

BEFORE THE CHELAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF )  
ADMINISTRATIVE APPEAL NO. AA-2020-003 ) FINDINGS OF FACT,  
OBERFELDER ) CONCLUSIONS AND  
DECISION

THIS MATTER, came before the Hearing Examiner for an open record public hearing to consider an appeal of a Notice and Order (CE 16-0050) submitted by Jeff and Shelly Oberfelder. Based upon the below Findings of Fact and Conclusions of Law, Notice & Order CE 16-0050 is hereby **AFFIRMED** on this 24th day of June, 2020.

**FINDINGS OF FACT**

1. The subject property, located at 120 Rolling Rock Road Chelan, WA is zoned Commercial Agricultural Lands (AC). Located on the subject property is an outdoor and indoor cannabis producer/processor operation within a chain link fenced enclosure.
2. According to records maintained by the State of Washington, Oberfelder Holdings, license number 412286, was first issued a Marijuana Producer Tier 2 license on July 16, 2014 and a Marijuana Processor license on November 18, 2014. Both licenses are current with an expiration of July 31, 2020.
3. County GIS Aerials indicate in 2011, no cannabis facility was observed. In 2015, the aerials show a fenced facility with two hoop houses. Google Earth imagery dated May 2015 show a fenced facility with two hoop houses, a structure measuring approximately 54' x 12' in the northeast corner of the fenced area and cultivated soil. Google Earth imagery dated July 2017 show the expanded fenced facility, two hoop houses, the structure located on the northeast corner of the fenced area, cultivated soil and plants being grown.
4. Internet research of Oberfelder Holdings, provided by staff, shows a current website listing the address of the cannabis operation as 120 Rolling Rock Road, Chelan, Washington. The website posts pictures and information that indicates cannabis is being grown on the subject property. Pictures demonstrate cannabis being grown outdoors and within two hoop houses, all within an enclosed fenced area. The website also lists cannabis varieties being grown onsite and retail locations where Oberfelder cannabis is available for purchase.
5. I-502 Data website reports sales for February 2020 of \$16, 904.00 and total sales of \$1,280.084.00 since Oberfelder Holdings inception.
6. Washington State Liquor and Cannabis Board (WSLCB) records indicate revenue started in July of 2014. Revenue has been continued to be reported for 2015, 2016, and 2017. On July 11, 2018 WSLCB Officer Steve Morehead told CCI David Rinehart, Oberfelder

Holdings was still licensed and in full production, plants are located in the ground (outside) and in the greenhouses (hooped structures). WSLCB records also noted a marijuana premises check on August 7, 2018 with two violations cited. WSLCB Enforcement Officer Steve Morehead did a marijuana premises check on April 10, 2019. He reported plants in the green houses were tagged.

7. Complaints from neighboring residents have been filed with Chelan County Community Development in reference to odor from the Oberfelder Holdings cannabis operation.
8. On July 19, 2016 Code Compliance Manager, Angel Hallman, did a site inspection and hoop houses were observed.
9. On June 20, 2018, Code Compliance Inspectors (CCI) Craig Davidson and David Rinehart did a site inspection and hoop houses were observed within the chain link fence.
10. On August 21, 2018, Code Compliance Manager, Angel Hallman and CCI David Rinehart did a site inspection. Four (4) to Five (5) foot plants were observed within the fenced area on the south end of the property, fans were running within the hooped structures and there was the distinct odor of cannabis.
11. On November 19, 2019, CCI(s) Andrew Helean and David Rinehart did a compliance site inspection in reference to an RV park violation. During the site inspection, Mr. Oberfelder invited Helean and Rinehart inside the fenced area of the cannabis operation. No growing cannabis was seen within the area but two hoop houses were located within the fenced area. Mr. Oberfelder stated he had completed harvesting cannabis. Mr. Oberfelder invited the inspectors inside the building within the fenced area where his employees were actively processing and packaging cannabis. The strong odor of cannabis could be smelled within the building.
12. On February 25, 2020, CCI(s) Andrew Helean and David Rinehart did a site inspection from a neighboring property by permission from the owner. The structure (54'x12'), the two hoophouse/greenhouses and the fence were still located on the subject property. Photos were taken from the neighboring property.
13. Pursuant to CCC 11.100.040(3)(A) indoor cannabis production and/or processing is allowed in the AC zoning district subject to conditional use permit approval. Search of County records shows a pre-application meeting was submitted on February 27, 2018 for a conditional use permit of cannabis production and/or processing, file PL 18-067 and conducted on May 24, 2018. No land use permit application has been submitted to date. Specifically, a conditional use permit has not been submitted for cannabis production and/or processing on the subject property. Pursuant to CCC 11.100.040 (4)(A) outdoor cannabis and/or processing is only allowed in the RR20 zoning district and therefore, is prohibited in the AC zoning district.
14. An after-the- fact Building Permit 140252 was issued for the construction of a 125' x 125' x 8' chain link privacy/security fence and a final inspection was performed on May 16, 2014. On May 3, 2017 a complaint was filed indicating Mr. Oberfelder was expanding the existing fence. On May 10, 2017, a "Stop Work" was issued by the Building Official, due to expansion of the 8' fence without a building permit. On May 11, 2017, an email from Code Compliance Manager, Angel Hallman informed Mr. Oberfelder the fence expansion was outside the parameters of the previously issued

building permit and would require a new permit. A Google Earth photo dated July of 2017 shows the expanded fence installation. From the photos it appears the fence has been extended by an additional 100' feet to the south closer to a bordering property with a residence. To date, no building permit has been obtained or issued for the fence expansion. Also shown in the satellite imagery is a structure located in the northeast corner of the subject property measuring approximately 54' x 12' (648 sq. ft.) feet. This square footage is in excess of the 120 sq. ft. which is exempt from a building permit provided the structure is single story and for tool and storage uses. To date, no building permit has been issued for the completed fence expansion. The fence and the structure located on the subject property are contrary to and in violation of International Building Code [A] 105.1 and [A] 105.2 (1).

15. Pursuant under Resolution 2016-14 and CCC Chapter 11.100 cannabis production is illegal unless the operation is in lawful production prior to September 29<sup>th</sup>, 2015. Oberfelder Holdings was not in legal production (i.e., they did not have all required County permits) prior to this date and therefore is an illegal operation.
16. Pursuant to CCC, Section 16.02.030, all violations of this title and all applicable titles, statutes, and regulations are hereby declared to be detrimental to public health, safety, and welfare and are hereby declared to be public nuisances. This title declares certain acts to be civil violations and establishes non-penal enforcement procedures and civil penalties.
17. On February 20, 2019, an Initial Notice of Violation was issued to Jeff and Shelly Oberfelder for violations of Chelan County Code (CCC) on the subject property located at 120 Rolling Rock Road, Chelan, WA, Assessor's Parcel #282327741050 for violations of Chelan County Code (CCC) on the subject property.
18. On March 2, 2020, a Notice and Order was issued to Jeff and Shelly Oberfelder for violations of CCC on the subject property located at 120 Rolling Rock Road, Chelan, WA, Assessor's Parcel #2823227741050.
19. In the March 2, 2020 Notice and Order to Abate Violations, the following violations were noted:
  - 19.1 The Appellants are operating a cannabis production and processing facility without obtaining a conditional use permit from Chelan County.
  - 19.2 The odor of the cannabis operation on the Appellant's property, which originates from the Appellant's property, is easily detected on properties surrounding the Appellant's property.
  - 19.3 The Appellant has failed to obtain a permit for the fence addition and expansion on the property.
  - 19.4 The cannabis production and/or processing operation is being improperly conducted within the identified "open space designation of Tract A of the Oberfelder East Subdivision, P2008-012."
  - 19.5 The Appellant's operation of a cannabis production and processing facility is in violation of CCC 16.02.030 as a public nuisance, due to its failure to comply with all applicable titles, statutes and regulations, including the Chelan County Code.

20. On March 12, 2020, an appeal of the March 2, 2020 Notice and Order was filed. The file number for this appeal is AA 20-003.
21. On March 13, 2020, Chelan County Community Development received correspondence from the Volyn Law Firm. The firm represents Jeff and Shelly Oberfelder and the correspondence was to advise of the Oberfelder's request to appeal the Notice and Order and a check in the amount of \$580.00 was enclosed for the appeal fee.
22. On March 13, 2020, Chelan County Community Development received correspondence from the Volyn Law Firm. The firm represents Jeff and Shelly Oberfelder and the correspondence was to advise of the Oberfelder's request to appeal the Notice and Order and a check in the amount of \$580.00 was enclosed for the appeal fee.
23. The Hearing Examiner finds that the appeal of Notice and Order CE 16-0050 was timely filed.
24. In reference to the Notice and Order issued on March 2, 2020, a site visit of November 3, 2019 was noted. After a review of site visit notes and photos it was found the correct date should have been noted as November 19, 2019.
25. After legal notice, an open record public hearing was held before the Chelan County Hearing Examiner on May 20, 2020.
26. The File of Record, Chelan County Department of Community Development Staff Report, and exhibits were received, admitted into the record and considered by the Hearing Examiner.
27. Specifically, admitted into the record was the entire planning staff files CE 16-0050 and AA 20-003.
28. Admitted into the record was a May 12, 2020 letter from Marcus Foster, Deputy Prosecuting Attorney, along with the County's response to the Notice of Appeal, the Declaration of Marcus Foster and the Declaration of Service.
29. Admitted into the record was a May 13, 2020 letter from Melissa Campbell, on behalf of the Appellant, along with the following documents:
  - 29.1 Declaration of Anne Hessburg
  - 29.2 Declaration of Jeff Oberfelder
  - 29.3 Declaration of Dirk Veleke
  - 29.4 Declaration of Tyler Ehlert
  - 29.5 Declaration of Sean Patrick and April Marie Alizae-Puryear
  - 29.6 Declaration of Mike Brownfield
  - 29.7 Declaration of John Brownfield
  - 29.8 Declaration of James Collin; and
  - 29.9 Declaration of Shelly Oberfelder
30. Admitted into the record was Chelan County's Supplemental Response to the Notice of Appeal dated May 2020.

31. Admitted into the record was the Declaration of Marcus Foster, with exhibits, dated May 18, 2020.
32. Admitted into the record was the Declaration of David Spencer dated May 18, 2020.
33. Admitted into the record was Declaration of Angel Hallman, with exhibits, dated May 18, 2020.
34. Admitted into the record was Washington State Department of Revenue report regarding Jeff Oberfelder and Oberfelder Holdings.
35. Admitted into the record was Declaration of Angel Hallman dated May 19, 2020.
36. Admitted into the record was a May 19, 2020 letter and Supplemental Declaration of Jeff Oberfelder, the Appellant's Supplemental Briefing Re: Notice of Appeal, the Declaration of Cory DeMotts and the Declaration of Melissa Campbell.
37. Attorney, Scott Volyn, appeared on behalf of Jeff and Shelly Oberfelder. Testifying on behalf of the Oberfelders were the following individuals:
  - 37.1 Scott Volyn. Mr. Volyn provided argument consistent with the written materials submitted by the Appellant prior to and after the hearing.
  - 37.2 Anne Hessburg. Ms. Hessburg was available to answer questions from the Hearing Examiner. She indicated that the Appellant did not seek a conditional use permit because of their position that the use is a legal non-conforming use and that a conditional use permit is not required. Regarding CCC 11.97.030(2) it is Ms. Hessberg's expert, but non-legal, opinion that the County cannot invalidate a legal non-conforming use by a code adoption.
38. It is the County's position that the processing onsite is clearly non-conforming because the processing license was issued after a moratorium on cannabis production was put in place by Chelan County.
39. Testifying on behalf of the County was Dave Rinehart. Mr. Rinehart testified that he lives approximately 950' from the Oberfelder facilities and that he is very familiar with the odor of cannabis from his law enforcement experience. He stated he can clearly smell cannabis from his home from late summer into the fall and has for the past two to three years. The smell of cannabis aggravates his wife's allergies.
40. No member of the public testified at this hearing.
41. At the conclusion of the hearing, the Hearing Examiner kept the record open to allow the Appellant to supplement the record as they deemed appropriate, for the County to respond, and for the Appellant to reply to the County. In response, Appellant submitted the following documents:
  - 41.1 May 29, 2020 letter from Melissa Campbell.
  - 41.2 Declaration of Jeff Oberfelder dated May 29, 2020, with exhibits.
  - 41.3 Appellant's Second Supplemental Brief dated May 29, 2020.

42. Also submitted by Chelan County was the Second Supplemental Response to the appeal, dated June 5, 2020.
43. Substantial evidence supports the finding that the Appellants are operating a cannabis production and processing facility without first obtaining a conditional use permit from Chelan County.
44. Substantial evidence exists that the odor of the cannabis operation on Appellant's property, which originates from the Appellant's property, is easily detected on property surrounding the Appellant's property and is offensive and annoying the neighboring property owners.
45. Substantial evidence exists to prove the Appellant failed to obtain a permit for the now completed fence expansion on the property.
46. Substantial evidence exists that the cannabis production and/or processing operation taking place on Appellant's property is being improperly conducted within the identified open space designation of Tract A of the Oberfelder East Subdivision P2008-012.
47. Substantial evidence exists to prove that because Appellant's have not obtained all required permitting from Chelan County in order to operate a cannabis production and/or processing facility, that this failure to obtain the required permits is declared by Chelan County to be a nuisance.
48. Any Conclusion of Law that is more appropriately a Finding of Fact is hereby incorporated as such by this reference.

#### **CONCLUSIONS OF LAW**

1. The Hearing Examiner has jurisdiction to render a decision in this matter.
2. To date no land use permits have been issued to the subject property. This is contrary to and in violation of Chelan County Code (CCC) 11.100.040(3)(A), 11.100.040(4)(A).
3. Oberfelder Holdings cannabis production and/or processing business operation is contrary to and in violation of CCC 11.100.080.
4. The expansion and construction of the fence measuring 100' x 125' and a 54' x 12' structure used for the cannabis business operation remain on the subject property without issuance of a building permit, are contrary to and in violation of the IBC, section [A]105.1, IBC, section [A] 105.2 (1).
5. The cannabis production and/or processing business being operated within the "Open Space" designation is in violation of Conditions of Approval for Preliminary Plat No. 2008-012 and RCW 58.17.320.
6. Pursuant to CCC 16.02.030, all violations of this title and all applicable titles, statutes, and regulations are hereby declared to be detrimental to public health, safety, and welfare and are hereby declared to be public nuisances. This title declares certain acts to be civil violations and establishes non-penal enforcement procedures and civil penalties. Thus the subject property is contrary to and in violation of CCC 16.02.030.

7. Notice & Order CE 16-0050 was properly issued.
8. The requested sanctions contained in Notice & Order CE 16-0050, are allowable pursuant to Chelan County Code.
9. While non-conforming uses are vested rights, the burden of proof is on the entity asserting the non-conforming use to prove by a preponderance of evidence that the non-conforming use lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance.
10. The Chelan County Code defines a non-conforming use as a use “which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails by reason of such adoption, revision or amendment to conform to the current requirements of the zoning district.” CCC 14.98.1300.
11. Before qualifying as non-conforming, a use must be lawfully established prior to adoption of a zoning ordinance.
12. The Appellant’s use of their property as a cannabis producer and processor has never been lawfully established.
13. The Appellant’s use of their property as a cannabis production and processing facility is not legal because permits required by Chelan County have not been obtained, including a building permit for the structure on the property, and a final permit for the fence expansion.
14. CCC 11.97.030(2) provides: “Marijuana or Cannabis production and processing uses conducted pursuant to chapter 69.50 or 69.51A RCW, and associated structures are hereby declared non-conforming and are each prohibited and not allowed in any zone in unincorporated Chelan County, including Urban Growth areas and fully contained communities, pursuant to chapter 11.04 and shall cease, abate and terminate on or before March 1, 2018. Said uses and associated structures are not eligible for remodeling, alterations, repairs, expansion or intensification.”
15. Pursuant to CCC 11.97.030(2), even if the appellant could establish that their use was a legal non-conforming use (which the Appellant has failed to prove), this code provision provides that any such production or processing uses must terminate on or before March 1, 2018. The Appellant’s continued use as a cannabis producer and processor after March 1, 2018, is a direct violation of CCC 11.97.030(2).
16. Merely receiving licenses from the State of Washington regarding cannabis production and processing, does not mean that the use is lawfully established within Chelan County.
17. CCC 11.97.030(2) is a legally adopted and enforceable provision within the Chelan County Code.
18. Cannabis production is not an agricultural use as defined by Chelan County.
19. Appellant is required to obtain a conditional use permit in order to operate indoor cannabis production and processing facilities on this property.

20. Outdoor cannabis growing activities are prohibited in the AC zoning district. Because the Appellant's property is in the AC zoning district, outdoor growing activities are prohibited on Appellant's property.
21. Appellants are in violation of CCC 11.100.080 which provides that no odor that is detectible beyond the property line of a Marijuana producer or processor in such concentration or with such duration as to cause a public nuisance. The evidence clearly establishes that the odor of Marijuana is easily detectible from off-site properties adjacent to, and near, the Appellant's property.
22. Any Finding of Fact that is more appropriately a Conclusion of Law is hereby incorporated as such by this reference.

### DECISION

Based upon the above Findings of Fact and Conclusions of Law, the Hearing Examiner hereby **AFFIRMS** Notice & Order CE 16-0050 in every respect;

DATED this 24th day of June, 2020.

CHELAN COUNTY HEARING EXAMINER

  
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Andrew L. Kottkamp

**EXCEPT AS PROVIDED BY CHELAN COUNTY CODE 1.24A AND 1.24 B, THE DECISION OF THE HEARING EXAMINER IS FINAL AND CONCLUSIVE UNLESS APPEALED TO THE CHELAN COUNTY SUPERIOR COURT WITHIN TWENTY-ONE (21) DAYS AFTER THE ISSUANCE OF A DECISION AS PROVIDED BY RCW 26.70C,040 AND CHELAN COUNTY CODE 1.61.160.**