

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.

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DIVISION II
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REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Gray's Harbor County's Brief of Respondent makes one thing abundantly clear: there were and are profound and material disputes about many of the facts relied upon by the County in support of its motion for summary judgment. The parties also have strong disagreements regarding the scope and application of the law. Three things are clear, however: (1) the County's action is largely based on the complaints of an admitted horse-loathing neighbor, whose assertions about the Tower Property are contradicted by 11 other individuals; (2) the County seeks to enjoin public camping activities that have not occurred on the Tower Property for five (now six) years; and (3) the County seeks to enjoin uses of the Tower Property that even the County admits are legal if the Towers did not receive rental payments.

II. LEGAL ARGUMENT

A. The County's argument regarding recreational camping misses the point.

The County discusses at length the 2005 and 2006 use of the Tower Property for third-party recreational camping purposes. But the Towers do not dispute that they offered third-party recreational camping through the summer of 2006, nor, for the purposes of this action, have they made a claim that this use is lawful. Rather, as set

forth in the Towers' opening brief, they ceased offering recreational camping to third parties after the summer of 2006 upon deciding not to continue to pursue their efforts to convince the County the use was lawful. Accordingly, whether the use of the Tower Property for recreational camping purposes was lawful is not at issue.

What is before this Court is whether the trial court's issuance of an injunction against third-party recreational camping that had not occurred for five (now six) years on the Tower Property was proper given the very high standards governing injunctions. As previously noted, the County is entitled to an injunction only when, among other things, the County has a *well-grounded fear of immediate invasion* by the Towers of a clear legal or equitable right.¹ The County relies on a single case, State v. Humphrey,² to get around these prerequisites. But even the most cursory review of the Humphrey decision shows that it is highly distinguishable from the facts before the Court here. In Humphrey, owners of a property leased it to tenants who were commonly known to be operating a house of prostitution. Eleven days after making a series of arrests, the State instituted an action seeking to abate a nuisance and collect penalties. The property owners

¹ Tyler Pipe Idus v. Dep't of Revenue, 96 Wn 2d 785, 792, 638 P. 2d 1213 (1982) .

² 94 Wash. 599, 600-601, 162 P. 983 (1917)

protested that such relief was not appropriate given that the offensive use (prostitution) had ceased 11 days earlier:

. . . [S]ince the evidence fails to show that the premises were occupied by prostitutes, or that acts of prostitution were practiced thereon subsequent to January 16, 1915, the appellants contend that the tax levied against the premises was unjustified. Attention is called to the fact that the language of the first section quoted is in the present tense-that the action may be begun 'whenever a nuisance exists'-and it is argued that since the nuisance ceased at the time of the last arrest no nuisance existed at the time the action was begun some days later, and hence the action will not lie. But we think this contention not justified. The appellants themselves made no effort to abate the nuisance until after the commencement of the abatement action. The cause for abatement was the activity of the police officers. **The appellants' activity commenced on the commencement of the abatement action. Having shown a disposition to allow the law to be avoided, it is presumable that they would have continued to do so but for the abatement action.** A temporary cessation from the unlawful practices is not enough.³

In sum, the County equates the five-year cessation of the campground activities on the Tower Property with the 11-day cessation of unlawful activity in the Humphrey matter. That is absurd. And the fact that this is the best case that the County could find to support its argument that it is entitled to an injunction five (now six) years after the fact speaks volumes about the strength of this argument.

³ State v. Humphrey, 94 Wash. 599, 600-02, 162 P. 983 (1917).

Finally, as it did before the trial court, the County argues that the Towers are still allowing recreational camping. But the only “evidence” that the County relied on for its claim that the Towers continue to allow camping on their property after 2006 was a declaration by Leonard Idso containing a single photograph taken in 2009 of a single RV that was on the Towers’ property “for a few days.”⁴ The uncontested evidence is that this vehicle belonged to the Towers’ daughter, who was visiting them for a few days.⁵ More importantly, no County ordinance bars such short-term use by a single self-contained vehicle on a private lot.⁶ And, as set forth in the Towers’ opening brief, the Towers and others strongly refute that any third-party recreational camping has occurred since 2006,⁷ at a minimum making this issue a contested material fact.

⁴ CP 123.

⁵ CP 154.

⁶ GHCC 8.20.020(B)(4).

⁷ CP 153.

B. The County failed to properly argue that horse training and riding lessons should be prohibited in its Motion for Summary Judgment.

Tellingly, the County's prime response to the Towers' argument that its inclusion of argument regarding the alleged use of the Tower Property for horse training and riding lessons⁸ for the first time in its reply brief was improper is that the Towers' argument lacks any supporting authorities and therefore should be ignored. But, as the County very well knows, it is black letter law that a court should not address issues or arguments raised for the first time in their reply brief⁹ for the rather obviously reason that doing so makes it impossible for the nonmoving party to respond except at oral argument. Which is what the Towers did.

Moreover, contrary to the County's assertions, its Complaint does not reference horse training or riding lessons. While it does attach advertisements for the Towers' property, these advertisements make no mention of the Towers providing riding lessons or horse training. Rather, they only note that the property has a riding arena in which horses stalled at the property can be exercised by their owners:

⁸ It bears mention that the County's assertion that the Towers' allegation that the prior owner of the property operated a boarding and training business on the property is based solely on a "Liesel Tower's self-serving statement" is false. Multiple declarants testified about this earlier use. CP 170-71, 191, 227, 232.

⁹ Stanzel v. City of Puyallup, 150 Wn.App. 835, 851, 209 P.3d 534 (2009); White v. Kent Medical Center, Inc., P.S., 61 Wn.App. 163, 168-69, 810 P.2d 4 (1991).

Covered arena plus beach accessibility makes a great combination for training your horse!¹⁰

More importantly, there was no mention of the provision of horse training or riding lessons in the five items set forth in the County's statement of the "Relief Requested" in its Motion for Summary Judgment.¹¹ Rather, the County references only "horse boarding and/ or horse stall rental facility."¹² More tellingly, the County's Statement of the Issues in its Motion for Summary Judgment makes no mention of horse training or riding lessons:

The following issues are presented for resolution by the court:

1. Whether there is a genuine issue of material fact in dispute that defendants Frank G. Tower III's and Liesel C. Tower's use of their Chester Avenue property by providing horse boarding facilities and/ or horse stalls to the public for a fee constitutes a prohibited use of this property in violation of chapter 17.36 of the County Code?
2. Alternative to Issue No. 1 above, whether a genuine issue of material fact exists that defendants Frank G. Tower III's and Liesel C. Tower's use of their Chester Avenue property by providing horse boarding facilities and/ or horse stalls to the public for a fee constitutes a conditional use of this property for which no conditional use permit has been issued in violation of chapter 17.36 of the County Code?

¹⁰ CP 33, 37, 41.

¹¹ CP 48-49.

¹² *Id.*

3. Whether, as a matter of law, defendants' use of their Chester Avenue property in providing horse boarding facilities and/ or horse stalls to the public for a fee in violation of chapter 17.36 of the County Code constitutes a public nuisance, which must be enjoined and abated?

....¹³

Finally, the Towers maintain that at no time have they ever provided riding lessons, training, and summer camps at the property that is the subject of this action as they do at their Port Orchard facility.¹⁴ Given this contested material fact, summary judgment on this issue was not appropriate.

C. The use of the Tower property is lawful.

As the County itself has recognized, it is perfectly lawful for the Towers themselves to house up to ten horses in their barn; exercise and train these horses in the riding arena and property generally; and provide riding lessons, so long as no money exchanges hands.

Indeed, the County makes this very point in its Response:

It is the Towers activity in operating a non-permitted *business* on their R-3 zoned property that is the violation here. It is not, as the Towers appear to emphasize, an enforcement effort to prevent them from boarding their own horses or ride their own horses on the property.¹⁵

¹³ CP 52.

¹⁴ CP 155.

¹⁵ Brief of Respondent at 14 (emphasis added).

Hence, as noted in the Towers' opening brief, the actual *use* of the Towers Property for housing and exercising horses is entirely lawful. And, as the authority cited by the County itself notes,¹⁶ it is the use of property that is controlled by zoning codes:

Zoning codes regulate the use of a property and control the dimensions of improvements placed on property to ensure that adjacent land uses are compatible with one another.¹⁷

Hence, as previously noted, the County is *de facto* seeking to regulate the form of ownership of the horses on the Towers' property. This is not a proper exercise of its zoning authority.

D. Rental of horse stalls on the Tower Property does not create a nuisance.

The parties obviously have very different views on Washington law governing nuisance arising from the violation of a statute or ordinance. This is not particularly surprising, given that Washington appellate decisions on the issue have not always been a model of clarity.

A nuisance action is a creature of statute. Notably, nowhere in the nuisance statutes adopted by the Washington Legislature state

¹⁶ Brief of Respondent at 23.

¹⁷ Kelly v. Chelan County, 157 Wn. App. 417, 426, 237 P. 3d 346 (2010), citing Sammamish Community Council v. City of Bellevue, 108 Wn. App. 46, 53, 29 P. 3d 728 (2001).

that the violation of a County ordinance is a public nuisance *per se*.¹⁸ Rather, courts have allowed such a finding only in specific circumstances. And, as set forth in the Towers' opening brief, the Washington Supreme Court has expressly held that an "ordinance may not make a thing a nuisance, unless it is in fact a nuisance."¹⁹ The Sowers decision cited by the County – which involved a statute that allowed the County to seek injunctive relief for violations of business license ordinances and actions by the appellant that would have violated the law even if he had a business license – recognizes this and cites to the Washington Supreme Court decision in Motor Car Dealers' Ass'n v. Fred S. Haines Co.²⁰ This case, which has not been modified or overruled, contains perhaps the clearest analysis of the issue by the Washington Supreme Court:

Observations made in Puget Sound Tr., L. & P. Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504, L. R. A. 1918F, 469, are quoted by appellants as follows, as sustaining their complaint:

'To engage in any form of business in defiance of laws regulating or prohibiting the business is a nuisance *per se*, and a person so engaging therein may, in this jurisdiction, be enjoined from so doing by any one suffering a special injury thereby. * * * [Citing cases.] And such an action

¹⁸ RCW 7.48.120, 7.48.140.

¹⁹ 106 Wn.2d 135, 138, 720 P.2d 818 (1986) (emphasis added).

²⁰ 128 Wash. 267, 222 P. 611 (1924).

will lie even though there may be for the wrong committed the legal remedy of arrest and punishment. [Citing cases.]'

But the language relied upon from the Grassmeyer Case is not of such comprehensive effect as appellants think. In that case we were dealing with a case where the plaintiffs, seeking an injunction, had a franchise to occupy streets and operate a street railway thereon, and carry passengers for hire. The injunction was sought against persons having no franchise, no license or permit of any kind, and who were virtually trespassing upon the property of appellant, although appellant did not have an exclusive franchise to carry passengers; but the other passenger carriers had no right of any kind. They were engaging in the business unlawfully. It was also shown that they were depriving the franchise holder of a very great deal of business and profits.

Practically the same situation existed in the Schoenfeldt Case, 123 Wash. 579, 213 Pac. 26, as to the railway company having a franchise and vested right to carry passengers, while the defendants had no such right and obtained none.

....

There are no allegations in the amended complaint charging that the keeping open by respondents of their places of business for the sale of automobiles on Sundays annoys, injures, or endangers the comfort, repose, health, or safety of others, or offends decency, or in any way renders others insecure in life or in the use of property.

It is true appellants use the exact terms of the statutes in setting up their causes of action. **But the court must judge of them as to whether they are facts which constitute a public nuisance** and by reason of the special injury to appellants become peculiarly a private nuisance to them and so entitle them to maintain such an action.

There is no doubt that the acts which respondents are alleged to be committing are lawful on every other day except Sunday. **Appellants themselves engage in the same business on every other day except Sunday, and therefore the acts complained of are not acts which constitute a nuisance at all times and under all conditions, thus failing of one of the most important elements of a nuisance per se.**²¹

The present matter is quite similar. The actual use of the Tower Property for stalling, exercising, and training horses is allowed under the County Code. The issue before the Court is whether the fact that these activities that occur in exchange for a rental payment is unlawful. Since these uses do not “constitute a nuisance at all times and under all conditions,” they cannot constitute a nuisance *per se*.

Finally, perhaps the most telling fact in this entire case is that the County could find only one party who complained about the horse-related uses on the Tower Property: the Idsos, who are very open about the fact that they despise horses and the people that ride them, a fact that they tellingly did not refute in declarations accompanying the County’s reply brief. Eleven neighbors and individuals familiar with the horse-related uses on the Tower Property directly contradicted each and every one of the Idsos’ assertions.²² At a minimum, there

²¹ Motor Car Dealers' Ass'n of Seattle v. Fred S. Haines Co., 128 Wash. 267, 271-274, 222 P. 611 (1924)

²² The County maintains that alleged negative effects caused by the alleged increase in traffic was not disputed by the Towers. That is incorrect. This was contradicted specifically by Dawn Soles, who lived 50 feet from the Tower Property for three years until spring 2011. CP 179-181 (the Towers mistakenly cited to the declaration of Shelley Jones in their Opening Brief for this fact, and they apologize for any resulting confusion).

are material issues of fact regarding the effect of the horse-related use of the Tower Property on the public.

III. CONCLUSION

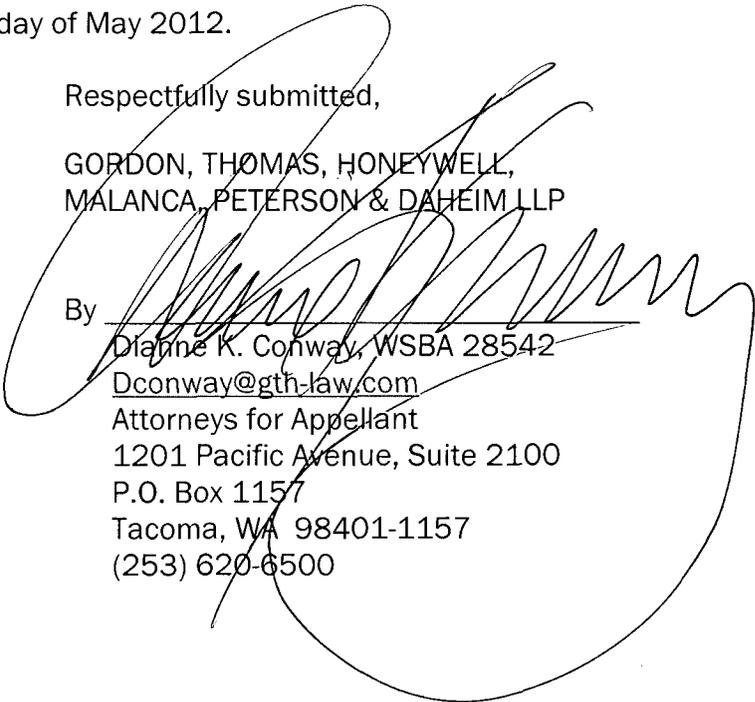
The County's arguments fail as a matter of law. And, at a minimum, there are material issues of fact that preclude summary judgment. The Towers respectfully ask that this Court reverse the trial court's order granting summary judgment to the County.

Dated this 25th day of May 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 25th day of May 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:

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