Hon. Susan Serko
Department 14

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF PIERCE

KITSAP COUNTY, a political subdivision of the State of Washington,

Plaintiff,

v.

KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE ROES I-XX, inclusive,

Defendants,

and

IN THE MATTER OF NUISANCE AND UNPERMITTED CONDITIONS LOCATED AT

One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton Washington.

Case No.: 10-2-12913-3

TRIAL MEMORANDUM OF DEFENDANT AND COUNTERCLAIMANT KITSAP RIFLE AND REVOLVER CLUB

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Defendant Kitsap Rifle and Revolver Club (the "Club" or "KRRC") hereby submits this trial memorandum setting forth the essential facts of the case and the key legal issues to be decided at trial.

I. INTRODUCTION

At its broadest level, this case arises from the desire of Plaintiff Kitsap County (the "County") to strip the Club of important rights that the County itself created or recognized through the prior words and actions of its Board of Commissioners. The County seeks a court order shutting the Club down because of: (1) perceived safety risks and noisiness associated with its operations; and (2) alleged land use and development permitting violations. Yet the Club is a responsible community service organization with a long track record of safety that has been making noise at its present location for decades (as every gun club does); its land use and site development activity have been consistent with its historic, nonconforming use right acknowledged by the County in 1993; and any issues related to land use or site development were previously resolved in 2009 when the parties negotiated the May 2009 sale to the Club (documented in the "2009 Deed") of the 72 acres of property the Club had historically occupied along Seabeck Highway (the "Property"). Of utmost importance in this case, the May 2009 Deed fully settled any potential code violations and nuisance conditions existing at that time or—at minimum—promised the Club that if it took title to the property it could continue to operate and maintain its existing facilities within its historic eight acres of active use, without requiring the Club to address any of the alleged code violations and nuisance conditions the County now raises in this lawsuit.

Rather than shut the Club down, the Court should dismiss the County's claims for failure of proof and under principles of equitable estoppel, accord and satisfaction (i.e., enforcement of prior settlement), waiver, and laches. The Court should then issue a declaratory judgment stating that: (1) the May 2009 Deed provides a right for the Club to continue without further permits or approvals from the County for any site conditions

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

existing as of May 2009; (2) the County's effort to prove code violations arising from site conditions existing as of May 2009 constitutes a breach of the 2009 Deed; (3) the Club retains a vested nonconforming use right to operate a shooting facility and gun club within the eight acres historically used at the Property; and (4) the County failed to prove any public nuisance or violation of Kitsap County Code associated with the Property.

II. PROCEDURAL BACKGROUND

When the parties entered into the 2009 Deed regarding the sale of the Property to the Club, the County had never cited the Club with a formal notice of violation of any ordinance or a directive to correct any alleged violation, nor had it ever notified the Club of any suspected public nuisance associated with the noisiness or safety of its operations. In fact, two days after signing the 2009 Deed, in which he affirmed the Club's right to maintain and improve its facility and Property within its historic eight acres of active use, Kitsap County Commissioner Josh Brown dismissed the accusations of a local landowner who alleged the Club had unlawfully expanded its nonconforming use. According to Commissioner Brown, the Club's operations were properly confined within "the footprint they have leased with DNR for the past 83 years."

Approximately one year after the County executed the 2009 Deed, the Department of Community Development arrived at the Club unannounced with an abrupt demand to inspect the Club property. When the Club asked the County to fill out an inspection request form as all other government agencies had done, the County refused, then initiated this litigation in September 2010 and immediately sought a preliminary injunction to close down the Club pending resolution of the case.

In its motion for a preliminary injunction, the County alleged the Club posed an imminent threat to public safety. The Court denied the motion because it could not find that the County was "likely to prevail at trial on the questions presented by this case" and because

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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Email: brianc@northwestlaw.com

the County had not proven "the existence of a substantial likelihood of imminent or actual injury[.]"[1]

Having failed to immediately persuade the Court that the Club was unsafe, the County shifted its focus to alleged land use and development permit violations, raising issues about the same site conditions that existed when the County inspected the property in 2009 before negotiating the 2009 Deed. After re-inspecting the property, the County amended its complaint to allege the improper culverting of a stormwater drainage ditch.

In May 2011, prior to the second mediation scheduled by the parties, the County amended its code on legal nonconforming uses and on August 29, 2011, filed a third amended complaint incorporating this new ordinance. The County now seeks to use the amended ordinance to prove the Club lost its vested nonconforming use right to operate its shooting ranges at the property, a right acknowledged by the County Board of Commissioners in writing in 1993.

III. KITSAP COUNTY'S CLAIMS

Kitsap County asserts claims of "Nuisance Per Se," "Statutory Public Nuisance," "Common Law Nuisance," and "Violation of Zoning and Nuisance Ordinances." All of these claims are alleged to arise out of roughly the same set of facts and circumstances involving the Club's historic use and maintenance of its property located at 4900 Seabeck Highway NW, Bremerton, WA (the "Property"). Specifically, Kitsap County alleges that the Club has violated the law by: (1) allowing errant bullets and excessive noise to leave the range; (2) expanding its area of active use beyond the scope of its nonconforming use right; (3) illegally disturbing wetlands, wetland buffers, and other "critical areas"; and (4) operating, maintaining, and improving its Property without obtaining land use permits required by Kitsap County Code. The County asserts it has authority to bring this civil action

[1] Order Den. Mot. For Prelim. Injunction and Governing Use of KRRC Property at 3.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
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seeking injunctive relief for any code violations and common law public nuisance conditions it is able to prove at trial.

The County asks the Court to find: (a) that the Club is a common law public nuisance because it is noisy and unsafe; (b) that the Club has lost its vested nonconforming use right to operate a gun club and shooting range at the Property; and (c) that the Club has committed specific violations of County Code related to the Club's operation, maintenance, and improvement of the Property. As a remedy, the County asks the Court to issue an injunction shutting the Club down indefinitely unless and until the Club takes unspecified steps to abate the alleged safety and noise nuisances and obtain the conditional use permit, shooting range permit, and other unspecified permits necessary to satisfy the County. The County also seeks a "warrant of abatement" to allow the County itself to abate any nuisance or unlawful condition associated with the Club Property and then require the Club to reimburse the County for its cost of doing so.

The County's claims, allegations, and choice of remedies in this lawsuit do not withstand legal and factual scrutiny, and its case should be dismissed with prejudice.

IV. FACTUAL SUMMARY

A. The Club's Historic Use of Its Property and the County's Acknowledgement of the Club's Lawful Nonconforming Use Right

Kitsap Rifle and Revolver Club is a non-profit organization founded by charter on November 11, 1926. For many decades, the Club leased the Property from the Washington Department of Natural Resources ("DNR") for use as a community shooting range for firearm sports and defense training. According to the Club's leases with DNR, the Property consists of approximately 72 acres, including eight acres of "intensive use and occupancy" by the Club, and the remainder serving as a de facto buffer for the Club.

In 1993, while the Club was still leasing the Property from DNR, Kitsap County enacted an ordinance that severely limited or prohibited shooting on private land without a

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

permit. The intent of this ordinance was to draw firearm users off smaller plots of private land and concentrate their activities at recognized shooting ranges where they and the persons around them would be safer and in a controlled shooting environment. The Club, by law, sat on the advisory committee and had input into the drafting of the ordinance.

In conjunction with the promulgation of the ordinance, the County determined the Club to be a lawful nonconforming use, and documented that determination in a letter to the Club. It was understood by the Club and County that the Club would be allowed to continue without the shooting range permit required of newly proposed ranges. For at least the next 17 years the parties acted in reliance on this understanding, yet now the County alleges that the Club must be shut down for failure to obtain a shooting range permit under the 1993 ordinance, asking the Court to provide equitable relief for the violation of an ordinance from which the parties have always treated the Club as exempt because of its historic nonconforming use right.

B. Unsubstantiated Allegations of Errant Bullets from the Club and the Club's Commitment to Safety

In the last several years some of the nearby residents have complained of bullets from the Club striking their properties. Yet the County cannot prove by a preponderance of the evidence that any such alleged bullet came from the Club, as opposed to the many other sources of gun fire in the area. In striking contrast to the controlled shooting environment at the Club, the woods and residential property near the Club are used by non-Club members for unsupervised shooting. Makeshift shooting ranges have been discovered, and the sound of gunfire can be heard with regularity. There are many firearm users in the area who choose, for whatever reason, legally or illegally, not to practice their shooting at the Club.

The Club has placed paramount importance in range and firearm safety and relies on a variety of safety measures that meet or exceed industry standards to ensure bullets do not leave the range and threaten neighboring properties. These measures include the

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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maintenance of numerous safety berms and backstops; extensive, mandatory safety training for all members; supervision by range safety officers; and closed circuit cameras to help ensure that all rules are followed and any violators can be held accountable. Expert testimony at trial will further confirm that the Club's safety measures compare favorably with those of other similar shooting facilities on a local and regional level. The Club's culture of safety and maintenance of its facility is exemplary, making it a preferred training facility for numerous groups and individuals within government law enforcement and the military.

Contrary to the County's protestations regarding imminent threats to the surrounding community, there is no evidence from the entire 84-year history of the Club that anyone has ever made so much as an allegation of a personal injury caused by a bullet leaving the Club.

C. Noise Complaints by a Few Isolated Newcomers

The Club has provided a safe venue for firearms practice for decades. Meanwhile, the surrounding area has steadily grown in population. A few relative newcomers have decided that the noise of gunfire at the Club, however, distant and faint, have become annoying. These witnesses disagree as to when the noise from the Club became annoying. Nevertheless, the County adopts their complaints in this lawsuit.

The County has produced no decibel readings, sound engineering studies, or other empirical data demonstrating that the sounds of gunfire from the Club have an unreasonable or substantial impact on anyone in the community. The County has not designated any expert in sound or noise. Instead, the County appears to rely solely upon the subjective observations of a few isolated landowners who apparently are upset with their decision to purchase rural property near a rifle range.

The Club will offer testimony and evidence confirming the level of noise is well within reasonable and historic levels, along with testimony from neighbors who do not find the noise excessive or bothersome at all. Audio recordings taken by one of the County's

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510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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Email: brianc@northwestlaw.com

most vocal noise complainants will further demonstrate that the distant sounds from the Club are no louder than other noises typically heard in the neighborhood, such as airplanes flying overhead or the sounds of nearby birds and chipmunks.

D. The Club's Exploratory Work in 2005, Abandonment of the Project, and Satisfaction of DNR with the Club's Restoration Effort

The Conflict between the Club and County regarding the Club's use of its Property dates back, at least in part, to 2005, which is when the County alleges the Club committed clearing and grading violations in an area outside the Club's historic eight acres of active use. At that time the County made a site visit in response to a complaint that the Club was clearing vegetation. The Club had, in fact, begun clearing vegetation in the area to explore the possibility of relocating its rifle range to achieve numerous benefits for the community. The Club was very open about its potential project and had already begun corresponding with other government agencies about it. In fact, the Club had obtained a grant for the project based in part on the County's written support. To the Club's surprise, the County informed the Club, for the first time, that its entire facility would need a conditional use permit (meaning the Club would permanently lose its nonconforming use right) if the Club continued with the project. The County clarified, however, that if the Club did not continue the project and kept its activities within its historic eight-acre area of active use it would need no conditional use permit or any other land use permits. The Club weighed its options and decided it was in its best interest to abandon the relocation project, retain its nonconforming use right, and continue within its historic eight acres.

The County never issued any citation to the Club for the exploratory work in 2005, nor did it order the Club to restore the area. Instead, the County relied on the landowner, the Washington DNR, to address any need for restoration. After the Club replanted the cleared area, DNR inspected the Property and was satisfied with the effort. The County now alleges the area requires further restoration.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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E. Conflict Since 2005 Over the Club's Use of Its Property, Leading to the 2009 Deed

Since 2005 there have been accusations and speculation, by both certain individuals within the County and a handful of nearby residents, questioning the legality of the Club's activities on the property it historically leased from DNR and whether the Club had lost its legal, nonconforming use right by expanding or enlarging its area of active use. The Club, however, has not expanded or enlarged its area of active use. The Club has only maintained and improved the same areas of the Property that had been used for gun club and shooting activities since before 1993. This historic eight-acre area of active use was recognized and authorized in the DNR leases as an area of "intensive use and occupancy" and, later, in the 2009 Deed as the Club's "historical eight (8) acres" of "active shooting ranges." All of the Club's maintenance and improvement work within its historic eight acres is consistent with modern standards exemplified by other, similar shooting ranges, and has been intended to improve the Club's service to the community, its safety, and its stewardship of wetlands and other "critical areas" near the Club facility.

Between 2007 and 2009, the County was pursuing a land exchange with DNR, which would include the 72 acres DNR leased to the Club. DNR wanted to divest its land holdings in the area and the County wanted a large tract adjacent to the Club for development into what is now the Newberry Hill Heritage Park. DNR would not give the County the park land unless the County would also take title to the Club Property.

While planning the land deal with DNR, the County held meetings and received public comments as to whether the Club should be allowed to continue on its leased land once the County became its landlord. Public comments were both for and against the Club's continued existence on the Property, though the vast majority were in favor of the Club and its activities. In addition, while planning the land exchange, the County Commissioners received information from County code enforcement officials regarding potential violations

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510 SW Fifth Avenue, Fifth Floor
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of code that may have existed at the Club Property. Indeed, the County was aware, at least in general terms, of virtually every allegation it now levies against the Club in this lawsuit, including the allegation that the Club had expanded and thereby lost its nonconforming use right.

As part of the County's due diligence before taking title to the park land and Club Property from DNR, the County's representatives inspected the Property, considered environmental and other liabilities associated with the Property, and hired an appraiser, who separately inspected the Property. The County did not advise its own appraiser that there were any suspected, potential, or actual code violations or nuisance conditions associated with the property.

The appraisal estimated that if the Property were not maintained as an active shooting range the potential environmental cleanup cost would be $2 to $3 million.[2] To insulate itself from this potentially large liability and still obtain the land it coveted for the Newberry Hill Heritage Park, the County offered to sell the Property to the Club as soon as the County received title from DNR, subject to written terms to be negotiated, including the Club's agreement to indemnify the County for any environmental liability arising out of the Property.

The Club's attorney, Regina Taylor, had direct negotiations with County representatives regarding the written terms of the land sale expressed in the 2009 Deed. She will testify that one of the concerns raised in the negotiations was the Club's ability to continue its current operations and maintain and modernize its then-existing facilities. The County's representative conducting the negotiations, Matt Keough, personally inspected the Property prior to the sale to the Club. He admits in sworn deposition testimony that the

[2] According to the Kitsap County Health Department, which inspected the Property, the Club's practices regarding metals and other hazardous substances exceed EPA's best management practices (BMPs) for shooting ranges. If the Club were permanently shut down, there is a distinct risk that the Property would become subject to the more stringent hazardous substance cleanup requirements applicable to other land uses.

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parties intended as part of the sale to the Club to allow the active shooting areas in use by the Club at the time of the transfer to continue. The parties agreed the Club would still be subject to County review and permitting requirements for any new development outside the historic eight-acre area of active use.

The parties' agreement was memorialized in a document entitled, *Bargain and Sale Deed with Restrictive Covenants* (the "2009 Deed"), executed by the parties on May 13, 2009. When the County executed the deed, it also created a record of public proceedings expressing the County's strong support for the Club and its reasons for conveying title to the Club. Two days after signing the 2009 Deed, County Commissioner Josh Brown stated the County's position that the Club's operations were properly confined within "the footprint they have leased with DNR for the past 83 years."

The 2009 Deed contains a release of certain types of claims against the County, proving it was intended to resolve potential disputes between the parties, rather than reserve them. In exchange, the County affirmatively promised that the Club could continue using, maintaining, and even improving its historic eight acres of active use, without identifying any code violations that needed to be addressed as a condition of the Club's continuation.

The 2009 Deed states, in pertinent part:

> "3. **Grantee shall confine its active shooting range facilities on the property consistent with its historical use of approximately eight (8) acres of active shooting ranges with the balance of the property serving as safety and noise buffer zones**; provided that Grantee may upgrade or improve the property and/or facilities within the historical approximately eight (8) acres consistent with management practices for a modern shooting range. "Modernizing" the facilities may include, but not be limited to: (a) construction of a permanent building or buildings for range office, shop, warehouse, storage, caretaker facilities indoor shooting facilities, and/or classrooms; (b) enlargement of parking facilities; (c) sanitary bathroom facilities; (d) re-orientation of the direction of individual shooting bays or ranges; (e) increasing distances for the rifle shooting range; (f) water system improvements including wells, pump house, water distribution and water storage; (g) noise abatement and public safety additions. **Also, Grantee may**

CHENOWETH LAW GROUP, PC
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> **also apply to Kitsap County for expansion beyond the historical eight (8) acres** for "supporting" facilities for the shooting ranges or additional recreational or shooting facilities, **provided that said expansion is consistent with public safety, and conforms with** the terms and conditions contained in paragraphs 4, 5, 6, 7 and 8 of this Bargain and Sale Deed and **the rules and regulations of Kitsap County for development of private land**. * * *
>
> "4. **Grantee's activities shall also conform to the Firearms and Archery Range (FARR) Program** as found in Chapter 79A.25 RCW. The primary goals of the program are to assist with acquisition, development, and renovation of firearm and archery range facilities **to provide for increased general public access to ranges**. This includes access by a) law enforcement personnel; b) members of the general public with concealed pistol or hunting licenses; and c) those enrolled in firearm or hunter safety education classes. Access by the public to Grantee's property shall be offered at reasonable prices and on a nondiscriminatory basis.
>
> "5. **Grantee agrees to operate the shooting range at all times in a safe and prudent manner and conform its activities to accepted industry standards and practices.**"

(Emphasis added.)

As evident, the agreement resolves issues regarding the Club's nonconforming use rights, site development, and permitting by requiring the Club to continue operating within its historic eight acres, while providing public access. The agreement also gives the Club the express right to "upgrade or improve the property and/or facilities within the historical approximately eight (8) acres," so long as such upgrades and improvements are "consistent with management practices for a modern shooting range."

The agreement requires the Club to seek County approval for "expansion" beyond its historic eight acres and any such expansion must conform to code requirements regarding land development, but those same provisions do not apply to ongoing use and maintenance of the Club's historic eight acres of active use.

The agreement resolves the safety concerns raised by a handful of neighbors by requiring the Club to operate "in a safe and prudent manner and conform its activities to accepted industry standards and practices." The agreement further addresses safety and noise

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

concerns by requiring the Club to maintain the areas outside the historic eight acres as "safety and noise buffer zones," and by requiring that any approved expansion into those areas be "consistent with public safety." Ironically, the County has never alleged that the Club breached any of these safety and noise provisions.

The text of the 2009 Deed, the statements of Commissioner Brown and Mr. Keough, and evidence regarding the circumstances and communications surrounding the negotiation, drafting, and execution of the 2009 Deed all confirm it was intended to clarify the Club's legal and land use status, affirm the Club's right to continue using, maintaining, and improving its Property and facilities as configured, and resolve any issues regarding accusations of land use and permitting violations and nuisance conditions related to conditions existing at the Property at that time.

F. The Club's Reliance on the County's Words and Actions

In reliance on: (1) the written agreements in the deed; (2) the oral and written statements by the County surrounding the transaction; and (3) the County's silence in not stating that it viewed the Club's current facilities and operations as being in violation of any ordinance or constituting any nuisance condition; the Club took title to the Property and gave the County valuable consideration. That consideration included the indemnity, release, public access, and safe operation provisions included in the 2009 Deed. It also included the Club's support for the County's acquisition of the Club Property and park land from DNR, and the Club's foregoing of the opportunity offered by DNR to enter into a long-term lease of 30 years or more for the Property to ensure the Club's continuity, regardless of the County's desires after taking title to the Property. With the Club's support and the 2009 Deed negotiated, the County was able to obtain the heritage park property from DNR without retaining ownership of the Club Property, which DNR required the County to take along with the park land.

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510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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After purchasing the Property, the Club relied further on the 2009 Deed and the County's approval. The Club spent approximately $40,000 on subsequent property improvements, including a drilled water well, septic system, electrical upgrades, improvement to the Club's environmental laboratory, and security fencing. Club members provided hundreds of hours of volunteer labor to complete these projects and to improve and maintain the Property consistent with the Club's high standards.

In 2010, after the transfer of the Property, having induced the Club's reliance, having made the promises in the 2009 Deed, and having obtained the desired park land while divesting itself of title to the Club Property, the County sharply reversed course and filed this lawsuit against the Club.

V. LEGAL ANALYSIS

A. The 2009 Transaction Constitutes a Settlement of Any Disputed Claims.

All of the code violations and nuisance conditions alleged by the County in this lawsuit existed prior to the May 2009 Deed. The 2009 Deed was intended to resolve any potential issues existing between the parties at that time. It provides the terms and conditions upon which the Club was required to continue operating at the Property for the benefit of the community. Its effect was to settle and bar further dispute over the land use, site development, and nuisance issues the County now alleges in this case. The Court should hold the County accountable for its promises, honor the parties' agreement, and give effect to the 2009 Deed by dismissing the County's claims.

"This court interprets settlement agreements in the same way it interprets other contracts." *McGuire v. Bates*, 169 Wash. 2d 185, 188–89, 234 P.3d 205 (2010) (quoting *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wash.2d 411, 424 n. 9, 191 P.3d 866 (2008)). "In doing so, we attempt to determine the intent of the parties by focusing on their objective manifestations as expressed in the agreement." *McGuire*, 169 Wash. at 188

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Facsimile: (503) 221-2182
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(quoting *Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wash. 2d 493, 503, 115 P.3d 262 (2005)).

While the text of the 2009 Deed is the most direct expression of the parties' intentions, the circumstances surrounding its negotiation also show the transaction was intended to settle and resolve potential claims. "[A] trial court may, in interpreting contract language, consider the surrounding circumstances leading to execution of the agreement, including the subject matter of the contract as well as the subsequent conduct of the parties, not for the purpose of contradicting what is in the agreement, but for the purpose of determining the parties' intent." *Berg v. Hudesman*, 115 Wash. 2d 657, 666–67, 801 P.2d 222 (1990).

The text of the 2009 Deed, the admissions of Commissioner Brown and Mr. Keough, and the additional evidence regarding the circumstances and communications surrounding the negotiation, drafting, and execution of the deed in May 2009 all confirm it was intended to resolve any issues regarding accusations regarding land use, permitting violations, and public nuisances related to conditions existing at the Property at that time.

Prior to the 2009 Deed, Kitsap County held public meetings and received comments from some vocal opponents of the Club, who pressed the County Board of Commissioners to take enforcement action and shut the Club down. Considering these comments and the County's desire for the Club to indemnify and release it from potential environmental liability associated with the Property, the Club negotiated written terms intended to foreclose potential claims by the County related to existing conditions at the Club. The County agreed to these terms. In exchange, the County divested itself of title to the Property, obtained the Newberry Hill Heritage Park property, and obtained release and indemnity provisions from the Club. The County even ensured its agreement that the Club could continue operating within its historic eight acres would benefit the local community as a whole by requiring the Club to open its facility to the public.

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Notwithstanding the obvious intent embodied in the language of the 2009 Deed and the circumstances surrounding it, the Club anticipates Kitsap County will present testimony that it never intended this bargained for exchange to constitute a settlement of potential claims. However, "[t]he subjective intent of the parties is generally irrelevant if we can impute an intention corresponding to the reasonable meaning of the actual words used." *McGuire*, 169 Wash. 2d at 189. Accordingly, even if a witness for the County were to testify that the 2009 Deed was never intended to be a settlement, such subjective thoughts cannot supersede the overt manifestations of the parties and the objective text and circumstances of the 2009 Deed.

B. Kitsap County's Claims Are Barred by the Doctrine of Equitable Estoppel.

If the Court decides the 2009 Deed does not require dismissal of the County's equitable claims as a matter of contract law, it should nevertheless dismiss them as a matter of fairness under the doctrine of equitable estoppel. Whereas the Club's contract defense is based more on the objective intent of the 2009 Deed, the Club's equitable estoppel defense looks at all of the conduct of the parties and focuses on the unfairness of allowing the County to reverse its approvals of the Club expressed in and prior to the 2009 Deed and implied by the County's lack of enforcement action, after the Club relied so heavily on those approvals in conferring numerous agreements and benefits on the County and improving its Property, actions that would be to the Club's great detriment if it were shut down.

The elements of estoppel are: "(1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Kramarvcky v. Dep't of Social and Health Services*, 122 Wash. 2d 738, 743, 863 P.2d 535 (1993). For the defense to apply to a government agency, it must also be shown that (1) equitable estoppel is necessary to prevent a manifest injustice, and (2) the exercise of governmental functions will

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not be impaired as a result of the estoppel. *Id.* at 743–44. All of the elements of equitable estoppel are present in this case.

One of the specific contexts in which equitable estoppel applies is where a party seeks to repudiate a transaction after another relies on it, especially where the party had actual or constructive knowledge prior to the transaction of the facts upon which it seeks repudiation:

> "Where a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice."

Bd. of Regents of Univ. of Wash. v. City of Seattle, 108 Wash. 2d 545, 553, 741 P.2d 11 (1987). This case follows this basic fact pattern because the County now seeks to withdraw its approval of the Club and prevent the Club from operating anywhere on its Property, effectively repudiating the 2009 Deed and its prior approvals of the Club. This attempted repudiation is based on facts that were actually or constructively known to the County before the Club entered into the 2009 Deed because the County had full access and inspected the Property when it performed its due diligence and obtained its appraisal.

In 1993 the County acknowledged the Club's nonconforming use right by declaring in a letter to the Club: "this letter is to confirm that [the Club is] . . . considered by Kitsap County to be [a] lawfully established nonconforming use[.]" A nonconforming use right is a vested property right that is protected and not easily lost. *McMilian v. King County*, 161 Wash. App. 581, 591–92, 255 P.3d 739 (2011); *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wash. App. 606, 614, 191 P.3d 928 (2008); *Van Sant v. City of Everett*, 69 Wash. App. 641, 649, 849 P.2d 1276 (1993). Ever since the County documented its approval of the Club as a lawful nonconforming use, the Club has relied on that approval.

In 2005 the County advised the Club that if it abandoned its proposed rifle line relocation project and returned to its area of historic use it would not require a conditional

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

use permit, meaning it would not lose its nonconforming use right. The Club abandoned the project, using its grant money for other improvements, and the County notified it of no further issues. The Club relied on the words and actions of the County and confined its operations within its area of historic use.

In the 2009 Deed the County expressly approved the continuation of the same Club operations and facilities that exist today, without identifying any violation of any County ordinance or any nuisance condition whatsoever. Leading up to the 2009 Deed and shortly thereafter, the County repeatedly communicated its approval of the Club. The Club relied on that approval by entering into the deed and improving its Property after taking title.

The 2009 Deed clearly recognizes the Club's vested nonconforming use right by confirming that the Club can maintain and modernize its facilities within its approximately eight historic acres of active use. This right to maintain and modernize the property and facilities within the Club's historic area is not conditioned on addressing any existing violations or obtaining any permits. The parties were simply documenting their understanding of the Club's nonconforming use right and the County's approval of the Club's nonconforming use.

The 2009 Deed recognizes that the Club's nonconforming use right is limited to the Club's approximately eight acres of active shooting ranges—the same eight acres set aside for "intensive" Club use in its leases with DNR. If the Club wants to expand beyond its historic eight acres, only *then* must it apply to the County for the right to do so. This is what the County had advised the Club in 2005, which led to the Club abandoning its proposed rifle range relocation project.

Overall, the clear intent of the 2009 Deed and the County's prior conduct was to express the County's approval of the Club's operations as a nonconforming use within its historic eight acres. The Club relied on this approval when it purchased the property and agreed in the 2009 Deed to make its activities regularly available to the general public. The

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Club further relied on this approval when it agreed in the 2009 Deed to indemnify the County against any environmental liability associated with the property. The Club again relied on these provisions when it spent approximately $40,000 on subsequent property improvements, including a drilled water well, septic system, electrical upgrades, improvement to the Club's environmental laboratory, and security fencing, not to mention the hundreds of hours of volunteer labor provided by Club members since the 2009 Deed to improve and maintain the property and complete these projects.

Now the County asks this Court to sanction the repudiation of its agreements and approvals of the Club, alleging that the same activities and site conditions in place at the time of the 2009 Deed are an unlawful nuisance, in violation of code, and the Club should be shut down. Doing so would cause immediate and irreparable harm to the Club, its members, and the broader community that depends on it. The County will have prevented the Club from fulfilling its promise under the 2009 Deed to maintain a publicly available shooting area, yet the County would still retain the many other benefits it obtained from the Club, such as the benefit of having divested itself of the Property while obtaining the Club's environmental indemnity agreement. The County's repudiation of its former position would create precisely the type of manifest injustice that equitable estoppel is aimed at preventing.

The Washington Supreme Court emphasizes the importance of applying the doctrine of equitable estoppel to government actions:

> "We ordinarily look to the action of the state to be characterized by a *more scrupulous* regard to justice than belongs to the ordinary person. The state is formed for the purpose of securing for its citizens impartial justice, and it must not be heard to repudiate its solemn agreement, relied on by another to his detriment, nor to perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

Strand v. State, 16 Wash. 2d 107, 118–19, 132 P.2d 1011 (1943) (quoting *State v. Horr*, 165 Minn. 1, 205 N.W. 444 (1925)) (emphasis added).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

In *Strand*, the government sold property to a private purchaser who constructed a duck club and shooting blinds on the property and used it for recreational duck hunting. Years later, the government argued the sale was a mistake and claimed title to the improved land. The Court questioned whether there had actually been a mistake, but held that even if there had been, equitable estoppel would not allow the state to repudiate the sale because it had a full and fair opportunity to investigate the facts before selling the property and the defendant had improved the property in reliance on the sale. *Strand*, 16 Wash. 2d at 119 ("If the commissioner or his subordinates erred in determining the lands as attached, the state should not have the right many years later to come into a court of equity and set aside the acts of its officials to the irreparable injury of the citizens who acted in good faith and relied upon the assumption that the commissioner knew what he was doing").

Just as in *Strand*, the County should be equitably estopped from reversing the position taken before, during, and after its 2009 Deed with the Club—which expressly authorized the Club to continue and modernize its lawfully nonconforming use within its historic eight acres. However, unlike *Strand*, there is absolutely no evidence that the County in this case made any mistake in bargaining for that requirement. The County knew exactly what it was doing, making the need for equitable estoppel in this case even more compelling.

The County has argued that its earlier conduct was entirely of a "proprietary" nature and therefore cannot estop its present "regulatory" action. This argument overlooks the regulatory nature of the County's 1993 acknowledgement of the Club's nonconforming use, its 2005 communications regarding the Club's right to continue without a conditional use permit upon abandonment of its proposed rifle line relocation project, and the numerous agreements in the 2009 Deed regarding permitting and the Club's right to continue within its historic eight acres subject to express operating conditions.

Given the manifest injustice of the County's new position, the County cannot escape equitable estoppel by exploiting any distinction between its proprietary and regulatory

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

actions. *See Finch v. Matthews*, 74 Wash. 2d 161, 175, 443 P.2d 833 (1968) (holding "equitable estoppel will be applied against . . . [a] political entity when acting in its governmental as well as when acting in its proprietary capacity, when necessary to prevent a Manifest injustice and the exercise of its governmental powers will not be impaired thereby" (citing 31 C.J.S. Estoppel § 141 (1964))).

Estoppel will not impair the County's governmental powers because determining the scope of the Club's nonconforming use right and settling disputed potential claims is a normal exercise of a governmental power. In addition, the 2009 Deed documents the parties' legitimate understanding of the Club's nonconforming use rights. Finally, the 2009 Deed preserves and clarifies the County's specific authority to regulate the Club by documenting: (1) that the Club may only maintain and modernize its historic eight acres if it does so "consistent with management practices for a modern shooting range"; (2) that the Club must conform to all current development codes if it wants to expand beyond its historic eight acres; (3) that the Club must operate at all times in a safe and prudent manner; and (4) that the Club must conform its activities to accepted industry standards and practices.

In *Finch*, the government sold some land and received payment of the purchase price and years of property tax payments from the purchaser. *Id.* at 167. After the purchaser spent thousands of dollars improving the land, the government claimed an interest and asserted the original sale was unlawful, unauthorized, and had to be set aside. *Id.* The Court applied equitable estoppel to avoid the manifest injustice that would result from the government's new position. *Id.* at 175. The Court also invoked the concept of unjust enrichment, holding, "the rule against estopping a governmental body should not be used as a device by a municipality to obtain unjust enrichment or dishonest gains at the expense of a citizen." *Id.* at 176.

Likewise in this case, the County is subject to estoppel to prevent the unjust enrichment and manifest injustice associated with its receipt of valuable benefits from the

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Club and its present effort to repudiate its prior approvals and agreements. The Court should dismiss the County's claims under principles of equitable estoppel.

C. Kitsap County Has Waived its Right to Bring an Enforcement Action against the Club.

By entering into the 2009 Deed, Kitsap County waived any right it might have had to bring this action against the Club. "Waiver is based on the words or conduct of the waiving party." *Saunders v. Lloyd's of London*, 113 Wash.2d 330, 339-40, 779 P.2d 249 (1989). Waiver is different from estoppel in that the focus is not on the reliance of the defendant, but on whether the plaintiff "voluntarily and intentionally relinquished a known right" or exhibited conduct that "warrants an inference of the relinquishment of such right." *James E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.*, 118 Wash. App. 12, 18, 74 P.3d 648 (2003) (quoting *Saunders*, 113 Wash. 2d at 339).

Here, the 2009 Deed expressly states that the Club may continue using the historic eight acres and "may upgrade or improve the property and/or facilities" within those eight acres "consistent with management practices for a modern shooting range." The 2009 Deed then provides a non-exclusive list of seven categories of "modernization" that the Club can pursue. Through the express words of the deed, the County chose to voluntarily relinquish the right to bring this enforcement action related to conditions and operations of the Club existing as of May 2009 when the parties executed the 2009 Deed. In the very least, the terms of the 2009 Deed combined with the County's silence as to any land use, permitting, or nuisance issues at the Property warrant the inference that the County intended to waive the very claims it now brings in order to obtain the many benefits and terms it negotiated in the 2009 Deed.

D. The County's Claims are Barred by Laches.

"Laches is an equitable defense and consists of only two elements, both of which are present here: "(1) inexcusable delay and (2) prejudice to the other party from such delay."

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

*State ex rel. Citizens Against Tolls (CAT) v. Murphy***,** 151 Wash. 2d 226, 241, 88 P.3d 375 (2004). "While a court may look to various factors, including similar statutory and rule limitation periods to determine whether there was an inexcusable delay, the main component of laches is prejudice to the other party." *Id.*

In 1993, when the County enacted its shooting range permit ordinance, the County wrote to the Club specifically informing it that it was grandfathered in as a nonconforming use. Never, until this lawsuit, has the County taken the position that the Club needed to apply for a shooting range permit. Now the County alleges that the Club must be shut down because it never obtained such a permit. For the County to remain silent and take the opposite position for so long, waiting until after the Club purchased the Property from the County to raise the issue of a shooting range permit is an inexcusable and prejudicial delay if ever there was one.

With respect to other alleged code violations, the County's delay is not so long, but it remains equally inexcusable and prejudicial. By no later than 2005, the County was aware of accusations of a variety of code violations and nuisances associated with the Club Property. The County inspected the Property and raised issues about relocation of the rifle range, but never noticed a violation or directed the Club to take any further action after the Club abandoned the relocation project. In its due diligence leading up to the 2009 Deed, the County again inspected the Property and had it appraised, but again remained silent regarding code violations and nuisance conditions. The County then negotiated and drafted the 2009 Deed and voted in favor of the transfer of title to the Club in an open public meeting over objections from the Club's local opponents. Now the County alleges code violations and common law nuisances related to conditions at the Club Property that existed prior to the 2009 Deed. Given the Club's reliance on the County's silence and express approval, the County's present suit is highly prejudicial and inequitable. Under the doctrine of laches, the County's inexplicable and unreasonable delay in waiting to raise concerns about site

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

activities until after title transferred to the Club bars its current enforcement action.

The County has taken the position that laches does not apply to government actions, citing an older case from the United States Supreme Court for the proposition. However, more recently, the federal courts have explained that this previous general rule cited by the County is no longer valid and that actions brought by government bodies can sometimes be subject to equitable defenses, including laches, upon a showing of significant harm caused by the government's unreasonable delay in bringing an enforcement action. *Nat'l Labor Relations Bd. v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893–94 (7th Cir. 1990) (recognizing that old U.S. Supreme Court pronouncements regarding unavailability of laches defense against government is no longer an absolute rule).

Nor does RCW 7.48.190 bar a laches defense in this case. That statute states that "no lapse of time can legalize a public nuisance." However, unlike a statute of limitations defense, the Club's laches defense is not premised solely on the passage of time. Instead, it is based on the injury and prejudice to the Club and the inexcusable nature of the County's delay. *See Vance v. City of Seattle*, 18 Wash. App. 418, 425, 569 P.2d 1194 (1977) (noting that laches is an equitable doctrine and its application does not depend solely upon the passage of time but also upon the effects of the delay on the relative positions of the parties). More importantly, even if RCW 7.48.190 were to somehow bar the laches defense against the County's public nuisance claims, the defense would still apply to the other claims the County has leveled at the Club.

E. The Club's Nonconforming Use Right Allows Intensification of the Club's Use, and the Club Has Not Expanded or Moved to an Area of the Property Outside of Its Historic Eight Acres of Active Use.

If the Court finds that the 2009 Deed and the County's words, actions, and silence surrounding it provide no protection to the Club in this lawsuit, the Court's next task will be to judge Kitsap County's claim for termination of the Club's lawful nonconforming use right.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

If the Court were grant this claim, the Club's only way to continue operating an organized shooting facility at the Property would be to proceed through a costly, uncertain, and contentious conditional use permit process in which the County asserts the right to review the Club's entire operation and impose virtually any condition on the Club the County deems "reasonable." In such a proceeding, local landowners who want to destroy the Club will inevitably intervene to oppose the issuance of any permit whatsoever and advocate for conditions so onerous and costly that the Club could never satisfy them.

The County's first argument for termination of the Club's nonconforming use right is that the Club has lost its right because its area of active Club use has expanded or moved since 1993. The County amended its nonconforming use ordinance in May 2011 in an ostensible effort to bolster this claim. Under the amended ordinance, in pertinent part:

> "If an existing nonconforming use or portion thereof, not housed or enclosed within a structure, occupies a portion of a lot or parcel of land on the effective date hereof, the area of such use may not be expanded, nor shall the use or any part thereof, be moved to any other portion of the property not historically used or occupied for such use[.]"

KCC 17.460.020(C). In this case, the testimony and evidence will show that the Club's use of its Property has not expanded or moved to an area of the Property outside the Club's historic eight acres of active use.

The Club anticipates that the County will present testimony that, since 1993, the level of shooting has increased and the Club has made various improvements within its historic eight acres of active use, while maintaining the facility. This evidence would merely show a permissible *intensification* of the nonconforming use, and not an "expansion" prohibited by ordinance.

In evaluating whether a nonconforming use right has been lost, Washington courts distinguish an "intensification" of the use from an "enlargement" or "expansion" of the use. *Keller v. City of Bellingham*, 92 Wash. 2d 726, 600 P.2d 1276 (1979). In *Keller*, for

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

example, the Washington Supreme Court held that the installation of six additional 50-foot long chemical vats at a factory was not an enlargement or expansion of the factory causing it to lose its lawful status, but was instead a permissible "intensification" of the use. As the Washington Supreme Court explained: "Intensification is permissible . . . where the nature and character of the use is unchanged and *substantially* the same facilities are used." *Id.* at 731 (emphasis added). "The test is whether the intensified use is 'different in kind' from the non-conforming use in existence when the zoning ordinance was adopted." *Id.*

In this case, the use of the Club facility today is of the same nature and character as it was in 1993 and prior to that time, and substantially the same facilities are used. The Club has always served its mission (as stated in its 1926 charter) of existing for "Sport and National Defense" by providing and maintaining a safe and organized space for a broad range of meaningful firearms practice. At the very most, the use of the facility may have intensified due to the County's policy of concentrating firearms practice at organized shooting clubs, and the Club's desire to maintain and improve its Property to serve the best interests of the community. The use, however, has not expanded, and there has been no substitution of one fundamentally different *kind* of use for another.

The Club's efforts to maintain and improve shooting areas within its historic eight acres of active use do not constitute a prohibited "expansion." In the 2009 Deed, the parties properly characterized as "modernization" work such as "re-orientation of the direction of individual shooting bays or ranges" and construction of "noise abatement and public safety additions." As long as such work is consistent with management practices for a modern shooting range and conducted within the Club's historic eight acres, the 2009 Deed properly allows it. These terms of the 2009 Deed are consistent with the law set forth in *Keller*, and with the Kitsap County Code, which recognizes that modernization is inherently different from expansion and is within a landowner's nonconforming use right. *See, e.g.*, KCC

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

17.460.050(C) (providing that structures associated with a non-conforming use "may be altered to adapt to new technologies or equipment").

In addition, the County's use of the term "expansion" in the 2009 Deed when referring to potential activities *outside* the Club's historic eight acres of active use, while using the term "modernization" when discussing improvements *inside* those eight acres, provides further confirmation that the Club's efforts to modernize its shooting areas, while maintaining substantially the same facilities it has used for many decades, do not constitute an impermissible expansion of a nonconforming use.

F. The County's Position That the Club Loses Its Nonconforming Use Right if the County Proves a Single Legal Violation Fails on Multiple Grounds.

The County's other argument for termination of the Club's nonconforming use right depends on the County's interpretation of its newly amended nonconforming use ordinance, which provides:

> "Where a lawful use of land exists that is not allowed under current regulations, but was allowed when the use was initially established, that use may be continued so long as it remains otherwise lawful, and shall be deemed a nonconforming use."

KCC 17.460.020. According to the County, this ordinance terminates the Club's nonconforming use right if the County proves so much as a single violation of any law or regulation at the Property.

The Court should reject the County's unreasonable and extreme position because: (1) the County's interpretation is based on its fundamental misunderstanding of the operative term, "use," in the ordinance; and (2) the County's interpretation would violate multiple constitutional doctrines that protect the Club from such an oppressive and abrupt deprivation of property rights and the unreasonable over-reach of the County's police power.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

1. The County Misinterprets Its Amended Nonconforming Use Ordinance.

The County interprets the term "use" in KCC 17.460.020 to refer to any activity at a property, such that the use of a property does not remain "otherwise lawful" if there is so much as a single legal violation, however, trifling. Under the County's interpretation, a landowner loses its nonconforming use right whenever there is any violation of law at a property, however trifling. If the County were correct, every corner store in a residential zone with an unpermitted electrical socket would immediately lose its right to do business. The County's interpretation of its own ordinance is based on an erroneous understanding of the operative term "use."

In the context of a land use ordinance, the term "use" refers to "*the* nature of occupancy, type of activity or character and form of improvements to which land is devoted." KCC 17.110.730 (emphasis added). Under Kitsap County Zoning Code, the definition most closely matching the Club's use of its Property is "recreational facility."[3] Recreational facilities remain lawful uses within Kitsap County. Even if the County could prove some violation of law at the Club Property, that would not render the "use" unlawful so as to terminate the Club's nonconforming use right under KCC 17.460.020.

The County has cited a few Washington cases that supposedly support its interpretation, but the cases simply do not suggest that any unlawful activity at a property already enjoying a nonconforming use right renders the entire *use* of the property unlawful so as to terminate all such rights. In *McMilian v. King County*, for example the court ruled that a land user who is trespassing cannot obtain a nonconforming use right. 161 Wn. App. 581 (2011). The case stands for the basic principle that a nonconforming use must be lawful to become established or vested in the first place, not that a single violation of law will

[3] Kitsap County Zoning Code defines "recreational facility" to mean: "a place designed and equipped for the conduct of sports and leisure-time activities. Examples include athletic fields, batting cages, amusement parks, picnic areas, campgrounds, swimming pools, driving ranges, skating rinks and similar uses." KCC 17.110.647.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

terminate an already-vested right. Here, unlike the trespasser in *McMilian*, there is no question that the Club's use was lawful in 1993 when the County acknowledged the Club's vested nonconforming use right.

Similarly, in *First Pioneer Trading Co. v. Pierce County*, the court found that First Pioneer never carried its burden of establishing a nonconforming use right because it could not prove: (1) "[it] was lawfully using the subject site as a manufacturing site before the Pierce County Code changed" or (2) it had put the property to "continuous use each and every year of the time period in question." 146 Wash.App. 606, 611–12 (2008) ("The quality of evidence necessary to sustain [First Pioneer's] burden of proof has not been met."). *First Pioneer* merely affirms that a nonconforming use right must be lawful at the time it vests or becomes established, and that it must continue without a significant lapse in order for the right to be preserved. *See* KCC 17.460.020.A (treating as permanently abandoned any nonconforming use that ceases for twenty-four months or more). *First Pioneer* says nothing about the present matter, where the County cannot dispute that the Club's lawful nonconforming use right vested by no later than 1993, that the County express acknowledgement at the time. There is also no issue here regarding continuity because the Club has never abandoned its historic eight acres of active use, and certainty has not abandoned that area for twenty-four months.

Even if the County could prove some violation of law at the Property, the Club's "use" itself would not have ceased to be "otherwise lawful" within the meaning of KCC 17.460.020. The County's position that a single violation of any law or ordinance results in the permanent termination of a nonconforming use right relies on an unreasonable interpretation of its own ordinance, and must be rejected.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

2. The County's Interpretation of Its Amended Nonconforming Use Ordinance Is Unconstitutional.

The Club's response to *Kitsap County's Motions in Limine to Bar KRRC's Counterclaims and Affirmative Defense of Offset* ("KC's Motion in Limine") discusses the unconstitutionality of the County's erroneous interpretation of its newly amended nonconforming use ordinance. The Club challenges the constitutionality of the County's interpretation on the grounds that it violates substantive due process and represents an unreasonable exercise of the County's police power. The Club also raises issues regarding procedural due process and unconstitutional vagueness. The Club hereby incorporates into this trial memo the points and authorities raised in its response to the County's motion in limine. Even if the County were otherwise correct in its application and interpretation of its newly amended nonconforming use ordinance to the Club, the Club would not lose its nonconforming use right because the County's position would be unconstitutional.

G. The Club Did Not Illegally Damage or Disturb Wetlands, Wetland Buffers, and Other Protected "Critical Areas."

The County alleges that the Club created nuisance conditions on the Property by violating the County's current Critical Areas ordinance set forth at Title 19 of the Kitsap County Code. As discussed above, the County's allegations arising from conditions on the Property existing at the time of the 2009 Deed must be dismissed on multiple grounds. Moreover, the County's "critical areas" allegations are based on flawed determinations as to the extent, location, and quality of wetlands, wetland buffers, and historic Club activities. At trial, the parties will present conflicting expert testimony regarding the alleged wetland violations. As the Club's experts will explain, the County's conclusions are fraught with error and do not comply with established regulations and rules governing wetland determinations.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

The Club will also present documentation and other evidence from the State of Washington Department of Ecology ("Ecology") and the U.S Army Corps of Engineers ("Corps") who have regulatory authority over wetlands and wetland buffers and have conducted their own independent investigation of the alleged wetland issues at the Property. These agencies agree with the conclusions of the Club's experts and are entitled to special deference from the court. *See generally Airport Communities Coalition v. Graves,* 280 F. Supp. 2d 1207, 1225 (W.D. Wash. 2003) (holding U.S. Army Corps of Engineers determinations of wetland impacts are entitled to special deference); *United States v. Bailey,* 516 F. Supp. 2d 998, 1012–13 (D. Minn. 2007) (holding methods for wetland determinations used by U.S. Army Corps of Engineers are entitled to deference).

Accordingly, the alleged violations of County Code involving wetlands and wetland buffers simply could not have occurred because the activities at issue took place outside of the very limited areas determined to be protected wetlands and wetland buffers according to the Club's experts, Ecology, and the Corps.

Moreover, the County alleges critical areas violations under an ordinance enacted in 1998 as Ordinance 217-1998. This ordinance, enacted after the County acknowledged the Club's nonconforming use right in 1993, cannot abridge the Club's right to continue using, maintaining, and even improving areas of historic use within wetland buffers under the doctrine of vested rights. *See McMilian*, 161 Wn. App. 581, 592–93 (2011); *Weyerhaeuser v. Pierce County*, 95 Wn. App. 883, 891, 976 P.2d 1279 (1999) (vesting fixes the "rules that will govern the land development regardless of later changes in zoning or other land use regulations."). The Club's wetland expert will further explain how applicable wetland rules and standards recognize such vesting by excluding from buffers any areas whose natural ecological integrity was already "interrupted" by human use prior to the creation of those buffers as legally protected areas.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

With the exception of the Club's activities in exploring the potential for relocating its primary rifle line, the County's allegations of critical areas violations relate to areas within the Club's historic eight acres of active use, and are therefore subject to its vested nonconforming use right. All of the changes made within this eight-acre area have improved both safety and environmental conditions at the Club, such as by allowing safer and cleaner storm water drainage, improved berms and backstops for capturing projectiles, improved recovery of recyclable materials, and improved access for disabled shooters.

It bears emphasis that even if the Court finds that one or more of the Club's efforts to maintain its Property were in violation of County Code, it does not follow that the Club should permanently lose its entire nonconforming use right, especially since the County has testified that any potential violations can be corrected via after-the-fact permits.

H. The Club's Culverting of Its Drainage Ditch Was an Allowed Act of Maintenance.

The violation alleged by the County in connection with the Club's work of culverting a man-made stormwater drainage ditch constitutes maintenance allowed by County Code. The County defines "maintenance" to mean:

> "activities conducted on currently serviceable structures, facilities, and equipment that involve no expansion or use beyond that previously existing and result in no significant adverse hydrologic impact. It includes those usual activities taken to prevent a decline, lapse, or cessation in the use of structures and systems. Those usual activities may include replacement of dysfunctional facilities … as long as the functioning characteristics of the original structure are not changed."

KCC 12.08.010 (39). The Club culverted a man-made ditch that for many years had conducted stormwater across the primary rifle range. This work constitutes the maintenance of "storm water facilities," as defined in KCC 12.08.010(71). Such maintenance does not require a site development permit. KCC 12.10.030 (omitting maintenance from the list of actions triggering a permit).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

I. The Club's Facility Does Not Pose a Risk of Harm to Neighboring Property.

Kitsap County alleges the Club's facility is a common law public nuisance because it poses a substantial and unreasonable risk of harm to neighboring properties. The County then seeks a permanent injunction shutting the Club down entirely, in order to protect the public from the supposed threat of errant bullets allegedly leaving the range. It is "incumbent upon [the] one who seeks relief by preliminary or permanent injunction to show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right." *Isthmian SS Co. v. Nat'l Marine Engn'r Beneficial Assoc.*, 41 Wash. 2d 106, 117, 247 P.2d 549 (1952); *accord San Juan County v. No New Gas Tax*, 160 Wash. 2d 141, 153, 157 P.3d 831, 837 (2007) (setting forth standard for granting injunctive relief). "Furthermore, the acts complained of must establish an actual and substantial injury or an affirmative prospect thereof to the complainant." *Isthmian SS*, 41 Wash. 2d at 117; *accord No New Gas Tax*, 160 Wash. 2d at 153. "The failure to establish any of these criteria requires the denial of injunctive relief." *No New Gas Tax*, 160 Wash. 2d at 153.

In this case, Kitsap County cannot show that the Club's facility poses any safety risk, let alone the type of immediate threat of substantial harm needed to justify an injunction. On the contrary, the evidence and testimony will demonstrate that the Club has always placed paramount importance in range safety. To this end, the Club has installed numerous safety berms, requires all members to undergo safety training, and employs range safety officers and closed circuit cameras to help ensure that all rules are followed. The Club will present evidence and testimony of expert witnesses that its facility is as safe or safer than many other ranges in the Pacific Northwest, including the range used by Kitsap County itself for training of its own sheriff's department.

Kitsap County will offer testimony from a handful of residents of neighborhoods near the Club who claim to have seen or heard a few bullets entering areas outside the Club property over the years. However, as discussed in the Club's motions in limine, none of

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

these neighbors have any special training or education in ballistics and they are simply not competent to testify as to the source of the supposed errant bullets. Meanwhile, the "experts" retained by Kitsap County to develop opinions regarding errant bullets are unable to testify with any reasonable degree of scientific or professional certainty that the alleged bullets came from the Club as opposed to the many other locations in the area where firearms are used.

One of the County's "experts," Roy Ruel, will also attempt to offer his opinion that the Club facility is unsafe, despite the fact that he committed to this opinion and testified to it before he had ever visited the facility, cannot cite any industry standards or guidelines on range safety he used in reaching his opinion, and was unable to make any comparisons between the level of safety at the Club's facility as compared to other shooting ranges. This speculative opinion, if admissible at all, is completely lacking any basis in sound scientific principals or methodologies and is readily contradicted by hard evidence and the testimony of the Club's own well-qualified range design and safety experts.

Moreover, the testimony and evidence will reveal other likely sources of any errant bullet entering a nearby property. In a very recent similar case, the Indiana Court of Appeals affirmed the denial of an injunction against a gun club, notwithstanding testimony by neighbors of bullets landing on their property, where there was evidence that the wooded area near the range in question was used by others for shooting and could be the actual source of the errant rounds. *Woodsmall v. Lost Creek Townsend Conservation Club, Inc.*, 933 N.E.2d 899 (Ind. Ct. App. 2010). The court in *Woodsmall* explained that an injunction would not be issued because, among other things, the evidence did not "definitively establish" that the gun club was the source of the alleged bullets. *Id.* at 903.

In this case, the testimony will prove that individuals not associated with the Club regularly discharge firearms in the nearby wooded areas outside the Club property. In fact, Club members have discovered numerous makeshift shooting ranges in the woods near the

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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Facsimile: (503) 221-2182
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Club property and the ground littered with hundreds of spent cartridges. Unlike the Club's range, these makeshift ranges discovered on neighboring properties contain no backstops to capture bullets. This evidence also shows it is much more likely that any errant rounds allegedly observed by the County's witnesses came from shooters in the woods outside the Club, rather than from the Club's well-supervised and maintained firing ranges. In addition, with respect to the County's evidence of errant bullets prior to 2004, another likely source exists because until then the United States Navy at Camp Wesley-Harris operated several shooting ranges directly east of and adjacent to the Club property.

The evidence shows the makeshift range on adjacent property, other unsupervised shooting in the nearby woods, and the former ranges at Camp Wesley-Harris are the most likely source of any bullets allegedly found by The County's witnesses. The County's limited evidence and dubious "expert" testimony is unpersuasive, in dispute, and insufficient to meet the high standard for issuance of an injunction.

Moreover, even if there were a remote chance of bullets leaving the Club Property, that would still not be grounds for finding a nuisance or granting an injunction. The Michigan Supreme Court considered this question and held that the possibility of errant bullets leaving an outdoor shooting range and killing or injuring someone is insufficient grounds for an injunction. The court explained:

> "The fact that baseballs may be hit out of parks, that golfers may hook or slice out of bounds, that motorists may collide with pedestrians or other motorists (an automobile is considered 'a dangerous instrumentality') does not render such uses nuisances, subject to being enjoined."

Smith v. Western Wayne County Conservation Ass'n, 158 N.W.2d 463, 472 (Mich. 1968) (refusing to issue injunction against gun club notwithstanding testimony of neighbors that errant bullet struck their house); *accord Lehman v. Windler Rifle and Pistol Club*, 44 Pa. D & C. 3d 243, 247, 1986 WL 20804 (Pa. Com. Pl. April 9, 1986) (testimony that neighbors

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510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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heard bullets "whizzing by them" and that bullets were found "embedded in their barn" was insufficient to support injunction against gun club).

The court in *Smith* further explained that there was no history of any accidental shootings at the range in question in all its years in operation, indicating that "chances of an accidental shooting are remote, largely speculative and conjectural, and completely insufficient to establish a nuisance in fact." *Smith*, 158 N.W.2d at 471. More recently, the Indiana Court of Appeals in *Woodmsall* held that a shooting range did not constitute a nuisance even though it was theoretically possible for bullets to leave the property and neighbors testified about bullets landing on their property. 933 N.E.2d 899.

The County cannot meaningfully distinguish these instructive cases. During the nearly 85 years of the Club operating shooting ranges, there has not been so much as a single allegation of personal injury from a bullet leaving the Club. Thus, the evidence and testimony cannot establish that the Club's normal shooting activities constitute a nuisance or otherwise pose the type of serious, substantial, and unreasonable risk of harm that is required to enjoin the Club's entire operation as a public nuisance.

J. The Sounds Coming from the Club Are Not an Actionable Public Nuisance.

Kitsap County's evidence of excessive levels of noise coming from the Club's range is even more problematic. Specifically, there are no decibel readings, sound engineering studies, or other empirical data demonstrating that the sounds of gunfire from the Club shooting range are unreasonable. In addition, Kitsap County has not designated any expert in sound or noise. Instead, it appears that Kitsap County will rely solely upon the subjective observations of a small handful of neighbors who apparently are upset with their decision to purchase rural property near a rifle range.

However, as discussed in the Club's motions in limine, such subjective testimony, unsupported by quantifiable data concerning noise levels, cannot give rise to an actionable nuisance or support Kitsap County's request for an injunction. In addition, the Club will

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510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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offer testimony and evidence confirming the level of noise is well within reasonable and historic levels. This will include testimony from other neighbors who do not find the level of noise to be excessive or bothersome and audio recordings demonstrating that the sounds from the shooting range are no louder than other noises typically heard in a rural neighborhood.

K. Any Relief Granted Must Balance the Competing Interests of the Parties and Be Narrowly Tailored to Address Specific Findings of Unreasonable Risk of Harm.

As discussed above, the evidence and testimony will prove that none of Kitsap County's allegations have any merit, let alone support the "extraordinary" remedy of an injunction. *Venegas v. United Farm Workers Union*, 15 Wash. App. 858, 860, 552 P.2d 210, 212 (1976). ("Injunction is an extraordinary remedy and discretionary remedy to be granted upon the circumstances of each case.") However, if the Court does find in favor of the County on some of its claims, it does not mean that an injunction should automatically follow.

First, in determining whether to issue an injunction, courts look only to current violations and the likelihood of future harm and not past events. *Braam v. State*, 150 Wash. 2d 689, 708-09, 81 P.3d 851, 861-62 (2003). Accordingly, only the threat of future harm or ongoing violations can support injunctive relief and the Court should not consider allegations of past violations or conduct in deciding whether to grant relief.

Next, the Court will have to determine whether the ongoing violations or threat of future harm is significant enough to warrant an injunction. *San Juan County v. No New Gas Tax*, 160 Wash. 2d 141, 153, 157 P.3d 831, 837 (2007) (setting forth standard for granting injunctive relief). To this end, the court must also consider various factors, including:

> "(a) the character of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if any, in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interest of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment."

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Hoff v. Birch Boy Real Estate, Inc., 22 Wash. App. 70, 75, 587 P.2d 1087, 1091 (1978).

These factors weigh against granting broad injunctive relief even if the Court finds ongoing violations or significant threat of future harm. For instance, the County's inexplicable delay in bringing this enforcement action, when it knew of the same accusations of code violations against the Club since at least 2005, indicates the County felt whatever was occurring at the facility did not pose a serious or immediate threat to the public. In addition, the Club has not engaged in "misconduct" because not only did the County acquiesce in the Club's modernization of the range, it expressly allowed it under the 2009 Deed.

More importantly, the court must balance the harm to the Club with the interests of the public. Under this balancing of the equities, Washington courts have denied injunctive relief where the burdens on the defendant in strictly complying with the restrictions on use of property outweigh the harm caused by the non-compliance. For example, it was proper to deny an injunction that would force a property owner to remove a building that was out of compliance with a subdivision's covenants and restrictions where the burden on the property owner would by high and the harm to the other residents of the subdivision was minor. *Hoff*, 22 Wash. App. at 76; *see also Hanson v. Estell*, 100 Wash. App. 281, 289-90, 997 P.2d 426, 451 (2000) (refusing to grant injunction to require removal of building encroaching one foot onto another's property where burden of removing building substantially outweighed harm to neighboring property caused by encroachment).

In another case, the Washington Court of Appeals held that a trial court erred by not vacating an injunction requiring landowners to obtain wetland permits before performing work to abate nuisance conditions, where the application had been denied and forcing strict compliance would work an extreme hardship on the landowners. *Anderson v. Griffen*, 148 Wash. App. 1035, 2009 WL 297444, *2 (2009). In that case, the defendants were found by the trial court to have altered the natural flow of water on their property, thereby causing

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damage to a neighboring property. *Id*. at *1. The trial court issued an injunction requiring the defendants to restore the natural flow of water, but only after obtaining the necessary permits. *Id.* After the permitting authority denied their permit application, the defendants requested the injunction be vacated, but the trial court denied that request. *Id.* After balancing the equities involved, the Court of Appeals reversed and ordered the injunction lifted. As the Court of Appeals explained:

> "It is manifestly unreasonable to continue the prospective application of an injunction where full compliance is, if not impossible, highly improbable, and the associated costs have become wildly disproportionate to the harm the court seeks to remedy, leading to undue hardship to the party subject to the injunction."

Id. at *2.

In addition, should this Court find in favor of Kitsap County on any of its claims and the circumstances and balancing of the equities justify granting an injunction, the relief granted must be narrowly tailored and limited to what is actually necessary to abate the alleged nuisance activity.

In determining the scope of an injunction to abate a nuisance arising from an otherwise lawful business, the Washington courts have held that an outright permanent injunction of all activities is improper. *Chambers v. City of Mount Vernon*, 11 Wash. App. 357, 361, 522 P.2d 1184, 1187 (1974). Instead, "[i]njunctions must be tailored to remedy the specific harms shown rather than enjoin all possible breaches of the law." *Kitsap County v. Kev, Inc.*, 106 Wash. 2d 135, 143, 720 P.2d 818, 823 (1986). In *Chambers*, for example, the Court of Appeals held the trial court erred in issuing a complete injunction against "any quarry operation" when the specific alleged nuisance conditions at issue (excess dust, vibrations, and "extraordinary noise") could be remedied without a complete shutdown of the quarry's operations. *Chambers*, 11 Wash. App. at 361.

Courts have also applied this principal in cases involving shooting ranges. For example, the Ohio Court of Appeals reversed the trial court's order enjoining any shooting at

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a rifle club after neighbors brought a nuisance action alleging excessive noise. *Christensen v. Hilltop Sportsman Club, Inc*., 573 N.E.2d 1183 (Ohio App. 1990). In addition to finding a lack of evidence supporting a claim of nuisance per se, the Court of Appeals also explained that to the extent there may have been a "qualified nuisance," the trial court still erred in completely banning shooting altogether which was "far in excess of what was necessary to protect the appellees' reasonable enjoyment of the property." 573 N.E.2d at 1186. Instead, the trial court should have restricted the activity "no more than is required to eliminate the nuisance." *Id.* (citing 5 POWELL, REAL PROPERTY 64-49 (1985)).

In this case, the Court must similarly avoid granting any relief that would result in a complete shut down of the Club's operations as requested by the County. To the extent the Court finds any actionable nuisance with a significant threat of future harm to warrant an injunction, any relief must be narrowly tailored to what is necessary to abate the particular harmful conditions found.

L. The Club's Counterclaims Should Prevail, as Detailed Further in the Club's Response in Opposition to the County's Supplemental Motion in Limine.

Kitsap County's Motions in Limine to Bar KRRC's Counterclaims and Affirmative Defense of Offset ("KC's Motion in Limine"), filed on September 13, 2011, seeks dismissal, on legal grounds, of the new counterclaims and affirmative defense alleged by the Club on September 13, 2011, in response to the County's third amended complaint, filed on August 29, 2011. According to the County, these allegations must be dismissed from the case prior to trial. The Club hereby incorporates into this trial memorandum its response in opposition to KC's Motion in Limine.

VI. CONCLUSION

In conclusion, trial of this case will reveal the bizarre history of the County's conduct towards the Club, and the many ways in which the County's present allegations are starkly contradictory to its past conduct, statements, determinations, and agreements. It will reveal

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Facsimile: (503) 221-2182
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the injustice in the County's goal of shutting down the Club and terminating its vested nonconforming use right. It will reveal the weakness and lack of evidence supporting the County's claims. It will show the Club to be a safe gun club devoted to serving the public interest, stewarding the environment around it, and preserving the Club's historic continuity and tradition of responsibly serving and instructing its membership and the community regarding the safe use of firearms for sport and defense. At the conclusion of trial, the Club requests that the Court dismiss the County's claims and find that the County's prosecution of this action has been in breach of the 2009 Deed, which is a fair, just, and equitable outcome under the facts and law of this case.

DATED this 27th day of September, 2011.

CHENOWETH LAW GROUP, P.C.

/s/ Brian D. Chenoweth
Brian D. Chenoweth, WSBA No. 25877
Of Attorneys for Defendant
510 SW Fifth Ave., Fifth Floor
Portland, Oregon 97204
(503) 221-7958

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com