
H4IT PROPERTIES, LLC,

Petitioner,

v.

CHELAN COUNTY,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

The essence of this case concerns the distinction between a lodging facility and a short-term rental ("STR"). The confusion between these two distinct types of rentals has resulted in the government's unconstitutional and erroneous interference with a private landowner's use of their property.

Petitioner H4IT Properties, LLC ("H4IT" or "Petitioner") attempted to permit their property as a short-term rental ("STR"), pursuant to Chelan County Code ("CCC") 11.88.290. CP 104–105; 141–142. On December 30, 2021, H4IT purchased real property at 23336 Lake Wenatchee Highway in Chelan County, Washington (the "Property") from Aleksandr and Tatiyana Drigailo ("Drigailo"), who had previously used the Property as an STR. CP 6, 106–108. Drigailo had, on at least one occasion, also used the Property as a "lodging facility," in violation of the CCC, which resulted in a citation by the County for improper use. CP 6, 256–259. The County and Drigailo eventually entered into a Settlement Agreement to

address and resolve the violation. CP 256–259. Key to this case is the fact that the County did not cite Drigailo for operation of an STR (separate and distinct from a lodging facility), nor was such operation referenced in the Settlement Agreement. *Id*. The County did not cite Drigailo for improper operation of an STR because, at the time of the citation, the County authorized STRs to operate in the zone where the Property is located without a permit or other land use approval. *See*, former Chapter 11.88 CCC.[1] Now, under the County's new STR Code, existing STRs are required to apply for permits to continue their operations. *See*, CCC 11.88.290(2)(E)(ii)(e).

The County and the Hearing Examiner denied H4IT's permit application, erroneously focusing entirely on Drigailo's use of the Property as a "lodging facility" and not its prior use as an STR, which is the actual basis for the STR Permit application. CP 69–73, 87–88.

[1] For a redlined version of the changes to the CCC, see the "FINAL Short-term rental code as adopted" on Chelan County's website: https://www.co.chelan.wa.us/files/community-development/documents/STR/FINAL_STR_Code_adopted_07272021_Attachment_A.pdf.

Nevertheless, both lower courts ruled that denial of the permit was proper, again, only focusing on the use of the Property as a lodging facility rather than its historic, and legally authorized, use as an STR. App. 1–15. Both courts ignored the evidence that Drigailo used the Property as an STR prior to the new CCC and that H4IT was seeking only to continue the STR use (and not pursue a lodging facility use).

The Court of Appeals decision impacts all landowners in Washington. Under the reasoning of the Division III Court's decision, a Land Use Petition Action ("LUPA") decision would be capable of being affirmed based on an erroneous understanding or misunderstanding of the factual record. Furthermore, the Division III decision sets precedent allowing the government to prohibit a landowning citizen from legally using their property in violation of their constitutional rights. Explaining the appropriate scope of what is considered a constitutional taking under RCW 36.70C.130(1)(f) is an issue of substantial public interest.

II. IDENTITY OF PETITIONER AND COURT OF APPEALS' DECISION

The petitioner is H4IT Properties, LLC ("H4IT"), the appellant in the Court of Appeals and the petitioner in the trial court. H4IT petitions for review of the unpublished decision terminating review entered on October 3, 2024, by Division III of the Court of Appeals (the "Decision"). A copy of the Decision is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

1. Is it erroneous for lower courts to misapply the factual and legal underpinnings of the case under RCW 36.70C.130(1)(d)?

2. Are lower courts required to articulate their reasoning for concluding that H4IT's constitutional rights were not infringed under RCW 36.70C.130(1)(f)?

3. Is unreasonably and erroneously denying a LUPA petition a taking in violation of a landowner's constitutional rights?

IV. STATEMENT OF THE CASE

A. Drigailo Uses the Property as a STR

Prior to H4IT purchasing the Property and the County's Moratorium on STRs (discussed below), Drigailo legally operated the Property as an STR via booking websites like VRBO and AirBnb. CP 109, 190–194, 211, 257. During this time, STRs were authorized to operate in the Property's land use zone without any permit. *See*, former Chapter 11.88 CCC.[2] In addition to the STR use, Drigailo occasionally operated a "lodging facility"[3] without first obtaining a conditional use permit ("CUP"), as required per the CCC. CP 256. Because of this unauthorized use as a lodging facility, the County cited Drigailo for a singular code violation on October 14, 2020. *See*, CP 256–259.

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[2] For a redlined version of the changes to the CCC, see the "FINAL Short-term rental code as adopted" on Chelan County's website: https://www.co.chelan.wa.us/files/community-development/documents/STR/FINAL_STR_Code_adopted_07272021_Attachment_A.pdf.

[3] CCC 14.98.1105 currently defines "lodging facilities" as "establishments providing transient sleeping accommodations and may also provide additional services such as restaurants, meeting rooms and banquet rooms. Such uses may include, but are not limited to, hotels, motels and lodges greater than six rooms, and any overnight accommodation that is rented nightly for fewer than thirty consecutive nights or days and has an occupancy of greater than sixteen persons, including children." (emphasis added).

After the Moratorium on STR uses (discussed below) was put into effect, the Hearing Examiner affirmed the County's finding of a singular instance of a code violation against Drigailo on January 27, 2021, for use of the Property as a lodging facility. CP 260. On July 28, 2021, the parties entered into a Settlement Agreement, ("Settlement Agreement"), resolving the claims against the Property solely addressing the use of the Property as a lodging facility. CP 256– 259.

The Settlement Agreement, states in pertinent part:

> D. . . . [T]he County filed an Amended Order to Abate Violations, alleging that the Drigailos were using the Property **as a lodging facility**. . .

Id. (emphasis added). The County did not cite Drigailo for their operation of an STR. *Id*. In fact, the County could not have done so, because at the time, STRs (separate from a lodging facility), were allowed without a permit and thus Drigailo was not committing a code violation.

On August 25, 2020, prior to the code violation, the County enacted a moratorium (the "Moratorium") freezing all

CUP and STR permitting in the County, which remained in effect until the County implemented the STR Code on September 27, 2021. The new STR code required all STRs existing prior to August 25, 2020 (as Drigailo had) to prove they were legally operating without any unresolved zoning, land use, or building permit violations as of the effective date of the Moratorium. *See*, CCC 11.88.290(2)(E)(ii)(e).

B. H4IT Applies for STR Permit

The STR Code, uses a tiered system to manage STRs: Tier 1 (owner occupied), and Tier 2 (non-owner occupied), and Tier 3 (non-owner occupied with up to 16 occupants). Currently, STRs are allowed in the Rural Residential 2.5 Zone ("RR 2.5"), where the Property is located, with an approved STR Permit. CP 80. Property owners with existing STRs, those operating before August 25, 2020 (like Drigailo), were allowed to apply for an existing nonconforming STR Permit until December 31, 2021, essentially grandfathering in such use. H4IT's Property meets the requirements of nonconforming STR

status based on CCC 11.88.290. H4IT timely applied for a nonconforming Tier 2 STR Permit based on the historic use of the Property as an STR on December 31, 2021. CP 104–105, 141–142, 211.

When the County denied H4IT's permit application, H4IT appealed to the Hearing Examiner. CP 80–83, 265–266. The Hearing Examiner erroneously upheld the County's denial (the "Decision"). CP 69–73. The Decision is erroneous because the Hearing Examiner improperly considered and referred to the application for a Tier 2 STR as one for a "lodging facility." *Id*. Pursuant to its STR Permit application, H4IT does not intend to use this Property (consisting of a single-family home) as a lodging facility.[4] Rather, it intends to rent the house on a short-term basis to the number of guests allowed pursuant to an STR permit (which would be less than the occupancy of a lodging facility).

[4] Note that the trial court upheld the Hearing Examiner's Decision which erroneously referred to the Property as a lodging facility. CP 13–17.

In contrast to these facts, the Decision focused exclusively on the use of the Property as a lodging facility, and not its historic use as an STR, which was the basis of the STR Permit application. *Id*. It also included broad generalizations and factually incorrect statements that the Property had active code violations and thus could not qualify for a STR permit. *Id*. As a result, the Decision failed to consider the Settlement Agreement which resolved the code violation(s).

C. Procedural History

On June 1, 2022, H4IT filed its Verified Petition under LUPA with the Chelan County Superior Court arguing that two LUPA standards applied: "(d) the land use decision is a clearly erroneous application of the law to the facts, and (f), the land use decision violates the constitutional rights of the party seeking relief." RCW 36.70C.130(1)(d-f). CP 1-17. H4IT sought reversal of the Decision identifying multiple statements within the Decision that were false or inaccurate, including most egregiously stating that H4IT "submitted an . . .

Application on December 31, 2021, to operate an established "**lodging facility**" . . . The previous owners were not legally operating because it was not legal to operate a lodging facility without a CUP." *Id*. (emphasis added). H4IT further noted the Decision incorrectly cited unresolved code violations as another reason for the denial. *Id*.

> 5. **To the extent that the Appellant is arguing that the prior, unpermitted and illegal use of the property as a lodging facility justifies the granting of a short term rental permit**, the Hearing Examiner rejects this argument **as not supported by the Chelan County Code.**

CP 17 (emphasis added).

The trial court mistakenly upheld the Decision and reiterated the same inaccurate findings as stated by the Hearing Examiner. CP 349–356. H4IT appealed to the Washington Court of Appeals who eventually affirmed the Superior Court's decision, again, based on a basic misunderstanding that H4IT is seeking to permit a lodging facility rather than an STR. CP 362–366; Appx. A015. These are two distinct types of rentals,

governed by two distinct Chapters of the CCC. H4IT specifically applied to permit an STR, not a lodging facility.

What the lower courts have failed to explain is that each denial of H4IT's STR Permit application and appeals have been based upon incorrect factual and legal findings regarding lodging facility use rather than STR use. Never has H4IT argued that Drigailo's use of the Property as a lodging facility permits their use of the Property as an STR. Conversely, because the County's claim of a CCC violation for lodging facility use was fully settled prior to H4IT's STR Permit application, and because the violation was not regarding use of the Property as a STR, the Property properly qualified as a nonconforming STR use. In other words, there is evidence in the record that the Property was legally used as an STR, which is the basis for H4IT's nonconforming STR permit application. H4IT now seeks this Court's review.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court of Appeals Decision affirming denial of the STR permit conflicts with precedent and raises issues of substantial public importance.

LUPA, chapter 36.70C RCW, governs judicial review of land use decisions. *HJS Dev., Inc. v. Pierce County, Dep't of Plan. & Land Servs.*, 148 Wash.2d 451, 466, 61 P.3d 1141, 1149 (2003). On review of a superior court land use permit decision, the appellate court stands in the same shoes as that court, reviewing the administrative decision on the record of the administrative tribunal, not the superior court record. *Id*. at 148 Wash.2d at 468, 61 P.3d at 1149. Therefore, this Court should review the record before the Hearing Examiner and review questions of law de novo to determine whether the facts and law supported the land use decision with no deference being given to the findings of the lower courts. *Id.* at 148 Wash.2d at 468, 61 P.3d at 1149; *Whatcom Cnty. Fire Dist. No. 21 v. Whatcom Cnty.*, 171 Wash. 2d 421, 426, 256 P.3d 295, 297 (2011).

Under RCW 36.70C.130(1)(d), "[a]n application of law to the facts is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Whatcom County Fire Dist. No. 21*, 171 Wn.2d at 427 (internal quotation marks omitted) (*quoting Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)).

"A nonconforming use is a use [that] 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." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024, 1027 (1998). Chelan County defines a nonconforming use as a use that "was lawful prior to the adoption, revision or amendment of a zoning ordinance . . ." CCC 14.98.1300.

The CCC defines lodging facilities as "hotels, motels and lodges greater than six rooms, . . ." CCC 14.98.1105. In contrast, an STR is defined as:

> a commercial use utilizing a dwelling unit, **or portion thereof**, that is offered or provided to a guest by a short-term rental owner . . . Short-term rental units may be whole house rentals, apartments, condominiums, **or individual rooms in homes**.

CCC 14.98.1691 (emphasis added). These definitions are not mutually exclusive, as the County contends. Appx. A008. Just because a property *can* be considered a lodging facility based on size does not mean it is, in fact, a lodging facility. Indeed, nothing in the CCC prohibits (or otherwise addresses) a larger house from being treated as a STR by only renting out a portion of the property, which portion being six or fewer rooms so as not to be considered a lodging facility. The CCC clearly contemplates this use as the plain language allows for "portion[s]" of homes to be rented as an STR. CCC 14.98.1691.

Here, the Court of Appeals failed to "determine whether the facts and law supported the land use decision with no

deference being given . . .” *HJS*, 148 Wash.2d at 468, 61 P.3d 1149. Rather, the Court of Appeals, like the Hearing Examiner and Superior Court before it, focused exclusively on the Property’s size and/or prior use as a lodging facility, which only occurred on one occasion. Appx. A003, A008-010.

Applying the above law to the facts of the case, substantial evidence confirms that H4IT should have been able to meaningfully apply for a nonconforming STR Permit because (1) there was no identified CCC code violation related to use of the Property as an STR prior to the Moratorium, (2) the Settlement Agreement resolved the written notice of violation at the Property (related to use as a lodging facility), and (3) H4IT submitted ample evidence of basic STR use of the Property that was not at issue in the Settlement Agreement or in violation of the CCC. [5]

[5] A critical fact for the Court to remember is that H4IT only applied for an STR Permit (which limits the number of guest and bedrooms available for rent) and NOT a conditional use permit for a lodging facility.

H4IT applied for a nonconforming Tier 2 STR Permit, not a Tier 3 Permit for use more consistent with a "lodging facility." However, as set forth above, neither the Hearing Examiner's Decision nor the Superior Court or Court of Appeals considered use of the Property by Drigailo that did not rise to the level of lodging facility (i.e. basic STR use of the Property). This is the critical assertion made by H4IT that confirms H4IT can meet its burden pursuant to RCW 36.70C.130(1)(d), which has been ignored by the lower courts. Under both the old and new definitions of lodging facility, any transient use of a property that is limited to use less than the lodging facility size and occupation thresholds would qualify as an STR use.

The lower courts erroneously affirmed the Hearing Examiner's Decision that the Settlement Agreement deemed all rental use of the Property as illegal, effectively ignoring the distinction between a lodging facility and an STR.

The Court of Appeals decision inaccurately stated that the "hearing examiner did not base his decision on CCC 11.88.290(2)(E)(ii)(e)." Appx. A009. The Court of Appeals asserts this despite acknowledging that "the hearing examiner noted that H4IT had received a letter from the County citing this code as a reason for denying the permit." *Id*. Because the County incorrectly cited the code violation as a reason for denying the STR permit, the Hearing Examiner and lower courts should have found the County's denial of H4IT's STR Permit application erroneous due to the misapplication of the law to the facts of this matter. These decisions are clearly erroneous because both the County and Hearing Examiner failed to consider any previous use of the Property that did not rise to the level of "lodging facility" use (i.e. as a basic STR) and instead focused on the resolved former code violation at the Property as the sole basis for denial of H4IT's STR Permit application.

The Court of Appeals failed to show how the facts and law supported the land use decision; rather, its decision is a simple regurgitation of the Hearing Examiners (inaccurate) findings. The facts demonstrate: the Property was used as an STR prior to August 25, 2020, as required; there were no code violations for use of the Property as a STR; and, H4IT timely applied for the prior nonconforming STR permit. However, it appears the Court of Appeals gave great deference to the Superior Court and Hearing Examiner's findings, rather than conducting a de novo review as required. If these facts do not support the finding of an erroneous decision by a Hearing Examiner under LUPA, what would rise to that level? The answer to this question is of substantial public importance as this fundamentally lowers the bar and alters the requirements for reversing a land use decision under LUPA and review should be granted pursuant to RAP 13.4(b)(4).

B. The Court of Appeals Decision contradicts Division III's prior caselaw, violates the constitutional rights of H4IT and has consequences for all landowners.

1. Division III's decision contradicts its own prior caselaw.

The trial court is required to articulate its reasoning when not doing so would hamper appellate review. *See, Housing Authority of Grant County v. Parker*, 2023 WL 6152642, Court of Appeals, Div. 3 (September 21, 2023) (*citing, Maldonado v. Maldonado*, 197 Wn. App. 779, 790-92, 391 P. 3d 546 (2017)). Here, the trial court failed to articulate its reasoning regarding why H4IT's constitutional takings claim was denied. For this reason alone, this Court should grant review to clarify this standard.

The Court of Appeals' decision summarily dismissed H4IT's argument as to this requirement, by claiming *Housing Authority of Grant County v. Parker* was an unlawful detainer action, "completely distinct from a LUPA action". Appx. A013. However, the *Housing Authority* decision, which was decided

by Division III, and held that the appellate courts must "mandate that the superior court correctly interpret the law and that its record be sufficiently detailed to allow for meaningful appellate review", cited to or relied upon a case from Division I concerning protection orders (which is distinct from an unlawful detainer action). *Hous. Auth. of Grant Cnty.*, 28 Wash. App. 2d at 345, 535 P.3d at 521–22 (2023) (citing *Maldonado v. Maldonado*, 197 Wn. App. 779, 790-92, 391 P.3d 546 (2017) (finding abuse of discretion where superior court's failure to adequately explain its reasoning hampered appellate review)). Therefore, it is clear the nature of the case is not determinative for use by the lower court to adequately explain its ruling.

In this case, Division III failed to explain why the standards announced in a case involving protection orders can be applied to a case regarding an unlawful detainer action, but the same standards announced in the unlawful detainer action could not equally be applied to a LUPA action, which standards determine that a superior court must provide a record that is

sufficiently detailed to as to "allow for meaningful appellate review." *Hous. Auth. of Grant Cnty.*, Wash. App. 2d at 345, 535 P.3d at 521.

More recently, in *Matter of M.G.-M.*, Division III held that "[w]hen a court rule requires findings of fact, the findings must be **sufficiently specific to permit meaningful review** . . . Boilerplate findings, without more, fail to permit meaningful appellate review." 30 Wash. App. 2d 1036 (2024)(internal citations omitted). This case again reiterates Division III's strong history of requiring an ample record that allows for sufficient appellate review. The Court's unsupported assertion in this case that the same guidance cannot be applied to a LUPA decision goes against its own prior caselaw with no justification.

There is no logical argument why this principal of law does not apply here. This Court should grant review so as to clarify Division III's contradiction with its own caselaw pursuant to RAP 13.4(b)(2).

2. Division III's Decision violates the constitutional rights of H4IT and has consequences for all citizens in Washington.

An unconstitutional taking occurs when regulations prohibit a right that has previously vested through nonconforming use. *Rhod–A–Zalea & 35th, Inc. v. Snohomish County*, 136 Wash.2d 1, 959 P.2d 1024 (1998). A "nonconforming" use is generally a use that is lawful at the time but becomes unlawful with the adoption of a zoning regulation. *City of Univ. Place v. McGuire*, 144 Wash. 2d 640, 648, 30 P.3d 453, 457 (2001) (citing *Rhod–A–Zalea*, 136 Wash.2d at 6, 959 P.2d 1024); CCC 14.98.1300.

To determine if land use regulations as applied to a specific property amount to a taking, courts consider "(1) the regulation's economic impact on the property; (2) investment-backed expectations; and (3) the character of the government action." *Peste v. Mason County*, 133 Wn. App. 456, 469 (2007). "An unconstitutional taking has occurred if the economic impact on the landowner imposed by a regulation outweighs the

public benefit conferred." *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 761 (2011). H4IT acknowledges, that the present case is a partial taking, since there may remain other uses for the Property; however, the County has gone too far in restricting H4IT's rights of use. *Id*. (*citing, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002)).

While the policy of zoning legislation may be to phase out nonconforming uses, these nonconforming uses are "a 'vested' property right that has protections." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998); *Icicle/Bunk, LLC v. Chelan Cnty.*, 28 Wash. App. 2d 522, 529, 537 P.3d 321, 325 (2023). "Nonconforming uses are treated like vested property rights and may not be voided easily." *City of University Place v. McGuire*, 144 Wn. 2d 640, 652, 30 P.3d 453, 459 (2001) (*citing, Van Sant v. City of Everett*, 69 Wn. App. 641, 648, 849 P. 2d 1276 (1993)).

The Court of Appeals has confirmed that the County may *regulate* nonconforming STRs because "the limited protection provided by a nonconforming use is still subject to 'ordinances regulating the manner or operation of use.'" *Icicle/Bunk, LLC v. Chelan County,* 537 P.3d 321, 326 (2023) (*citing*, *Rhod-A-Zalea*, 136 Wash.2d at 7-8, 959 P.2d 1024). However, a zoning ordinance can only *extinguish* nonconforming uses "either after a period of nonuse or a reasonable amortization period allowing the owner to recoup on investment." *City of Univ. Place*, 144 Wash. 2d at 648–49, 30 P.3d at 457 (citing *Rhod–A–Zalea*, 136 Wash.2d at 7, 959 P.2d 1024). Neither of these options occurred in this case resulting in a taking of H4IT's property rights.

The Division III Court of Appeals concluded that H4IT did not show that it had a vested nonconforming use and therefore a taking could not exist. Appx. A014–15. However, a key element of H4IT's argument is that it never received a meaningful opportunity to prove nonconforming use to any tribunal. H4IT desires the opportunity to offer evidence to the

County of nonconforming use of the Property as an STR (and not a lodging facility). The County did not provide such opportunity to H4IT prior to summarily denying its nonconforming STR Permit application. As a result of the closed record format of LUPA proceedings, H4IT has not been able to introduce new evidence of prior STR use at the Property.

H4IT previously asserted that it has evidence to demonstrate a nonconforming STR use at the Property existed to warrant issuance of the STR Permit. In particular, at a minimum, H4IT submitted proof with its STR Permit application that Drigailo had ample business renting the Property to guests on a short-term basis (prior to the Moratorium). CP 109. Drigailo asserted he netted $347,432.49 in 2020 by renting the property on its website, Airbnb, and VRBO. *Id*. Such income confirms that the Property was rented often throughout 2020 (i.e. as an STR). In the Settlement Agreement, the County and Drigailo agreed that Drigailo only violated the CCC in one instance of renting as a lodging

facility, rather than an STR. CP 256–259. It stands to reason then, that a significant portion of Drigialo's income was generated by STR rental use. The Hearing Examiner and trial court overlooked this use, focusing only on the size of the Property and the single violation for use as a lodging facility (which was cured prior to H4IT's STR Permit application).

Operating under the assumption that H4IT can successfully show nonconforming STR use, the County would be required to show why H4IT's nonconforming use does not qualify for continuance under a nonconforming STR Permit because of either: (a) H4IT (and its predecessor) indicated [a]n intention to abandon such use; or (b) H4IT performed an overt act, or failure to act, related to the STR use of the Property which carried the implication that it does not claim or retain any interest in its STR rights. *See, City of University Place,* 144 Wn.2d at 652 (internal citation omitted). The County could not (and did not) show that either H4IT had abandoned its STR use or failed to act. The Hearing Examiner, Superior Court, and

Court of Appeals further did not consider the prior non-conforming use, and County's failure to show abandonment in each related decision.

By failing to provide H4IT an opportunity to demonstrate legal, nonconforming use, the County has violated H4IT's constitutional rights. Further, H4IT never abandoned their right to use the Property as an STR.

The Court of Appeals dismissed H4IT's taking argument claiming H4IT "cannot show that it ever obtained a vested right to use the property as a short-term rental through legal nonconforming use." The Court of Appeals failed to discuss why any of the evidence presented failed to create a vested right. Instead, without explanation, the Court of Appeals dismissed all facts that H4IT did show proving there was in fact prior nonconforming use. This decision makes a property owner's long-standing vested constitutional right worthless. In addition to H4IT, such decision allows takings to occur without a valid basis.

VI. CONCLUSION

The Decision contains two significant errors. First, denying the permit on a clearly erroneous understanding of the factual record. Review of this issue is warranted under RAP 13.4(b) because it involves an issue of substantial public interest—the Decision fundamentally alters the manner in which a Hearing Examiner can deny a private landowner the right to legally use their land, based on incorrect facts and legal understanding. Second, the Court of Appeals' decision ruling as to the unconstitutional taking, without an explanation, blatantly violates the constitutional rights of H4IT. As such, review under RAP 13.4(b)(2) is warranted because the decision conflicts with the Division III Court of Appeal's own decision in *Housing Authority of Grant County v. Parker*. In addition, since LUPA is the exclusive means by which courts review land use decisions, there is substantial public interest in consensus and clarity as to how the RCW 36.70C.130(1) standard is to be applied. Accordingly, H4IT respectfully

requests that this Court grant review with respect to these two issues.

Pursuant to RAP 18.17(b) this Brief contains 4,751 words.

RESPECTFULLY SUBMITTED this 4th day of November, 2024.

I certify that the foregoing Petition for Review contains 4,751 words, excluding words contained in the title sheet, tables of contents and authorities, certificate of service, signature blocks, any pictorial images or appendices, and this certificate.

OGDEN MURPHY WALLACE,
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CERTIFICATE OF SERVICE

On said day below I electronically served a true and accurate copy of the Petition for Review in Supreme Court of Washington, electronically via the court's CM/ECF efiling system.

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.

Dated this 4th day of November, 2024 at Wenatchee, Washington.

/s/ Camilla Lillquist
Camilla Lillquist
Legal Assistant

APPENDIX A

FILED
OCTOBER 3, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

H4IT PROPERTIES, LLC, a Washington limited liability company, Appellant, v. CHELAN COUNTY, a Washington municipal corporation, Respondent.	)	No. 39772-6-III UNPUBLISHED OPINION

STAAB, A.C.J. — H4IT Properties, LLC (H4IT) purchased a residence in Chelan County (County) with the intent to use it as a short-term rental. Although the County had placed restrictions on permits for short-term rentals, H4IT sought a permit as an existing nonconforming short-term rental. The County denied the permit and a hearing examiner denied H4IT's appeal. H4IT filed a land use petition (LUPA[1]) challenging the hearing examiner's decision.

H4IT raises three arguments on appeal, but we consolidate the first two issues in our analysis. H4IT contends that the hearing examiner misconstrued the legal effect of a settlement agreement between the County and the previous owners of the property and

[1] Chapter 36.70C RCW.

failed to consider evidence that the property had been historically used as a nonconforming short-term rental. H4IT also contends that the superior court erred in failing to articulate the basis for its conclusion that Chelan County's newly adopted regulations on short-term rentals, and its denial of H4IT's application for a short-term rental permit resulted in an unconstitutional taking. We disagree with these claims and affirm.

BACKGROUND

The following facts are set forth from the hearing examiner's unchallenged findings.

On August 25, 2020, the County adopted "a moratorium on the designation, permitting, constructions, development, expansion, remodeling, creation, locating, and sitting of short term rental uses." Ex. C-001-003.[2] The moratorium was extended twice, but ended on the effective date of the Short-Term Rental code, September 27, 2021. Chelan County Code (CCC) 11.88.290(4)(A)(i). The newly enacted "Short-Term Rental Code" created a permitting system for both new and already existing short-term rentals and provided different requirements for each. *See* CCC 11.88.290. The purpose of this code was "to "establish regulations for the operation of short-term rentals as defined in [c]hapter 14.98, within the unincorporated portions of Chelan County." CCC 11.88.290(1)(B).

[2] Exhibit C-001-003 references the previous Chelan County Code located at the end of the Respondent's Brief under Exhibit C.

The property in question is described as a ten-bedroom single-family residence located near Lake Wenatchee in Chelan County. The property is zoned Rural Residential 2.5 (RR 2.5).

Prior to H4IT's purchase, the property had been used by the prior owners as an illegal "lodging facility" with no conditional use permit (CUP). Even prior to the change in zoning laws, the County Code required a lodging facility operating in a zone RR 2.5 to obtain a CUP. The previous owners were told that they did not qualify for an existing nonconforming short-term rental permit.

On October 14, 2020, the County filed a notice of order against the previous owners of the property for using the property as an illegal lodging facility. The prior owners and the County eventually entered into a settlement agreement pertaining to the notice of order. Within the settlement agreement, the previous owners admitted that the property had been used as a lodging facility on one occasion in a manner not authorized by, and in violation of, the Chelan County Code. The previous owners agreed not to operate the property as a short-term rental or lodging facility in the future without first obtaining all permits. They also agreed to notify any future potential purchasers of the property that the property may not be used as a short-term rental or lodging facility "without first obtaining any and all required permits 'which may or may not be granted by the County.'" Clerk's Papers (CP) at 14.

H4IT purchased the property on December 30, 2021 and filed an application for a short-term rental permit on December 31, 2021. At the time of H4IT's purchase, the moratorium was still in effect, prohibiting the issuance of new short-term rental permits. Additionally, at the time H4IT purchased the property, it was not being used as a short-term rental.

H4IT's permit application was denied. The hearing examiner affirmed this denial. The hearing examiner concluded that H4IT could not show that the property qualified as an existing nonconforming short-term rental because the previous owners were not operating a legally established rental. The hearing examiner found that H4IT's evidence, that the previous owners earned money and paid taxes in 2020 by renting the property, was not proof that the property was previously used as a nonconforming short-term rental. "Monies earned and taxes paid for an illegal operation does not automatically qualify a new owner as legally operating." CP at 14. In addition, the hearing examiner found that while the settlement agreement resolved the prior code violations, the agreement was not evidence that H4IT was entitled to receive a short-term rental permit.

H4IT filed a LUPA petition in superior court. The superior court affirmed the hearing examiner's decision. Additionally, the court found the land use decision did not violate the constitutional rights of H4IT. H4IT appealed to this court.

On appeal, H4IT challenges the hearing examiner's determination that, since the previous owners operated an illegal lodging facility, H4IT did not qualify for existing nonconforming status. In addition, H4IT contends that the hearing examiner committed clear error in applying the law to the facts when he concluded:

> "To the extent that the Appellant is arguing that the prior, unpermitted and illegal use of the property as a lodging facility justifies the granting of a short term rental permit, the Hearing Examiner rejects this argument as not supported by the Chelan County Code."

Appellant's Br. at 14 (quoting hearing examiner's COL 5; AR 5).

ANALYSIS

1. STANDARD OF REVIEW

"Judicial review of land use decisions is governed by LUPA." *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 426, 256 P.3d 295 (2011). In a LUPA appeal, this court "sits in the same position as the superior court." *Id*. We do not give deference to the superior court's decision. *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). Instead, we apply the LUPA standards to the administrative record and hearing examiner's decision, giving deference to the hearing examiner's legal and factual determinations. *Durland v. San Juan County*, 174 Wn. App. 1, 12, 298 P.3d 757 (2012).

To set aside a land use decision, the party seeking relief must establish one of six standards enumerated in RCW 36.70C.130(1). H4IT contends it has met two of these standards:

> "(d) The land use decision is a clearly erroneous application of the law to the facts;
>
> . . . .
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

2. EXISTING NONCONFORMING USE

H4IT contends the hearing examiner committed clear error in determining that the property did not qualify for existing nonconforming status. H4IT argues that the hearing examiner erroneously concluded that the settlement agreement prevented it from qualifying as an existing nonconforming use as a short-term rental. H4IT also asserts that the hearing examiner erred when it failed to consider evidence that the property had been lawfully used as a short-term rental in addition to its use as a lodging facility.

The County responds that the settlement agreement allowed the property owners to apply for a permit, but it did not guarantee that a permit would be issued and it was not evidence that the property was being lawfully used as a short-term rental. Additionally, the County contends that H4IT failed to meet its burden of proving an existing nonconforming use and the hearing examiner did not find such use.

Under standard (d), "[a]n application of law to the facts is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Whatcom County Fire Dist. No. 21*, 171 Wn.2d at 427 (internal quotation marks omitted) (quoting *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)). Under this test, this court defers to factual determinations made by the highest forum below. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

"A nonconforming use is a use [that] 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." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998). As with many counties, Chelan County addresses nonconforming uses in its county code. *See* ch. 11.97 CCC. Chelan County defines "nonconforming" use as a use that "was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails by reason of such adoption, revision or amendment to conform to the current requirements of the zoning district." CCC 14.98.1300. Before addressing H4IT's arguments, it is first necessary to differentiate between a lodging facility and a short-term rental under the Chelan County Code.

As the party asserting a nonconforming use, H4IT has the burden of showing: "(1) that the use existed before the County enacted the zoning ordinance, (2) that the use was lawful at the time, and (3) that it did not abandon or discontinue the use." *Seven Hills, LLC v. Chelan County*, 198 Wn.2d 371, 398, 495 P.3d 778 (2021).

While acknowledging that the property had been previously used as an illegal lodging facility, H4IT asserted that it had also been used as a lawful short-term rental. The CCC defines lodging facilities as:

> establishments providing transient sleeping accommodations and may also provide additional services such as restaurants, meeting rooms and banquet rooms. Such uses may include, but are not limited to, hotels, motels and *lodges greater than six rooms*, and any overnight accommodation that is rented nightly for fewer than thirty consecutive nights or days and has an occupancy of greater than sixteen persons, including children.

CCC 14.98.1105 (emphasis added). On the other hand, a short-term rental is defined as:

> a commercial use utilizing a dwelling unit, or portion thereof, that is offered or provided to a guest by a short-term rental owner or operator for a fee for fewer than thirty consecutive nights or days, by intent or net effect of nights or days rented. They are commonly referred to as vacation rentals. They are a form of commercial tourist or transient accommodations. Short-term rental units may be whole house rentals, apartments, condominiums, or individual rooms in homes. They are rented as a single lodging unit, do not provide food service, and retain the form and function of a dwelling unit.

CCC 14.98.1691.

Here, the property contained ten bedrooms. Thus, by definition, it has the capability of being used as a lodging facility. It is undisputed that even before the new

zoning code was enacted, a CUP was required to legally operate a property as a lodging facility.

H4IT contends that the hearing examiner committed clear error by concluding that the settlement agreement limited H4IT's ability to present evidence of the previous owner's lawful use of the property as a short-term rental. H4IT argues that the hearing examiner denied the permit based on application of CCC 11.88.290(2)(E)(ii)(e). This code prohibits a property from qualifying as a legal nonconforming use if there is a prior unresolved violation. H4IT asserts that this provision does not preclude its permit application because there was no code violation for using the property as a short-term rental and the settlement agreement resolved the violation pertaining to the use of the property as a lodging facility. H4IT reasons that since the settlement agreement only addressed the use of the property as a lodging facility, any use of the property other than as a lodging facility "was deemed nonactionable or not in violation by the County." Appellant's Br. at 23. Finally, H4IT maintains that it produced evidence that the property was used as a short-term rental in addition to being used as a lodging facility, and since this prior use was lawful at the time, the property qualifies as a legal nonconforming use as a short-term rental.

H4IT's logic fails for two reasons. First, the hearing examiner did not base his decision on CCC 11.88.290(2)(E)(ii)(e). The hearing examiner noted that H4IT had received a letter from the County citing this code as a reason for denying the permit. But

the hearing examiner did not cite this code in his conclusions of law as a reason for affirming denial of the permit application. Indeed, the hearing examiner noted that the prior violation had been resolved by the settlement agreement, but "[t]he resolution of the code violation is not evidence that [H4IT] is entitled to receive a short-term rental permit." CP at 14.

In addition, the hearing examiner did not preclude H4IT from presenting evidence of a prior use. The hearing examiner considered the evidence presented by H4IT and found that it was insufficient and H4IT failed to meet its burden of showing that the property had ever been used as a short-term rental. The hearing examiner found that the previous owners had used the property as an unlawful lodging facility, that they were told the property did not qualify as an existing nonconforming short-term rental, and "the property was not being used as a short-term rental at the time the current owners purchased the property." CP at 13, 14.

H4IT does not assign error to these findings. *See Seven Hills, LLC v. Chelan County*, 198 Wn.2d 371, 384, 495 P.3d 778 (2021) ("Unchallenged findings of fact are verities on appeal."). Even so, the findings are supported by substantial evidence; most notably the prior owners' admission that the property had been used at least one time as an unlawful lodging facility. H4IT's evidence is vague and does not prove that the

property was used as a short-term rental in addition to being used as a lodging facility.[3] The hearing examiner, as a fact-finder, was free to find that H4IT's evidence was not persuasive. *See In re Guardianship of Mesler*, 21 Wn. App. 2d 682, 718, 507 P.3d 864 (2022) ("'[T]he finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.'" (quoting *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)).

H4IT also contends that by entering into the settlement agreement, the County implicitly assured the previous owners that all they had to do was obtain the necessary permits in order to come into compliance. Thus, H4IT maintains that the County violated the settlement agreement and should be precluded from now asserting that the property does not meet the standards for a new lodging facility or a short-term rental under the amended code. The hearing examiner did not find this argument persuasive: "The settlement agreement between the prior owners and the County cannot be construed as binding the County to grant a short-term rental permit upon the application by a new owner after the moratorium has been lifted." CP at 16. H4IT fails to convince us that this was clear error.

[3] The County contends that since the property has 10 bedrooms it is a lodging facility and not a short-term rental, and the terms are mutually exclusive. The hearing examiner noted this argument but did not identify it as a basis for his decision.

Several factors negate H4IT's claim that the County violated the settlement agreement and should be estopped from taking a contrary position. First, H4IT has not shown that it has standing to assert any rights obtained from the settlement agreement. The settlement agreement specifically provided that it was not assignable and did not bind any successors. In addition, the settlement agreement did not guarantee or suggest that a permit would be granted. Instead, the agreement specifically required the previous owners to give notice to subsequent purchasers that the property could not be operated as a short-term rental or lodging facility "without first obtaining any and all required permits, *which may or may not be granted*." CP at 257 (emphasis added). While H4IT contends that the *County* refused to consider its evidence of prior use as a nonconforming short-term rental, nothing in the record suggests that the *hearing examiner* failed to consider H4IT's evidence.

To show an existing nonconforming use, H4IT needed to show that the property was lawfully used as a short-term rental before the amended zoning laws went into effect. *See* CCC 11.88.290(2)(E)(i)(d). After considering H4IT's evidence, the hearing examiner did not find that the property had been used as a lawful short-term rental. Instead, the hearing examiner found that the property had been used as an unlawful lodging facility. From these findings, the hearing examiner concluded that H4IT failed to prove that the property qualified as an existing nonconforming short-term rental. This application of the facts as found to the law was not clearly erroneous.

3. CONSTITUTIONAL VIOLATION

H4IT did not raise a constitutional taking claim before the hearing examiner, but did raise the issue in its LUPA petition in superior court. The superior court concluded that "the land use decision does not violate the constitutional rights of the party seeking relief." CP at 350. Before this court, H4IT assigns error to the trial court's failure to articulate its reasoning. Additionally, H4IT contends that "the County's improper processing and subsequent denial of H4IT's STR [Short-Term Rental] Permit resulted in a taking of H4IT's right to use the Property as an STR." Appellant's Br. at 45.

H4IT contends that it is entitled to relief because "the land use decision violates the constitutional rights of the party seeking relief." RCW 36.70C.130(1)(f). This standard presents a question of law, which this court reviews de novo. *Whatcom County Fire Dist. No. 21*, 171 Wn.2d at 426. "'In reviewing an administrative decision, [this court] stands in the same position as the superior court.'" *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 405-06, 120 P.3d 56 (2005) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

H4IT argues that the trial court is required to articulate its reasoning when not doing so would hamper review, citing *Housing Authority of Grant County v. Parker*, 28 Wn. App. 2d 335, 535 P.3d 516 (2023). *Parker* is inapposite because it involved an unlawful detainer action completely distinct from a LUPA action. 28 Wn. App. 2d at 337. Because we sit in the same position as the superior court, giving no deference to the

superior court's conclusions of law, and considering the issue on a de novo standard, the lack of reasoning by the superior court does not hamper our review.

In circumstances such as this, a taking occurs when regulations prohibit a right that has previously vested through nonconforming use. "'An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained.'" *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 218, 242 P.2d 505 (1952) (quoting *Austin v. Older*, 283 Mich. 667, 676, 278 N.W. 727, 730 (1938)). As noted above, a "nonconforming" use is generally a use that is lawful at the time but becomes unlawful with the adoption of a zoning regulation. *See* CCC 14.98.1300. "A nonconforming use is a 'vested' property right that has protections." *Icicle/Bunk, LLC v. Chelan County*, 28 Wn. App. 2d 522, 529, 537 P.3d 321 (2023). A vested right refers only "to the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use" and does not "change, alter, extend, or enlarge the existing use." *Rhod-A-Zalea & 35th, Inc.*, 136 Wn.2d at 6-7.

H4IT imprecisely argues that application of the County's nonconforming use code, CCC 11.88.290(2)(E)(ii)(e), to its property constitutes a partial taking. However, H4IT fails to show that the owners of the property ever acquired a vested right to a nonconforming use, i.e., the right to operate the property as a short-term rental. Nevertheless, H4IT asserts that it purchased the property with the understanding and

intent to use it as a short-term rental based on the prior owner's use. H4IT's expectations does not create a vested right. The "mere intention or contemplation of an eventual use of land is insufficient to establish an existing use for protection as a nonconforming use following passage of a zoning ordinance." *Anderson v. Island County*, 81 Wn.2d 312, 321-22, 501 P.2d 594 (1972).

H4IT's taking argument fails because it cannot show that it ever obtained a vested right to use the property as a short-term rental through legal nonconforming use. The County cannot take what H4IT never acquired.

Affirmed.

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.

Staab, A.C.J.

WE CONCUR:

Pennell, J.

Cooney, J.

From:	Camilla D. Lillquist
To:	DIV3 COURT EMAIL
Subject:	FOR FILING: H4IT PROPERTIES, LLC V. Chelan County - Court of Appeals Div. III No. 39772-6 III - Petition for Discretionary Review with Appendix A
Date:	Monday, November 4, 2024 2:13:48 PM
Attachments:	Petition for Discretionary Review with Appendix - Final.pdf

Greetings

As the Court of Appeals Division III website is down at the present time, attached for filing in the Court of Appeals Div. III, Cause No. 39772-6 II, please find H4IT Properties, LLC Petition for Discretionary Review, with Appendix A.

I would be grateful if you would acknowledge receipt of this filing.

Thank you!

Camilla D. Lillquist | Legal Assistant

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Dressler, Sam

From: Camilla D. Lillquist <clillquist@omwlaw.com>
Sent: Monday, November 4, 2024 2:38 PM
To: DIV3 COURT EMAIL
Subject: FW: H4IT PROPERTIES, LLC V. Chelan County - Court of Appeals Div. III No. 39772-6 III - Petition for Discretionary Review with Appendix A
Attachments: Petition for Discretionary Review with Appendix - Final.pdf

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From: Camilla D. Lillquist
Sent: Monday, November 4, 2024 2:15 PM
To: Marcus Foster <Marcus.Foster@CO.CHELAN.WA.US>
Cc: Julie K. Norton <jnorton@omwlaw.com>; Debbie V. Horn <dhorn@omwlaw.com>; Kaitlin M. Schilling <kschilling@omwlaw.com>
Subject: H4IT PROPERTIES, LLC V. Chelan County - Court of Appeals Div. III No. 39772-6 III - Petition for Discretionary Review with Appendix A

Mr. Foster –

Attached is your copy of the Petition for Discretionary Review, with Appendix A, which was filed with the Court of Appeals, Division III today. A hard copy will be delivered to you today as well.

Thank you.

Camilla D. Lillquist | Legal Assistant

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