NO. 43076-2-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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

Respondent,

vs.

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

Appellants,

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

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

KITSAP COUNTY'S ANSWER TO AMICUS BRIEF OF KITSAP ALLIANCE OF PROPERTY OWNERS

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I. INTRODUCTION

Amicus curiae Kitsap Alliance of Property Owners surfaced late in this appeal and KAPO's brief addresses an issue first broached by KRRC in its reply brief: Substantive due process. KAPO paints Kitsap County's action against KRRC as an attack on real property rights generally, and nonconforming land use rights in particular. KAPO has advocated in the name of real property owners in our community and has been a litigant with Kitsap County. See e.g. *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd.*, 160 Wn. App. 250, 255 P.3d 696 (Div. 2 2011), *review denied*, 171 Wn.2d 1030 (2011), *cert. denied*, 132 S.Ct. 1792 (2012). Unfortunately, KAPO misconstrues the trial court's verdict as equivalent to a regulatory action devoid of protections for the land owner, rather than as an enforcement action sounding in both the local code and the common law with application of safeguards built into our state's jurisprudence on nonconforming land use.

II. COUNTERSTATEMENT OF KAPO's ISSUES

1. May an amicus curiae raise an issue on appeal that has not been the subject of prior briefing or argument at the trial court level and has not previously been raised on appeal, even where the issue is framed as constitutional in nature?

2. If so, then did the Superior Court deny substantive due

process to landowner Kitsap Rifle and Revolver Club ("KRRC" or "Club") when the court granted declaratory judgment that dramatic changes in use, operation and development of KRRC's real property and illegal and unpermitted land uses and activities on that property each acted to terminate its legal nonconforming land use as a shooting range?

III. KAPO's STATEMENT OF THE CASE

KAPO has adopted without reservation the statement of the case offered by KRRC.[1] KAPO's amicus brief is silent on the subject of public nuisance, so this adoption presents a trial without the pressing issues of public noise and public safety nuisances.

IV. ARGUMENT

KAPO asserts that the trial court's verdict: (1) interpreted the Kitsap County Code so as to violate the federal constitution; (2) violated the substantive due process rights of the landowner; and (3) imposed an unduly oppressive remedy. All are aspects of the overarching claim that the verdict violated substantive due process. KAPO's brief raises issues that were not raised at either the trial court or the appellate court level.

KAPO's brief is silent on the subjects of public nuisance and the trial court's application of the common law in its nonconforming land use conclusions. Nor does KAPO acknowledge the court's power to render

[1] Brief of *Amicus Curiae* Kitsap Alliance of Property Owners ("KAPO Brief") at 3.

declaratory judgments and enter resulting orders.[2] KAPO does not owe us an analysis of these issues, but their absence invites analysis in a vacuum.

A. KAPO MAY NOT NOW RAISE THE ISSUE OF SUBSTANTIVE DUE PROCESS.

KAPO is the first to raise substantive due process as a ground for reversal in this appeal. In KRRC's appellate briefing, the Club first mentioned substantive due process in its reply brief while discussing what its opening brief is said to have argued:

> The trial court concluded the Club unlawfully expanded, changed, and enlarged its use, in violation of Kitsap County Code and common law governing nonconforming uses. ***The Club's opening brief argues*** the Club did none of those things, and ***that any change in the Club over the years was*** part of the natural intensification of the use, the result of the County's own policies, and ***permitted as a matter of substantive due process***. Brief at 26-40.

Amended Reply Brief of Kitsap Rifle and Revolver Club ("Reply"), at 35 (emphasis added). In fact, the phrase "due process" appears nowhere in the Club's opening brief. Moreover, KRRC's opening brief did not assign error to the trial court's decision to not adopt KRRC's proposed conclusion of law on the subject, which provided:

> 9. Substantive due process prohibits the County's new nonconforming use ordinance, KCC 17.460.020, from divesting the Club of its lawful nonconforming land use status based on the allegations at issue.

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[2] The phrase "declaratory judgment" appears nowhere in KAPO's brief.

> a. The harm to the Club would be unduly oppressive and grossly disproportionate to the alleged harm sought to be avoided by application of the new ordinance.
>
> b. There are much less oppressive means available to remedy the alleged harm.
>
> c. The Club could not anticipate that any minor violation proven by the County in this action would result in the Club's complete loss of its historical nonconforming use right to continue using its property as a gun club and shooting facility.

KRRC's Proposed Findings of Fact and Conclusions of Law (Reply, Appendix 26) at 21 (CP 4047). Neither KRRC's opening brief nor its reply brief even mention this proposed conclusion, and neither brief argues the specific contentions found therein. Now, KAPO presents an amicus brief that appears designed to address this exact issue.

In a similar vein, KAPO is the first to raise the issue of constitutionality of the County's nonconforming land use code, chapter 17.460 Kitsap County Code. KRRC assigned no error to the trial court's conclusion that KRRC had not proven this code or its enacting ordinance unconstitutional.[3] Now, KAPO claims that the trial court, at minimum, rendered an unconstitutional interpretation of chapter 17.460 KCC, based on substantial due process.

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[3] See Findings of Fact, Conclusions of Law and Orders (CP 4052 – 4092; attached as Appendix 1 to Respondent's Brief), at Conclusion No. 35. Hereafter, "FOF", "COL" or "Order" each refers to numbered paragraph(s) of the trial court's judgment.

KAPO cannot save KRRC from its failure to assign error to either the trial court's decision to not adopt KRRC's proposed conclusion no. 9 or the court's supposed violation of substantive due process rights. KRRC did not raise those issues and they are therefore waived. See, e.g., *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) ("This court does not consider issues raised for the first time in a reply brief."); *In re Disciplinary Proceeding Against Kennedy*, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) ("Points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits."). See also *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004), abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (holding that inadequate argument or only passing treatment does not merit review).

Moreover, courts generally do not consider issues, even constitutional ones, raised solely by amicus. See, e.g., *State v. Hirschfelder*, 170 Wn.2d 536 552, 242 P.3d 876 (2010) (amicus raised article I, section 7 right to privacy), (citing *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988) (courts need not reach issues raised only by amici)); *State v. Jorden*, 160 Wn.2d 121, 128 n. 5, 156 P.3d 893 (2007) (court is "not bound to consider argument raised only by amici") (citation omitted); *State v. Clarke*, 156 Wn.2d 880, 894, 134 P.3d 188

(2006) (amicus raised article I, section 21 protection of right to jury trial, to which court wrote "this court does not consider arguments raised first and only by an amicus") (citing *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993)).

The County would note that its respondent's brief addressed due process in citing to recent nonconforming use case authority. Respondent's Brief, at 51 (citing *King County, Dept. of Development and Environmental Services v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013)).

B. THE COURT DID NOT PERFORM AN UNCONSTITUTIONAL CONSTRUCTION OF COUNTY CODE.

KAPO asserts the trial court interpreted the Kitsap County Code "to provide an implied remedy of termination" of KRRC's nonconforming use rights. KAPO Brief at 4. KAPO correctly cites *Anderson v. Morris*, 87 Wn.2d 706, 558 P.2d 155 (1976), for the proposition that "[w]here a statute is susceptible to more than one interpretation, it is [the court's] duty to adopt a construction sustaining its constitutionality if at all possible." *Anderson*, 87 Wn.2d at 716 (citing cases). The *Anderson* court further held that "if alternative interpretations are possible, the one that best advances the overall legislative purpose should be adopted. *Anderson*, 87 Wn.2d at 716 (citing *Weyerhaeuser v. Department of*

Ecology, 86 Wn.2d 310, 321, 545 P.2d 5 (1976)).[4] However, KAPO does not explain how the trial court effected an unconstitutional interpretation, nor does KAPO address the purpose of title 17 Kitsap County Code:

> to provide for predictable, judicious, efficient, timely, and reasonable administration respecting due process set forth in this title and other applicable laws; and to protect and promote the public health, safety and general welfare.

KCC 17.100.020.

KAPO all but ignores the place of the Uniform Declaratory Judgments Act, chapter 7.24 RCW, in the trial court's judgment. In its public nuisance conclusions, the trial court noted that under Title 17 KCC, "'in all zones ... no use shall produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses.'" COL 11 (quoting KCC 17.455.110). This provision colors any interpretation of the Code's provision for nonconforming uses of land, which provides in pertinent part:

> 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.

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[4] The *Anderson* case concerned challenge to a state agency's implementation of a federal-state aid program, framed as an action for declaratory judgment that the agency's regulations were invalid as inconsistent with federal regulations. *Anderson*, 87 Wn.2d at 707-08. The Court found the state regulations invalid, applying the Supremacy Clause. Id, at 715-16.

KCC 17.460.020. Thus, it is unclear how the Court's declaratory judgment[5] resulted from an unconstitutional construction. To the contrary, as a declaratory judgment, the court's land use judgment stands as a declaration of rights and legal status under statute or ordinance. RCW 7.24.020. The trial court did not so much imply a remedy from the Kitsap County Code as it declared "rights, status and other legal relations" with the "force and effect of a final judgment". RCW 7.24.010.

C. KAPO MISAPPREHENDS THE COUNTY'S DECLARATORY JUDGMENT ACTION FOR A REGULATORY ACTION.

KAPO cites the regulatory takings case of *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), in support of its substantive due process contention. KAPO Brief at 7. Of course, there has been no claim of a regulatory taking at the trial court or appellate level in this action.

Orion does hold that land use regulations may be judged under the three-part test identified by KAPO and the case discusses the similarity of the takings and substantive due process tests:

> Under the classic, 3–pronged, substantive due process test of reasonableness, a police power action must be reasonably necessary to serve a legitimate state interest. *Goldblatt v. Hempstead*, 369 U.S. 590, 594–95, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962); *Lawton v. Steele*, 152 U.S.

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[5] The trial court granted declaratory judgment "that the activities and expansion of uses at the Property has terminated the legal nonconforming use status of the Property as a shooting range by operation of KCC Chapter 17.460 and by operation of Washington common law regarding nonconforming uses . . ." Order 1.

> 133, 137, 14 S.Ct. 499, 38 L.Ed. 385 (1894); *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986); *Cougar Business Owners Ass'n v. State*, supra, 97 Wn.2d at 476, 647 P.2d 481. A regulatory taking also hinges on whether the challenged regulation is "reasonably necessary to the effectuation of a substantial public purpose," *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) or "'does not substantially advance legitimate state interests ...'" *Keystone Coal Ass'n*, 480 U.S. at ——, 107 S.Ct. at 1242, 94 L.Ed.2d at 488 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)). Likewise, little difference seems to exist between the substantive due process requirement that police power actions not be overly oppressive on an individual property owner, *Goldblatt*, 369 U.S. at 594–95, 82 S.Ct. at 990; *West Main Assocs.*, 106 Wn.2d at 52, 720 P.2d 782, and hinging a taking on whether a regulation has gone "too far", causing the property owner to suffer an economic deprivation significant enough to outweigh the public interest. *Keystone Coal Ass'n*, 480 U.S. at ——, 107 S.Ct. at 1246, 94 L.Ed.2d at 493; *Granat*, 99 Wn.2d at 569–70, 663 P.2d 830; *Maple Leaf Investors*, 88 Wn.2d at 734, 565 P.2d 1162.

Orion, 109 Wn.2d at 646-47 (footnotes omitted). KAPO does not explain how a declaratory judgment action brought to bring final resolution to a profound disagreement about survival of a nonconforming land use right is comparable to a regulatory taking or excessive regulation, and – moreover – KAPO's arguments to that effect are new to the case.

KAPO argues strenuously that termination of KRRC's nonconforming use rights violates the third prong of the *Orion* test – "whether the regulatory action is unduly oppressive on the landowner".

KAPO Brief at 7. To that end, KAPO cites authority including *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990), which concerned impact of a newly enacted county wetlands ordinance's prohibition on new construction.

The plaintiffs in *Presbytery* owned a single family home on 4.5 acres of land, one-third of which was consisted of wetlands protected by the ordinance. Id. at 323. The ordinance prohibited new construction within wetland boundaries and buffer zones. Id. at 324-25. The plaintiffs alleged this ordinance prohibited them from building a church or using their property for any other economically reasonable use, and filed an inverse condemnation action against the county asserting that the ordinance resulting in an unconstitutional "taking" of property. Id. at 325.

The *Presbytery* court held that whether the ordinance violated substantive due process and whether it effected a "taking" should be analyzed separately, recognizing them as alternative theories. Id., at 329. The Court held that mere regulation on the use of land has never constituted a taking or violation of due process, but rather, the regulation must be "severe." Id., at 327, 329. A regulation is insulated from a takings challenge when the regulation safeguards the public interest in health, safety, the environment or fiscal integrity and does not infringe

upon a fundamental attribute of ownership - the rights to possess, exclude others, and dispose of property. Id., at 329-30.

Presbytery endorsed the three-pronged analysis to determine whether a regulation violates substantive due process: (1) whether the regulation is aimed at achieving a legitimate public purpose, (2) whether its means are reasonably necessary to achieve that purpose, and (3) the regulation does not unduly oppress the land owner. Id. at 330-31. KAPO cites several other cases on the subject of whether a regulation is unduly oppressive, but none explain why this analysis is pertinent to the question of a declaratory judgment reflecting the state's common law on nonconforming use, which already embodies the substantive due process principles protecting these disfavored uses from immediate cessation but limiting that protection to nonconforming uses that do not undergo fundamental change. As has been briefed previously in this action –

> A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use.

Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998) (citation omitted). Where, as here, the trial court found that KRRC profoundly and illegally changed and enlarged its existing use, the trial court rendered the correct declaratory judgment.

V. CONCLUSION

KITSAP COUNTY respectfully requests that this Court deny the reversal or remand sought by Amicus Curiae KAPO.

Respectfully submitted this 9th day of June, 2014.

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CERTIFICATE OF SERVICE

I, Laurie A. Hughes, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

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SIGNED in Port Orchard, Washington this 9th day of June, 2014.

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