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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Case 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.

BRIEF OF RESPONDENT

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I. INTRODUCTION & ARGUMENT SUMMARY

Seven Hills, LLC, and Water Works Properties, LLC

(collectively, “Seven Hills”) seek review of the Chelan County Superior Court’s order granting dismissal of their land use petition after they failed to show they were entitled to relief under Chapter 36.70C RCW, the Washington State Land Use Petition Act.

The primary focus in this appeal is the claim by Seven Hills that the marijuana production and processing operations occurring on the Seven Hills property constituted a legal nonconforming use notwithstanding a county moratorium prohibiting such uses and the fact that Seven Hills could not legally engage in marijuana production and processing activities on the property prior to the effective date of a county moratorium prohibiting such uses.

A review of the facts in this matter along with Washington’s well established case law concerning nonconforming uses leads to the conclusion that Seven Hills neither legally nor actually engaged in marijuana production and processing prior to a change in regulations prohibiting the same. Thus, Seven Hills’ marijuana production and processing activities are not a legal nonconforming use.

The very first date on which Seven Hills could legally engage in marijuana production and processing on its property was January 26, 2016, when the Washington State Liquor and Cannabis Board (“WSLCB”) issued a marijuana production and processing license to Seven Hills, LLC. Prior to issuance of the marijuana license, marijuana production and processing on the Seven Hills property was illegal under state law.

By the time a marijuana license had been issued for the Seven Hills property, however, a moratorium on marijuana production and processing was in effect, having been established by Chelan County Resolution 2015-94, adopted on September 29, 2015. The moratorium’s prohibition was made permanent on February 16, 2016 through adoption of Chelan County Resolution 2016-14. At no time did Seven Hills legally or actually engage in marijuana production or processing in Chelan County prior to enactment of county regulations prohibiting the same. Therefore, Seven Hills’ marijuana operations cannot qualify as a legal nonconforming use.

Because the hearing examiner committed no procedural or substantive error and because Seven Hills’ activities cannot qualify for nonconforming status, Chelan County (the “County”) properly issued a notice and order of violation. The County properly required Seven Hills

cease the unlawful activities. The decisions below, therefore, should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether Seven Hills' marijuana production and processing operations constituted a legal nonconforming use notwithstanding a county moratorium on such uses and the fact that Seven Hills was not licensed and therefore not legally allowed to engage in such activities until after the county's moratorium took effect?

III. COUNTERSTATEMENT OF THE CASE

A. Relevant History of Chelan County's Marijuana/Cannabis Regulations.

Washington voters approved Initiative Measure 502 ("I-502") in November 2012 thereby decriminalizing certain activities associated with marijuana, as well as setting forth a regulatory scheme for the production, processing and retail sale of marijuana. Laws of 2013, ch. 3. I-502 established a licensing program for marijuana production, processing and retail sale regulated and enforced by WSLCB. *Id.*; *see also* RCW 69.50.325-.395. Subsequent to I-502's approval, WSLCB enacted rules implementing the initiative. *See generally* Chapter 314-55 WAC. Per WSLCB's rules, issuance of a marijuana license is not "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).

On September 16, 2013, the County adopted a six-month moratorium on locating and permitting marijuana businesses within unincorporated Chelan County for the purpose of drafting new zoning and development regulations to coincide with implementation of the I-502 licensing scheme. The moratorium was terminated, however, on January 14, 2014, without adoption of any regulations. On September 29, 2015, the County adopted another six-month moratorium on siting of recreational marijuana retail stores, production, and processing within unincorporated Chelan County (Chelan County Resolution 2015-94). CP 445-446. During the moratorium, no application for a building permit, occupancy permit, tenant improvement permit, fence permit, variance, conditional use permit or other development permit or approval was to be accepted as either consistent or complete by any county department. CP 446. On November 10, 2015, a public hearing was held regarding the moratorium in accordance with RCW 36.70.795 and RCW 36.70A.390. CP 447. On November 16, 2015, the County continued the moratorium (Chelan County Resolution 2015-102). CP 447-449. On February 16, 2016, the County adopted a permanent prohibition on marijuana production and processing (Chelan County Resolution 2016-14). CP 450-

456. The prohibition was codified in Title 11 of the Chelan County Code. CP 456.

B. Property, Licensing, Permitting and Enforcement History.

Water Works Properties, LLC, is the record owner of the real property commonly known as 2729 Mill Pond Drive, Malaga, Washington 98828, Assessor's Parcel Number 222119440100, and legally described as set forth in the statutory warranty deed recorded with the Chelan County Auditor on December 26, 2014 under AFN 2411333 (the "property"). CP 505-511. Seven Hills, LLC, leases a portion of the property to conduct marijuana production and processing operations. CP 406, 467-493, 496, 607. On January 26, 2016, Seven Hills, LLC, was issued a Marijuana Producer Tier 3 and a Marijuana Processor license (License No. 416935), thereby authorizing marijuana production and processing on the property. CP 496, 609. After January 26, 2016, Seven Hills, LLC, began planting cannabis for production. CP 609.

The Chelan County Department of Community Development (the "Department") became aware of Seven Hill' marijuana operations and conducted site visits to the property on July 13 and November 17, 2016.¹

¹ Seven Hills argues that the County was aware of and "acquiesced" to the marijuana operations. Seven Hills points to calls pertaining to greenhouses, a marijuana licensing notice WSLCB allegedly sent to the County, and permit applications as providing notice of its activities. App. Opening Brief 5-6, 19. No

CP 402-403, 426. During site visits of the property, Department personnel observed seven temporary grow structures, each measuring approximately thirty (30) feet by eighty (80) feet. CP 402-403, 406. According to its lease agreement, Seven Hills LLC was to construct greenhouses on the property for its marijuana production and processing operations. CP 478-493. No permits were ever sought or issued for structures used to grow marijuana on the property. CP 407.

Other facts pertinent to this appeal are those concerning a permit for the installation of five above ground 1000 gallon propane tanks on the property. That permit was issued by the Department on November 30, 2015. CP 427, 499-500. While the application materials indicated “piping for G.H.”, the application made no mention of marijuana. CP 502. The permit specified that a final inspection was required and that it was the duty of the permit holder (Water Works Properties, LLC) to notify the County when work was ready for inspection. CP 499-500. The Department conducted an inspection on the permit on December 2, 2015 and issued a notice of corrections required before work on the permit

contemplated marijuana uses were disclosed, however, in either Seven Hills’ permit applications or in any purported communications with the County. *See* CP 502, 611-617. Furthermore, the County did not receive the marijuana licensing notice allegedly sent by WSLCB in 2015. CP 819-820. Rather, there is no evidence in the record that the County knew of or “acquiesced” to Seven Hills’ marijuana activities.

could continue. CP 497-498. No subsequent inspection was requested and therefore no final approval was obtained from the County for installation of the propane tanks. CP 408, 497. The permit expired on May 30, 2017. CP 463-464, 499. Even though no final approval was obtained, Seven Hills utilizes the tanks to heat structures used to conduct marijuana operations. CP 408.

On September 9, 2016, the Department's Code Enforcement Division sent Water Works Properties, LLC an initial notice setting forth four violations of county regulations. CP 056-058. The initial notice was followed by issuance on March 24, 2017, of a Notice and Order to Abate Zoning and Building Code Violations Pursuant to Chapter 16.06 Chelan County Code (the "notice and order") which set forth the previously identified four violations: (1) production and processing of marijuana; (2) unpermitted structures; (3) operation of propane tanks; and (4) nuisance. CP 041-046. On April 7, 2017, Seven Hills submitted to the Department a notice of appeal of the notice and order. CP 313-314.

C. Proceedings Below.

An administrative appeal hearing on the notice and order was held on July 19, 2017 before the Chelan County hearing examiner. CP 354-355, 663. On August 2, 2017, the hearing examiner entered

findings of fact, conclusions of law, and decision thereby affirming issuance of the notice and order. CP 660-671.

On August 22, 2017, Seven Hills filed a land use petition in the Chelan County Superior Court case *Seven Hills, LLC, et al. v. Chelan County*, cause number 17-2-00698-4, seeking review of the hearing examiner's decision. CP 001-019. A hearing on the merits was held before the superior court on March 21, 2018. CP 794, 824. On May 25, 2018, the superior court issued a memorandum decision that addressed only the assertion that the hearing examiner failed to properly assign the burden of proof during the administrative proceedings. CP 824-827. Citing to an additional authority, *Daily v. City of Sioux Falls*, 802 N.W.2d 905 (S.D. 2011), the superior court requested additional briefing on the issue. On June 19 and July 9, 2018, the parties submitted supplemental briefing regarding the issue of allocation of the burden of proof. CP 829-859.

On October 2, 2018, the superior court issued a memorandum decision affirming the hearing examiner's decision. CP 860-864. This memorandum decision was incorporated into the superior court's Order of Dismissal that was entered on October 19, 2018. CP 865-873.

IV. LEGAL AUTHORITIES & ARGUMENT

A. Standard of Review

This matter is a review of the superior court's dismissal of a land use petition filed pursuant to the Washington State Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. LUPA governs review of land use decisions. RCW 36.70C.030(1); *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). The appellate court reviews the decision of the "local jurisdiction's body or officer with the highest level of authority to make the determination." *McMilian v. King County*, 161 Wn. App. 581, 589, 255 P.3d 739 (2011). The appellate court stands in the same position as the superior court and its review is limited to the record established before the hearing examiner. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005); *ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 282, 348 P.3d 1222 (2015); *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 690 P.2d 434 (1998), *review denied*, 137 Wn.2d 1004 (1999).

Relief may only be granted under LUPA if one of the following standards of relief have been met:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (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;

- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). The party seeking relief from a land use decision bears the burden of proving one of these standards has been violated. *Id.*; *Isla Verde Int'l. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002). Standards (a), (b), (e), and (f) present questions of law under which the accepted standard of review is de novo. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011).

Standard (c) concerns factual determinations that are reviewed for substantial evidence. *Id.* at 828-829. Evidence is substantial when there is a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true. *Id.* at 829; *Nagle v. Snohomish County*, 129 Wn. App. 703, 709, 119 P.3d 914 (2005). Under the substantial evidence standard, the appellate court does not substitute its judgment for that of the fact finder. *Hilltop Terrace Homeowner's Ass'n*

v. Island County, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). Rather, the appellate court accepts the factfinder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences. *Id.*; *City of Univ. Place*, 144 Wn.2d at 652. Evidence will be viewed in the light most favorable to the party that prevailed in the highest forum that exercised factfinding authority, in this case the County. *Id.*

Standard (d) is reviewed under the clearly erroneous standard. *Phoenix Dev., Inc.*, 171 Wn.2d at 829. A decision is clearly erroneous when the reviewing body is "left with the definite and firm conviction that a mistake has been committed." *Id.* When reviewing a decision under the "clearly erroneous" standard, the reviewing body is required to examine the record and evidence "in light of the public policy contained in the legislation authorizing the decision." *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 747, 755 P.2d 264 (1988).

While initially setting forth the standard of review, Seven Hills fails to offer any substantive analysis or discussion as to how any of these standards have been met in this matter. *See* App. Opening Brief 11-29. Furthermore, Seven Hills fails to specifically list any assignments of error to any of the hearing examiner's findings of fact as required by RAP 10.3(g). The only findings of fact referenced by Seven

Hills in the body of their briefing are Findings of Fact paragraph numbers 39 and 40. App. Opening Brief 25. Seven Hills fails to assert, however, that those findings were in error based on a lack of substantial evidence. Seven Hills' failure to assign error to the findings of fact make them verities on appeal. *Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999); *ABC Holdings, Inc.*, 187 Wn. App. at 282; *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 29, 95 P.3d 377 (2004).

B. Seven Hills Does Not Have Vested Rights in Marijuana Production and Processing Uses.

The hearing examiner and superior court were correct in concluding that marijuana production and processing on the Seven Hills property was not a legal nonconforming use and therefore Seven Hills did not have vested rights to engage in such activities. Seven Hills sets forth a list of events allegedly to demonstrate that the marijuana activities are a nonconforming use. App. Opening Brief 19-20. The pertinent dates, however, are the following:

- September 29, 2015 – the County enacts a moratorium on marijuana production and processing.
- January 26, 2016 – a marijuana license is issued legally allowing for the first time marijuana production and processing on the Seven Hills property.
- February 16, 2016 – the County prohibition against marijuana production and processing is made permanent.

Since marijuana production and processing was not legally authorized on the Seven Hills property until after the moratorium, both the hearing examiner and superior court correctly found that Seven Hills failed to prove the marijuana production and processing activities were legal nonconforming uses. CP 665 (Findings of Fact paragraph numbers 27, 29.1.4); CP 669 (Findings of Fact paragraph numbers 36-37); CP 670 (Conclusions of Law paragraph numbers 3-6, 8); CP 863. Neither the factual record nor Washington case law support any other conclusions than those reached by the hearing examiner and superior court.

Case law defines a nonconforming use as one which “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*, 144 Wn.2d at 648. Like many jurisdictions, the County addresses nonconforming uses in its code, specifically Chapter 11.97 of the Chelan County Code.² As with the case law, the county code defines “nonconforming” 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

² The Chelan County Code ("CCC") is published online at <https://www.codepublishing.com/WA/ChelanCounty/>.

conform to the current requirements of the zoning district.” CCC § 14.98.1300.

Nonconforming uses are vested rights. *Rhod-a-zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998). It is the policy of zoning legislation, however, to phase out a nonconforming use. *Id.* at 7-8. 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), *review denied* 91 Wn.2d 1023 (1979); *McMilian*, 161 Wn. App. at 592. Washington courts have repeatedly held that the doctrine of nonconforming uses “is a narrow exception to the State’s nearly plenary power to regulate land through its police powers.” *King County Dep’t of Dev. & Envtl. Servs. v. King County*, 177 Wn.2d 636, 646, 305 P.3d 240 (2013). The one asserting a legal nonconforming use bears the initial burden to prove that “(1) the use existed before the county enacted the [contrary] zoning ordinance; (2) the use was lawful at the time; and (3) the applicant did not abandon or discontinue the use for over a year [prior to the relevant change in the zoning code].” *McMilian*, 161 Wn. App. at 591. Furthermore, “to establish a valid nonconforming use, the use must have been more than intermittent or occasional prior to the change in the zoning legislation.” *Id.*

When analyzing whether a use is nonconforming, the first inquiry is determining when the regulatory landscape changed. In this matter, the change in regulations came on September 29, 2015, when the County adopted a moratorium on the siting of licensed recreational marijuana production and processing. CP 445-446. A simple definition of “moratorium” is “a suspension of activity” and “a time when a particular activity is not allowed.” “Moratorium.” *Merriam-Webster.com*. 2019. <https://www.merriam-webster.com> (23 May 2019). Moratoria are “recognized techniques designed to preserve the status quo so that new plans and regulations will not be rendered moot by intervening development.” *Matson v. Clark County Bd. of Comm’rs*, 79 Wn. App. 641, 644, 904 P.2d 317 (1995). Because there is a risk of frustrating long-term planning if moratoria are not given due effect, moratoria prevail over vesting of rights. *Id.* at 647-648. Pursuant to the moratorium, after September 29, 2015, marijuana production and processing was no longer allowed within unincorporated Chelan County. After holding a public hearing, the moratorium was continued on November 16, 2015. CP 447-449.

The moratorium was immediately followed by adoption of a permanent prohibition on marijuana production and processing. CP 450-456. Chelan County Resolution 2016-14 addressed nonconforming uses

by setting forth that 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.” Chelan County Resolution 2016-14 recognized the date in the change of regulations, i.e. September 29, 2015 - the date that the moratorium was placed on marijuana production and processing. Additionally, this language follows Washington case law which holds that before qualifying as nonconforming, a use must be lawful and actually exist prior to the change in regulations. *Anderson v. Island County*, 81 Wn.2d 312, 321, 501 P.2d 594 (1972) (particular use in question must actually exist prior to change in regulations – mere purchase of property and occupation are not sufficient to establish a nonconforming use); *Rhod-a-zalea & 35th, Inc.*, 136 Wn.2d at 6 (nonconforming use is a use that *lawfully* existed prior to the enactment of a zoning ordinance); *King County Dep’t of Dev. & Env’tl. Servs.*, 177 Wn.2d at 646 (materials processing facility did not constitute nonconforming use since all stages required for implementation of materials processing - site preparation, actual grinding of materials and transfer of those materials off site – did not occur prior to change in regulations); *First Pioneer Trading Co., Inc. v. Pierce County* (“*First Pioneer*”), 146 Wn. App. 606, 616-17, 191 P.3d 928 (2008), *review denied* 165 Wn.2d 1053 (2009) (metal fabrication

business failed to obtain any permits, including building and business permits, and environmental assessments thereby negating a finding that it's use of property was lawfully established); *McMilian*, 161 Wn. App. at 591 (in asserting nonconforming use, landowner must prove various elements, including that use existed and was lawful).

Nowhere in the record before this Court is there evidence that Seven Hills was actually or lawfully growing or processing marijuana prior to Chelan County's enactment of its moratorium on marijuana production and processing, September 29, 2015. Rather, the record only demonstrates preparation of land in anticipation of such activities. *See* CP 608 (declaration stating "[t]hroughout 2015 and early 2016 we continued to *develop* the Property"). It was not until after receiving a marijuana license on January 26, 2016, that Seven Hills "began planting cannabis for production." CP 609; *see also* CP 496, 646. Pursuant to the case law cited above, however, Seven Hills' preparation was not enough to establish a nonconforming use. Both the hearing examiner and superior court recognized as much. CP 665-666 (Findings of Fact paragraph numbers 29.1.5-29.1.6); CP 669 (Findings of Fact paragraph number 37); CP 863.

Furthermore, no legal use of the property for producing and processing marijuana could have occurred prior to issuance of a marijuana license on January 26, 2016, thereby preventing Seven Hills' use from obtaining any nonconforming status. Seven Hills argues that receipt of a marijuana license prior to September 29, 2015 is not required to establish a nonconforming use. As support, Seven Hills misconstrues *Van Sant v. City of Everett*, 69 Wn. App. 641, 849 P.2d 1276 (1993). App. Opening Brief 21. Seven Hills' argument and citation to *Van Sant* mimics an argument raised by the appellant property owner in *First Pioneer*. See *First Pioneer*, 146 Wn. App. at 616-617. As the *First Pioneer* court discussed, however, the issue before the Court of Appeals in *Van Sant* was regarding abandonment of a nonconforming use, not establishment. *Id.* at 617; see *Van Sant, supra* at 651-654. In that regards, the *Van Sant* court held that a license or other regulations not related to land use approval are not per se determinative of the *continuance* of a nonconforming use. *Van Sant, supra* at 652. This issue in this case, however, is regarding *establishment* of a nonconforming use.

Under Washington law, it is illegal for a person or entity to engage in marijuana production or processing until that person or entity has been issued a license by WSLCB. See RCW 69.50.363-.366 (marijuana production and processing legal only when conducted pursuant to a

marijuana license and in compliance with rules adopted by WSLCB); *see* WAC 314-55-015(4) (marijuana license applicant cannot exercise the privileges of a license, *i.e.* produce or process marijuana, until WSLCB has approved a license). A marijuana license, therefore, directly impacts use of land for such purposes. Seven Hills, however, was not issued a license authorizing marijuana production or processing on the property until January 26, 2016. CP 496, 646. Until a marijuana license had been issued, any marijuana production and processing uses on the property would have been illegal. Washington case law reflects the logical reasoning that one cannot obtain vested rights to an illegal use. *See e.g. King County Dep't of Dev. & Env'tl. Servs.*, 177 Wn.2d at 647-648; *First Pioneer, supra*; *McMilian*, 161 Wn. App. at 595-600 (trespasser cannot establish a valid nonconforming use). Therefore, Seven Hills could not have legally engaged in marijuana production and processing uses prior to issuance of the marijuana license and certainly not prior to September 29, 2015, the date the moratorium on such uses took effect. Since marijuana production and processing did not legally or actually exist on the subject property prior to September 29, 2015, any subsequent activities cannot constitute a nonconforming use.

The superior court similarly reasoned that when the moratorium went into effect on September 29, 2015, Seven Hills' marijuana operations

were not a legal nonconforming use. CP 863. As the superior court reasoned, the temporary moratorium continued until a permanent ban was enacted on February 16, 2016, thus there was no way Seven Hills' marijuana operations could become a legal nonconforming use. CP 863.

Also, the factual record does not demonstrate that Seven Hills' marijuana operations were legally and actually in operation prior to February 16, 2016 – the date the marijuana production and processing prohibition was made permanent pursuant to Chelan County Resolution 2016-14. As noted below in section IV.D and IV.E, Seven Hills failed to obtain and finalize permits for structures and systems utilized in its marijuana operations. Seven Hills failure to obtain or finalize required permits prior to February 16, 2016 defeats any argument that its marijuana operations constitute a legal nonconforming use. *See King County Dep't of Dev. & Env'tl. Servs.*, 177 Wn.2d at 647-648; *First Pioneer Trading Co., Inc.*, 146 Wn. App. at 616-17. Furthermore, there is no evidence in the factual record as to when any marijuana processing activities began on the property.

The hearing examiner appropriately found that Seven Hills “failed to satisfy its burden of proof that the use of the site as a marijuana production and processing facility was established prior to the adoption of

Resolution 2015-94, 2015-102 and Resolution 2016-14.” CP 669 (Findings of Fact paragraph number 36). Seven Hills fails to assign any error to this or any other findings of the hearing examiner on this issue. CP 664-669 (Findings of Fact paragraph numbers 26-29.1.8, 34-38). The findings are now verities. *Dumas*, 137 Wn.2d at 280; *ABC Holdings, Inc.*, 187 Wn. App. at 282; *City of Medina*, 123 Wn. App. at 29. Furthermore, the hearing examiner's findings are supported by the case law and substantial evidence in the record. As such, the hearing examiner's decision was not issued in error.

Seven Hills also questions the constitutionality of the nonconforming use language in Chelan County Resolution 2016-14, describing it as having “retroactive” effect. Regularly enacted ordinances are presumed constitutional and the challenger to such legislative enactment has the burden of establishing beyond a reasonable doubt that the disputed ordinance is unconstitutional. *Thurston County Rental Owners Ass’n v. Thurston County*, 85 Wn. App. 171, 181, 931 P.2d 208 (1997). Seven Hills cannot meet this burden. Seven Hills’ characterization of “retroactive” effect is simply wrong. Seven Hills fails to recognize the fact that, as of September 29, 2015 (the date of the moratorium), marijuana production and processing activities were no longer a lawful land use. CP 445-446. Any person that began marijuana

production and processing after this date did so in contravention of county regulations, thus negating any status as a lawful nonconforming use. The moratorium was immediately followed by adoption of a permanent prohibition. CP 450-456. Therefore, Chelan County Resolution 2016-14 properly recognized the date of the change in regulations, i.e. the date of the moratorium which made marijuana production and processing uses unlawful within the County.³ The hearing examiner was therefore correct that Seven Hills' marijuana production and processing uses did not constitute a nonconforming use. CP 669 (Findings of Fact paragraph numbers 35-38), 670 (Conclusions of Law paragraph numbers 3-8). Seven Hills fails to show that it is entitled to relief under RCW 36.70C.130.

C. The Hearing Examiner Did Not Commit Procedural Errors.

Seven Hills also argues that the hearing examiner erred in two procedural respects. First, Seven Hills asserts that the hearing examiner incorrectly allocated the burden of proof to Seven Hills to show the notice and order was erroneously issued. App. Opening Brief 11-15. Second, Seven Hills argues that the hearing examiner's decision is defective due to

³ The findings contains in Chelan County Resolution 2016-14 include recognition of the September 29, 2015 moratorium on marijuana production and processing. CP 450.

a lack of legal citations. App. Opening Brief 15-18.

1. The Hearing Examiner Correctly Allocated the Burden of Proof.

Seven Hills is incorrect that the hearing examiner failed to properly allocate the burden of proof in the administrative proceedings. In his decision, the hearing examiner referred to a Chelan County Code provision that expressly allocates the burden of proof to the appellant in an administrative appeal. CP 663. Chelan County Code states that in appeals of an administrative decision to the hearing examiner, “the appellant shall have the burden of proving the decision is erroneous.” CCC § 14.12.010(2)(C). In addition, the hearing examiner rules of procedure, adopted pursuant to Chelan County Resolution No. 2001-201 and referenced in Title 16 of the Chelan County Code, also expressly states that an “appellant shall have the burden of proof to show compliance with applicable laws and regulations of Washington State and Chelan County.” CP 581; *see* CCC § 16.12.020(a) (The appeal hearing shall be conducted as provided for in the Chelan County rules of procedure for proceedings before the Chelan County hearing examiner . . .”).

Seven Hills nevertheless argues that the Hearing Examiner erred by failing to perceive a constitutional problem with this allocation of burden of proof. App. Opening Brief 11-15. Seven Hills’ argument is

devoid of any citation to precedent. For instance Seven Hills claims without any authority whatsoever that the “burden of proof is always on the person who brings the claim in a dispute.” App. Opening Brief 12. Seven Hills argues that this represents a “basic principal of due process” but again cites nothing to support this contention. App. Opening Brief 13.

Seven Hills’ argument that the hearing examiner’s allocation of burden of proof violates due process standards is incorrect. Due process must be afforded prior to deprivation of a protected property interest. U.S. Const. amend XIV; Washington Const. art. I, § 3. The fundamental requirements of procedural due process are notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2nd 556 (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 of Washington*, 18 Wn. App. 245, 250, 566 P.2d 1283 (1977). A procedural rule that satisfies due process in one context, may not necessarily satisfy due process in every case. *Olympic Forest Prods. Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 423, 511 P.2d 1002 (1973). Rather, procedural safeguards afforded in a situation should be tailored to the specific function to be served by them. *Id.* In determining whether procedures are adequate to protect the interest at stake, a court considers three factors: (1) “the private interest that will be affected by the

official action;” (2) “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 (3) “the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Post v. City of Tacoma, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). To be entitled to due process protections prior to government action, a person must face a deprivation of a significant property interest by the government. *Olympic Forest Prods. Inc.*, *supra* at 428. A notice and order of violation, however, does not implicate a significant property interest giving rise to due process requirements. *Cranwell v. Mesec*, 77 Wn. App. 90, 111, 890 P.2d 491 (1995), *review denied*, 127 Wn.2d 1004; *see ABC Holdings*, 187 Wn. App. at 286.

Therefore, the notice and order itself did not deprive Seven Hills of a significant property interest requiring due process protections. Even so, the administrative proceedings before the hearing examiner provided ample opportunity for Seven Hills to present evidence and raise arguments. CP 587-606 (memorandum of authorities submitted by Seven Hills), 607-647 (declaration and exhibits submitted by Seven Hills), 677-

703 (argument and testimony presented by Seven Hills during administrative hearing). Due process requires no more.

The hearing examiner followed the Chelan County Code and the rules of procedure as set forth above. Seven Hills simply ignores these provisions. Rather, Seven Hills 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. Seven Hills also analogizes this matter to disparate concepts such as Washington's civil infraction statutes and the Rules for Enforcement of Lawyer Conduct. But these analogies do nothing to prove a due process problem with the County's administrative procedures, and only shows that different burdens of proof may exist for different settings. Furthermore, Chapter 7.80 RCW is silent regarding the issuance of notice and orders. Consequently, the County's issuance of the notice and order in this matter did not trigger the procedure outlined in Chapter 7.80 RCW.⁴

Seven Hills' citations to the codes of other counties is also to no avail since those cited provisions relate to those counties' infraction

⁴ Even if a notice and order were the same as an infraction under Chapter 7.80 RCW, the legislature explicitly provided authority for cities, towns and counties to enact their own system for determining civil infractions: "Nothing in this chapter prevents any city, town, or county from hearing and determining civil infractions pursuant to its own system established by ordinance." RCW 7.80.010(5).

processes, not their notice and order of violation processes. Seven Hills' citations prove nothing, because there was no infraction issued in this case. A notice and order of violation is not an infraction. The County has not imposed a civil monetary penalty.

In its May 25, 2018, memorandum decision, the superior court sought additional briefing on this very issue, referring to the *Daily* case in which the South Dakota court held the burden of proof in that matter be borne by the City of Sioux Falls. *Daily*, however, is distinguishable. In *Daily*, the local jurisdiction issued four citations that assessed a civil fine. 802 N.W.2d at 911. It was that property interest – a civil fine – that the South Dakota court identified as raising due process protections. *Id.*

Per Title 16 of the Chelan County Code, citations and notices and orders are distinct. *Compare* Chapter 16.06 CCC *with* Chapter 16.08 CCC. A “citation” is “a written order issued by the administrator imposing a fine for failure to abate a civil code violation(s).” CCC § 16.04.010. A “notice and order,” however, is defined as “a written notice declaring that a code violation(s) has occurred which specifies the action required to abate the violation and the civil fine for failure to comply with the notice and order.” *Id.* While some Chelan County Code provisions state civil fines are assessed pursuant to a fee schedule, *see* CCC §

16.16.010, and authorize lien as a method for enforcing an already imposed civil fine, *see* CCC § 16.18.010, these provisions do not in fact direct that a notice and order immediately impose a civil fine. Rather it is the noncompliance with the notice and order that would trigger imposition of any civil fine. *See* CCC § 16.06.040(b); CCC § 16.06.070(a).

Unlike the citations in *Daily*, the notice and order issued in this matter did not impose upon its issuance a monetary penalty. Thus, the property interest the *Daily* court identified as requiring due process protections – imposition of a civil fine – is not present in this matter. Rather, as set forth above, Washington courts have held that a notice and order does not implicate a property interest giving rise to due process requirements. *See ABC Holdings, Inc., supra; Cranwell, supra.*

This Court also addressed this property interest distinction in two unreported cases, *Marlow v. Douglas County*, 2013 Wash. App. LEXIS 2509 (Oct. 22, 2013) and *Schneck v. Douglas County*, 2014 Wash. App. LEXIS 1933 (Aug. 7, 2014). In *Marlow* and *Schneck*, landowners who had been issued “notices of land use violations and orders to comply” appealed the notice and orders to the hearing examiner who, in turn, placed the burden on the landowners to demonstrate compliance with shoreline regulations. *Marlow, supra* at *10-11; *Schneck, supra* at *6-7.

Like Seven Hills in this case, the landowners in *Marlow* and *Schneck* argued that the hearing examiner erred in allocating the burden of proof to the landowners. *Marlow, supra; Schneck, supra*. The landowners cited to *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), to support their argument regarding allocation of burdens. *Marlow, supra; Schneck, supra*. This Court distinguished *Post* on the basis that *Post* involved over \$500,000 in infraction penalties administratively imposed by the City of Tacoma without any opportunity for administrative challenge or review. *Marlow, supra; Schneck, supra*. The landowners in *Marlow* and *Schneck*, however, were afforded an opportunity to challenge the notice and orders and did not face a similar monetary penalty. *Marlow, supra; Schneck, supra*.

Another distinction from *Daily* stems from that court's concern that there was no right to appeal an administrative decision to the South Dakota circuit courts. *Daily, supra* at 915. Unlike South Dakota, however, Washington does provide for judicial review of land use decisions pursuant to LUPA. RCW 36.70C.010. Standards for relief are set forth in RCW 36.70C.130 and include review of questions of law as well as evidentiary support for factual findings. *Compare* RCW 36.70C.130 *with Daily, supra* (judicial review is limited to the issue of whether the hearing examiner 'regularly pursued' his authority).

Furthermore, LUPA provides for limited discovery as well as supplementation of the record. *See* RCW 36.70C.120.

The post-decision review afforded by LUPA helps to quash any due process concerns. Due process may be satisfied where a post-deprivation remedy is available. *See e.g. Schlosser v. Bethel Sch. Dist.*, 183 Wn. App. 280, 292-293, 333 P.3d 475 (2014) (post-deprivation review satisfied due process). Even though this matter does not present a significant property interest triggering due process protections, Seven Hills was afforded an opportunity to challenge the notice and order by presenting evidence and raising arguments to the hearing examiner. *See* CP 587-606, 607-647, 677-703. Following the decision of the hearing examiner, Seven Hills was afforded additional review under LUPA. These provisions for additional post-decision review lessen any likelihood of an erroneous deprivation of any property interests (especially in the case of a notice and order which does not implicate any significant property interest). Thus, the process utilized by the County coupled with review under LUPA satisfy any due process requirements.

Furthermore, a change in the burden of proof is unlikely to impact the hearing examiner's decision. The County provided substantial documentary evidence during the administrative hearing to support the

violations outlined in the notice and order. CP 399-409 (Department staff report); CP 428-431 (photographs depicting the property and the temporary grow structures); CP 463-464 (state business and marijuana licensing records); CP 455-462 (resolutions); CP 478-493 (Seven Hills, LLC marijuana producer/processor operating plan); CP 163-178 (lease agreement stating that use of the property is for state-licensed marijuana production and processing); CP 497 (inspection form showing no final inspection approved); CP 499-504 (mechanical permit issued for propane tanks and accompanying application); CP 505-511 (statutory warranty deed); CP 463-464 (Department permitting information for property); CP 523 (building code interpretation); CP 525-571 (excerpts from building and fire codes); CP 299-309 (Geographic Information System “GIS” mapping). There was therefore a sufficient quantum of evidence within the record before the hearing examiner to persuade a reasonable person that the violations existed even if the burden of proof had initially rested with the County. In addition, Seven Hills fails to assign error to any of factual findings of the hearing examiner making them now verities. *Dumas*, 187 Wn.2d at 268. Also, even if the initial burden of proving violations were on the County, Seven Hills would still have held the burden of proving the existence of a legal nonconforming use. *City of Univ. Place*, 144 Wn.2d at 647.

The hearing examiner correctly allocated the burden of proof based on the provisions in county code and the hearing examiner's own procedural rules. Washington case law demonstrates that such allocation did not offend notions of due process. There was no unconstitutionality in the hearing examiner's allocation of burden of proof. Seven Hills' due process rights to notice and an opportunity to be heard were fully satisfied by the administrative proceedings and the post-decision review afforded pursuant to LUPA. Seven Hills has no persuasive argument to the contrary. As such, the hearing examiner's decision was not in error and Seven Hills fails to demonstrate that it is entitled to relief under RCW 36.70C.130.

2. The Hearing Examiner's Decision was Sufficient for Purposes of Review.

Seven Hills also raises as procedural error the absence of legal citations in the hearing examiner's decision. App. Opening Brief 15-18. In support, Seven Hills cites to cases that generally describe the standards for granting relief under LUPA. App. Opening Brief at 16-17. None of these cases, however, state that a land use decision is erroneous for failure to supply legal citations, as opposed to committing an actual erroneous interpretation of the law. Both before the hearing examiner and the superior court, and now before this Court, Seven Hills has had ample

opportunity to identify legal error and state its arguments. Seven Hills fails to cite to any authority that supports the proposition that lack of legal citation in a decision constitutes reversible error.

Seven Hills argues that 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. App. Opening Brief 15-16. The hearing examiner's findings of fact, along with the evidentiary record, however, imposed no impediments on Seven Hills in its ability to seek review in its land use petition.

Furthermore, there is no basis to criticize the hearing examiner's decision over the extent to which he did or did not cite legal authority for his conclusions of law. Firstly, the hearing examiner did cite to county resolutions and code provisions as well as statutory references. *See* CP 663-670. Secondly, the hearing examiner explained his legal reasoning in clear sentences. The superior court clearly articulated the legal precedent upon which it relied. CP 860-864. This Court is also fully capable of evaluating Seven Hills' legal theories and assessing their merit.

Seven Hills relies on procedures related to student sexual misconduct hearings as the basis for their argument that legal citations are a requirement. While some agencies may require legal citations in decisions, the Administrative Procedures Act, Chapter 34.05 RCW, does

not contain such a requirement applicable to all agencies. *See e.g.* RCW 34.05.461 (statute lists findings of fact and conclusions of law as requirements for an order, but fails to require legal citations). For example, legal citations are not listed as a requirement in decisions issued pursuant to some environmental and land use review proceedings. *See e.g.* WAC 242-03-810 (Growth Management Hearings Board); WAC 371-08-535 (Pollution Control Hearings Board). Furthermore, the hearing examiner system utilized by counties for land use matters is authorized by the Planning Enabling Act, Chapter 36.70 RCW. Nowhere in the authorizing statute is the requirement that a hearing examiner set forth legal citations in any decision. *See* RCW 36.70.970. Seven Hills' request for a remand on this issue is unsupported in fact and law and would promote pointless delay. Seven Hills fails to show how any perceived lack of legal citation entitles it to relief under RCW 36.70C.130.

D. Seven Hills Was Required To Obtain Building Permits for Construction of Structures Used to Grow Marijuana.

The record evidences, and Seven Hills does not dispute, the existence of a number of unpermitted structures located on the property used for growing marijuana. CP 032-34, 165, 178, 402, 406, 429-430, 480, 493. Instead, Seven Hills argues contrary to the findings of both the

hearing examiner and the superior court that permits were not required. Seven Hills is again incorrect and fails to demonstrate that the decisions below were issued in error on this point.

The State Building Code, adopted by the Chelan County Code, in turn adopts the International Building Code. RCW 19.27.031(1)(a); CCC § 3.04.010. The State Building Code is in effect in, and enforced by, the counties and cities. RCW 19.27.031 and -.050. Per the 2012 International Building Code, a permit is required to “construct . . . a building or structure.”⁵ IBC 105.1. Structure is defined as “that which is built or constructed.” IBC 202. Thus, the default procedure is that a permit is required whenever something is built or constructed on land. The State Building Code contains several exceptions to the permit requirement. One exception is for “temporary growing structures used solely for the commercial production of horticultural plants including ornamental plants, flowers, vegetables, and fruits.” RCW 19.27.065; WAC 51-50-007.

The Washington State Building Code Council adopts and maintains the codes comprising the State Building Code. RCW 19.27.074(1)(a). Amendments to the State Building Code adopted by the

⁵ At the time the structures were constructed or erected, the 2012 edition of the International Building Code was in effect.

Building Code Council are contained in Title 51 WAC. The Building Code Council is authorized to issue opinions relating to the State Building Code. RCW 19.27.031; WAC 51-04-060. In an interpretation issued by the 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 523. 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 523. The Building Code Council’s interpretation expressly cited to the exclusion of marijuana from the definition of “agriculture,” “farming,” “horticulture,” “horticultural,” and “horticultural product” contained in Washington statute:

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.

RCW 82.04.213. 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 various other Washington statutes resulting in the exclusion of marijuana from various agricultural definitions and provisions, including, but not limited to 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 permit exception contained in RCW 19.27.065 and WAC 51-50-007 only applies to temporary grow structure utilized "solely for purposes of commercial production of horticultural plants including ornamental plants, flowers, vegetables, and fruits," use of the structures for any other purpose would render the permit exception inapplicable. Thus, a permit would be required for temporary grow structures utilized for any other purpose. IBC 105.1 (requiring permit for anything built or constructed).

Seven Hills argues that the hearing examiner incorrectly relied on the Building Code Council’s interpretation, and that the interpretation is merely advisory and should not be afforded weight. While authorizing issuance of opinions, neither RCW 19.27.031 nor WAC 51-04-060 indicate the weight afforded to such opinions or interpretations. Case law makes clear, however, that courts give “great deference to an agency’s interpretation of its own promulgated regulations, ‘absent a compelling indication,’ that the agency’s regulatory interpretation conflicts with

legislative intent or is in excess of the agency’s authority.” *Silverstreak, Inc. v. Dep’t of Labor & Indust.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007).

As noted above, the Building Code Council adopts and maintains the codes comprising the State Building Code as well as amendments. The exception to the permit requirement is contained not only in statute, but also the Washington Administrative Code provisions adopted by the Building Code Council. *See* WAC 51-50-007. There is no indication, let alone a compelling one, that the Building Code Council’s interpretation was incorrect.⁶ Since the interpretation was first issued in 2015, the permit exception has not been amended by either the Building Code Council or the legislature to clarify that it also pertains to temporary growing structures used for growing marijuana. Neither has the definition of marijuana been amended to indicate that it is a horticultural or

⁶ The Building Code Council’s interpretation comports to Washington’s statutory and regulatory scheme which does not define or treat marijuana as an agricultural product. *See* RCW 69.50.325 and Chapter 314-55 (marijuana licensing regulated by WSLCB, not the Washington State Department of Agriculture); *compare* RCW 69.50.101(x) (definition of marijuana) *with* RCW 15.120.020 (agricultural statute specifically defining industrial hemp as an “agricultural product”); *see also* WAC 458-30-200(2)(d) (Washington Department of Revenue rules exclude marijuana from definition of agricultural product); *see also* RCW 15.13.270 (excluding marijuana production from nursery dealer licensing), RCW 15.17.020 (excluding marijuana from definition of “fruits and vegetables”), RCW 15.49.061 (excluding marijuana from Chapter 15.49 RCW, Seeds), and RCW 84.34.410 (excluding marijuana land uses from provisions of Chapter 84.34 RCW, Open Space, Agricultural, Timberlands – Current Use – Conservation Futures).

agricultural product. RCW 69.50.101(x). The hearing examiner assessed the interpretation and agreed that “per 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 669 (Findings of Fact paragraph number 40).

The record provides substantial and uncontroverted evidence that Seven Hills operates marijuana production and processing on the subject property and utilizes growing structures for the marijuana operations. CP 406, 467-493, 496. Since marijuana does not constitute “agriculture,” “farming,” “horticulture,” “horticultural,” and “horticultural product” under Washington law, the permit exception for commercial production of horticultural plants contained in RCW 19.27.065 and WAC 51-50-007 is inapplicable to the grow structures utilized by Seven Hills for cultivation of marijuana. Rather, pursuant to the State Building Code, a permit was required prior to construction of the structures. IBC 105.1. Since no permits were acquired, the structures are in violation of state and local building regulations. The hearing examiner therefore correctly resolved this issue, and his decision was not issued in any error entitling relief under RCW 36.70C.130.

E. The Hearing Examiner Correctly Affirmed the Violation Pertaining to the Unapproved Installation and Operation of Propane Tanks, and Occupancy of Growing Structures.

Seven Hills also argues that its due process rights were violated on account that the County refused to conduct a final inspection of a permit for installation of propane tanks. The hearing examiner made the following findings of fact:

29.3.2 A mechanical permit (BP 150687) was issued for the installation of five (5) above ground, 1000 gallon propane tanks. County records indicate on December 2, 2015, a rough inspection was performed on BP 150687 by Inspector Richard Campbell. A correction notice was issued. No further inspections were requested or conducted, and no certificate of approval was issued for installation of the propane tanks. The propane tanks are being used to fuel furnaces, which in turn, are heating the growing structures located on the subject property.

29.3.3 Final inspection and approval of the installation of the propane tanks were required prior to their use. Even though required under IFC Section 106.2.1, Water Works Properties LLC failed to call for an inspection of the installation of the propane tanks after a correction notice was issued. No final approval was obtained for installation of the tanks. Use of the propane tanks without first obtaining a certificate of approval is a violation of IFC Section 106.2.2. Furthermore, no approval was received to fuel the furnaces with the propane gas in violation of IFC Section 6105.1. Occupancy of the growing structures that are heated using the unapproved propane system and furnaces constitutes a violation of IFC Section 105.3.3.

CP 667-668. The evidentiary record supports the hearing examiner's finding. CP 408, 463-464, 497-504. Seven Hills fails to assign error to

these findings making them verities on appeal. *Dumas*, 137 Wn.2d at 268; *ABC Holdings, Inc.*, 187 Wn. App. at 282; *City of Medina*, 123 Wn. App. at 29.

While failing to assign any error, Seven Hills still argues that it was the County that refused to conduct inspections based on the declaration of Roy Arms. App. Opening Brief 27-28. Mr. Arms testified before the hearing examiner, however, that he relied on a contractor, AmeriGas Propane LP, to install the propane tanks. CP 698 (lines 12 through 15). In concluding his testimony on this subject, it became apparent that Mr. Arms was speculating as to the circumstances surrounding the propane tanks. CP 699 (lines 1 through 2) (stating “I don’t know, it’s on them [AmeriGas], I’m not quite sure.”). Similarly, Mr. Arms in a declaration stated he “believed” that all the work had been completed by AmeriGas and that it was the County that failed to perform and inspection. CP 609 (paragraph no. 10). Mr. Arm’s declaration and testimony before the hearing examiner evidence speculation more than anything.

As the factfinder, the hearing examiner weighed the evidence and found that no final inspection was requested by Water Works Properties LLC. CP 667-668 (Findings of Fact paragraph numbers 29.3.2 and 29.3.3). The superior court likewise found that Seven Hills failed to cite

to any evidence to the contrary. CP 864. The hearing examiner's findings are supported by the substantial documentary evidence in the record. CP 408, 434-464, 497-498. This court does not substitute its judgment for the factfinder, but rather accepts the factfinder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences. *Hilltop Terrace Homeowner's Ass'n*, 126 Wn.2d at 34; *Isla Verde Int'l. v.*, 99 Wn. App. at 133-34.

Seven Hills argues that an applicant for a building permit is entitled to its immediate issuance and failure to do so will subject the County to liability. App. Opening Brief 28. In this matter, however, the County did not refuse to issue a permit. The permit to install the propane tanks was issued. CP 499-500. Therefore, Seven Hills' arguments and citations are misplaced.

Furthermore, contrary to any contention otherwise, the burden of compliance with codes, regulations and ordinances is the responsibility of the permit applicant. *Meaney v. Dodd*, 111 Wn.2d 174, 179, 759 P.2d 455 (1988). The 2012 International Fire Code⁷ composes part of the State Building Code, and, in turn, county building regulations. RCW 19.27.031; CCC § 3.04.010. Pursuant to the International Fire Code, a permit is

⁷ At the time the permit was issued, the 2012 edition of the International Fire Code was in effect.

required to install propane (i.e. liquid petroleum gas or LP-gas) systems and equipment. IFC 105.7.11. Once a permit is required, it is the permit holder's duty to schedule the necessary inspections. IFC 106.2.1. Final approval is required for installation and use of the propane tanks. IFC 106.2.2 and 6105.1. A building or structure cannot be occupied prior to issuance of a permit and associated inspections have been conducted indicating code provisions have been met. IFC 105.3.3. It is unlawful for a person to erect, construct or utilize a building, occupancy, premises or system regulated by the International Fire Code in conflict with or in violation of any of its provisions. IFC 109.1.

Seven Hills does not dispute the fact that a certificate of approval was never issued for installation of the propane tanks, or the fact that the propane tanks are being used to fuel furnaces, which, in turn, were heating the growing structures located on the subject property. Seven Hills' only argument is that the County refused to conduct a final inspection and that that excuses Seven Hills' violation. Pursuant to regulation and case law, the burden of compliance (including scheduling final inspections and refraining from utilizing the propane tanks for heating until installation is approved) fell upon Seven Hills. The evidentiary record fails to support any assertion to the contrary. As such, the hearing examiner's decision was not issued in error.

F. The Hearing Examiner Was Correct In Affirming the Nuisance Violation.

Finally, Seven Hills contends that the hearing examiner erred in finding that the violations in this case constituted a nuisance. Seven Hills is again incorrect. Nuisance is defined as “doing an act which either annoys, injures or endangers the comfort, repose, health or safety of others . . . ; or in any way renders other persons insecure in life, or in the use of property.” RCW 7.48.120. A public nuisance is one which affects equally the rights of an entire community or neighborhood. RCW 7.48.130. “A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance.” *Kitsap County v. Kitsap Rifle and Revolver Club, et al.*, 184 Wn. App. 252, 277, 337 P.3d 328 (2014). Counties have been conferred the power to declare by ordinance what shall be deemed a nuisance within their borders. RCW 36.32.120(10).

The County has set forth in its code that a violation of any provisions of its building and zoning regulations is detrimental to public health, safety, and welfare and thus constitutes a public nuisance. CCC § 16.02.020-.030. As briefed above, there was substantial evidence in the record that Seven Hills’ use and development of the property violates county building and zoning regulations. Also, as noted above, the law

comports to the hearing examiner's findings and conclusions. Thus, the production and processing of marijuana, use of the propane tanks, and unpermitted construction of the growing structures constitute nuisances *per se* pursuant to Title 16 of the Chelan County Code. The hearing examiner therefore correctly found Seven Hills' use and development of the property constituted public nuisance. CP 668 (Findings of Fact paragraph number 29.4.3). As such, the hearing examiner's decision was not issued in error and Seven Hills is not entitled to relief.

V. CONCLUSION

For the forgoing reasons, the Superior Court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of June, 2019.

DOUGLAS J. SHAE
Chelan County Prosecuting Attorney

By:


APRIL D. HARE, WSBA #42924
Deputy Prosecuting Attorney
Attorney for Respondent Chelan County

APPENDIX

Unpublished Opinions GR 14.1(d)

A Last updated May 21, 2019 01:36:48 pm GMT

Marlow v. Douglas County

Court of Appeals of Washington, Division Three

October 22, 2013, Filed

No. 31013-2-III

Reporter

2013 Wash. App. LEXIS 2509 *: 2013 WL 5760571

MARK MARLOW ET AL., *Appellants*, v. DOUGLAS COUNTY,
Respondent.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at Marlow v. Douglas County, 2013 Wash. App. LEXIS 2536 (Wash. Ct. App., Oct. 22, 2013)

Prior History: [*1] Appeal from Douglas Superior Court. Docket No: 12-2-00010-4. Date filed: 06/29/2012. Judge signing: Honorable John Hotchkiss.

Core Terms

exempt, hearing examiner, concrete, dock, shoreline, bulkhead, retaining wall, burden of proof, launch, land use decision, statute of limitations, examiner's, penalties, boat, law law law, development permit, requirements, injunctive, repair, shoreline management, land use, constructed, violations, expertise, installed, replaced, wetlands, proceedings, regulations, provides

Counsel: *John Maurice Groen, W Forrest Fischer*, Groen Stephens & Klinge LLP, Bellevue, WA, for Appellant(s).

Steven Michael Clem, Douglas County Prosecuting Attorney, Waterville, WA, for Respondent(s).

Judges: AUTHOR: Stephen M. Brown, J. WE CONCUR: Laurel H. Siddoway, A.C.J., George B. Fearing, J.

Opinion by: Stephen M. Brown

Opinion

¶1 BROWN, J. — Mark and Nancy Marlow appeal the Douglas County Superior Court's denial of their land use petition under the Land Use Petition Act (LUPA), chapter 36.70C RCW, concerning improvements to their Columbia River waterfront property purchased in 1997. In 2011, Douglas County (County) issued a notice of land use violation and order to comply (NOV). A hearing examiner found the Marlows had violated, inter alia, the Shoreline Management Act (SMA), chapter 90.58 RCW; section 173-27 WAC (Shoreline Permit and Enforcement Procedures); and the Douglas County Shoreline Master Program (SMP). The Marlows contend here as they did at the superior court (1) the hearing examiner lacked legal authority or jurisdiction to impose injunctive relief, (2) the proceeding was barred by [*2] the statute of limitations, (3) the hearing examiner misallocated the burden of proof, (4) the hearing examiner wrongly interpreted the law regarding shoreline exemptions, and (5) evidentiary error. We find no error, and affirm.

FACTS

¶2 In 1997, the Marlows bought Douglas County waterfront property along the Columbia River near Rock Island. The shoreline is steep and rocky, with a portion excavated approximately 75 to 100 years ago apparently for a ferry landing. The property included a rock/dirt boat launch and a 4-foot-wide by 16-foot-long dock.

¶3 In 1997, the Marlows constructed a concrete block retaining wall and a second retaining wall in 1998 or 1999. They claim the retaining walls were necessary to stop soil erosion. They further installed a concrete pad above one of the retaining walls for a hot tub. Also in 1997, the Marlows replaced the rock/dirt boat launch with a concrete launch. In 2003, the Marlows installed a 55-foot bulkhead, sidewalks, and a patio. The bulkhead is one to two feet landward of the ordinary high water mark. In 2006, the Marlows replaced the concrete blocks in their retaining walls with flat stones. They brought in fill sand and attached a slide to the bulkhead [*3] that was later removed. In 2008, the Marlows replaced

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the existing dock with a grated dock (the prior dock had a solid surface), which is more “environmentally friendly.” Clerk’s Papers (CP) at 660. And, they installed a boat lift. The new dock was 8-feet-wide by 20-feet-long.

¶4 On June 24, 2011, the County issued a NOV to the Marlows. The NOV described the Marlows’ unauthorized development on the Columbia River shoreline as violations, specifically including the boatlift; concrete bulkhead, sidewalk, and patio; concrete launch ramp; multiple dock floats and a dock ramp; diving board and slide; grading and retaining walls; non-native sand; and the concrete pad under the hot tub.

¶5 The Marlows appealed to the Douglas County Hearing Examiner. In a November 2011 hearing, the Marlows offered the testimony of Tony Roth, a certified wetlands scientist, who visited the Marlows’ property from Seattle on the day of the hearing and then opined “continuity of use” was best for the environment. CP at 663. The hearing examiner found Mr. Roth was not “an expert witness” and “[e]ven if Mr. Roth could be characterized as an expert witness . . . Mr. Roth’s purported opinions [are not] convincing.” CP at 13. [*4] The hearing examiner affirmed the County’s NOV, entering findings of fact and conclusions of law.

¶6 The Marlows then filed a LUPA petition in the Douglas County Superior Court, challenging the hearing examiner’s decision. The court dismissed their petition, concluding the County had jurisdiction to provide a NOV and the Marlows had failed to show they obtained the necessary permits for their improvements or that they were exempt from obtaining permits. The Marlows appealed to this court.

ANALYSIS

A. Jurisdiction

¶7 The issue is whether the hearing examiner lacked jurisdiction to affirm the County’s NOV. The Marlows contend the hearing examiner’s decision amounted to an unlawful injunction that the examiner does not have authority to impose.

¶8 LUPA governs judicial review of Washington land use decisions. *HJS Dev., Inc. v. Pierce County ex rel. Dep’t of Planning & Land Servs.*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). Relief from a land use decision may be granted if the petitioner carries its burden in establishing one of six standards of relief:

(a) [*5] The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

¶9 Standards (a), (b), (e) and (f) present questions of law we review de novo, but under (b) we give deference to the hearing examiner’s construction of local land use regulations based on his or her specialized knowledge and expertise. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Standard (c) involves factual determinations we review for supporting substantial evidence. *Id.* We consider [*6] all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Id.*

¶10 “When reviewing a superior court’s decision on a land use petition, the appellate court stands in the shoes of the superior court.” *HJS Dev.*, 148 Wn.2d at 468 (quoting *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001)). “An appellate court reviews administrative decisions on the record of the administrative tribunal, not of the superior court.” *HJS Dev.*, 148 Wn.2d at 468 (quoting *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993)).

¶11 The Marlows first argue the land use decision is outside the authority or jurisdiction of the body or officer making the decision (RCW 36.70C.130(1)(e)). Implementation of the SMA is a coordinated effort of the State and local jurisdictions. The SMA and applicable regulations expressly provide for the County’s permitting and enforcement under the SMA and SMP. RCW 90.58.050, 140(3); WAC 173-27-240.

¶12 Regarding penalties, RCW 90.58.210(3) provides they “shall be imposed by a notice in writing . . . to the person incurring [*7] the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate

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cases, requiring necessary corrective action to be taken within a specific and reasonable time.”

¶13 Likewise, WAC 173-27-240 was codified to “implement the enforcement responsibilities of the department and local government under the Shoreline Management Act.” Further, this code section “provides for a variety of means of enforcement, including civil and criminal penalties, orders to cease and desist, orders to take corrective action, and permit rescission.” *Id.*

¶14 In harmony with RCW 90.58.210(3) and WAC 173-27-270, the County ordered the Marlows to stop property development and identified specific corrective steps to comply with the County’s SMP:

1. Immediately cease and desist all development
2. Submit to the Douglas County Department of Transportation and Land Services, within 30 days, the following:
 - a. A Shoreline Management Substantial Development Permit Application . . . ;
 - b. State Environmental Policy Act (SEPA) Environmental Checklist;
 - c. A fish and wildlife habitat management [*8] and mitigation plan . . . ; and
 - d. Appropriate application fees in the amount of \$3,208.00.
3. In accordance with an approved shoreline substantial development permit and fish and wildlife habitat management and mitigation plan, all structures and development identified in this notice and order must be removed and remediated.

CP at 66-67.

¶15 Citing *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 689 P.2d 1084 (1984), the Marlows argue the examiner exceeded his jurisdiction by granting “injunctive” relief. In *Chaussee*, the court addressed a challenge to injunctive relief. The case involved the authority of a hearing examiner and the county council to consider and apply the doctrine of equitable estoppel in a land use administrative proceeding. The court held that the authority of a hearing examiner is created by and limited to the statutes and/or ordinances creating the position. *Id.* at 636-38. Here, however, the hearing examiner was affirming action authorized by RCW 90.58.210(3) and WAC 173-27-270, not imposing an injunction.

¶16 *Herman v. Shorelines Hearings Board*, 149 Wn. App. 444, 457-58, 204 P.3d 928 (2009) is instructive. There, this court reversed the superior court’s decision and [*9] reinstated a Shorelines Hearings Board (SHB) order. The SHB order included an order to comply, conditions

required to comply, and imposed sanctions if compliance was not achieved. In affirming the order, this court acknowledged the SHB’s authority to place conditions on development and held the administrative order was not self-executing. Similarly, in *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008), our Supreme Court held the Department of Ecology had no authority to directly review a county development permit or issue fines for noncompliance with the SMA. *Id.* at 845-46. The authority was granted to the county.

¶17 Accordingly, because the NOV issued to the Marlows and affirmed by the hearing examiner, does not impose injunctive relief and is within the authority granted by statute and code, it is not outside the authority or jurisdiction of the body or officer making the decision. Thus, we conclude the Marlows have not met their burden to justify relief under RCW 36.70C.130(1)(c).

B. Statute of Limitations

¶18 The issue is whether the County’s NOV was barred by the statute of limitations. The Marlows initially argued the NOV is essentially a civil [*10] penalty and a misdemeanor, which carry a two-year statute of limitations and one-year statute of limitations, respectively. In their reply brief, however, the Marlows appear to concede no statute of limitations applies to these proceedings, but they ask us to take the delay in enforcement into consideration.

¶19 As discussed above, the County properly issued a NOV that the hearing examiner had jurisdiction to affirm. This case does not involve civil penalties or criminal liability as contemplated by the time limitations set forth in RCW 4.16.100(2) (two-year statute of limitations to pursue civil penalties) and RCW 9A.04.080(1)(j) (one-year statute of limitations for misdemeanors). Accordingly, these proceedings are not barred by the statute of limitations.

C. Burden of Proof

¶20 The issue is whether the hearing examiner applied an incorrect burden of proof thereby justifying relief under RCW 36.70C.130(1)(a). The Marlows contend the examiner wrongly placed the burden on them to demonstrate SMA compliance.

¶21 Douglas County Code 2.13.070(A)(3), grants the hearing examiner authority to review appeals “alleging an error in a decision” in the “enforcement of violations of the zoning code or any other [*11] development regulation.” The error must be alleged by the appellant, here, the Marlows.

¶22 Further, under the SMA, the proponent seeking a development permit has the burden of proving the policies

and regulations of the SMA have been met. RCW 90.58.140(7). The statute places the burden of proof on any party challenging the granting or denial of a permit. Similarly, the proponent of development has the burden of proving the development is exempt from permitting. WAC 173-27-040(1)(c).

¶23 Relying on *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), the Marlows argue the County had the burden of proof before the hearing examiner. *Post* involved a challenge to over \$500,000 in infraction penalties administratively imposed by Tacoma under its building code. The penalties were imposed without any opportunity for administrative challenge or review, and were struck down by the Supreme Court as violating due process. Here, the Marlows exercised their right to administratively challenge the NOV and no infractions were issued or penalties imposed. The Marlows will be subject to enforcement solely after their failure to comply with the NOV. Thus, the *Post* case is distinguishable on its procedure [*12] and facts.

¶24 The Marlows cite WAC 461-08-500(3), which provides, "Persons requesting review pursuant to RCW 90.58.180(1) and (2) shall have the burden of proof in the matter. The issuing agency shall have the initial burden of proof in cases involving penalties or regulatory orders." This section, however, applies to proceedings before the SHB, which reviews cases de novo. And, the term "agency" used in WAC 461-08-500(3) is defined as "any state governmental agency." A county falls within the defined term "local government." WAC 461-08-305(7). Therefore, the burden of proof provision in WAC 461-08-500(3) is not applicable to proceedings before a county hearing examiner.

¶25 Under RCW 90.58.140(7) and WAC 173-27-040(1)(c), the burden of proof is on the Marlows to demonstrate they did not develop within the shoreline, or they obtained all necessary permits, exemption determinations and other approvals. The Marlows have failed to meet their burden of proof to establish the standard for relief at RCW 36.70C.130(1)(a).

D. Exemption Claims

¶26 The issue is whether the hearing examiner erred in concluding the Marlows failed to meet their burden of showing "the dock . . . boat launch . . . bulkhead . . . [*13] and four new retaining walls could qualify as exemptions." CP at 19 (Conclusion of Law 7). The Marlows contend they were exempt from the WAC's shoreline permit and enforcement procedures requirements.

¶27 Initially, we note the Marlows did not specifically assign error to the hearing examiner's findings of fact, but provided a

general objection in assignment of error 3, stating, "This issue affected all findings of fact and particularly the findings related to [the] Marlows' contention that their actions were exempt from permitting requirements." Br. of Appellant at 2. While not a specific assignment of error of each finding as contemplated by RAP 10.3(g), RAP 1.2(a) requires we interpret the appellate rules liberally "to promote justice and facilitate the decision of cases on the merits." The Marlows' briefing clearly reveals their challenges. Even so, the evidence and reasonable inferences are viewed in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority (the County). *Cingular Wireless, LLC*, 131 Wn. App. at 768.

¶28 Under the WAC's shoreline permit and enforcement procedures, local entities are required "to establish a program, consistent [*14] with rules adopted by the department of ecology, for the administration and enforcement of the permit system for shoreline management." WAC 173-27-020. But, under WAC 173-27-040 several exemptions exist to the permit requirement. The County's NOV ordered the Marlows to submit to the County, "A Shoreline Management Substantial Development Permit Application." CP at 66. The Marlows argue exemptions existed for the dock, boat launch, bulkhead, and retaining walls but the hearing examiner concluded otherwise. We review conclusions of law de novo. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

¶29 The dock was installed sometime after 1984, after adoption of the SMA and the County's SMP. But, the County did not issue a determination of exemption or letters of exemption for this prior dock. In 2008, the Marlows placed a new dock in the shoreline. The Marlows claim this dock was exempt in 2008 based on WAC 173-27-040(2)(b). "Normal maintenance or repair of existing structures or developments" do not require substantial development permits. WAC 173-27-040(2)(b). The original dock, however, was not maintained or repaired; it was replaced by one considerably larger and wider [*15] in a different style. Accordingly, the hearing examiner properly concluded this structure was not exempt from the permit requirements.

¶30 The boat launch was constructed in 1997. It is a long concrete structure extending from a concrete parking area down into the Columbia River. Concrete was poured 5 to 10 feet into the Columbia River. The Marlows argue the boat launch was exempt based on maintenance or repair under WAC 173-27-040(2)(b). But, the original launch was dirt and rock, the new boat launch is made out of a different material and is a different size and shape. The work was not limited to maintenance or repair and required a permit. The Marlows argue they were exempt based on the fair market value of the

repairs. Former RCW 90.58.030(3)(e) (1997) provides that improvements having a fair market value of less than \$2,500 are not substantial developments and do not require a permit (the current statute has raised the amount to \$5,000). While the Marlows claim the concrete cost less than \$2,500, that claim alone is not substantial evidence to establish the fair market value. See *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 320, 94 P.3d 987 (2004) (bare, self-serving declarations [*16] are inadequate).

¶31 The bulkhead was constructed by the Marlows in July 2003. It consists of a large 60-foot concrete structure along the shoreline. Concrete was poured waterward of the ordinary high water mark to a depth of three to six feet. The Marlows argue the bulkhead was eligible for the fair market value exemption. During his testimony, Mr. Marlow could not remember how much he paid for the concrete bulkhead until reminded by his counsel. Mr. Marlow agreed with his counsel that the cost was \$1,500 to \$2,000. The Marlows did not provide any further evidence. As discussed above, this self-serving recollection is insufficient to establish a permit exemption. The Marlows further argue the bulkhead was exempt because it was needed for protection. Both RCW 90.58.030(2)(e)(ii) and WAC 173-27-040(2)(c) allow an exemption for a "normal protective bulkhead" on a single-family residence property. Based on our record, it does not appear the bulkhead was constructed to protect the Marlows' residence from erosion. Instead, it appears the bulkhead was created for more dryland area. Again, without further evidence, the Marlows fail to establish they are exempt from the permit requirements.

¶32 The [*17] retaining walls were constructed in 2006. The Marlows placed four retaining walls within the shoreline, two of which replaced existing retaining walls. They argue a permit was not required because the new walls are maintenance or repair of the original walls. But, the walls are not comparable to the original in size, shape, configuration, location, material, and external appearance. The terracing has been largely expanded. The Marlows argue the walls are an exempt "appurtenance" to their home. Under WAC 173-27-040(2)(g), an appurtenance to a single-family residence is exempt from the permit requirements. In this context, an appurtenance is "a garage; deck; driveway; utilities; fences; installation of a septic tank and drainfield and grading which does not exceed two hundred fifty cubic yards and which does not involve placement of fill in any wetland or waterward of the ordinary high water mark." WAC 173-27-040(2)(g). A retaining wall is not included in this list. Accordingly, a permit was required.

¶33 Given all, we conclude none of the Marlows' exemption claims are well founded.

E. Mr. Roth's Testimony

¶34 The issue is whether the hearing examiner's finding regarding the weight given to Mr. [*18] Roth's testimony and rejecting his expertise justifies relief under RCW 36.70.130(1)(c) as a decision not supported by substantial evidence.

¶35 The minimum qualifications for an expert used by a development proponent to address impacts and mitigation are set out in the County's SMP. The SMP defines a "qualified professional for wetlands" as a person with a "degree in biology, ecology, botany, or a closely related field and a minimum of five (5) years of professional experience in wetland identification and assessment in Eastern Washington." Douglas County SMP, ch. 8, § 203, available at (<http://www.douglascountywa.net>).

¶36 The Marlows retained Mr. Roth, a Western Washington resident, the day before the hearing and he visited the Marlows' property the day of the hearing. Mr. Roth did not testify regarding the scope and details of his investigation of the Marlows' property and did not prepare a written report; rather, Mr. Roth testified regarding general observations of the Marlows' property. Mr. Roth did not testify as to any professional experience involving Eastern Washington wetlands as required by the SMP. Based on the limited information provided regarding his education and experience, [*19] Mr. Roth did not establish his expertise under the County's SMP. The hearing examiner properly found likewise. Moreover, any error was harmless because the hearing examiner additionally found, "Even if Mr. Roth could be characterized as an expert witness . . . Mr. Roth's purported opinions [are not] convincing." CP at 13.

¶37 In sum, considering the SMP, the hearing examiner's specialized knowledge and expertise, the examiner's fact-finding discretion regarding credibility and evidence weight, and our standard of viewing the evidence and reasonable inferences from the evidence in the light most favorable to the prevailing party, we cannot conclude the hearing examiner erred regarding Mr. Roth's testimony.

F. Attorney Fees

¶38 The County argues the Marlows' appeal is frivolous and requests attorney fees under RAP 18.1 and RCW 4.84.185 for defending against a frivolous appeal. "An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised." *Johnson v. Jones*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998). While the Marlows have not established a basis to reverse the hearing [*20] examiner's decision, we cannot say their issues are so

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meritless that reasonable minds could not differ. Thus, the County's request is denied.

¶39 Affirmed.

¶40 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, A.C.J., and Fearing, J., concur.

Reconsideration denied December 3, 2013.

End of Document

Last updated May 21, 2019 01:37:04 pm GMT

Schenck v. Douglas County

Court of Appeals of Washington, Division Three

June 12, 2014, Oral Argument; August 7, 2014, Filed

No. 31749-8-III

Reporter

2014 Wash. App. LEXIS 1933 *

CARY SCHENCK ET AL., *Appellants*, v. DOUGLAS COUNTY, *Respondent*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at Schenck v. Douglas County, 2014 Wash. App. LEXIS 2075 (Wash. Ct. App., Aug. 7, 2014)

Prior History: [*1] Appeal from Douglas Superior Court. Docket No: 13-2-00011-1. Date filed: 05/30/2013. Judge signing: Honorable John James Hotchkiss.

Core Terms

dock, exemption, hearing examiner, burden of proof, installed, lift, land use decision, concrete, fence, boat, statute of limitations, shoreline, law law law, penalties, issuing, requirements, Violations, examiner's, permits, Steele, River, plans, single-family, appurtenance, challenging, proceedings, regulations, structures, frivolous, inspect

Counsel: *John Maurice Groen, Groen Stephens & Klinge LLP*, Bellevue, WA, for Appellant(s).

Steven Michael Clem, Douglas County Prosecuting Attorney, Waterville, WA, for Respondent(s).

Judges: AUTHOR: Stephen M. Brown, A.C.J. WE CONCUR: George B. Fearing, J., Robert E. Lawrence-Berrey, J.

Opinion by: Stephen M. Brown

Opinion

¶1 BROWN, A.C.J. — In 1999, Cary and Cathleen Schenck purchased property in Douglas County on the Columbia River shoreline to build a home. In that same year, they applied for and received a permit from Douglas County (County) to install a dock. Between 2000 and 2005, the Schencks installed a new dock, boat lift, and concrete wall and fence. In 2012, Douglas County issued a Notice of Land Use Violations and Order to Comply (NOV) for construction of the above items without a permit or exemption. The Schencks appealed the NOV and a public hearing was held before the Douglas County Hearing Examiner. The hearing examiner affirmed the NOV and the Schencks filed a Land Use Petition Act (LUPA) petition seeking judicial review. The trial court dismissed the LUPA petition. The Schencks appeal, contending the proceeding [*2] was barred by the statute of limitations, the hearing examiner misallocated the burden of proof, and the hearing examiner's decision that the Schencks were not exempt from the permit requirements was an erroneous interpretation of the law and not supported by substantial evidence. We reject the Schencks' contentions, and affirm.

FACTS

¶2 In 1999, the Schencks purchased property along the Columbia River in Douglas County. Wanting to install a dock and boat lift, the Schencks contacted the County to inquire about the procedure. On October 4, 1999, they submitted a dock permit application to the County. The proposed dock would have two steel/concrete pilings and be tied to the shore by a proposed concrete pad. The value of the project was \$7,000.

¶3 At the same time, the Schencks hired a consultant team to help them submit a Joint Aquatic Resource Permits Application (JARPA) form. This form is a general form used to apply for permits from the United States Army Corps of Engineers (Corps), the Washington Department of Ecology (DOE), and the Washington Department of Fish & Wildlife (DFW). The front page is stamped as received on October 4, 1999 by Douglas County Department of Transportation

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and [*3] Land Services (TLS). The JARPA describes the proposed dock as a “ramp and floating wood dock finished with TREX decking.” Clerk’s Papers (CP) at 423. The JARPA also states the dock will be secured in the water with two steel pilings sleeved with 8-foot white PVC. The dock would be secured with a concrete pad attachment block. The Schencks did not include information about a boat lift. A transmittal letter from DFW to the Schencks warned that the Schencks were responsible to see that “all provisions within this HPA permit are *strictly* followed at all times.” CP at 435.

¶4 In late 1999, Douglas County determined the Schencks’ proposed dock was exempt from the Shoreline Management Act (SMA) permit requirement under WAC 173-27-040 (2)(h)(ii), which exempts permit requirements for private, freshwater docks costing less than \$10,000. Douglas County then issued a building permit for the dock and ramp system. Soon after, the DFW issued a Hydraulic Project Approval (HPA).

¶5 In February 2000, the Schencks began installing their dock. They soon learned, however, that the cost of the dock had gone up and was over the \$10,000 maximum for the exemption. They claim they contacted Bob Steele with the DFW and he advised they change to an EZ Dock system, which is cheaper. [*4] The Schencks then installed an EZ Dock. Ms. Schenk claims she called the County to inspect the new dock, but Joe Williams, a county senior planner, said that since an EZ Dock was installed (rather than built) and since Mr. Steele approved the changes, there was nothing to inspect. Mr. Williams denies this conversation. The Schencks did not obtain county inspections and the building permit expired. The Schencks did not obtain an SMA substantial development permit or exemption for the new dock from the County, a new HPA from DFW, or a federal permit from the Corps.

¶6 In May 2000, the Schencks installed a boat lift. They again claim the County told them a permit was not required. Again, Mr. Williams denies this.

¶7 The Corps wrote directly to the Schencks on November 24, 2000, to inform the Schencks their permit application was stale, incomplete and had been cancelled. This correspondence included the statement, “Do not proceed with the work until you have received a permit from the Corps.” CP at 521.

¶8 Between 2003 and 2005, the Schencks constructed a concrete wall with an attached fence. The Schencks built the wall and fence themselves for a total cost, including their own labor of approximately \$1,000. [*5] The wall and fence are approximately 40 feet long and between 2 and 3 feet high. And, by the Schencks’ estimate, it is 27 feet from the river’s

ordinary high water mark (OHWM), sometimes referred to in the record as the ordinary high water level (OHWL). No permit was obtained for constructing the wall and fence.¹

¶9 On July 3, 2012, the County issued a NOV relating to unauthorized Columbia River shoreline development by the Schencks. The Schencks appealed to the County hearing examiner. The hearing examiner affirmed the NOV after entering findings of fact and conclusions of law. The Schencks filed a LUPA petition in superior court, challenging the hearing examiner’s decision. The court affirmed the hearing examiner and dismissed the petition. The Schencks appealed to this court.

ANALYSIS

A. Statute of Limitations

¶10 Preliminarily, the Schencks contend the County’s NOV was barred by the statute of limitations. They argue the NOV is essentially a civil penalty and a misdemeanor that carry a two-year statute of limitations and a one-year statute [*6] of limitations, respectively. This case, however, does not involve civil penalties or criminal liability as contemplated by the time limitations of RCW 4.16.100(2) (two-year statute of limitations to pursue civil penalties) and RCW 9A.04.080(1)(j) (one-year statute of limitations for misdemeanors); rather, this case involves the validity of a NOV issued by the County. And, the Schencks do not point to a statute of limitations applicable to the issuing of an NOV. Accordingly, these proceedings are not barred by the statute of limitations.

B. Burden of Proof

¶11 The issue is whether the hearing examiner applied an incorrect burden of proof thereby justifying relief under LUPA. The Schencks argue the examiner wrongly placed the burden on them to demonstrate the improvements complied with the SMA.

¶12 Douglas County Code 2.13.070(A)(3), grants the hearing examiner authority to review appeals, “alleging an error in a decision” in the “enforcement of violations of the zoning code or any other development regulation.” The error must be alleged by the appellant, in this case, the Schencks.

¶13 Further, under the SMA, the proponent seeking a development permit has the burden of proving the policies and regulations of the SMA have been met. [*7] RCW 90.58.140(7). The statute also places the burden of proof on

¹ Other structures were also installed or brought in, including a jet ski dock, concrete pad with bench, and sand, but they are not the subject of this appeal.

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any party challenging the granting or denial of a permit. Similarly, the proponent of development has the burden of proving the development is exempt from permitting. WAC 173-27-040(1)(c).

¶14 Compare *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), where the city had the burden of proof before the hearing examiner. There, however, the issue was \$500,000 in infraction penalties administratively imposed by the city under its building code. The penalties were imposed without any opportunity for administrative challenge or review, and were struck down by the Supreme Court as violating due process. Here, the Schencks exercised their right to administratively challenge the NOV and no infractions were issued or penalties imposed. The Schencks will be subject to enforcement after their failure to comply with the NOV. Thus, the *Post* case is distinguishable on its procedure and facts.

¶15 The Schencks cite WAC 461-08-500(3), providing, "Persons requesting review pursuant to RCW 90.58.180(1) and (2) shall have the burden of proof in the matter. The issuing agency shall have the initial burden of proof in cases involving penalties or regulatory orders." This section, however, applies to proceedings before the SHB, which reviews cases de novo. And, the term [*8] "agency" used in WAC 461-08-305(1) is defined as "any state governmental entity." A county falls within the defined term "local government." WAC 461-08-305(7). Therefore, the burden of proof provision in WAC 461-08-500(3) is not applicable to proceedings before a county hearing examiner.

¶16 Accordingly, under RCW 90.58.140(7) and WAC 173-27-040(1)(c), the burden of proof is on the Schencks to demonstrate they did not develop within the shoreline, or they obtained all necessary permits, exemption determinations, and other approvals.

C. Exemptions

¶17 The issue is whether the hearing examiner erred in concluding the Schencks failed to meet their burden in challenging the NOV. Specifically, the Schencks contend the dock, boat lift, and concrete wall and fence did not violate any codes or statutes.

¶18 LUPA governs judicial review of Washington land use decisions. *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). Relief from a land use decision may be granted if the petitioner carries its burden in establishing one of six standards of relief:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to

follow a prescribed process, unless the error was harmless;

(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 [*9] by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Standards (a), (b), (e) and (f) present questions of law we review de novo, but under (b) we defer to the hearing examiner's construction of local land use regulations based on his or her specialized knowledge and expertise. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Standard (c) involves factual determinations this court reviews for supporting substantial evidence. *Id.* We consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Id.*

¶19 "When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court." *HJS Dev.*, 148 Wn.2d at 468 (quoting *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001)). "An appellate court reviews administrative decisions on the record of the administrative [*10] tribunal, not of the superior court." *HJS Dev.*, 148 Wn.2d at 468 (quoting *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993)).

¶20 The Schencks argue the land use decision was an erroneous interpretation of the law and not supported by substantial evidence (RCW 36.70C.130(1)(b) and (c)). They point to the dock, boat lift, and concrete wall.

¶21 First, regarding the dock, in 1999, the Schencks obtained an exemption to install a dock. The exemption, however, stated, "Any changes should *be reviewed* by this department to ensure continued compliance with goals, policies and requirements of the shoreline management act and master program, and that the exemption is still valid. The applicant is

responsible for obtaining and complying with all federal, state and local permits required.” CP at 495. Further, the DFW warned the Schencks they were responsible to see that “all provisions within this HPA permit are *strictly* followed at all times.” CP at 435. Paragraph 6 of the HPA sets forth the specifics of the dock including the size, ramp, pilings, and anchors. Additionally, “*Any modifications to this project or future work within, below or over the OHWL will require a separate HPA from the Washington Department of Fish and Wildlife.*” CP at 369. Further still, the Corps application acknowledgement stated, “Since a Department [*11] of the Army permit is necessary for this work, do not commence construction before the permit has been issued.” CP at 524.

¶22 The Schencks installed a different dock and related structures than the one proposed during the application process. The new dock did not conform to the exemption issued by the County and the HPA issued by the DFW. The Schencks knew they had not obtained a required federal permit from the Corps. While the Schencks allege the County and DFW had full knowledge of their changed plans and the County allegedly gave oral approval, the County denied this and the hearing officer decided credibility for the County. We consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *Cingular Wireless*, 131 Wn. App. at 768.

¶23 Given all, we conclude substantial evidence supports the County's NOV. The Schencks have failed to meet their burden of proof under RCW 36.70C.130(1)(b) and (c). The hearing examiner did not err.

¶24 Second, the Schencks argue the boat lift did not warrant an NOV because they were orally told a permit was not necessary. Again, the County refutes this. Mr. Williams, a county senior planner, denies this and states that it has never [*12] been the policy to orally grant exemptions. Again, the hearing officer found credibility for the County.

¶25 Under the WAC's shoreline permit and enforcement procedures, local entities are required “to establish a program, consistent with rules adopted by the department of ecology, for the administration and enforcement of the permit system for shoreline management.” WAC 173-27-020. But, under WAC 173-27-040 several exemptions exist to the permit requirement. The exemption is granted after application. No application exists for the boat lift. Indeed, Mr. Williams declared that boat lifts required a permit or an exemption determination in 1999-2001 and “[i]f a lift was to be added as part of pending dock construction, the dock exemption/permit plans on file with the County would need to be revised.” CP at 492. They were not. Accordingly, substantial evidence

supports the County's NOV.

¶26 Third, the Schencks argue the concrete retaining wall and fence were exempt from the SMA because it was landward and the cost was minimal. The SMA requires developers to obtain a substantial development permit before building a structure. RCW 90.58.140(2). However, an exemption may be allowed under WAC 173-27-040(2)(g) for “[c]onstruction on shorelands by an owner ... of a single-family residence [*13] for their own use or for the use of their family” or under former RCW 90.58.030(3)(e) (1996), which exempts any development of which the total cost or fair market value is below “two thousand five hundred dollars.” Former RCW 90.58.030(3)(e) (1996). The County concedes the wall and fence were landward of the OHWM. Resp't Br. at 45, n.14. However, exemptions under the SMA are not self-executing. WAC 173-27-040(1)(a). WAC 173-27-040(2) does not eliminate the requirement to apply for and obtain an exemption from the County.

¶27 The Schencks would need to establish that the wall and fence cost less than \$2,500 and was a “normal appurtenance” to a single-family residence. *See* WAC 173-27-040(2)(g) (“‘Single-family residence’ ... [includes] structures ... which are a normal appurtenance.”) Because the Schencks did not apply for any exemption under the SMA, the County was denied an opportunity to review their plans, determine whether “fair market value” and/or “normal appurtenance” was a basis for issuing an exemption, or to provide for shoreline mitigation required by the development. As stated in the NOV, the Schencks will be required to submit the appropriate paperwork for a permit or exemption. Accordingly, the NOV was justified.

¶28 Given all, the Schencks have failed to meet their burden [*14] of proof under RCW 36.70C.130(1)(b) and (c). The hearing examiner did not err in concluding likewise. And, the trial court correctly dismissed the Schencks' LUPA petition.

D. Attorney Fees

¶29 The County argues the Schencks' appeal is frivolous and requests attorney fees under RAP 18.1 and RCW 4.84.185 for defending against a frivolous appeal. “An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised.” *Johnson v. Mermis*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998). While the Schencks have not established a basis to reverse the hearing examiner's decision, we cannot say their issues are so meritless that reasonable minds could not differ. Thus, the County's request is denied.

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¶30 Affirmed.

¶31 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

FEARING and LAWRENCE-BERREY, JJ., concur.

End of Document

DECLARATION OF SERVICE

On the date set forth below, I deposited in the U.S. First Class Mail, postage prepaid, a true and correct copy of the document, BRIEF OF RESPONDENT (with Appendix), to the following person(s):

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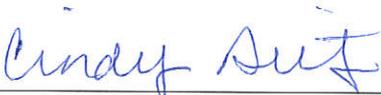
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

SIGNED this 4th day of June, 2019 in Wenatchee, Washington.



CINDY DIETZ

CHELAN COUNTY PROSECUTING ATTORNEY

June 04, 2019 - 11:05 AM

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