

No. 42656-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FRANK G. TOWER III and LIESEL C. TOWER, husband and wife, d/b/a
"The Riding Place Equestrian Center,"

Appellants,

vs.

GRAYS HARBOR COUNTY, a political subdivision of the State of
Washington,

Respondent.

BRIEF OF APPELLANTS

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP
Dianne K. Conway
Attorney for Appellants

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500
WSBA No. 28542

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This appeal seeks to reverse the trial court's grant of summary judgment to Gray's Harbor County regarding the County's claims relating to the Appellants Christine and Frank Towers' use of their property. The County's Complaint and the summary judgment motion sought to (1) enjoin an activity – offering camping sites on the Towers' property to the public – that had not occurred for nearly five years at that point; (2) prevent the Towers from renting horse stalls to third parties; and (3) have the horse-stall renting activities on the Towers' property declared a public nuisance. The trial court granted summary judgment on all three issues and also enjoined additional activities that were complained of for the first time in the County's reply brief.

I. ASSIGNMENTS OF ERROR

A. Did the trial court err in granting the County summary judgment of claims relating to horse training and riding lessons at the Property that were raised for the first time in the County's reply brief?

B. Did the trial court err in granting the County summary judgment of its claims relating to camping activities on the property that had not occurred for five years?

C. Did the trial court err in granting the County summary judgment of its claims that the Towers' horse-stall rental activities violated the Gray's Harbor County Code?

D. Did the trial court error in granting the County summary judgment of its claim that the Towers' horse-stall rental activities constituted a nuisance?

E. Did the trial court err in not allowing the Towers more time pursuant to CR 56(f) to investigate the nonconforming use argument?

II. STATEMENT OF THE CASE

A. The Towers buy horse property in Grayland.

The Towers are committed horse people. Among other things, they own a horse boarding, riding, and training facility in Port Orchard, Washington known as The Riding Place Equestrian Center.¹

Before 2005 the Towers would frequently camp at the Coast Guard Campground in Westport with their horses so that they could ride on the beach, as horseback riding on the beach is allowed in this area.² The Coast Guard stopped allowing horse camping on its Westport property in approximately 2004.³ Accordingly, the Towers started looking for property near the ocean in the surrounding area on which they could stay with their horses. They ended up purchasing the Grayland property that is the subject of this action in April 2005.⁴

¹ CP 151.

² CP 152.

³ *Id.*

⁴ *Id.*

The Grayland property is a three-acre+ farm consisting of five lots and was (and is) zoned R-3, or Resort Residential.⁵ When the Towers purchased the property, it was improved by a 10-stall horse barn, large shop area, and covered indoor riding arena; it did not contain a residence.⁶ Most importantly for the Towers, there was a well-maintained trail that accesses the beach directly adjacent to the property.⁷ The seller of the property, Marie Miller, had operated a horse breeding, training and boarding business with up to 20+ horses at a time.⁸ She also offered riding and training on the property for 25+ years, which is why the barn and riding arena were constructed in the first place.⁹

Before purchasing the Grayland property, the Towers reviewed the applicable Gray's Harbor County Code ("GHCC") sections and consulted with the Gray's Harbor County Planning Department personnel regarding whether they could operate a small campground for recreational vehicles on the property.¹⁰ Pursuant to that discussion, following their purchase of the property the Towers installed hook-ups for ten recreational vehicles and undertook other

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ CP 152 CP 152, 170-71, 191, 227-28, 232.

⁹ *Id.*

¹⁰ CP 152.

related improvements at a cost of over \$20,000.¹¹ Their primary motivation was to provide a service to the horse community, as it provided a facility for both horses and humans to stay.¹² There are many small campgrounds on other properties in the neighborhood and surrounding area, so the Towers did not think they were doing something out of the ordinary.¹³

The Towers offered (mostly self-contained) RV camping on their property during the summers of 2005 and 2006.¹⁴ This camping was all done by prior reservation, and the Towers were present on the property much of the time when they had guests.¹⁵ The Towers had a set of rules and regulations, and their guests picked up after themselves and their horses.¹⁶

B. The County complains of camping activity on the Grayland.

After the campground was in operation, the Towers were advised by the County that the campground was not a permitted use.

¹¹ *Id.*

¹² *Id.*

¹³ CP 152, 195-226.

¹⁴ CP 153.

¹⁵ *Id.*

¹⁶ *Id.*

On June 5, 2006, the Towers received a Notice of Violation directly solely at the campground activity:

A review of County records failed to document the issuance of a Conditional Use Permit for this facility. Therefore, pursuant to the authority granted by Gray's Harbor County Code Chapter 17.76, you are here by requested to complete the one following actions by 5 pm on July 17, 2006:

(1) Cease the operation of the campground facility and the associated retail activities, including advertising the availability of the use on the site;

OR

(2) Cease the operation of the campground facility, including advertising the availability of the use on the site, and apply for and obtain a conditional Use Permit (CUP) to allow for the operation of the recreational campground facility and associated retail activities. . .¹⁷

The Towers also received December 6, 2006 and February 9, 2007 Notices of County Code Violation containing identical language.¹⁸ None of these notices referenced any activities relating to horses.¹⁹

After initially challenging the County's determination, the Towers opted not to continue their appeal and instead discontinued camping on the Grayland property.²⁰ Accordingly, there has not been

¹⁷ CP 99-101.

¹⁸ CP 112-16.

¹⁹ CP 99-101, 112-16.

²⁰ CP 153.

third-party camping on the Towers' property since the summer of 2006.²¹ Rather, since that time the Towers have referred anyone who rents a horse stall from them on a short-term basis to local hotels or campgrounds.²² They tell friends with horses who visit them to do the same thing.²³ Hence, the only time third-party RVs (which are essentially horse trailers, not RVs) are parked on the Tower property are when people drop off or pick up their horses or when they go riding on the beach during the day.²⁴ The Towers' personal guests who have horses are allowed to park their horse trailers on their property.²⁵

The Towers themselves stay on the Grayland property a few times each summer and occasionally during the off-season months when doing maintenance work.²⁶ They never stay for more than a week.²⁷ When the Towers stay at the property, they use a self-contained camper which is situated inside the shop building.²⁸

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ CP 153-54.

²⁸ CP 154.

C. The Towers rent out horse stalls on the Grayland property.

Consistent with the Gray's Harbor County Code description of R-3 as being for allowing "recreational type" residential uses, when the Towers bought the Grayland property they intended to rent out the horse stalls to families and individuals who used the campground.²⁹ They also intended to provide the horse facilities to local horse owners who did not have property or facilities of their own.³⁰ After they shut down the campground following the 2006 summer season, the Towers continued to rent horse stalls on a monthly or short-term basis to locals and horse owners visiting the area; renters can also exercise their horses in the riding arena or on the grounds.³¹ On average they have three, sometimes four, of their ten horse stalls at any given time.³²

It is undisputed that the Towers provide no services to the individuals renting horse stalls at their Grayland property. Rather, the rentals are all "self-care" – individuals renting stalls are responsible for feeding their horses, cleaning up after their horses, and cleaning the stalls.³³ Accordingly, the Towers do not provide the services

²⁹ CP 154-55.

³⁰ CP 155.

³¹ *Id.*

³² *Id.*

³³ CP 155, 161, 180, 186.

associated with a traditional “boarding” facility, although they generally refer to it – perhaps incorrectly – as “self-care” boarding.³⁴

When the Towers purchased the Grayland property, they initially called it *'The Riding Place West.'* The Towers now refer to the property as *The South Beach Riding Club*, which is a registered, non-profit corporation in effect since July of 2007.³⁵ There are no signs or other “advertising” on the property and have not been any since 2006.³⁶ At no time have the Towers ever provided the types of “regular” boarding services, lessons, training, and summer camps at the Grayland property that they do at their Port Orchard facility.³⁷

As set forth in 11 supporting declarations provided to the trial court in addition to the Towers’ own declarations, the Towers’ Grayland property is kept very clean and does not emit offensive odors or attract flies.³⁸ The Sanicans on the property are serviced regularly, and the individuals renting the stalls clean up all of the manure from their horses.³⁹ The traffic to the property is quite limited and less than when it was owned by the prior owner.⁴⁰ Overall, the Towers’ property is in

³⁴ CP 155.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ CP 155, 161-62, 167, 172, 176, 180-81, 185, 191, 228, 241, 245.

³⁹ CP 167, 176, 186, 228, 233, 241

⁴⁰ CP 170-72.

better condition now and much quieter overall than when the prior owner owned the property.⁴¹

D. Leonard Idso buys the neighboring property.

Following the Towers' purchase of the Grayland property, the adjacent parcels were bought by Leonard and Joan Idso and their son, Christopher Idso, and his wife.⁴² While the horse barn and use of the Tower property for horse purposes was plainly apparent, the Idsos' behavior soon made clear that they strongly disliked horses.⁴³ In perhaps the most notable incident, on July 4, 2010, the Idsos repeatedly directed rockets at the Towers' horse barn, terrifying the horses and leaving a mess on their grounds.⁴⁴ Individuals with horses in the barn spent hours trying to calm the horses down.⁴⁵

E. The County files a Complaint against the Towers.

Although the Towers thought that the camping dispute with the County was long behind them, on October 19, 2010, the County filed a Complaint for Injunctive Relief and Abatement of a Nuisance against the Towers.⁴⁶ The Complaint asserted that the Towers were unlawfully

⁴¹ CP 156, 191.

⁴² CP 122, 131.

⁴³ CP 156-57, 161, 180, 185-86. Notably, Leonard Idso did not dispute this in his declaration filed in support of the County's reply in support of the summary judgment motion. CP 281-88.

⁴⁴ CP 161, 180, 185-56.

⁴⁵ CP 161, 180, 185-56.

⁴⁶ CP 1-42.

allowing their property to be used for recreational vehicle and tent camping for three or more vehicles; allowing recreational vehicle and camping activities without proper sanitary facilities; unlawfully engaging in a commercial use of their property by renting out stalls or boarding horses without obtaining a conditional use permit; and creating a public nuisance by engaging in activities that “annoy, injure, or endanger the safety, health, comfort or repose of any considerable number of people.”⁴⁷

On April 29, 2011, the County filed a motion for summary judgment of all of its claims.⁴⁸ The County argued that the Towers were violating the County Code by operating a horse boarding and/ or horse stall rental facility; that such horse boarding and/ or horse stall rental created a public nuisance; and that the Towers were allowing vehicle and tent camping in violation of the Code and thereby creating a public nuisance.⁴⁹ The County requested injunctive and declaratory relief.⁵⁰ In support of its motion it submitted declarations from the Towers’ next door neighbors, Leonard Idso and Christopher Idso. The Towers responded with eleven declarations of neighbors and visitors detailing their appreciation for the Towers, the lack of any problems

⁴⁷ *Id.*

⁴⁸ CP 48-77.

⁴⁹ *Id.*

⁵⁰ CP 76-77.

with the activities on the Towers' property, and the Leonard Idso's established antipathy towards horses.⁵¹

On August 10, 2011, the trial court issued a letter ruling granting the County summary judgment of the County's claims:

In a review of all the evidence presented to this court in the Motion for Summary Judgment, including, but not limited to all declarations by the parties, arguments and information, it is unquestionable to this Court that Mr. and Mrs. Tower have operated a camping, recreational vehicle site without appropriate health officer approved sanitary facilities. Despite their protestations that this no longer exists, it is this Court's position that an injunction be granted to permit any further such activity without appropriate authorization from Grays Harbor County.

A review of all materials presented further establishes beyond dispute that Mr. and Mrs. Tower are operating a rental stall business in violation of GHCC 17.36 in an R-3 zoning district. Such actions are in violation of that chapter and therefore constitute a public nuisance. Defendants are enjoined from such actions of this nature without proper authorization.⁵²

The County subsequently prepared a proposed order formalizing the trial court's ruling. Much to the Towers' surprise, the order included language prohibiting horse training and riding lessons on the property, even though these activities were not raised until the County's reply brief and were not addressed in the trial court's letter

⁵¹ CP 133-247.

⁵² CP 289-90.

ruling. The Towers objected to the County's proposed order, noting again that this was not part of the County's motion and that they had been no opportunity to respond.⁵³ The trial court nevertheless signed the County's proposed order, saying that the issues were for this Court to decide:

I have read all of the material in this and actually have taken some great interest in this historically, which I can inform you people of later. But the bottom line as I look at this, its' a generic situation of trying to enforce the cords – codes of the County – ordinances of the County and also of the conduct of people on their properties. And if you people have an issue with it you can go to the higher courts and get it resolved, but I believe this is appropriate and I'm going to sign the order.

I will tell the County, however, that I am empathetic to Mr. and Mrs. Tower because I am so old that I can recall when there was no such thing as the other beach called Ocean Shores and I can recall as a child trying to rope the wild horse herds owned by the Minard (phonetic) family. So I like what they're doing. It's unfortunate that I have to do this . . .⁵⁴

III. LEGAL ARGUMENT

A. Recreational camping that ceased five years ago cannot justify an injunction.

In order to obtain injunctive relief, a plaintiff is required to show some evidence of imminent or continuing harm. Specifically, the law is

⁵³ CP 296-98.

⁵⁴ VRP (Sept. 16, 2011) at 5-6.

well settled that to obtain injunctive relief, a plaintiff must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him.⁵⁵ The plaintiff must satisfy these three basic requirements regardless of whether the injunction it seeks is temporary or permanent.⁵⁶

The only “evidence” that the County relied on for its claim that the Towers allowing camping on their property in violation of the County Code was a declaration by Leonard Idso containing series of photographs taken by Mr. Idso *in 2006* and a single photograph taken in 2009 of an RV that was on the Towers’ property “for a few days.”⁵⁷ And, as testified to by Mrs. Tower, the Towers have not allowed camping on their property since the summer of 2006.⁵⁸ While the Towers themselves occasionally stay on the property for spans of less than a week, they use the sanicans on the property, which are serviced

⁵⁵ Tyler Pipe Idus v. Dep't of Revenue, 96 Wn 2d 785, 792, 638 P. 2d 1213 (1982) .

⁵⁶ Federal Way Family Physicians v. Tacoma Stands Up for Life, 106 Wn.2d 261, 265, 721 P. 2d 946 (1986) .

⁵⁷ CP 123.

⁵⁸ CP 153.

regularly.⁵⁹ The Towers' statements were supported by multiple declarations from third parties.⁶⁰

In sum, the trial court granted injunctive relief for an activity that had not occurred on the Towers' Grayland property for nearly five years at the time of the ruling. The facts simply do not and cannot support the existence of reasonable fear of an "immediate invasion" of any right belonging to the County that would result in an "actual or substantial injury." Accordingly, the grant of summary judgment on this issue was improper.

B. Horse stall rental does not violate the Grays Harbor County Code.

1. Horse boarding on the Tower property is a legal nonconforming use.

Non-conforming uses are vested property rights that are protected under Washington law.⁶¹ Accordingly, non-conforming use rights cannot be lost or voided easily, and there is properly a high burden of proof that must be met by a municipality before a landowner loses what was a vested property right.⁶² This protection is acknowledged by the Gray's Harbor County Zoning Code's non-

⁵⁹ CP 153-54.

⁶⁰ CP 170, 175-76, 180, 184-85, 191 .

⁶¹ Van Sant v. City of Everett, 69 Wn.App. 641, 649, 849 P.2d 1276 (1993) .

⁶² *Id.*

conforming use regulations. Under these regulations, uses of land and structures that existed before the 1998 adoption of the Zoning Code but do not conform to the current ordinance may continue as legal nonconforming uses.⁶³ Indeed, nonconforming uses can even be intensified.⁶⁴

The prior owners of the Towers' Grayland property, the Millers, used the property to board horses since approximately 1980.⁶⁵ Indeed, not only did they allow horses to stay in their barn, they provided all of the traditionally boarding amenities, such as feeding the horses and cleaning out the stalls, as well as breeding, training, and riding lessons.⁶⁶ While the County provided testimony with its reply brief disputing the validity of the prior nonconforming use,⁶⁷ the Towers had no chance to respond. Accordingly, to the extent rental of horse stalls in the R-3 Zoning District violates the GHCC – which, as discussed below, the Towers dispute – there are material and disputed facts regarding whether it is a legal nonconforming use that preclude summary judgment. Additionally, the trial court should have granted

⁶³ GHCC 17.72.010, 17.72.020.

⁶⁴ *Id.*

⁶⁵ CP 170-71, 191, 227, 232.

⁶⁶ *Id.*

⁶⁷ CP 258-80.

the Towers' request that they be afforded more time to respond pursuant to CR 56(f).

2. Renting a horse stall is not a commercial activity.

The Towers' three-acre Grayland property is zoned R-3, or "Resort Residential District."⁶⁸ Unlike with R-1 and R-2 Zoning,⁶⁹ commercial uses are *not* prohibited in R-3.⁷⁰ More importantly, to qualify as "commercial" there must be the offering of a good or service:

"Commercial" means the purchase, sale, offering for sale, or other transaction involving the handling or disposition of any article, service, substance or commodity for livelihood or profit, or the management or occupancy of an office building, offices, recreational or amusement enterprises; or the maintenance and the use of building, offices, structures or premises by professions or trades offering services.⁷¹

The uncontested evidence before the trial court was that the Towers are not providing any good or service to the individuals renting the stalls for their horses. Rather, they simply rent out horse stalls, and the individual renting the stall must do any and all work relating to her or his horse. In other words, the Towers are doing exactly the same thing as renting out a room in a house to a roommate or, for that

⁶⁸ CP 152.

⁶⁹ GHCC 17.28.050, 17.32.050.

⁷⁰ GHCC 17.36.050.

⁷¹ GHCC 17.08.010.

matter, the renting of a house as a whole. Under the County's reasoning, the renting of a room or home would also be commercial activities barred in R-3 zoned district (and R-1 and R-2 zoned districts, for that matter), because money changes hands. That is absurd result and certainly not one supported by the GHCC or Washington law.

3. The County is overreaching its authority to reach an absurd result.

The "general purpose" of zoning is to stabilize uses, conserve property values, preserve neighborhood characters, and promote orderly growth and development.⁷² Generally "zoning ordinances are constitutional in principle as a valid exercise of the police power, and will be upheld if there is a substantial relation to the public health, safety, morals, or general welfare."⁷³ Hence, a zoning regulation is enforceable "only if it has some tendency reasonable to serve the public health, safety, morals, or general welfare."⁷⁴ Moreover, zoning regulations regulate use of a property, not the manner in which that use is exercised.

⁷² Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 27-28, 586 P.2d 860 (1978); McNaughton v. Boeing, 68 Wn.2d at 661, 414 P.2d 778 (1966).

⁷³ Lutz v. City of Longview, 83 Wn.2d 566, 574, 520 P.2d 1374 (1974).

⁷⁴ Salkin, Patricia E., American Law of Zoning, §7:3 (5th ed. 2009) . See also La Salle Nat. Bank of Chicago v. City of Chicago, 125 N.E. 2d 609 (Ill. 1955) ("An exercise of the [zoning] power is valid only when it bears a reasonable relation to the public health, safety, morals, or general welfare . . .").

The Towers' Grayland property is, among other things, zoned R-3, or "Resort Residential District", which is defined as a "district designed to permit **recreational type residential** as well as conventional residential."⁷⁵ When analyzing the County's argument that renting of horse stalls is a banned activity in R-3 zoning, it is important to bear in mind that it is undisputed that the Towers themselves could keep their own horses in the 10-stall barn and use the arena and remainder of their property for their horses on a daily basis – a more intense use than what currently exists – and not be in violation of the Zoning Code. Similarly, even under the County's interpretation, the Towers could allow horses of their family and friends (or whomever) to stay at their property, so long as they didn't charge them a monetary fee.

Hence, the County is not in fact arguing that the current *use* of the Towers' property as a horse facility is unlawful. Rather, it is arguing that the Towers cannot make any money from this allowed use. But the fact that money changes hands does not change the nature of the (allowed) use of the Towers' property. The Towers' property is being used for horses, stalling of horses, and exercise of horses, all of which are allowed uses under the GHCC. The County's is in effect trying to regulate the form of ownership of the horses on the Towers' property,

⁷⁵ GHCC 17.36.010 (emphasis added).

which is outside the scope of its zoning authority. Moreover, it is outside the scope of its police power, as whether or not the Towers are paid for having the allowed horse activities on their property has zero effect on the public health, safety, morals, or general welfare.

C. The horse-related activities on the Towers' property are not a public nuisance.

In its reply brief the County argued for the first time that “horse training activities” at the Towers’ Grayland property should also be enjoined by the trial court.⁷⁶ The Towers strongly objected to this during oral argument,⁷⁷ noting that no such claim had been raised in the Complaint or original motion and that the allegation was based on pure hearsay in the form of a newspaper article attached to a new declaration from Leonard Idso.⁷⁸ The trial court did not address this issue in its written ruling,⁷⁹ but the County nevertheless included it as part of its proposed order, which the trial court then signed over the Towers’ protests.⁸⁰ Given that the Towers had no opportunity to address or challenge the County’s claims, the grant of summary judgment on this issue was improper.

⁷⁶ CP 248.

⁷⁷ VRP (June 27, 2011), at 9-11.

⁷⁸ *Id.* at 10.

⁷⁹ CP 189-90.

⁸⁰ CP 296-98, VRP (June 27, 2011), at 3-4.

D. The horse-related activities on the Towers' property are not a public nuisance.

1. The alleged activities do not arise to the level of a public nuisance.

A nuisance claim is a statutory claim in Washington.

RCW 7.48.120 defines a nuisance as any unlawful act or omission that

either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

A nuisance is a public nuisance only if it “affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.”⁸¹ Every nuisance that does not rise to the level of a public nuisance is a private nuisance.⁸²

RCW 7.48.140 enumerates specific activities that constitute public nuisances, such as dumping offal and animal carcasses in a stream, constructing or impeding the passage of any river without legal authority, and impeding the flow of municipal transit vehicles. In addition to the enumerated public nuisances, the case law provides additional example of businesses that are so unreasonable as to

⁸¹ RCW 7.48.130 (emphasis added).

⁸² RCW 7.48.150.

amount to public nuisances because they threaten public health or welfare and significantly depreciate the value of neighboring property. Examples include a bathing resort that would depreciate neighboring property by ten percent and would result in an “epidemic of dangerous disease”;⁸³ an undertaking establishment that came with obnoxious odors, noises day and night, and depreciation in value of neighboring property”;⁸⁴ and a tuberculosis sanitarium that caused a fear and dread of disease in the adjacent property.⁸⁵

In its summary judgment motion the County failed to assert any threat to the comfort, repose, health, or safety of others and therefore failed to prove any sort of nuisance arising from either the camping activities that ended in 2006 or the horse-stall rental activities. Although it submitted the Idsos’ declarations, who made various complaints, their testimony was directly contradicted by the testimony of eleven others in addition to the Towers’, creating at a minimum a question of material fact precluding summary judgment. But even if the County had proven that there is a nuisance, it must show that this nuisance affects equally the rights of an entire community or neighborhood, which the County failed to do. Absent such a finding,

⁸³ Turtle v. Fitchett, 156 Wash. 328, 287 P. 7 (1930) .

⁸⁴ Haan v. Heath, 161 Wash. 128, 296 P. 816 (1931) .

⁸⁵ Everett v. Paschall, 61 Wash 47, 111 P. 879 (1910) .

there is no public nuisance, and the County's request for abatement under RCW 7.48.200 is improper.

2. Violation of an ordinance must threaten the comfort, repose, health, or safety of others in order to qualify as a nuisance.

The County in its summary judgment motion asserted that “[e]ngaging in any business or profession in defiance of a law regulating or prohibiting the same is a nuisance per se and subject to an injunction.”⁸⁶ But the case law is clear that violation of an ordinance is not a nuisance unless the prohibited activity threatens the “comfort, repose, health, or safety of others,” as required by Chapter 7.48 RCW. Indeed, the case relied on by the County, Kitsap County v. Kev, Inc.,⁸⁷ demonstrates as much. This case involved a strip club that had been declared a public nuisance by a Kitsap County ordinance. The Washington Supreme Court expressly held that an “ordinance may not make a thing a nuisance, unless it is in fact a nuisance.”⁸⁸ Thus, rather than rely on the violation of the ordinance alone, the Court went on to consider the definition of a public nuisance under RCW 7.48.120 and 7.48.130. Because the strip club included “almost daily violations of controlled substance and positions laws,” it

⁸⁶ CP 54.

⁸⁷ 106 Wn.2d 135, 720 P.2d 818 (1986) .

⁸⁸ *Id.* at 138 (emphasis added).

violated “the comfort, repose, health, or safety of others, and can clearly affect an entire neighborhood or community [T]he illegal activities at Fantasy’s were so pervasive that the studio was a public nuisance.”⁸⁹ Other cases likewise involved threats to public safety, such as by practicing dentistry without a license.⁹⁰

The Washington Supreme Court decision in Greenwood v. Olympic, Inc.⁹¹ is also notable. There, the Washington Supreme Court addressed a building that had violated a city ordinance that declared that the lack of intermediate handrails on certain stairways was a nuisance. The Court disagreed: “If they became a nuisance, it was because the city council of Seattle, by ordinance No. 72200 (the 1942 building code) declared them so to be. A municipal ordinance may not make a thing a nuisance, unless it is in fact a nuisance.”⁹²

Here, the Towers horse-stall rental activities (and the long gone campground activities) do not arise to the level of offensive or dangerous activities that were at the center of cases where Washington courts have found that the activities in question constituted a nuisance. Tellingly, not once did the County assert as

⁸⁹ *Id.* at 139–40.

⁹⁰ State v. Boren, 42 Wn.2d 155, 164, 253 P.2d 939 (1953); Gebbie v. Olson, 65 Wn. App. 533, 535, 828 P.2d 1170 (1992) .

⁹¹ 51 Wn.2d 18, 315 P.2d 295 (1957).

⁹² *Id.* at 21 (underlining added).

part of its motion that the comfort, repose, health, or safety of the public at large is at risk because of the Towers' alleged activities. In any event, how does that fact that money changes hands when the horse stalls are rented threaten the public at large? Even if the County made such an argument, such an assertion would certainly be a factual question that could not be decided on summary judgment. But without any assertion about the comfort, repose, health, or safety of others as both Chapter 7.48 RCW and the case law require, there can be no claim for a nuisance, public or otherwise.

IV. CONCLUSION

Ultimately, this matter is not about a Code violation or nuisance. Rather, it is a neighbor dispute between the Idsos and the Towers regarding the presence of horses and people on the Towers' property. For reasons that remain unclear, the County has inserted itself into the dispute. In the end, though, the County's arguments fail as a matter of law. And, at a minimum, there are material issues of fact that preclude summary judgment. The Towers respectfully ask that this Court

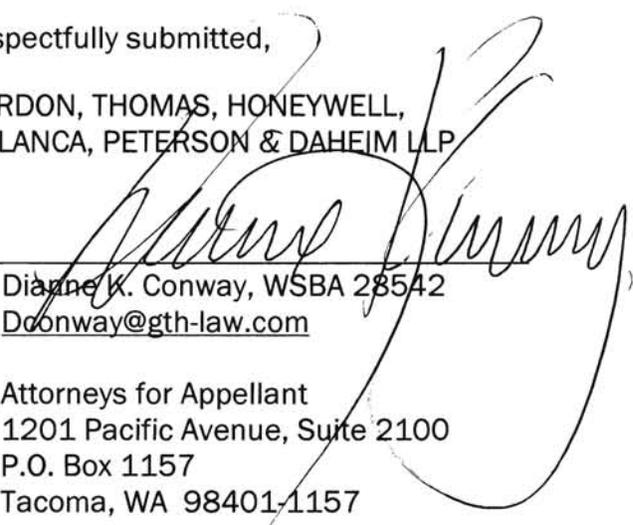
reverse the trial court's order granting summary judgment to the County.

Dated this 2nd day of April 2012.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By



Dianne K. Conway, WSBA 28542
Dconway@gth-law.com

Attorneys for Appellant
1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 2nd day of April 2012, I did serve via email and first-class mail, a true and correct copy of the foregoing by addressing and directing for delivery to the following:

Counsel for Respondent:

James G. Baker
H. STEWARD MENESEE, PROSECUTING ATTORNEY FOR
GRAYS HARBOR COUNTY
102 West Broadway, Room 102
Montesano, WA 98563
Email: jbaker@co.grays-harbor.wa.us
FAX: 360.249.6064



Christine L. Scheall
Legal Assistant to Dianne K. Conway

APR 2 2012
BY [Signature]
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