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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

No. 364399

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.

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv
Statutes	v
Administrative Authorities	v
1. INTRODUCTION	1
2. ASSIGNMENT OF ERRORS	3
2.1 Assignment of Errors	3
2.2 Issues Pertaining to Assignment of Errors	3
3. STATEMENT OF CASE	4
4. STANDARD OF REVIEW	9
5. ARGUMENT AND AUTHORITIES	11
5.1 Chelan County Bears the Burden of Proof When Alleging Land Use Violations	11
5.2 The Hearing Examiner’s Conclusions of Law Lack Citations and Must Be Amended to Be Useful To The Parties and The Court.....	15
5.3 Seven Hill’s Use Of The Property For Cannabis Production And Processing Was Lawfully Established.....	18
5.3.1 Seven Hills has nonconforming rights to continue to operate through a reasonable amortization period	18
5.3.2 Seven Hills complied with the County’s regulations related to temporary growing structures	23
5.3.3 Chelan County granted Seven Hills permits for five propane tanks and cannot legally rescind them by failing to provide final inspection	27

5.3.4	Appellants' conduct does not amount to nuisance.....	29
6.	CONCLUSION.....	29

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Byers v. Board of Clallam County Comm'rs</i> , 84 Wn.2d 796, 529 P.2d 823 (1974)	28
<i>Citizens to Preserve Pioneer Park, LLC vs. City of Mercer Island</i> , 106 Wn.App. 461, 24 P.3d 1079 (2001)	11
<i>Gillis v. King County</i> , 42 Wash.2d 373, 255 P.2d 546 (1953)	22
<i>Homeowners Ass'n v. Glen A. Cloninger & Assocs.</i> , 151 Wn.2d 279 (2004)	9, 10
<i>Isla Verde Int'l Holdings Inc. v. City of Camas</i> , 146 Wash.2d, 740, 49 P.3d 867 (2002)	10
<i>Jefferson County v. Lakeside Industries</i> , 106 Wash.App. 380, 23 P.3d 542 (2001)	18
<i>Johnston v. Beneficial Management Corp.</i> , 85 Wash.2d 637, 538 P.2d 510 (1975)	22
<i>Lakeside Industries v. Thurston County</i> , 119 Wash.App. 886, 83 P.3d 433 (2004)	16
<i>Macumber v. Shafer</i> , 96 Wash.2d 568, 637 P.2d 645 (1981)	22
<i>Mission Springs, Inc. v. City of Spokane</i> , 134 Wash.2d 947, 954 P.2d 250 (1998)	28
<i>Phoenix Development, Inc. v. City of Woodinville</i> , 171 Wash.2d 820, 256 P.3d 820 (2011)	17
<i>Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc.</i> , 151 Wn.2d 279, 87 P.3d 1176 (2004)	9, 10

<i>Port of Seattle v. Pollution Control Hearings Board</i> , 151 Wn.2d 568, 90 P.3d 659 (2004)	10
<i>Shelton v. City of Bellevue</i> , 73 Wn.2d 28, 435 P.2d 949 (1968)	28
<i>State ex rel. Shannon v. Sponburgh</i> , 66 Wn.2d 135, 401 P.2d 635 (1965)	32
<i>Van Sant v. City of Everett</i> , 69 Wash.App. 641, 849 P.2d 1276 (1993)	19, 21
<i>Washington State Dept. of Transp. v. City of Seattle</i> , 192 Wash.App. 824, 368 P.3d 251 (2016)	17
<i>W. Main Associates v. City of Bellevue</i> , 106 Wash. 2d 47, 720 P.2d 782 (1986)	2

STATUTES

RCW 7.80.005	13
RCW 7.80.050	13
RCW 7.80.100(3)	13
RCW 19.27.065	23
RCW 19.27.015	23
RCW 19.27.031	26
RCW 36.70C.130	9, 16, 18
RCW 36.70C.130(1)(b)	10
RCW 36.70C.130 (1)(c)	11
RCW 36.70C.130(1)	9
RCW 69.50.331(7)	6

ADMINISTRATIVE AUTHORITIES

Chelan County Code 14.98.1300	18
Chelan County Code 16.04.010	12
Chelan County Code 16.18.010	12

Chelan County Code 16.18.020	13
Chelan County Code 16.06.070	13
Kittitas County Code 18.02.040(b)(vii).....	14
Snohomish County Code 30.85.120	14
King County Code 23.20.080(D)	14
Pierce County Code 1.16.100(C).....	14
Rules for Enforcement of Lawyer Conduct, ELC 10.14(b).....	14
<i>Rules Of Procedure For Proceedings Before The Chelan County</i>	
<i>Hearing Examiner, 1.23(B)(3)</i>	
	15, 18, 31
Resolution 2014-5	4, 19
Resolution 2014-38	5, 19
Resolution 2015-94	2-3, 6, 21
Resolution 2016-14	1, 3, 4, 7, 8, 9, 21, 23, 27, 29
WAC 51-04-060	26
WAC 51-50-007	24, 26
WAC 172-121-123	16
WA State Building Code Council Interpretation No. 15-04..	24, 26, 27

1. INTRODUCTION

Water Works is the owner of real property located at 2729 Mill Pond Drive, Malaga, WA 98828 (the “Property”). Seven Hills has operated a cannabis business on the Property since 2015 as a tenant of Water Works.

In early 2015, when Seven Hills began developing the Property for the cultivation and processing of cannabis, it did so under the guidance of Chelan County and pursuant to the County’s laws as they existed at the time. Two years later, On March 24, 2017, Appellants received a Notice and Order to Abate Zoning and Building Code Violations that alleged four complaints: (1) production and processing of marijuana in contravention of Resolution 2016-14, (2) construction and operation of unpermitted structures, (3) operation of unpermitted propane tanks, and (4) public nuisance for violating the foregoing. CP 020-671.

Appellants appealed the Notice and Order, and on July 19, 2017, a public hearing was held before the Chelan County Hearing Examiner, who, through a decision dated August 2, 2017, ultimately denied Appellants’ appeal and affirmed each violation raised in the March 24, 2017 Notice and Order. Although Seven Hills completely developed the

Property, received approval of its site from Chelan County, received its license from the State of Washington, and began operating its facility, Chelan County argued to the Hearing Examiner that Appellants did not “do enough” to establish nonconforming rights and, as such, are operating as a nuisance per se.

In short, the County’s position defies Washington law and clearly contradicts its past authorizations. Washington law does not permit Chelan County to explicitly authorize a land use for the Property, and then terminate that use without observing the landowner’s nonconforming and vested rights. The Washington State Supreme Court has repeatedly defended the rights of private property owners against the capricious acts of government:

As James Madison stressed, citizens should be protected from the “fluctuating policy” of the legislature. *The Federalist No. 44*, at 301 (J. Madison) (J. Cooke ed. 1961). Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692 (1960). Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.

W. Main Associates v. City of Bellevue, 106 Wash. 2d 47, 51 (1986).

Seven Hill’s use of the Property prior to the adoption of Resolution 2015-

94 and its receipt of a license from the state prior to the adoption of Resolution 2016-14 create nonconforming rights that allow it to continue to operate on the Property.

2. ASSIGNMENT OF ERRORS

2.1 Assignment of Errors

1. The Hearing Examiner erred by holding that the Appellants had the burden of proof in the appeal of the County's enforcement action.
2. The Hearing Examiner erred by failing to include citations or analysis to legal precedence in his Conclusions of Law.
3. The Hearing Examiner erred by failing to recognize and acknowledge Appellants' nonconforming rights.
4. The Hearing Examiner erred by failing to recognize and acknowledge Appellants' vested rights.
5. The Hearing Examiner erred by failing to recognize and acknowledge the fact that Appellants growing structures don't require permits and/or the County has no permitting process for such a structure.

2.2 Issues Pertaining to Assignment of Errors

1. Whether the Chelan County Hearing Examiner inappropriately placed the burden of proof on Appellants to disprove the County's claims contained in the Notice and Order.
2. Whether the Chelan County Hearing Examiner's Conclusions of Law need to cite legal authority.
3. Whether Appellants established nonconforming rights through their activities on the Property prior to the enactment of Resolution 2016-14.

4. Whether Resolution 2016-14 may be applied retroactively to extinguish Appellants' vested rights.
5. Whether temporary growing structures require a building permit under Chelan County Code.

3. STATEMENT OF THE CASE

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

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

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

In late 2014 Seven Hills began its due diligence to establish a site for its cannabis operation. In December 2014 Seven Hills contacted the Chelan County Planning Department who confirmed that there were no local cannabis-specific regulations to be aware of when developing the Property, and that Chelan County treated cannabis like any other agricultural business. CP 020-671; *Decl. of Roy Arms*, at Paragraph 3.

On or about February 5, 2015 Seven Hills again contacted Chelan County regarding requirements related to greenhouses and was instructed that greenhouses were exempt from building permit requirements. CP 020-671; *Decl. of Roy Arms*, at Paragraph 4.

On or about February 24, 2015 a Local Authority Notice¹ was sent to Chelan County from the Washington Liquor and Cannabis Board (the “WLCB”), which Chelan County failed to respond to. CP 020-671; *Decl. of Roy Arms*, at Paragraph 5. Legally, the County’s failure to respond equates to an acquiescence of the siting of the business. WAC 314-55-160; RCW 69.50.331(7).

On or about May 15, 2015 Appellants submitted a building permit application for an 8-foot fence, a state-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, the County adopted an emergency moratorium prohibiting the siting of new I-502 businesses in the County (Resolution 2015-94). Importantly, this Resolution left existing operations unaffected and did not enact any new regulations regarding the actual operation of existing I-502 businesses. The Resolution did, however, place

¹ 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.

a six month moratorium “on the siting of licensed recreational marijuana retail stores, production, and processing . . .” Cultivation and processing of cannabis were still treated as agricultural activities under the County’s existing code, only the siting of new businesses was prohibited. On November 10, 2015, a public hearing was held regarding continuing the moratorium, the outcome of which was to continue the moratorium.

Throughout 2015 and into early 2016 Seven Hills continued to develop the Property and work toward fulfilling all of the various state requirements. CP 020-671; *Decl. of Roy Arms*, at Paragraph 8. On January 26, 2016 Seven Hills received its final licensing from the Washington State Liquor Control Board. CP 020-671; *Decl. of Roy Arms*, at Paragraph 9.

On February 9, 2016, Chelan County conducted a public hearing regarding the moratorium, the result of which was the adoption of Resolution 2016-14, which terminated all I-502 related businesses in Chelan County using a single, uniform two-year termination date, and purports to retroactively apply back to September 29, 2015 (the moratorium date). By September 29, 2015 (the date of the moratorium) Seven Hills spent approximately \$765,751.35 on costs, investments and site improvements for the Property. And by February 9, 2016 (the date of

the retroactive “ban”) it had spent approximately \$1,232,390.84 on costs, investments and site improvements in pursuit of receiving its state license. CP 020-671; *Decl. of Roy Arms*, at Paragraph 8.

On September 9, 2016 Water Works received an Initial Notice from Chelan County alleging four violations of Chelan County Code. CP 020-671. On September 22, 2016 counsel for Appellants sent Chelan County a response addressing the claims of the Initial Notice. CP 020-671. On or about March 24, 2017 Water Works was the recipient of a “Notice and Order to Abate Zoning and Building Code Violations” (the “Notice and Order”), dated March 24, 2017, and issued by Chelan County. Specifically, the Notice and Order contained four complaints against Appellants: (1) production and processing of marijuana in contravention of Resolution 2016-14, (2) construction and operation of unpermitted structures, (3) operation of unpermitted propane tanks, and (4) public nuisance for violating the foregoing. CP 020-671.

On July 19, 2017, a public hearing was held before the Chelan County Hearing Examiner, who, through a decision dated August 2, 2017, ultimately denied Appellants’ appeal and affirmed each violation raised in the County’s March 24, 2017 Notice and Order.

Appellants appealed the Hearing Examiner’s decision to the

Chelan County Superior Court, who on October 18, 2018 entered an order denying Appellant's LUPA appeal. On November 16, 2018 Appellant's appealed the Superior Court's decision to this Court alleging errors concerning: (1) the proper allocation of the burden of proof utilized by the Chelan County Hearing Examiner, (2) the alleged illegal use of the subject property for the production and processing of cannabis, (3) the failure of the Superior Court to recognize Appellant Seven Hill's valid non-conforming rights, (4) the Superior Court's retroactive application of Resolution 2016-14, (5) the Superior Court's failure to recognize that temporary growing structures do not need building permits, and, generally, (6) the Superior Court's affirmation of the violations set forth in the Notice and Order issued by Chelan County.

4. STANDARD OF REVIEW

Under LUPA, this Court stands in the same position as the Superior Court and generally limits its review to the record created before the Hearing Examiner. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); RCW 36.70C.130. Appellants bear the burden of meeting one of the standards in RCW 36.70C.130(1), and in this case rely upon the following:

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

A court will review questions of law de novo. *Pinecrest*

Homeowners Ass'n v. Glen A. Cloninger & Assocs., 151 Wn.2d 279, 290 (2004). The appellate court's review of any claimed error of law in the Hearing Examiner's interpretation of a Chelan County ordinance is also undertaken de novo. *Isla Verde Int'l Holdings Inc. v. City of Camas*, 146 Wn.2d, 740, 751, 49 P.3d 867(2002); RCW 36.70C.130(1)(b). Deference with regard to interpretation of ordinances is given to a local jurisdiction with expertise so long as that interpretation is not contrary to the statute's plain language. RCW 36.70C.130(1)(b); *See also Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 587 (2004).

The Hearing Examiner's decision may be reversed where the

Hearing Examiner’s application of the law to the facts is clearly erroneous. Under the “clearly erroneous application” test, the court applies the law to the facts and will overturn the land use decision if the court is left with a “definite and firm conviction” that the decision maker committed a mistake. *Citizens to Preserve Pioneer Park, LLC vs. City of Mercer Island*, 106 Wn.App.461, 473, 24 P.3d 1079 (2001).

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

5. ARGUMENT AND AUTHORITIES

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

The Hearing Examiner placed the burden of proof regarding the validity of the claims in the County’s Notice and Order on the Appellants, in essence denying that the County has any burden of proof in its enforcement actions. CP 020-671; Conclusions of Law, Paragraph 2.

The “burden of proof” is the duty of a party to produce evidence that will shift the conclusion away from the default position, to that party's own position. The burden of proof is always on the person who brings a claim in a dispute. This matter arrives before the Hearing Examiner pursuant to Chelan County Code Title 16. Critically, Title 16 does not contain any standards related to burden of proof.

This is an enforcement action, not a permitting action where the local jurisdiction would be given deference to its expertise or interpretation. In this situation, Appellants were not approaching the County asking for it to make a determination on a land use permit or application – as they would under Title 14. In this situation, the County is unilaterally condemning the actions of Appellants through its enforcement powers.

Per the Chelan County Code, the Notice and Order is a “written notice that a code violation(s) has occurred.” CCC 16.04.010. A “civil code violation” is an “act or omission contrary to any ordinance, resolution or regulation” or “a notice and order”, among other things, and “*shall constitute a separate infraction for each and every day . . . during which a violation is continued.*” *Id.* (emphasis added). Further, civil fines “shall be assessed” for code violations. CCC 16.16.010. Finally, 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.

All of these provisions use the word “shall,” denoting that no discretion is present and each item follows the previous one with no further process or proof necessary. *See also* CCC 16.06.070 (authorizing civil penalties for failure to abide by a Notice and Order). In other words, failure to comply with the Notice and Order results in monetary fines and a lien recorded against private property without the County ever having, per the County’s position, proved anything.

The Washington legislature acknowledged this basic principal of due process when it drafted rules for civil proceedings. Civil infraction proceedings (recall that Title 16 calls violators in the Notice and Order “infractions”) are held to establish whether a civil misdemeanor violation has occurred. RCW 7.80.005. The proceedings are initiated and conducted much like a proceeding under a Notice and Order of Abatement with the issuance, service, and filing of a notice of civil infraction. RCW 7.80.050. At the hearing for a civil infraction “[t]he burden of proof is upon the state to establish the commission of the civil infraction by a preponderance of the evidence.” RCW 7.80.100(3). Many Washington

jurisdictions have drafted similar appeal provisions into the enforcement sections of their land use code:

Kittitas County Code 18.02.040(b)(vii)

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

Snohomish County Code 30.85.120

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

King County Code 23.20.080(D)

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

Pierce County Code 1.16.100(C)

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

This basic principal of due process appears in analogous illustrations in other areas of Washington law as well. For example, in the Rules for Enforcement of Lawyer Conduct, ELC 10.14(b) states:

“[d]isciplinary counsel has the burden of establishing an act of misconduct

by a clear preponderance of the evidence.”

Any alleged violation of law by the government must have a corresponding burden of proof placed initially upon the government, otherwise violations of law could be asserted without the need for support or corroboration. Assigning the government the initial burden of proof ensures that private citizens affected by government action understand the basis of that action, and necessarily allows citizens to challenge that basis.

5.2 The Hearing Examiner’s Conclusions of Law Lack Legal Citation and Must Be Amended to Be Useful to The Parties and The Court.

The Chelan County Hearing Examiner’s Conclusions of Law and Decision (the “Decision”) contain absolutely no citations to the law, thus frustrating the statutory remedies available to Appellants. CP 001-019; *Decision of the Hearing Examiner*. Chelan County Code 1.61.070 states that the Hearing Examiner has the obligation to “enter findings of fact *and conclusions of law* based upon the facts in the record of decision.” *Emphasis supplied*. “Conclusions of Law” are defined by Black’s Law Dictionary as a “[s]tatement of court as to law applicable on basis of facts found by jury. Finding by court as determined through application of rules of law.” Further, *Rules Of Procedure For Proceedings Before The Chelan County Hearing Examiner*, 1.23(B)(3), state:

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

There is no reason that it was not "practicable" to conform the Decision with this requirement. The requirement to provide legal citations and/or authority supporting a conclusion of law is a common requirement in administrative law. See e.g. WAC 172-121-123 (related to student conduct hearing decisions).

This case contains a multitude of legal issues, all of which include nuanced legal arguments based upon the unique application of the facts of this situation to Washington case law. The problem is that a party who seeks relief under the Land Use Petition Act (LUPA) carries the burden of meeting one of the statutory standards outlined in RCW 36.70C.130. *Lakeside Industries v. Thurston County*, 119 Wash.App. 886, (2004). RCW 36.70C.130 provides the Court with a standard of review for decisions that are either (a) "a clearly erroneous application of the law to the facts," and/or (b) "an erroneous interpretation of law." A land use decision is a *clearly erroneous application of the law to the facts*, so as to warrant reversal of the decision under the Land Use Petition Act (LUPA),

when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. *Phoenix Development, Inc. v. City of Woodinville*, 171 Wash.2d 820 (2011). And a court may overturn a land use decision that is an *erroneous interpretation of the law*, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise. *Washington State Dept. of Transp. v. City of Seattle*, 192 Wash.App. 824 (2016).

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

On this basis, Appellants respectfully request that the Court first remand this matter back to the Chelan County Hearing Examiner for a

modification of his Decision consistent with his obligations to produce a decision that can be analyzed according to the standards outlined in the Hearing Examiner Rules 1.23(3) and RCW 36.70C.130.

5.3 Seven Hill’s Use Of The Property For Cannabis Production And Processing Was Lawfully Established.

5.3.1 Seven Hills has nonconforming rights to continue to operate through a reasonable amortization period.

“Nonconforming uses” are defined in Chelan County’s code as 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 requirement of the zoning district.” CCC 14.98.1300. Legal nonconforming uses are vested legal rights. *Skamania County v. Woodall*, 104 Wn.App. 525, 539 (2001). Washington law allows preexisting legal nonconforming uses to continue in spite of a subsequent contrary zoning ordinance. *Jefferson County v. Lakeside Industries*, 106 Wash.App. 380, 385 (2001).

An applicant asserting a prior legal nonconforming use bears the initial burden to prove 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. *Id.* at 385. Once the applicant establishes that such a legal nonconforming use

existed before enactment of a contrary zoning ordinance, the burden of proof shifts to the municipality to show that the applicant abandoned or discontinued the use after the ordinance's enactment. *Van Sant v. City of Everett*, 69 Wash.App. 641, 648 (1993) (citing 8A E. McQuillin, Municipal Corporations § 25.191 (3d ed.1986)).

Appellants established their nonconforming use of the Property because prior to the County enacting a contrary zoning ordinance, the following events occurred:

- Seven Hills began developing property located in the Rural Industrial Zone for its cannabis operation in early 2015. Pursuant to Resolution 2014-5 and Resolution 2014-38 production and processing of cannabis under I-502 were regulated as any other form of agriculture, controlled exclusively though the State's licensing requirements (*e.g.* WAC 314-55 *et seq.*), and permitted outright on land zoned for agricultural uses which included the Rural Industrial Zone. No Conditional Use Permit was required to cite a growing/processing operation in the Rural Industrial Zone.
- On February 5, 2015 Seven Hills contacted Chelan County regarding requirements related to greenhouses, and was instructed that greenhouses were exempt from building permit requirements.
- On February 24, 2015 a Local Authority Notice was sent to Chelan County from the Washington Liquor and Cannabis Board, which Chelan County failed to respond to. The County's failure to respond is acquiescence to the siting.
- On May 15, 2015 Seven Hills submitted an application for an 8-foot fence, a state-licensing requirement, to Chelan County. On May 27, 2015 Chelan County issued the fence

permit and on August 21, 2015 the final fence inspection passed. At this point, since Chelan County advised Appellants that no building permits were necessary for the greenhouses, no other permits were needed from Chelan County.

- Throughout 2015 and into early 2016 Seven Hills continued to develop the Property for the purpose of its cannabis operation by developing the site to meet State requirements. In fact, by September 29, 2015 Seven Hills spent approximately \$765,751.35 on costs, investments and site improvements for the Property. And by February 9, 2016 it had spent approximately \$1,232,390.84 on costs, investments and site improvements for the Property.
- On January 26, 2016 Seven Hills received its Tier 3 license from the State of Washington.
- Between January 26, 2016 and February 9, 2016, under full license from the State, Seven Hills produced and processed cannabis on the Property.

CP 020-671; Declaration of Roy Arms.

There were no land use permitting prerequisites that Seven Hills failed to observe prior to its use of the Property and subsequent development of its nonconforming rights.

In the record created before the Hearing Examiner, Chelan County distorts Washington nonconforming use law by suggesting that Seven Hills needed to have received its state license prior to September 29, 2015 in order to establish any nonconforming rights. CP 020-671; *County's Brief*, at Page 6:18-25. The County makes two mistakes here. First, the

County attempts to create a requirement, unrecognized by Washington courts, that Seven Hills needed to have received all of its state licensing before any nonconforming rights attached. In fact, as the Court in *Van Sant vs. City of Everett* pointed out “[c]ourts have repeatedly found that licensing and other regulations *unrelated* to land use approval, whether business licensing, business and occupation tax regulations, or building permits, are not per se determinative of the continuance of a nonconforming use.” *Van Sant*, 69 Wash. App. 641, 651–52 (1993).

Seven Hills was fully licensed and fully operational prior to the adoption of Resolution 2016-14 (creating the ban) and it has never abandoned or discontinued the use. Under Washington nonconforming use law, these facts are enough to shift the burden to the County to demonstrate that Seven Hills abandoned or discontinued the use after the ordinance's enactment. *See e.g. Van Sant v. City of Everett*, 69 Wash.App. 641, 648 (1993).

In this regard, the County doesn't appear to deny that timing and functionality of the site, but rather attempts to create a retroactive date for the establishment of nonconforming rights - September 29, 2016 (Resolution 2015-94 - date of moratorium), and thus implies that Seven Hills was not fully operational to achieve its nonconforming rights at that

point. The language of Resolution 2016-14 states:

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.

The Resolution does not prohibit (nor could it) nonconforming rights from developing in other ways, but rather singles out a particular class of business owners – e.g. those in “actual physical operation prior to September 29, 2015” – and declares those to be nonconforming. The County portrays this language as prohibitive of any property owner from garnering nonconforming rights in any other manner.

This is important because statutes are generally presumed to apply prospectively only. *Macumber v. Shafer*, 96 Wash.2d 568, 570 (1981). But, if a statute is remedial, its effects may be retroactively applied, *Macumber*, at 570, **unless the statute affects a vested right**, *Johnston v. Beneficial Management Corp.*, 85 Wash.2d 637, 641 (1975), **or existing right**, *Gillis v. King Cy.*, 42 Wash.2d 373, 378 (1953). In fact, a statute may not be given retroactive effect, **regardless of the intention of the legislature**, where the effect would be to interfere with vested rights. *Gillis*, 42 Wn.2d at 376. Further, a statute written in present and future tenses manifests a legislative intent that it apply prospectively only. *Miebach v. Colasurdo*, 35 Wash. App. 803, 812, 670 P.2d 276, 282

(1983)(citing *Johnston*, 85 Wash.2d at 641–42).

Under Washington law, Resolution 2016-14 cannot be applied retroactively to eliminate or impinge the nonconforming rights of Seven Hills. Legal nonconforming uses are vested legal rights. *Skamania County v. Woodall*, 104 Wash.App. 525, 539 (2001). The County concurs with this legal principal. CP 020-671; *County Brief*, at page 4:19.

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. It is entitled to operate through a reasonable amortization period.

5.3.2 Seven Hills complied with the County’s regulations related to temporary growing structures.

The Chelan County Community Development Department told Seven Hills in early 2015 that its greenhouses did not require building permits. CP 020-671; *Decl. of Roy Arms*, at Paragraph 4. This direction from the County regarding greenhouses was, and still is, consistent with the State Building Code (as adopted by County Code), which provides:

The provisions of this chapter do not apply to temporary growing structures used solely for the commercial production of horticultural plants including ornamental plants, flowers, vegetables, and fruits. A temporary growing structure is not considered a building for purposes

of this chapter.

RCW 19.27.065. Moreover, RCW 19.27.015 provides the following definition:

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

In short, the State Building Code makes clear that greenhouses are not considered buildings and do not require building permits. In reliance upon this language, Chelan County was routinely advising cannabis farmers, including Seven Hills, that their greenhouses were exempt from building permits.

Chelan County apparently changed its position² (after advising Seven Hills on this issue) in reliance on the following interpretation from the Washington State Building Code Council issued March 12, 2015 (“Interpretation No. 15-04”):

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

² In the action before the Hearing Examiner, the County argued that “per Interpretation No. 15-04, the temporary growing structure exception to the permit requirement does not apply to marijuana operation since ‘marijuana is not considered an agricultural product which would not classify it as an ornamental plant, flower, vegetable, or fruit.’” CP 020-671; *County’s Brief*, at Page 8:2-12.

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

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

The Hearing Examiner’s Decision, at Paragraph 29.2, made several incomplete findings of fact with regard to Seven Hill’s temporary growing structures, that simply re-stated the general rule and the obvious facts.

The Hearing Examiner’s findings on this issue are woefully incomplete and completely lack any reference to or analysis of pertinent law. CP 001-019; Hearing Examiner’s Decision at 29.2. Additionally, the Hearing Examiner made the following specific finding of fact with regarding to the temporary growing structures:

39. The Appellants also argue that the State Building Code Council’s interpretation 15-4 is no binding. However, the Hearing Examiner finds that the challenged interpretation by the Building Code Council is a binding interpretation of the application of the State Building Code.
40. The Hearing Examiner agrees that under RCW 82.04.213, that marijuana must be explicitly mentioned and because it is not, the interpretation by the Building Code Council is lawfully allowed and enforceable.

CP 001-019; Hearing Examiner's Decision at 39-40.

The Hearing Examiner's reliance on Interpretation No. 15-04 for the proposition that Seven Hills must have permits for its greenhouses is flawed for two reasons. First, the Washington State Building Code Council is an independent body that advises the Governor, the Department of Commerce and the Legislature regarding State building code issues. Its interpretations to local jurisdictions are advisory only, not binding upon the County or Seven Hills, and the County has yet to adopt the SBCC guidance through its legislative process. RCW 19.27.031 and WAC 51-04-060 authorize the Council to issue opinions/interpretations addressing questions raised by local building officials. Nothing in either of those code sections declares that the interpretations are "binding" in any way. In fact, the Council's website explicitly states that the "[t]he final interpretations are the opinions of the Council and are advisory only." See e.g. <https://apps.des.wa.gov/sbcc/page.aspx?nid=6> (emphasis supplied).

As a result, the assertion that Seven Hills's soft-sided growing structures required building permits under SBCC Interpretation No. 15-04 amounts to unauthorized rule-making in deprivation of Seven Hills's due process rights. In fact, Interpretation No. 15-4 is not binding and cannot be used by the County to justify an enforcement action. The County's

claim that Seven Hills is out of compliance with the County's code due to its lack of building permits for its growing structures is pure fiction since Chelan County has yet to adopt regulations regarding the need for a building permit or building permit standards for soft-sided greenhouses. How can Seven Hills be out of compliance with a regulation that Chelan County has yet to adopt?

Interpretation 15-04 does not control whether Seven Hills's soft-sided growing structures required a permit under the building code. The County's regulatory scheme contains no such requirements, nor has it developed such a permit for a putative applicant to even apply for. Seven Hills greenhouse structures are not out of compliance with Chelan County code.

5.3.3 Chelan County granted Seven Hills permits for five propane tanks and cannot legally rescind them by failing to provide final inspection.

Seven Hill's due process rights have been violated by the County's refusal to process its propane tank permit. On November 20, 2015 Chelan County issued a building permit (BP 150687) to Water Works for the installation of 5 propane tanks to provide heat to the greenhouses on site. Chelan County then refused to perform the final inspection on this building permit, ostensibly because of the perceived effect of Resolution

2016-14 on the building permit. Seven Hill's believes that all work requested by Chelan County has been addressed and completed by its contractor (AmeriGas) and that the County refused to perform the final inspection. CP 020-671; *Decl. of Roy Arms*, at Paragraph 10.

However, the procedures spelled out in local ordinances must be followed. *See e.g. Durocher v. King County*, 80 Wn.2d 139 (1972); *Byers v. Board of Clallam County Comm'rs*, 84 Wn.2d 796 (1974); *Shelton v. City of Bellevue*, 73 Wn.2d 28 (1968). The County's assertion that it cannot continue to process Seven Hill's building permit application is simply wrong. A building permit is a ministerial act, not subject to the discretion of the building official. An applicant for a building permit is entitled to its immediate issuance upon satisfaction of the relevant ordinance's criteria. *Larson vs. Town of Colton*, 94 Wn.App. 383, 391 (1999). Any delay in doing so opens up the County to liability for delay damages under RCW 64.40. *Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947 (1998) (neither a grading permit, building permit, nor any other ministerial permit may be withheld at discretion of local official to allow time to undertake a further study if applicant has satisfied all ordinance and statutory criteria.). Any delay in processing is out of Appellants' control and solely within the control of the County.

5.3.4 Appellants' conduct does not amount to nuisance.

In this case before the Hearing Examiner, Chelan County alleged a public nuisance due to its belief that Appellants' actions contravene the County Code. CP 020-671; *County Brief*, at Page 10:8-12. As discussed above, Appellants' actions are justified and their nonconforming rights protect their legally existing operations. This Court should consequently find the County's public nuisance (and/or nuisance per se) claim to be moot.

6. CONCLUSION

The law and policy cited above strongly favor Appellants, who simply seek the use of the Property for the lawful purposes for which it was developed, all with the County's actual knowledge and consent.

Appellants herein allege the following deficiencies:

1. Chelan County accepted and approved Appellants' various building permit applications, with the full knowledge that the Property was to be used for the production and processing of cannabis, prior to the passage of Resolution 2016-14. The decision of the Hearing Examiner to consider Appellants' use of the Property as violating Chelan County Code and a nuisance is not supported by substantial evidence, is a clearly erroneous application of the law to the facts, and is an erroneous interpretation of law, because the Hearing Examiner failed to recognize and acknowledge the vested and

nonconforming rights of Appellants.

2. When Appellants inquired of the County as to whether their growing structures required permits, they were told “no.” The RCWs, WACs and Chelan County Code support this conclusion. Subsequently, the County changed its position citing “guidance” from the Washington State Construction Council. The decision of the Hearing Examiner is not supported by substantial evidence, is a clearly erroneous application of the law to the facts, and is an erroneous interpretation of law, because the Hearing Examiner failed to recognize and acknowledge the fact that Appellants growing structures don’t require permits and/or the County has no permitting process for such a structure.
3. The decision of the Hearing Examiner is not supported by substantial evidence, is a clearly erroneous application of the law to the facts, and is an erroneous interpretation of law, because the Hearing Examiner failed to recognize and acknowledge the fact that Chelan County granted Seven Hills permits for five propane tanks and cannot legally rescind them by failing to provide final inspection.
4. The Hearing Examiner engaged in unlawful procedure, failed to follow a prescribed process, made an erroneous interpretation of law, and violated the Appellants’ constitutional rights by holding that the Appellants had the burden of proof in the appeal of the County’s enforcement action. By placing the burden of proof on the Appellants rather than the County, the Hearing Examiner both eliminated the County’s burden of establishing that any violation actually occurred, and required that the Appellants establish their innocence of the violation, with the net effect of inverting the basic structure of our legal system.
5. The Hearing Examiner engaged in unlawful

procedure, failed to follow a prescribed process, made an erroneous interpretation of law by failing to draft a decision that contains proper Conclusions of Law in conformity with its own adopted *Rules Of Procedure For Proceedings Before The Chelan County Hearing Examiner*, 1.23(B)(3).

Appellants respectfully request the following relief from the

Court, in light of the standards discussed above:

1. That the Court first remand this matter back to the Chelan County Hearing Examiner for a modification of his Decision consistent with his obligations under the *Rules Of Procedure For Proceedings Before The Chelan County Hearing Examiner*, 1.23(B)(3).
2. That the Court remand this matter back to the Hearing Examiner to reissue a decision consistent with the correct burden of proof.
3. That the Court review the decision of the Chelan County Hearing Examiner and determine that the decisions) with regard to Appellants vested rights, nonconforming rights, requirements concerning building permits for temporary growing structures, and the presence of a nuisance per se are an erroneous interpretation of law, are not supported by substantial evidence, are a clearly erroneous application of the law to the facts, followed unlawful procedure, violated Appellants' constitutional rights, were outside the authority of the Hearing Examiner; and therefore must be reversed.
4. That Appellants be awarded their costs and attorneys fees incurred herein.
5. That Appellants be granted such further relief as the Court may deem just, equitable and proper.

Such a ruling from the Court would be consistent with Washington

land use law, which emphasizes and honors necessary safeguards (e.g.

nonconforming rights and vested rights) aimed to keep government from immediately changing its rules and regulations to the detriment of developers and property owners who have relied on previous assertions and ordinances. *See e.g. State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143-44 (1965).

RESPECTFULLY SUBMITTED this 6th day of May, 2019.

PARSONS | BURNETT | BJORDAHL | HUME, LLP

A handwritten signature in black ink, appearing to read 'Taud A. Hume', written in a cursive style.

Taud A. Hume, WSBA No. 33529
Attorneys for Water Works Properties, LLC and Seven Hills, LLC

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' OPENING BRIEF pursuant to RCW 4.12.050 as follows:

Kenneth Harper Menke Jackson Beyer, LLP 807 North 39 th Avenue Yakima, WA 98902 kharper@mjbe.com	<input checked="" type="checkbox"/> US Mail & Email <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax)
April D. Hare Deputy Chelan County Prosecuting Attorney PO Box 2596 Wenatchee, WA 98807 April.Hare@CO.CHELAN.WA.US	<input checked="" type="checkbox"/> US Mail & Email <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax)

EXECUTED on the 6th day of May, 2019 at Spokane, WA.



TAUDD A. HUME

PARSONS BURNETT BJORDAHL HUME

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