but only where an immediate property interest is at stake (which the County interprets as an immediate, monetary penalty) is the County required to bear the burden of proof. *Reply Brief*, at Page 28. In support of this position, the County looks to the statutory difference in definitions between “citation” and “notice and order,” the case of *Cranwell v. Mesec*, 77 Wn. App. 90, 890 P.2d 491 (1995), and the unpublished cases of *Marlow v. Douglas County*, 6 Wn.App.2d 1026, 2018 WL 6263418 (2013) and *Schenck v. Douglas County*, 181 Wn.2d 1030, 340 P.3d 228 (2014).

The differences the County points out in the definitions of “citation” and “notice and order” are not illuminating. In fact, as previously briefed by Appellants, under the Chelan County Code the “Notice and Order” is defined by the Chelan County Code as a “written notice that a code violation(s) has occurred. ” And a “civil code violation” by definition “*constitute[s] a separate infraction for each and every day . . . during which a violation is continued.*” CCC 16.04.010 (emphasis

added). Further, civil fines and liens “shall be assessed” for code violations. *See* CCC 16.16.010; CCC 16.18.020; *see also* CCC 16.06.070 (authorizing civil penalties for failure to abide by a Notice and Order). Moreover, because the claims in Chelan County’s Notice and Order are considered to be civil “infractions,” the burden of proof should be consistent with what the legislature determined would be appropriate for civil infraction hearings in RCW 7.80.100(3) (government bears the burden of proof in civil infraction matters).

Essentially, the County argues that, when it comes to issuing a Notice and Order of Violation to citizens of Chelan County, the citizens must defend themselves from the otherwise unsupported accusations of the County. The Superior Court expressed concern over this issue:

The Court’s concern here is heightened upon review of the record and hearing examiner decision. It appears that the notice of violation is an unsworn document issued by a county employee. [citation omitted] There is no indication in the written decision that any county employee testified under oath that any of the information contained in the notice is actually correct. Rather, it appears that the only testimony at hearing came from appellants.

CP 824-827. It is important to note that, as stated by the Court above, the record in this matter does not contain any sworn testimony as to the alleged violations supporting the claims of the notice and order.

Finally, Chelan County argues that such a burden hardly warrants

due process concerns, citing *Cranwell v. Mesece*, 77 Wn. App. 90 (1995), a case in which the court determined that no pre-notice-of-violation hearing was required by due process as the City of Seattle code did not consider such a notice to amount to anything other than a notice. However, the city in *Cranwell* could not obtain civil penalties without first satisfying its burden of production and proving by a preponderance of the evidence that the violation had, in fact, occurred. *Id.* at 94-95.<sup>2</sup> Only thereafter, could the City lien the property. *Id.* In short, *Cranwell* is inapposite and actually supports Appellants' position on the issue of who bears the burden of proof for proving the claims contained in a Notice and Order.<sup>3</sup>

Moreover, in *Marlow* and *Schenck* the burden of proof requirement turned *explicitly* on RCW 90.58.140(7) ("In any review of the granting or denial of an application for a permit as provided [for in the Chapter] the person requesting the review has the burden of proof") and WAC 173-27-040(1)(c) ("[t]he burden of proof that a development or use is exempt from the permit process is on the applicant."). *Marlow* at 5; *Schenck* at 3.

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<sup>2</sup> The Superior Court agreed with this interpretation stating "in *Cranwell*, the city acknowledged that, in the event of any appeal for the notice of violation, the city had the burden of production and proof by a preponderance of the evidence. CP 824-827.

<sup>3</sup> Chelan County also looks to *ABC Holdings, Inc. vs. Kittitas County*, 187 Wn.App. 275, 348 P.3d 1222 (2015) to support its argument. However, *ABC Holdings, Inc.* adds no content to the argument but quotes *Cranwell's* holding that "[a] violation notice, even if final, is not the type of encumbrance that constitutes a significant property interest giving rise to procedural due process." 187 Wash.App. 275, 286, 348 P.3d 1222, 1229 (2015) (citing *Cranwell v. Mesece*, 77 Wash.App. 90, 111, 890 P.2d 491 (1995)) (internal citations omitted).

In other words, the burden of proof was statutorily prescribed by the relevant SMA statute and shoreline WAC in *both* cases, a condition not present in the instant case, and was imposed because the Court analogized the parties to applicants applying for shoreline development permits and/or requesting an exemption from such a permit. This burden of proof would be similar to the burden discussed in Title 14 of the Chelan County Code (discussed above) relating to the appeal of a development permit application, which, as discussed above, are facts that do not fit the instant situation where the County is rather pursuing an enforcement action.

It is also worth noting that the Superior Court also dismissed the analogistic value of *Marlow* and *Schenck* for the same reason:

In each of these cases, the court held that Douglas County properly placed the burden of proof on appellants in LUPA appeals. However, *Schenck* and *Marlow* both involved notices of violation under the Shoreline Management Act, which has its own rules regarding the burden of proof on appeal.

CP 860-864.

Establishing the correct burden of proof is a very basic tenet of the American legal system. If you are going to accuse someone of wrongdoing, you have the burden of proof to demonstrate that a wrong has in fact occurred. According to Chelan County, such an essential protection is not important. Appellants hope the Court disagrees, and

remands this matter back to the Hearing Examiner to produce a decision consistent with the appropriate burden of proof.

### **3.2 Appellants Established Nonconforming Rights For The Production And Processing Of Cannabis.**

The parties disagree as to how a nonconforming use is created.

The County's briefing argues the nonconforming rights of all cannabis farmers in Chelan County were established by Resolution 2016-14, which states: "uses that were lawfully established and in actual physical operation prior to September 29, 2015, are nonconforming . . . ." *County's Reply Brief*, at page 15.

The suggestion that the nonconforming rights of an entire class of property owners are created by a uniform date found in a municipal resolution ignores the specific facts of each individual case, Chelan County Code and Washington law related to the establishment of nonconforming uses, and the plain language of Resolution 2016-14.

Under Chelan County Code and Washington law, a nonconforming use is established when a party can demonstrate that (1) the use existed before the county enacted the 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. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d

1, 385, 959 P.2d 1024 (1998); *see also* Chapter 11.97 Chelan County Code. This is important because legal nonconforming uses are vested legal rights to be protected. *Skamania County v. Woodall*, 104 Wn.App. 525, 539, 16 P.3d 701 (2001). Washington law allows preexisting legal nonconforming uses to continue in spite of a subsequent contrary zoning ordinance. *Jefferson County v. Lakeside Industries*, 106 Wn.App. 380, 385, 23 P.3d 542 (2001).

3.2.1 Appellants lawful use of the Property for cannabis production and processing was established before the County enacted contrary regulations through Resolution 2016-14.

The development activities and legal use of the property occurring prior to the County's passage of contrary regulations through Resolution 2016-14 on February 9, 2016 established nonconforming rights. The following facts are undisputed in the record:

- In 2014, when Seven Hills began developing the Property, cannabis production and processing were regulated as any other form of agriculture and permitted outright on land with zoned for agricultural uses in Chelan County. See Resolution 2014-5 and 2014-38. Appellants property is located in the Commercial Agriculture Zone and such a use was therefore lawful.
- In 2014 the Chelan County Planning Department confirmed to Seven Hills that there were no local cannabis-specific regulations to comply with when developing the Property. CP 020-671; *Decl. of Roy Arms*, at Paragraph 3.

Consequently, Seven Hills began to develop the site for its cannabis business.

- On February 5, 2015 when Seven Hills asked for the process for a building permit for green houses, Chelan County advised that greenhouses were exempt from building permit requirements. CP 020-671; *Decl. of Roy Arms*, at Paragraph 4. Consequently, Seven Hills constructed green houses on the property without building permits.
- In March 2015 Chelan County confirmed the adequacy of the underlying zoning on the Property by approving a license siting request (Local Authority Notice<sup>4</sup>) for Seven Hill's. WAC 314-55-160; RCW 69.50.331(7). CP 020-671; *Decl. of Roy Arms*, at Paragraph 5.
- On May 15, 2015 Seven Hills submitted a building permit application for an 8-foot fence, a state cannabis licensing requirement, to Chelan County. CP 020-671; *Decl. of Roy Arms*, at Paragraph 5. On May 27, 2015 Chelan County issued the fence permit and on August 21, 2015 the final fence inspection passed. CP 020-671; *Decl. of Roy Arms*, at Paragraph 6.
- On September 29, 2015, Chelan County adopted an emergency moratorium prohibiting the siting of new I-502 businesses in the County (Resolution 2015-94), but which otherwise left existing businesses unaffected. Cultivation and processing of cannabis were still treated as agricultural activities under the County's existing code.
- By September 29, 2015 Seven Hills no longer needed any building permits or entitlements for the development of it's property. Throughout 2015 and into 2016 Seven Hills developed the Property and worked to fulfill various state license requirements. CP 020-671; *Decl. of Roy Arms*, at Paragraph 8.

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<sup>4</sup> A "Local Authority Notice" is required under WAC 314-55-020(1) to be sent by the Washington Liquor and Cannabis Board to a local jurisdiction to inquire as to the suitability of a proposed permit location for a cannabis license.

- On January 26, 2016 Seven Hills received its final licensing from the WA State Liquor Control Board and immediately began to grow cannabis prior to February 9, 2016. CP 020-671; *Decl. of Roy Arms*, at Paragraph 9.
- On February 9, 2016, Chelan County adopted Resolution 2016-14, which terminated all I-502 related businesses in Chelan County using a single, uniform two-year termination date.<sup>5</sup>
- By September 29, 2015 (the date of the moratorium) Seven Hills spent approximately \$765,751.35 on costs related to the improvement of the Property in furtherance of its cannabis production and processing business. CP 020-671; *Decl. of Roy Arms*, at Paragraph 8.
- By February 9, 2016 (the date of the retroactive “ban”) Seven Hills spent approximately \$1,232,390.84 on costs related to the improvement of the Property in furtherance of its cannabis production and processing business. CP 020-671; *Decl. of Roy Arms*, at Paragraph 8.

Citing the cases of *King County Dep’t of Dev. & Env’tl. Servs. vs.*

*King County*, 177 Wn.2d 636, 305 P.3d 240 (2013), *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn.App. 606, 191 P.3d 928 (2008), and *Anderson vs. Island County*, 81 Wn.2d 312, 501 P.2d 594 (1972) Chelan County argues that despite the above-referenced activities Seven Hills’ simply did not do enough to “establish” its use prior to the adoption of contrary regulations. *County Reply Brief*, at Page 16.

Chelan County misunderstands and misapplies the cases cited, as

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<sup>5</sup> The length of time for which Appellants may use the property for this purpose is currently under appeal in Federal Cause No. 2:17-cv-00026.

there are no bright line rules recognized therein. For example, in *Anderson* the landowner moved its gravel operations to a newly purchased tract of land with the intent of also moving its cement batching plant to the same location. Several months later, the county amended the zoning code to designate the land as residential. Soon thereafter, the landowner began construction of a cement batching plant. The court held that while nonconforming rights may exist for gravel operations, a nonconforming use did not exist for the cement batching plant because that use did not actually precede the zoning change. *Anderson*, 81 Wn.2d at 321.

In *First Pioneer* the Court found that the property owner failed to demonstrate that he had nonconforming rights for the operation of a steel fabrication business on a parcel adjacent to the parcel containing his main operation. Specifically, the Court found no evidence - comparing postal records, aerial photographs and testimony from the neighbors - to support the owner's contention that any steel fabrication had taken place on the property at all. *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn.App. 606, 614 (2008). In *First Pioneer* the Court did not create any "rules" regarding the amount of use that must occur, but rather held that the lack of evidence in the record was sufficient to uphold the Hearing Examiner's decision.

A short review of the *King County* case reveals that the Supreme Court in that case drew its narrow conclusions based upon a statutory interpretation analysis of the language of King County’s nonconforming use ordinance, which is considerably more detailed and completely different than Chelan County’s ordinance. *Dep’t of Dev. & Envtl. Servs. vs. King County*, 177 Wn.2d 636, 643-648 (2013). As such, the *King County* case does not create any rules regarding the amount of use that must occur on a property to create nonconforming rights.

The County can’t ignore its own code or Washington law related to the creation of nonconforming rights, nor can it distort the language of Resolution 2016-14 to its advantage. Appellants used the Property exclusively for the purpose of developing a cannabis farm, received a building permit from Chelan County, were granted approval of their specific site from Chelan County, spent over \$1.2M developing the site, and were fully licensed and growing cannabis prior to the adoption of a contrary regulation on February 9, 2016.<sup>6</sup> Appellants established

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<sup>6</sup> In the alternative, by September 29, 2015 Seven Hills spent approximately \$765,751.35 on costs related to the improvement of the Property in furtherance of its cannabis production and processing business, received a building permit from Chelan County and received its siting approval from Chelan County. CP 020-671; *Decl. of Roy Arms*, at Paragraph 8. Pursuant to Chelan County Code and Washington law, these facts alone are sufficient to demonstrate the establishment of a legal nonconforming use on the property.

nonconforming rights and should be allowed to continue that use the property through a reasonable amortization period.

3.2.2 The County's Moratorium Was Not Applicable to Seven Hills.

Chelan County argues that Appellants needed to have received their business license and been growing cannabis prior to September 29, 2015, because Resolution 2016-14 arbitrarily concludes that “uses that were lawfully established and in actual physical operation prior to September 29, 2015, are nonconforming.” *County's Reply Brief*, at page 17. These assertions are legally and factually incorrect. Chelan County misinterprets the language of Resolution 2016-14 by making it applicable to all cannabis farms in Chelan County. It is not that broad. Resolution 2016-14 provides for the establishment of “nonconforming rights” for a subset of the farms in Chelan County (i.e. those in operation prior to September 29, 2015), but does not cover all possible scenarios and/or preempt or limit nonconforming rights obtained pursuant to the County's nonconforming use statutes found at Chapter 11.97 Chelan County Code.

It is important to understand that the County's September 29, 2016 moratorium did not apply to the Seven Hills operation because it left existing operations unaffected and did not enact any new cannabis

regulations. Resolution 2015-94 stated:

Chelan County does hereby adopt a six month moratorium on the **SITING** of licensed recreational marijuana retail stores, production, and processing, and on the **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.

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.

*Resolution 2015-94* (emphasis added). The moratorium did not apply to or affect any of Seven Hill's activities because it was not a "new" business (it had already been sited by Chelan County) and did not need to receive any additional entitlement or building permits from the County as of September 29, 2015. The County's existing regulatory structure placed the burden of site compliance upon the State of Washington through its regulations; and, as such, throughout 2015 and early 2016 Seven Hills continued to work with the Washington State Liquor and Cannabis Board on finalizing those requirements (mostly the installation of electrical, permitted through Labor & Industry, and other site improvement not requiring permits through Chelan County but approved through Washington State Liquor and Cannabis Board inspections).

Moreover, as previously briefed, under Washington law Resolution

2016-14 cannot be applied retroactively to eliminate or impinge the nonconforming rights of Seven Hills. *See e.g. Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981); *Johnson v. Beneficial Management Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1953); *Gillis v. King Cy.*, 42 Wn.2d 373, 378, 255 P.2d 546 (1953). Because Seven Hills used its Property prior to Resolution 2016-14 coming into effect to pursue its cannabis business, Resolution 2016-14 cannot be applied to Seven Hills retroactively to suddenly extinguish those rights.

### **3.3 Chelan County Cannot Enforce Regulations It Doesn't Have, And Should Be Estopped From Attempting To Do So.**

In general, Appellants direct the Court's attention to its prior briefing on this issue. Chelan County specifically instructed Appellants that no building permits were needed for the temporary growing structures and should be equitably estopped from changing that advice to Appellants' detriment. The elements of equitable estoppel, when alleged against the government, are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission; (4) equitable estoppel must be necessary to

prevent a manifest injustice; and (5) the exercise of governmental functions must not be impaired as a result. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993).

In relation to the elements of equitable estoppel, in the present case the record reflects that:

- Chelan County made a representation to Appellants that its greenhouses didn't need a building permit. If Chelan County had answered differently, Appellants would have applied for the building permits prior to the moratorium being in place, and we would not be in court. CP 020-671; Decl. of Roy Arms, at Paragraph 4.
- Appellants relied upon the County's advice, and constructed their greenhouses without permits. CP 020-671; Decl. of Roy Arms, at Paragraph 8.
- Injury will result to Appellants from allowing the County to contradict its prior advice because the County seeks to enforce a notice and order against Appellants related to the same issue.
- The County must be estopped to prevent a manifest injustice to Appellants, because not doing so could result in shutting down Appellants operation, fines, liens etc.
- The exercise of governmental functions will not be impaired if the County is liable to Appellants for following its advice.

This Court should recognize Appellants' equitable estoppel defense as it relates to the County's advice regarding permitting matters.

Moreover, as previously briefed by Appellants, State law confirms that no building permits are needed for temporary growing structures, and

because Chelan County has not legislatively approved a permit for temporary growing structures, Chelan County cannot enforce regulations that it has yet to adopt.

**3.4 Appellants' Actions Were At All Times Sanctioned By Chelan County And Therefore Cannot Be Considered A Nuisance.**

As the record in this case demonstrates, Appellants at all times sought the advice and guidance of Chelan County with regarding to the development and utilization of its property. All of Appellants' actions were explicitly informed by the advice of Chelan County. The County now seeks to enforce its regulations (some of which don't even exist – e.g. the temporary growing structure “permit”) against Appellants. Should the Court find that Appellants' actions of establishing its nonconforming rights were lawful, Chelan County's claims of nuisance, due to the fact that they are claims of nuisance per se, necessarily must fail.

**4. CONCLUSION**

The Hearing Examiner's decision to place the burden of proof on Appellants was an error of law. Chelan County should have borne this burden as the party making a claim of wrongdoing, and this Court should send this matter back to the Hearing Examiner to properly process.

The Hearing Examiner's decision to deny that Appellants had developed nonconforming rights on the Property was clearly erroneous. The nonconforming rights of a multitude of property owners cannot be created by a uniform date found in a municipal resolution. This approach ignores the facts of each individual case, ignores Chelan County code and Washington law, and expands the plain language of Resolution 2016-14. This Court should overturn the decision of the Hearing Examiner and the Superior Court on this matter.

Finally, Chelan County should be estopped from enforcing regulations that it doesn't currently have, particularly since Appellants relied to their detriment on contrary guidance from the County.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of July, 2019.

PARSONS | BURNETT | BJORDAHL | HUME, LLP



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## CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the state of Washington, that I caused to be served, in the manner indicated below, a true and correct copy of the APPELLANTS' REPLY BRIEF pursuant to RCW 4.12.050 as follows:

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

EXECUTED on the 5<sup>th</sup> day of July, 2019 at Spokane, WA.



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TAUDD A. HUME

**PARSONS BURNETT BJORDAHL HUME**

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