NO. 91056-1
COA NO. 43076-2-II

IN THE SUPREME COURT 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,

Petitioner,

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 PIERCE COUNTY
The Honorable Susan K. Serko

ANSWER TO AMENDED PETITION FOR DISCRETIONARY REVIEW

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APPENDIX NO. 1

Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn. App. 252, 337 P.3d 328 (Divison II, Oct. 28, 2014), as amended by the February 10, 2015 order of the Court of Appeals.

APPENDIX NO. 2

Findings of Fact, Conclusions of Law and Orders (Feb. 9, 2012), *Kitsap County v. Kitsap Rifle and Revolver Club*, Pierce County Superior Court Cause No. 10-2-12913-3

I. IDENTITY OF RESPONDENT

Kitsap County was Plaintiff in the trial court and Respondent in the Court of Appeals. The County appears by and through attorney Neil R. Wachter, Special Deputy Prosecuting Attorney for Kitsap County, to respectfully request that this Court deny Kitsap Rifle and Revolver Club ("KRRC" or the "Club")'s amended petition for review (the "Petition").

II. COURT OF APPEALS DECISION

The decision is *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (Divison II, Oct. 28, 2014), as amended by the February 10, 2015 order of the Court of Appeals (the "Opinion"; attached hereto as App. 1). The trial court's February 9, 2012 judgment[1] granted declaratory and injunctive relief against illegal land uses, unpermitted development and public nuisances at KRRC's shooting ranges. Division II reversed declaratory judgment that KRRC forfeited its real property's[2] nonconforming "shooting range" use status by engaging in illegal uses and "expanded uses" contrary to common law and local code, reversed a ruling that expanded hours of operation was an expanded use, affirmed conclusions that commercial and military firearms training and

[1] Findings of Fact, Conclusions of Law and Orders (CP 4052-4092) (the "Judgment"), attached hereto as Appendix 2. This brief's references to "FOF" or "COL" are to numbered paragraph(s) of the trial court's judgment.

[2] The "Property" refers to KRRC's real property identified in the caption to this action, a 72-acre parcel in central Kitsap County. The Property is zoned "rural wooded". FOF 9 (CP 4055).

activities dramatically increasing noise impacts each constituted expanded uses, and remanded for entry of a modified declaratory judgment and remedy for the expanded uses and for KRRC's years of unpermitted earthwork to modify existing ranges and create new earthen shooting bays.

The Court of Appeals further affirmed public nuisance rulings and injunctive orders necessitated by KRRC's disruptive shooting sounds and by KRRC's failure to prevent bullet escapement to the nearby community.

III. COUNTERSTATEMENT OF PETITION'S ISSUES

1. Did the Court of Appeals err in affirming that loud, percussive shooting sounds from the Property create a public nuisance when (a) trial witnesses did not all testify to interference with use and enjoyment of their homes from dramatically increased hours of shooting, frequent prolonged rapid-fire shooting, exploding targets, and use of high-caliber rifles and automatic weapons and (b) noise regulations exempt "authorized shooting ranges" from decibel standards? Petition at 1-2.

2. Did the Court of Appeals err in affirming that commercial and military training uses of the Property constitute "expanded uses" of KRRC's nonconforming "shooting range" land use of the Property prohibited under Washington common law and the Kitsap County Code[3] -

[3] The Kitsap County Code ("KCC" or the "Code") is published and maintained online at http://www.codepublishing.com/wa/kitsapcounty (last visited 4-14-15).

as distinguished from intensifications - where (a) KRRC has not sought review of the trial court's findings of KRRC's historic shooting activities and (b) KRRC has not sought review of the court's conclusion that these commercial uses are prohibited in the "rural wooded" zone? Petition at 2.

3. Did the Court of Appeals err in affirming that bullet escapement creates a public nuisance when the trial court found that it was likely that bullets have escaped and will escape the Property and that KRRC's safety protocols and physical infrastructure are inadequate to contain bullets, based on testimony of bullet strikes to nearby houses and expert testimony to populated "surface danger zones" vulnerable to bullet strikes from weapon systems commonly used at KRRC? Petition at 2.

4. "If the trial court's noise or safety nuisance decisions are reversed or remanded, should the permanent injunction and warrant of abatement intended to remedy these decisions also be reversed or remanded?" Petition at 2.[4]

5. Did the Court of Appeals err in affirming the trial court's public nuisance noise or bullet escapement injunctions without explicitly analyzing whether each such injunction is properly tailored to abate its corresponding public nuisance conditions? Petition, at 2-3.

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[4] KRRC's fourth issue, quoted verbatim, sets forth a possible consequence of reversal or remand but is not a separate issue subject to RAP 13.4(b) analysis.

IV. CONTINGENT CROSS-PETITION ISSUES PRESENTED FOR REVIEW UNDER RAP 13.4(d)

1. Did the Court of Appeals err in concluding that KRRC's expanded and illegal land uses and its unpermitted range development activities on the Property did not act to terminate the nonconforming "shooting range" use as a matter of declaratory judgment under the Kitsap County Code's nonconforming use provisions allowing continuation of a use only "so long as it remains otherwise lawful"?

2. Did the Court of Appeals err in finding that KRRC's "300-meter range" project was outside the eight-acre nonconforming use area of the Property, inconsistent with the trial court's findings?

V. STATEMENT OF THE CASE

Kitsap County filed this action on September 9, 2010 and filed its trial complaint on August 29, 2011. CP 2-88, 1695-1757. The trial court conducted a 14-day bench trial in Fall 2011 and entered its Judgment on February 9, 2012. CP 4052. KRRC filed its timely notice of appeal on February 15, 2012. CP 4114–4156.[5]

The Judgment compared KRRC's 2011 facilities, operations, uses

[5] KRRC remains an operational live-fire shooting range, pursuant to a stay of judgment pending appeal. Ruling Granting Stay on Conditions (4-23-12); Order Clarifying Stay and Denying Motion to Modify and Motion for Contempt (8-27-12).

and impacts with those in 1993.[6] In that span, the Property underwent

> conversion from a small-scale lightly used target shooting range in 1993 to a heavily used range with an enlarged rifle range and a 11-bay center for local and regional practical shooting competitions . . . .

COL 33.[7] After 1993, KRRC made dramatic changes to uses of and facilities at eight-acres of active use (the "eight acres"), including:

- Transformation from a daylight range with two developed shooting ranges (one rifle and one pistol) into a heavily-used range open to members from 7 a.m. to 10 p.m. year-round, and into a center for practical shooting[8] training and competitions. FOF 29, 30, 70, 80.

- Clearing, grading and excavation to lengthen the rifle range, to construct 11 earthen practical shooting "bays"[9], and to "underground" a seasonal water course into twin 475-foot long culverts crossing the

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[6] In 1993, the Chair of the Board of County Commissioners wrote a letter to shooting ranges in unincorporated Kitsap County, recognizing their nonconforming use status. FOF 10, citing Ex 315 (COA Respondent's Brief, App. 3). This letter established a land use benchmark in the case. COL 6, 33. KRRC treated the letter as exempting the Club from county permitting. RP 1712:20–1713:15, 2185:20–2186:11, 2287:14-19.

[7] See also FOF 80 ("In the early 1990's, shooting sounds from the range were typically audible for short times on weekends, or early in the morning during hunter sight-in season (September). Hours of active shooting were considerably fewer.")

[8] Practical shooting refers to practice and competition for shooting in mock self-defense scenarios, often with multiple targets and "bad guy/good guy" decisions for the participant. RP 335:25-336:12, 367:2-11. Practical shooting frequently occurs at multiple bays on the Property, creating a cacophony from multiple rapid fire shooters. Ex 28, 132 (YouTube videos).

[9] The shooting bays facilitate shooting in up to 180, 270 or 360 degrees. Ex 133.

Property – all done without required site development permitting, engineering or wetland study. FOF 33-36, 53-56.

- For-profit use by National Firearms Institute[10] and by contractors providing firearms training to U.S. Navy personnel. FOF 72-79.

- Permissive use of automatic weapons, cannons and exploding targets, and frequent and incessant rapid-fire shooting. FOF 81-87.[11]

In 2005, KRRC undertook a major clearing and grading project outside the eight acres to establish a new "300-meter range", again without required site permitting. KRRC abandoned the project after the County demanded a conditional use permit for an expanded use. FOF 40-46. The Opinion regarded KRRC's development work as confined to the eight-acres, which is incorrect as to the 300-meter range. Opinion at 12, n. 4.[12]

1. Nonconforming Use and the Land Use Injunction

The trial court recognized KRRC's nonconforming "shooting

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[10] National Firearms Institute is the trade name for a firearms training business registered at the Property's street address starting in 2002. COL 73.

[11] KRRC's changes to its uses and facilities post-dated the building of nearby down-range residential developments where several of the County's witnesses resided. See e.g. Ex 1 ("Area Map with Selected Residences"), Ex 3 ("Kitsap Rifle & Revolver Club Complaints"), Ex 5 ("Year of Construction" for El Dorado Hills plats), Ex 6 ("Year of Construction" for Whisper Ridge plats).

[12] In its answer to KRRC's motion for reconsideration, the County asked Division II to correct its error of treating the 300-meter range as outside the eight acres, which the Court refused based on timeliness. See Kitsap County's Answer to Motion for Reconsideration (12-31-14) ("Answer on Recon.") at 3-6; Court's February 10, 2015 order at 2 (App. No. 3). See also Order Granting Appellant's Motion for Extension of Time to File a Motion for Reconsideration (12-18-14) (for reconsideration motion filed on 11-18-14).

range" use of its existing eight-acre range[13], but ruled that KRRC's changed uses were no mere intensifications: The Club's

> (1) expanded hours;
>
> (2) commercial, for-profit use (including military training);
>
> (3) increasing the noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber and practical shooting

"significantly changed, altered, extended and enlarged the existing use." COL 8. The trial court entered declaratory judgment that

> [KRRC's] activities and expansion of uses . . . 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 . . . .

Judgment, at 33 (CP 4084). The trial court declared the Club's "shooting range" use could resume only upon issuance of a conditional use permit for a "private recreational facility" or other recognized use under Chapter 17.381 KCC. Id. Furthermore, the court ruled that public nuisance conditions and unpermitted range development projects each constituted illegal uses violating the Property's nonconforming use. COL 11, 27-32.

Based on its holdings and declaratory judgment, the trial court entered its land use injunction:

> enjoining use of the Property as a shooting range until violations of Title 17 Kitsap County Code are resolved by

[13] COL 6.

> application for and issuance of a conditional use permit for use of the Property as a private recreational facility or other use authorized under KCC Chapter 17.381. The County may condition issuance of this permit upon successful application for all after-the-fact permits required pursuant to Kitsap County Code Titles 12 and 19.

Judgment at 34 (CP 4085). Division II vacated this injunction and remanded the case to address the affirmed expanded uses and unpermitted development. Opinion at 44-45, 47.

2. Outrageous Noise, Bullet Escapement, and the Public Nuisance Injunction

The trial court held found KRRC liable for common law and statutory public nuisances, finding the Club's expanded activities and "blue sky" ranges unleashed disruptive noises and intolerable risks of bullet escapement upon the nearby community. On noise, the court wrote:

> 84. The testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the Property. The noise conditions described by these witnesses interfere with the comfort and repose of residents and their use and enjoyment of their real properties. The interference is common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the "sounds of war" and the Court accepts this description as persuasive.
>
> 85. Expanded hours, commercial use of the club, allowing use of explosive devices (including Tannerite), higher caliber weaponry and practical shooting competitions affect the neighborhood and surrounding

environment by an increase in the noise level emanating from the Club in the past five to six years.

86. The Club allows use of exploding targets, including Tannerite targets, as well as cannons, which cause loud "booming" sounds in residential neighborhoods within two miles of the Property, and cause houses to shake.

FOF 84-86. As to bullet escapement, the trial court found KRRC's range facilities and operations endanger the neighboring residential areas:

67. The parties presented several experts who opined on issues of range safety. The Property is a "blue sky" range, with no overhead baffles to stop the flight of accidentally or negligently discharged bullets. The Court accepts as persuasive the SDZ diagrams developed by Gary Koon in conjunction with the Joint Base Lewis-McChord range safety staff, as representative of firearms used at the range and vulnerabilities of the neighboring residential properties. The Court considered the allegations of bullet impacts to nearby residential developments, some of which could be forensically investigated, and several of which are within five degrees of the center line of the KRRC Rifle Line.[14]

68. The County produced evidence that bullets left the range based on bullets lodged in trees above berms. The Court considered the expert opinions of Roy Ruel, Gary Koon, and Kathy Geil and finds that more likely than not, bullets escaped from the Property's shooting areas and that more likely than not, bullets will escape the Property's shooting areas and will possibly strike persons or damage private property in the future.

69. The Court finds that KRRC's range facilities are inadequate to contain bullets to the Property, notwithstanding existing safety protocols and enforcement.

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[14] See COA Respondent's Brief at 32-34 (explaining use of surface danger zone mapping to depict the vulnerabilities of numerous residences, public roads including state Highway 3 and at least one school within range of KRRC).

FOF 67-69. Accordingly, KRRC's failure

> to develop its range with engineering and physical features to prevent escape of bullets from the Property's shooting areas despite the Property's proximity to numerous residential properties and civilian populations and the ongoing risk of bullets escaping the Property to injure persons and property, is . . . an unlawful and abatable common law nuisance.

COL 21. The public nuisance conditions are continuing and "cause the County and public actual and substantial harm") COL 13.[15] The trial court therefore issued a public nuisance injunction:

> enjoining the following uses of the Property, which shall be effective immediately:
>
> a. Use of fully automatic firearms, including but not limited to machine guns;
>
> b. Use of rifles of greater than nominal .30 caliber;[16]
>
> c. Use of exploding targets and cannons; and
>
> d. Use of the Property as an outdoor shooting range before the hour of 9 a.m. in the morning or after the hour of 7 p.m. in the evening.

Judgment, at 34 (CP 4085).

Citing unchallenged factual findings on safety and noise, Division II upheld the public nuisance holdings and injunction. Opinion at 24.

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[15] See also COL 12 (applying KCC 17.455.110's prohibition on uses producing "noise, smoke dirt, dust, odor, vibration … which is materially deleterious to surrounding people, properties or uses.").

[16] The term "nominal .30 caliber" was defined in trial as a shooting term of art for a rifle firing a round "about .30 inches in diameter". RP 2797:17-2798:1.

VI. ARGUMENT

A. THE PUBLIC NOISE NUISANCE SURVIVES APPLICATION OF RCW 7.48.130 AND DECIBEL REGULATIONS, AND KRRC RAISES NO RAP 13.4(B) ISSUE

KRRC petitions for review of the trial court's public nuisance rulings on noise, claiming violation of RCW 7.48.130. Petition at 6.

> A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

RCW 7.48.130. The Opinion, at 29, noted that there were no explicit findings on this point, and KRRC claims that conflicts in testimony equate to inconsistent and insufficient causes for complaint. Petition at 6-7.

KRRC's RCW 7.48.130 argument ignores the trial court's authority to make implicit findings of credibility and evidentiary weight.[17] KRRC's citation to testimony "by six of the 18 community [trial] witnesses" (Petition at 7) ignores that unchallenged findings are verities and presumes that the trial court accorded witnesses equal veracity.[18]

KRRC relies on the distinguishable case of *State ex rel. Warner v. Hayes Inv. Corp.,* in which neighbors of a public beach and trailer park

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[17] See *Trotzer v. Vig*, 149 Wn. App. 594, 611 n.13, 203 P.3d 1056, *review denied*, 166 Wn.2d 1023 (2009) (recognizing trial court's implicit findings of credibility).

[18] See *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n,*, 173 Wn. App. 778, 791, 295 P.3d 314 (Div. 2, 2013) (findings of fact are verities on appeal absent assignment of error) (citing *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 808, 828 P.2d 549 (1992)).

testified to alleged public nuisances ranging from loud noises to vulgar language to public drinking.[19] The Court affirmed rejection of these wide-ranging complaints which established "some occasional minor annoyance from the operation ... of the respondents' camp."[20] From this testimony, the Court concluded the offending activities "[did] not affect 'equally the rights of an entire community or neighborhood'."[21] *Warner* did not even reach RCW 7.48.130's clause allowing unequal "extent of the damage".

In contrast, this Judgment found testimony describing everyday exposure to and disruption by KRRC's "sounds of war" was representative of a significant number of residents within two miles of KRRC. FOF 84.[22]

KRRC claims to be "fully exempt" from decibel standards between 7 a.m. and 10 p.m. Petition at 8.[23] However, the enabling statute does not abridge statutory or common law actions or remedies. RCW 70.107.060.

KRRC's noise argument identifies no directly conflicting Supreme Court authority and creates no issue of substantial public interest, particularly in the highly fact-specific realm of public nuisance noise.

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[19] *State ex rel. Warner v. Hayes Inv. Corp. ("Warner")*, 13 Wn.2d 306, 309, 125 P.2d 262 (1942).
[20] *Warner*, 13 Wn.2d at 310.
[21] *Warner*, 13 Wn.2d at 311 (citing former Rem.Rev.Stat. § 9912's and current RCW 7.48.130's "prerequisite of a public nuisance").
[22] The trial court's findings refute KRRC's suggestion that its neighbors suffer an "inconvenience". Petition at 8 (citing *Rea v. Tacoma Mausoleum Assn.*, 103 Wash. 429, 435, 174 P. 961 (1918)).
[23] Citing Opinion at 22; RCW 70.107.080; WAC 173-60-050; KCC 10.24.040.

B. THE OPINION'S RECITAL OF TIMING OF NOISE INCREASES DOVETAILS WITH ITS EXPANDED NONCONFORMING USE REVIEW UNDER COMMON LAW, AND KRRC RAISES NO RAP 13.4(B) ISSUE

KRRC asserts the Opinion overlooked an inconsistency in the findings' timelines relating to expanded use and public nuisance noise. On one hand, the Opinion affirmed that multiple changed uses caused a dramatic increase in KRRC's sound output in about 2005 or 2006. Petition at 11 (citing Opinion at 4).[24] On the other hand, commercial firearms training started at KRRC in 2002 and continued through 2010. Petition at 11 (citing Opinion at 15). Thus, claims KRRC, "for-profit commercial and military training at the Club did not perceptibly increase the intensity or volume of the Club's use of its property." Petition at 11. This section of the brief answers that attack on the Opinion's expanded use rulings, and then presents the County's contingent cross-petitions.

1. Expanded Use Analysis of For-Profit Activities

Where findings are inconsistent, a judgment will be upheld if one or more of the findings support the judgment.[25] Here, the trial court

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[24] The Opinion, at 4, cited CP 4073. See also FOF 85 (dramatic increases in KRRC's noise output occurred "in the past five to six years" before trial.

[25] *Dept. of Revenue v. Sec. Pac. Bank of Washington N.A.*, 109 Wn. App. 795, 807, 38 P.3d 354 (Div. 2, 2002) (citing *In re Marriage of Getz*, 57 Wn. App. 602, 606, 789 P.2d 331 (1990); *Lloyd's of Yakima Floor Center v. Department of Labor and Indus.*, 33 Wn. App. 745, 752, 662 P.2d 391 (Div. 2 1982) (citing cases)).

recited commercial uses as one of several activities *contributing* to increased public nuisance noise in 2005-2006. FOF 85. From this supposed inconsistency, KRRC seeks review of the "expanded use" ruling for commercial uses. Petition at 12.

The Judgment applied both common law and local zoning code to evaluate uses as "intensified" or "expanded" (or illegal). In affirming two of the three expanded uses, the Opinion primarily applied the case law.

This Court has pronounced that "[u]nder Washington common law, nonconforming uses may be intensified, but not expanded."[26] The Opinion cited *McGuire*, *Keller*, and the seminal *Rhod-A-Zalea*[27] case for this proposition, Opinion at 9-10. In *Keller*, the Court distinguished "intensified" uses from expanded or enlarged uses:

> When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. 1 R. Anderson, Supra at s 6.47; 8 A. McQuillan, Municipal Corporations s 25.207 (3rd ed. 1976). Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. *Jahnigen v. Staley*, 245 Md. 130, 137, 225 A.2d 277 (1967). The test is whether the intensified use is "different in kind" from the nonconforming use in existence when the zoning ordinance was adopted. 3 A. Rathkopf, The Law of Zoning and

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[26] *City of University Place v. McGuire ("McGuire")*, 144 Wn.12d 640, 649, 30 P.3d 453 (2001) (citing *Keller v. City of Bellingham*, 92 Wn.2d 726, 731-32, 600 P.2d 1276 (1979)).

[27] *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998),

Planning, ch. 60-1, s 1 (4th ed. Cum.Supp.1979).

Keller, 92 Wn.2d at 731. KRRC alludes to its constitutionally-protected right of intensification. Petition at 2. That right is limited:

> This right, however, *only* refers to the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use.[[28]]

The case of *Meridian Minerals Co. v. King County*,[29] instructs that "intensified" vs. "expanded' use analysis applies even without a local ordinance governing expanded uses. *Meridian* concerned a grading permit sought by a nonconforming rock quarry dating from 1905 on the Enumclaw Plateau, zoned "agricultural" in 1958.[30] The county had previously denied applications for a "re-zone" or an unclassified use permit to operate a commercial quarry, so the case turned on whether the county "erred in refusing to issue a grading permit allowing Meridian to intensify, enlarge, and expand its nonconforming land use."[31]

King County's code had no provision "regarding variations in use (e.g. expansion, enlargement, or intensification)".[32] Nevertheless, the Court affirmed that the county properly rejected the proposed permit on

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[28] *Rhod-Z-Zalea*, 136 Wn.2d at 6 (emphasis in original) (citing 1 Robert M. Anderson, American Law of Zoning § 6.01; Richard L. Settle, Washington Land Use and Environmental Law and Practice § 2.7(d) (1983).
[29] *Meridian Minerals Co. v. King County ("Meridian")*, 61 Wn. App. 195, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991).
[30] *Meridian*, 61 Wn. App. at 198-99.
[31] *Meridian*, 61 Wn. App. at 204-05.
[32] *Meridian*, 61 Wn. App. at 205.

the basis of the *extent of the change* the permit would have allowed in the property's established quarry use, writing:

> As acknowledged in *Keller*, nonconforming uses do not always remain static. *Keller*, at 731 (citing 1 R. Anderson, Zoning § 6.47 (2d ed. 1976)). The issue thus arises as to the extent changes in a nonconforming use are tolerated without requiring a rezone or conditional use permit.[33]

The Court recognized that the proposed grading permit would not transform the "type of activity", but found the resulting tremendous increase in quarrying activity would cross over from an intensification:

> Meridian's proposed intensification is different in kind from that which existed in 1958 and would constitute a prohibited enlargement of the nonconforming use. The nature and purpose of the original use would change with the proposal and would have a substantially different impact and effect on the surrounding area.[34]

Meridian's application of the *Keller* analysis matters to this case's treatment of commercial use as an expanded use, because Division II declined to affirm expanded or illegal uses under KCC 17.460.020 of the Code's nonconforming use chapter (17.460 KCC). Opinion at 11.[35]

KRRC articulates no conflict between the Opinion's expanded use

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[33] *Meridian*, 61 Wn. App. at 208.
[34] *Meridian*, 61 Wn. App. at 210.
[35] KCC 17.460.020 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 conforming use. (emphasis added).

analysis and *Keller*, and raises no issue of substantial public interest.

Review, based on KRRC's nonconforming use issue, would be futile because the Opinion left intact the conclusion applying former KCC 17.455.060 (COL 35; Opinion at 12), which provides in pertinent part:

> A. A use or structure not conforming to the zone in which it is located ***shall not be altered or enlarged*** in any manner, unless such alteration or enlargement would bring the use or structure into greater conformity with the uses permitted within or requirements of the zone in which it is located.[36]

Review of KRRC's nonconforming use issue would also be futile because the Opinion did not vacate conclusions that KRRC's commercial and new uses are disallowed in the rural wooded zone and violations of Title 17 KCC (zoning) are enjoinable nuisances per se. COL 25, 11.[37]

2. Contingent Cross-Petitions on Nonconforming Use

If this Court grants review, the County would respectfully petition for review of Division II's failure to also affirm expanded and illegal use findings under KCC 17.460.020's prohibition on nonconforming uses of land not remaining "otherwise lawful".[38] Opinion at 11. The Opinion's

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[36] See Answer on Recon. at 3, 16-18 (explaining application of former KCC 17.455.060 despite its repeal, effective July 1, 2012).

[37] Citing KCC 17.530.030 and 17.110.515.

[38] See *Hartley v. City of Colorado Springs*, 764 P.2d 1216, 1224 (Colo. 1988) (applying strict construction to zoning provisions allowing continuance of nonconforming uses and liberal construction to zoning provisions restricting nonconforming uses) *(citing City & County of Denver v. Board of Adjustment,* 31 Colo.App. 324, 331, 505 P.2d 44, 47 (1972); *Hooper v. Delaware Alcoholic Beverage Control Comm'n,* 409 A.2d 1046, 1050 (Del.Super.Ct.1979); *Brown*

construction is not consistent with other provisions of KCC Title 17[39] and is particularly troublesome for public nuisance, which is plainly an "illegal use" of the core "shooting range" use. COL 32. This contingent petition seeks to restore declaratory judgment that KRRC must obtain land use approval to continue its "shooting range" use.

If this Court grants review, the County would also respectfully petition for review of Division II's mistaken ruling that the 300-meter range project was not subject to KCC 17.460.020(C)'s prohibition on geographic expansion of nonconforming uses. Opinion at 11-12; see *supra* at 6, n. 12.

C. THE OPINION PROPERLY AFFIRMED THE PUBLIC SAFETY NUISANCE CAUSED BY KRRC'S MODIFIED OPERATIONS AND FACILITIES LACKING ENGINEERING CONTROLS TO PREVENT BULLET ESCAPE TO NEARBY POPULATED AREAS, AND KRRC RAISES NO RAP 13.4(B) ISSUE

KRRC posits that the Opinion erroneously affirmed the public nuisance rulings by giving short shrift to probability of harm and social utility analyses. Petition at 12-13.

County v. Meidinger, 271 N.W.2d 15, 18–19 (S.Dak. 1978) (citations omitted); 1 R. Anderson, American Law of Zoning § 6.35, at 557–58 (3d ed. 1986)).

[39] See e.g. KCC 17.100.030, providing in pertinent part:

> It shall be unlawful for any person, firm, or corporation to erect, construct, establish, move into, ***alter, enlarge***, use or cause to be used, any buildings, structures, improvements, or ***use of premises*** contrary to the provisions of this title . . . . (emphasis added).

KRRC cites *Hite v. Cashmere Cemetery Association,* holding that likelihood of harm must be "reasonable and probable", rather than just a possibility.[40] *Hite* affirmed dismissal of private nuisance based on a cemetery neighbor's fears that germs from cemetery could migrate to the a drinking water well, which the Court adjudged to be highly improbable.[41]

KRRC cites *Turner v. City of Spokane* for the proposition that a court "ought not to interfere, where the injury apprehended is of a character to justify conflicting opinions as to whether it will in fact ever be realized".[42] The *Turner* court affirmed dismissal of nuisance claims against a proposed quarry.[43] The Court noted that the trial court's decision

> would not prevent appellants from applying for an injunction after, for example, the first blast, if they show that they have been damaged, or are in real danger of suffering damage.[[44]]

In contrast, Kitsap County presented evidence of five houses down range of KRRC's rifle range, each struck by bullets over the 15 years preceding trial. FOF 67.[45] Moreover, the findings include the Club's failure to develop its range with available engineering and physical

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[40] Petition at 13 (citing *Hite v. Cashmere Cemetery Assn.,* 158 Wash. 421, 424, 290 P.1008 (1930).
[41] *Hite*, 158 Wash. at 424.
[42] Petition at 13 (citing *Turner v. City of Spokane*, 39 Wn.2d 332, 335, 235 P.2d 300 (1951).
[43] *Turner*, 39 Wn.2d at 333.
[44] *Turner*, 39 Wn.2d at 337-38.
[45] See also COA Respondent's Brief at 37-38 (summarizing bullet strikes to houses approximately 1.5 miles down range of KRRC).

features "despite ... the ongoing risk of bullets escaping the Property to injure persons and property". COF 21. Read together, the findings assign a more-probable-than-not likelihood to future bullet escapement from the Property. The fact that no *person* has yet to be hit offers no comfort.

KRRC claims that the Opinion also conflicts with *Lakey v. Puget Sound Energy, Inc.*, which rejected residential plaintiffs' nuisance based on fear of electromagnetic currents from a nearby substation, based on the facility's social utility.[46] The Opinion properly analyzed the social utility question in light of the obvious lethality of KRRC's blue-sky ranges, Opinion at 27, and KRRC presents no direct conflict with cited cases.[47]

VII. CONCLUSION

For the foregoing reasons, the Court should deny KRRC's petition for review.

Respectfully submitted this 5th day of April, 2015.

TINA R. ROBINSON
Prosecuting Attorney

NEIL R. WACHTER, WSBA #23278
Special Deputy Prosecuting Attorney
Attorney for Kitsap County

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[46] Petition at 14 (citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 924-25, 296 P.3d 860 (2013).

[47] Space constraints limit an answer to KRRC's remaining issue(s), which challenge the tailoring of public nuisance orders. Petition at 15-18. These orders addressed nuisance conditions discussed extensively in earlier briefing in the case. See generally, COA Respondent's Brief at 29-39.

CERTIFICATE OF SERVICE

I, Batrice Fredsti, 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:

Brian D. Chenoweth Brooks Foster The Chenoweth Law Group 510 SW Fifth Ave., Ste. 500 Portland, OR 97204	[X] [X] [ ]	Via U.S. Mail Via Email: As Agreed by the Parties Via Hand Delivery
David S. Mann Gendler & Mann LLP 936 N. 34th St. Suite 400 Seattle, WA 98103-8869	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery
Matthew A. Lind Sherrard McGonagle Tizzano, PS 19717 Front Street NE, PO Box 400 Poulsbo, WA 98370-0400	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery
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C.D. Michel Michel & Associates, P.C. 180 E. Ocean Blvd, Ste 200 Long Beach, CA 90802	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery

SIGNED in Port Orchard, Washington this 15th day of April, 2015.

BATRICE FREDSTI, Legal Assistant
Kitsap County Prosecuting Attorney
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Appendix No. 1

***Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (Divison II, Oct. 28, 2014), as amended by the February 10, 2015 order of the Court of Appeals.**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KITSAP COUNTY,

Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB,

Appellant.

Consol. Nos. 43076-2-II
43243-9-II

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION, GRANTING APPELLANT'S MOTION TO MODIFY OPINION, DENYING RESPONDENT'S REQUEST TO MODIFY, AND AMENDING OPINION

THIS MATTER came before the court on Kitsap Rifle and Revolver Club's motion for partial reconsideration or, in the alternative, to modify the court's opinion filed on October 28, 2014. This motion relates to the effect of the post-trial repeal of former KCC 17.455.060, which stated that a nonconforming use could not be altered or enlarged in any manner. In its response, Kitsap County requested that the court modify its opinion with regard to an issue unrelated to the Club's motion. It is hereby ORDERED as follows:

1. The Club's motion for partial reconsideration is denied because the Club did not argue that the repeal of KCC 17.455.060 had any effect on this case until after the court filed its opinion, and we typically do not address arguments first made in a motion for reconsideration.

2. The Club's motion to modify the court's opinion is granted in part. The court hereby amends its opinion as follows:

a. On page 12, replace the text of footnote 5 with: "Neither party discusses the issue, and therefore we do not address the effect of former KCC 17.455.060 being repealed.

Because the ordinance was repealed after trial, on remand the parties may address the effect of former KCC 17.455.060 being repealed, if any."

b. On page 13, lines 11-12, delete "adopting the common law and."

3. The County's request to modify the court's opinion is denied because the County did not file a motion to modify within 20 days after the opinion was filed as required under RAP 12.4(b).

IT IS SO ORDERED.

DATED this 10TH day of FEBRUARY, 2015.

MAXA, J.

We concur:

JOHANSON, C.J.

MELNICK, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KITSAP COUNTY, a political subdivision of the State of Washington, Respondent, v. KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE DOES I-XX, inclusive, Appellants. IN THE MATTER OF THE 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, Defendant.	Consol. Nos. 43076-2-II 43243-9-II PUBLISHED OPINION

MAXA, J. — The Kitsap Rifle and Revolver Club appeals from the trial court's decision following a bench trial that the Club engaged in unlawful uses of its shooting range property. Specifically, the Club challenges the trial court's determinations that the Club had engaged in an impermissible expansion of its nonconforming use; that the Club's site development activities violated land use permitting requirements; and that excessive noise, unsafe conditions, and unpermitted development work at the shooting range constituted a public nuisance. The Club

also argues that even if its activities were unlawful, the language of the deed of sale transferring the property title from Kitsap County to the Club prevents the County from filing suit based on these activities. Finally, the Club challenges the trial court's remedies: terminating the Club's nonconforming use status and entering a permanent injunction restricting the Club's use of the property as a shooting range until it obtains a conditional use permit, restricting the use of certain firearms at the Club, and limiting the Club's hours of operation to abate the nuisance.[1]

We hold that (1) the Club's commercial use of the property and dramatically increased noise levels since 1993, but not the club's change in its operating hours, constituted an impermissible expansion of its nonconforming use; (2) the Club's development work unlawfully violated various County land use permitting requirements; (3) the excessive noise, unsafe conditions, and unpermitted development work constituted a public nuisance; (4) the language in the property's deed of sale from the County to the Club did not preclude the County from challenging the Club's expansion of use, permit violations, and nuisance activities; and (5) the trial court did not abuse its discretion in entering an injunction restricting the use of certain firearms at the shooting range and limiting the Club's operating hours to abate the public nuisance. We affirm the trial court on these issues except for the trial court's ruling that the Club's change in operating hours constituted an impermissible expansion of its nonconforming use. We reverse on that issue.

[1] The County initially filed a cross appeal. We later granted the County's motion to dismiss its cross appeal.

However, we reverse the trial court's ruling that terminating the Club's nonconforming use status as a shooting range is a proper remedy for the Club's conduct. Instead, we hold that the appropriate remedy involves specifically addressing the impermissible expansion of the Club's nonconforming use and unpermitted development activities while allowing the Club to operate as a shooting range. Accordingly, we vacate the injunction precluding the Club's use of the property as a shooting range and remand for the trial court to fashion an appropriate remedy for the Club's unlawful expansion of its nonconforming use and for the permitting violations.

FACTS

The Club has operated a shooting range in its present location in Bremerton since it was founded for "sport and national defense" in 1926. Clerk's Papers (CP) at 4054. For decades, the Club leased a 72-acre parcel of land from the Washington Department of National Resources (DNR). The two most recent leases stated that the Club was permitted to use eight acres of the property as a shooting range, with the remaining acreage serving as a buffer and safety zone.

Confirmation of Nonconforming Use

In 1993, the chairman of the Kitsap County Board of Commissioners (Board) notified the Club and three other shooting ranges located in Kitsap County that the County considered each to be lawfully established, nonconforming uses. This notice was prompted by the shooting ranges' concern over a proposed new ordinance limiting the location of shooting ranges. (Ordinance 50-B-1993). The County concedes that as of 1993 the Club's use of the property as a shooting range constituted a lawful nonconforming use.

Property Usage Since 1993

As of 1993, the Club operated a rifle and pistol range, and some of its members participated in shooting activities in the wooded periphery of the range. Shooting activities at the range occurred only occasionally – usually on weekends and during the fall "sight-in" season for hunting – and only during daylight hours. CP at 4059. Rapid-fire shooting, use of automatic weapons, and the use of cannons occurred infrequently in the early 1990s.

Subsequently, the Club's property use changed. The Club allowed shooting between 7:00 AM and 10:00 PM, seven days a week. The property frequently was used for regularly scheduled shooting practices and practical shooting competitions where participants used multiple shooting bays for rapid-fire shooting in multiple directions. Loud rapid-fire shooting often began as early as 7:00 AM and could last as late as 10:00 PM. Fully automatic weapons were regularly used at the Club, and the Club also allowed use of exploding targets and cannons. Commercial use of the Club also increased, including private for-profit companies using the Club for a variety of firearms courses and small arms training exercises for military personnel. The U.S. Navy also hosted firearms exercises at the Club once in November 2009.

The expanded hours, commercial use, use of explosive devices and higher caliber weaponry, and practical shooting competitions increased the noise level of the Club's activities beginning in approximately 2005 or 2006. Shooting sounds changed from "occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration." CP at 4073. The noise from the Club disrupted neighboring residents' indoor and outdoor activities.

The shooting range's increased use also generated safety concerns. The Club operated a "blue sky" range with no overhead baffles to stop the escape of accidentally or negligently discharged bullets. CP at 4070. There were allegations that bullets had impacted nearby residential developments.

Range Development Since 1996

From approximately 1996 to 2010, the Club engaged in extensive shooting range development within the eight acres of historical use, including: (1) extensive clearing, grading, and excavating wooded or semi-wooded areas to create "shooting bays," which were flanked by earthen berms and backstops; (2) large scale earthwork activities and tree/vegetation removal in a 2.85 acre area to create what was known as the 300 meter rifle range;[2] (3) replacing the water course that ran across the rifle range with two 475-foot culverts, which required extensive work—some of which was within an area designated as a wetland buffer; (4) extending earthen berms along the rifle range and over the newly buried culverts which required excavating and refilling soil in excess of 150 cubic yards; and (5) cutting steep slopes higher than five feet at several locations on the property.

The Club did not obtain conditional use permits, site development activity permits, or any of the other permits required under the Kitsap County Code for its development activities.

Club's Purchase of Property

In early 2009, the County and DNR negotiated a land swap that included the 72 acres the Club leased. Concerned about its continued existence, the Club met with County officials to

[2] The Club abandoned its plans to develop the proposed 300 meter rifle range because County staff advised the Club that a conditional use permit would be required for the project.

discuss the transaction's potential implications on its lease. The Club was eager to own the property to ensure its shooting range's continued existence, and the County was not interested in owning the property because of concern about potential heavy metal contamination from its long term shooting range use. In May 2009, the Board approved the sale of the 72-acre parcel to the Club.

In June, DNR conveyed to the County several large parcels of land, including the 72 acres leased by the Club. The County then immediately conveyed the 72-acre parcel to the Club through an agreed bargain and sale deed with restrictive covenants.

The bargain and sale deed states that the Club "shall confine its active shooting range facilities on the property consistent with its historical use of approximately eight (8) acres of active shooting ranges." CP at 4088. The deed also states that the Club may "upgrade or improve the property and/ or facilities within the historical approximately eight (8) acres in a manner consistent with 'modernizing' the facilities consistent with management practices for a modern shooting range." CP at 4088. The deed does not identify or address any property use disputes between the Club and County.

Lawsuit and Trial

In 2011, the County filed a complaint for an injunction, declaratory judgment, and nuisance abatement against the Club. The County alleged that the Club had impermissibly expanded its nonconforming use as a shooting range and had engaged in unlawful development activities because the Club lacked the required permits. The County also alleged that the Club's activities constituted a noise and safety public nuisance. The County requested termination of the Club's nonconforming use status and abatement of the nuisance.

After a lengthy bench trial, the trial court entered extensive findings of fact and conclusions of law. The trial court concluded that the Club's shooting range operation was no longer a legal nonconforming use because (1) the Club's activities constituted an expansion rather than an intensification of the existing nonconforming use; (2) the Club's use of the property was illegal because it failed to obtain proper permits for the development work; and (3) the Club's activities constituted a nuisance per se, a statutory public nuisance, and a common law nuisance due to the noise, safety, and unpermitted land use issues. The trial court issued a permanent injunction prohibiting use of the Club's property as a shooting range until issuance of a conditional use permit, which the County could condition upon application for all after-the-fact permits required under Kitsap County Code (KCC) Title 12 and 19.The trial court also issued a permanent injunction prohibiting the use of fully automatic firearms, rifles of greater than nominal .30 caliber, exploding targets and cannons, and the property's use as an outdoor shooting range before 9:00 AM or after 7:00 PM.

The Club appeals. We granted a stay of the trial court's injunction against all shooting range activities on the Club property until such time as it receives a conditional use permit. However, we imposed a number of conditions on the Club's shooting range operations pending our decision.

ANALYSIS

STANDARD OF REVIEW

We review a trial court's decision following a bench trial by asking whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law. *Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012).

Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Here, the Club did not assign error to any of the trial court's findings of fact, and only challenged four findings regarding the deed in its brief.[3] Accordingly, we treat the unchallenged findings of fact as verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 100 P.3d 805 (2004).

The process of determining the applicable law and applying it to the facts is a question of law that we review de novo. *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007). We also review other questions of law de novo. *Recreational Equip., Inc. v. World Wrapps Nw., Inc.*, 165 Wn. App. 553, 559, 266 P.3d 924 (2011).

We apply customary principles of appellate review to an appeal of a declaratory judgment reviewing the trial court's findings of fact for substantial evidence and the trial court's conclusions of law de novo. *Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n*, 173 Wn. App. 778, 789, 295 P.3d 314 (2013).

THE CLUB'S UNLAWFUL ACTIVITIES

The Club argues that the trial court erred in ruling that the Club's use of the property since 1993 was unlawful because (1) the Club's activities constituted an expansion rather than an intensification of the existing nonconforming use, (2) the Club failed to obtain proper permits for

[3] In the body of its brief the Club argued that the evidence did not support findings of fact 23, 25, 26, and 57. These findings primarily involve the trial court's interpretation of the deed transferring title from the County to the Club. Although the Club's challenge to these findings did not comply with RAP 10.3(g), in our discretion we will consider the Club's challenge to these findings.

its extensive development work, and (3) the Club's activities constituted a public nuisance. We disagree and hold that the trial court's unchallenged findings of fact support these legal conclusions.

A. EXPANSION OF NONCONFORMING USE

The Club argues that the trial court erred in ruling that the Club engaged in an impermissible expansion of the existing nonconforming use by (1) increasing its operating hours; (2) allowing commercial use of the Club (including military training); and (3) increasing noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber, and practical shooting. We hold that increasing the operating hours represented an intensification rather than an expansion of use, but agree that the other two categories of changed use constituted expansions of the Club's nonconforming use.

1. Changed Use – General Principles

A legal nonconforming use is a use that "lawfully existed" before a change in regulation and is allowed to continue although it does not comply with the current regulations. *King County Dep't of Dev. & Envtl. Servs. v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013); *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998). Nonconforming uses are allowed to continue because it would be unfair, and perhaps a violation of due process, to require an immediate cessation of such a use. *King County DDES*, 177 Wn.2d at 643; *Rhod-A-Zalea*, 136 Wn.2d at 7.

As our Supreme Court noted, as time passes a nonconforming property use may grow in volume or intensity. *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). Although a property owner generally has a right to continue a protected nonconforming use,

there is no right to "significantly change, alter, extend, or enlarge the existing use." *Rhod-A-Zalea*, 136 Wn.2d at 7. On the other hand, an "intensification" of the nonconforming use generally is permissible. *Keller*, 92 Wn.2d at 731. "Under Washington common law, nonconforming uses may be intensified, but not expanded." *City of University Place v. McGuire*, 144 Wn.2d 640, 649, 30 P.3d 453 (2001). Our Supreme Court stated the standard for distinguishing between intensification and expansion:

> When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified use is different in kind from the nonconforming use in existence when the zoning ordinance was adopted.

Keller, 92 Wn.2d at 731 (internal citations omitted).

In *Keller*, our Supreme Court determined that a chlorine manufacturing company's addition of six cells to bring its building to design capacity (which increased its chlorine production by 20-25 percent) constituted an intensification rather than an expansion, and thus was permissible under the company's chlorine manufacturing nonconforming use status. 92 Wn.2d at 727-28, 731. The court's decision was based on the Bellingham City Code (BCC), which stated that a nonconforming use " 'shall not be enlarged, relocated or rearranged,' " but did not specifically prohibit intensification. *Keller*, 92 Wn.2d at 728 731 (quoting BCC § 20.06.027(b)(2)). The Supreme Court highlighted the trial court's unchallenged factual findings that the addition of the new cells "wrought no change in the nature or character of the nonconforming use" and had no significant effect on the neighborhood or surrounding environment. *Keller*, 92 Wn.2d at 731-32.

2. Kitsap County Code Provisions

Our Supreme Court in *Rhod-A-Zalea* noted that the Washington statutes are silent regarding regulation of nonconforming uses and that the legislature "has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances." 136 Wn.2d at 7. As a result, "local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution." *Rhod-A-Zalea*, 136 Wn.2d at 7. The analysis in *Keller* is consistent with these principles. Accordingly, we first determine whether the Club's increased activity is permissible under the Code provisions that regulate nonconforming uses, interpreted within due process limits.

Title 17 of the Code relates to zoning. KCC 17.460.020 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.

This ordinance reflects that generally the Code "is intended to permit these nonconformities to continue until they are removed or discontinued." KCC 17.460.010.

The Code contains two provisions that address when a nonconforming use changes. First, KCC 17.460.020(C) prohibits the geographic expansion or relocation of nonconforming uses:

> 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.

(Emphasis added). This ordinance prohibits expansion of only the *area* of a nonconforming use – i.e., the footprint of the use.

With one possible exception,[4] the Club did not violate this provision. The trial court concluded that the Club "enjoyed a legal protected nonconforming status for historic use of the existing eight acre range." CP at 4075. The Club developed portions of its "historic eight acres" by creating shooting bays, beginning preliminary work for relocating its shooting range, and constructing culverts to convey a water course across the range. CP at 4060. There is no allegation that any of this work took place outside the existing area of the Club's nonconforming use. Further, all of the activities that the trial court found constituted an expansion of use took place within the eight acre area.

Second, former KCC 17.455.060 (1998), which was repealed after the trial court rendered its opinion,[5] provided:

> A use or structure not conforming to the zone in which it is located shall not be *altered or enlarged in any manner*, unless such alteration or enlargement would bring the use or structure into greater conformity with the uses permitted within, or requirements of, the zone in which it is located.

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[4] The one possible violation of KCC 17.460.020 involved the Club's work on the proposed 300 meter range. It is unclear whether the proposed 300 meter range was outside the historic eight acres. The trial court made no factual finding on this issue, although the parties imply that this project went beyond the existing area. In any event, when the County objected the Club discontinued its work in this area. Because the project was abandoned, at the time of trial the Club no longer was in violation of KCC 17.460.020. Apparently, the Club currently is using this area for storage but is willing to move the items if a court determines it is outside its historical use area.

[5] Neither party discusses the effect of former KCC 17.455.060 being repealed. Because we interpret this ordinance consistent with the common law, we need not address this issue.

(Emphasis added). The court in *Keller* determined that the term "enlarged" in the ordinance at issue did not prohibit intensification. 92 Wn.2d at 731. "Alter" is defined as "to cause to become different in some particular characteristic . . . without changing into something else." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 63 (2002). Arguably, the prohibition on *altering* a nonconforming use could be interpreted as prohibiting every intensification of that use. But the County does not argue that former KCC 17.455.060 prohibits intensification. Further, as in *Keller*, the Code does not expressly prohibit intensification of a nonconforming use. And interpreting former KCC 17.455.060 strictly to prohibit any change in use would conflict with the rule that zoning ordinances in derogation of the common law should be strictly construed. *Keller*, 92 Wn.2d at 730.

Based on these factors, we interpret former KCC 17.455.060 as adopting the common law and prohibiting "expansion" but not "intensification" of a nonconforming use. As a result, we must analyze whether the Club's use since 1993 constitutes an expansion or intensification of use under common law principles.

3. Expansion vs. Intensification

As discussed above, *Keller* described the concept of "expansion" as an increase in the volume or intensity of the use of such magnitude that effects a "fundamental change" in the use, and the concept of "intensification" as where the "nature and character" of the use is unchanged and substantially the same facilities are used. 92 Wn.2d at 731. According to *Keller*, the test is whether the intensified use is "different in kind" than the nonconforming use. 92 Wn.2d at 731. Although the case law is somewhat unclear, we hold that the expansion/intensification determination is a question of law. *See City of Mercer Island v. Kaltenbach*, 60 Wn.2d 105, 107,

371 P.2d 1009 (1962) (whether ordinances allow a use must be determined as a matter of law); *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 209 n.14, 810 P.2d 31 (1991) (whether a zoning code prohibits a land use is a question of law).[6]

The trial court concluded that three activities "significantly changed, altered, extended and enlarged the existing use" and therefore constituted an expansion of use: "(1) expanded hours; (2) commercial, for-profit use (including military training); [and] (3) increasing the noise levels by allowing explosive devises [sic], high caliber weaponry greater than 30 caliber and practical shooting." CP at 4075-76. We hold that the Club's increased hours did not constitute an expansion of its nonconforming use. However, we hold that the other two activities did constitute an impermissible expansion of use.

First, the trial court found that the Club currently allowed shooting between 7:00 AM and 10:00 PM, seven days a week. But the trial court found that in 1993 shooting occurred during daylight hours only, sounds of shooting could be heard primarily on the weekends and early mornings in September (hunter sight-in season), and hours of active shooting were considerably fewer than today. We hold that the increased hours of shooting range activities here do not effect a "fundamental change" in the use and do not involve a use "different in kind" than the nonconforming use. *Keller*, 92 Wn.2d at 731. Instead, the nature and character of the use has remained unchanged despite the expanded hours. By definition, this represents an intensification

[6] *But see Keller*, 92 Wn.2d at 732, in which our Supreme Court discusses the trial court's *finding of fact* that "intensification wrought no change in the nature or character of the nonconforming use."

of use rather than an expansion. We hold that the trial court's findings do not support a legal conclusion that the increased hours of shooting constituted an expansion of the Club's use.

Second, the trial court made unchallenged findings that from 2002 through 2010 three for-profit companies regularly provided a variety of firearms courses at the Club's property, many for active duty Navy personnel. The trial court found that one company provided training for approximately 20 people at a time over three consecutive weekdays as often as three weeks per month from 2004 through 2010. Before this time, there was no evidence of for-profit firearm training at the property. Because the training courses involved the operation of firearms, that use on one level was not different than use of the property as a gun club's shooting range. However, using the property to operate a commercial business primarily serving military personnel represented a fundamental change in use and was completely different in kind than using the property as a shooting range for Club members and the general public.

We hold that the trial court's findings support the legal conclusion that the commercial and military use of the shooting range constituted an expansion of the Club's nonconforming use.

Third, the trial court made unchallenged findings that the noise generated at the Club's property changed significantly between 1993 and the present. The trial court found:

> Shooting sounds from the Property have changed from occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration. Rapid fire shooting sounds from the Property have become common, and the rapid-firing often goes on for hours at a time.

CP at 4073. The trial court further found that "[u]se of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being

exposed to the 'sounds of war.' " CP at 4073. Similarly, the use of cannons and exploding targets caused loud booming sounds. By contrast, the trial court found that rapid-fire shooting, use of automatic weapons, and the use of cannons and explosives at the property occurred infrequently in the early 1990s.

The types of weapons and shooting patterns used currently do not necessarily involve a different character of use than in 1993, when similar weapons and shooting patterns were used infrequently. However, we hold that the frequent and drastically increased noise levels found to exist at the Club constituted a fundamental change in the use of the property and that this change represented a use different in kind than the Club's 1993 property use.

We hold that the trial court's findings support a conclusion that the extensive commercial and military use and dramatically increased noise levels constituted expansions of the Club's nonconforming use, which is unlawful under the common law and former KCC 17.455.060.

B. VIOLATIONS OF LAND USE PERMITTING REQUIREMENTS

The trial court concluded that beginning in 1996, the Club violated various Code provisions by failing to obtain site development activity permits for extensive property development work – including grading, excavating, and filling – and failing to comply with the critical areas ordinance, KCC Title 19. The Club does not deny that it violated certain Code provisions for unpermitted work, nor does it claim that it ordinarily would not be subject to the permitting requirements.[7] And it is settled that nonconforming uses are subject to subsequently

[7] The Club argues that the provisions of the deed transferring the property from the County relieved the Club from compliance with development permitting requirements within its historical eight acres. This argument is discussed below.

enacted reasonable police power regulations unless the regulation would immediately terminate the nonconforming use. *Rhod-A-Zalea*, 136 Wn.2d at 9, 12 (holding that nonconforming use of land for peat mining facility is subject to subsequent grading permit requirement). KCC 17.530.030 states that any use in violation of Code provisions is unlawful. Accordingly, there is no dispute that the Club's unpermitted development work on the property constituted unlawful uses.

C. PUBLIC NUISANCE

The Club argues that the trial court erred in ruling both that its shooting range activities constituted a nuisance and that it was a "public" nuisance. We disagree.

The trial court concluded that the Club's activities on the property constituted a public nuisance in three ways: "(1) ongoing noise caused by shooting activities, (2) use of explosives at the Property, and (3) the Property's ongoing operation without adequate physical facilities to confine bullets to the Property." CP at 4075. The trial court also concluded that the Club's expansion of its nonconforming use and unpermitted development activities constituted a public nuisance. More specifically, the trial court concluded that these activities constituted a public nuisance per se, a statutory public nuisance in violation of RCW 7.48.010, .120, .130, .140(1), and .140(2) and KCC 17.455.110, .530.030, and .110.515, and a common law nuisance based on noise and safety issues. We hold that the trial court's unchallenged factual findings support its conclusion that the Club's activities constituted a public nuisance.

1. General Principles

A nuisance is a substantial and unreasonable interference with the use and enjoyment of another person's property. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005).

Washington's nuisance law is codified in chapter 7.48 RCW. RCW 7.48.010 defines an actionable nuisance as "whatever is injurious to health . . . or offensive to the senses, . . . so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.120 also defines nuisance as an "act or omission [that] either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property."

The Code contains several nuisance provisions. KCC 9.56.020(10) defines nuisance similar to RCW 7.48.120. KCC 17.455.110 prohibits land uses that "produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses." KCC 17.530.030 provides that "[a]ny use . . . in violation of this title is unlawful, and a public nuisance." Finally, KCC 17.110.515 states that "any violation of this title [zoning] shall constitute a nuisance per se."

If particular conduct interferes with the comfort and enjoyment of others, nuisance liability exists only when the conduct is unreasonable. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 923, 296 P.3d 860 (2013). "We determine the reasonableness of a defendant's conduct by weighing the harm to the aggrieved party against the social utility of the activity." *Lakey*, 176 Wn.2d at 923; *see also* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 10.3, at 656-57 (2d ed. 2004) (whether a given activity is a nuisance involves balancing the rights of enjoyment and free use of land between possessors of land based on the attendant circumstances). " 'A fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance is the reasonableness or unreasonableness of conducting the business or making the use of the property

complained of in the particular locality and in the manner and under the circumstances of the case.' " *Shields v. Spokane Sch. Dist. No. 81*, 31 Wn.2d 247, 257, 196 P.2d 352, 358 (1948) (quoting 46 C.J. 655, NUISANCES, § 20). Whether a nuisance exists generally is a question of fact. *Lakey*, 176 Wn.2d at 924; *Tiegs v. Watts*, 135 Wn.2d 1, 15, 954 P.2d 877 (1998).

A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance: 17 STOEBUCK & WEAVER, § 10.3, at 656; *see also Tiegs*, 135 Wn.2d at 13. However, a lawful activity also can be a nuisance. *Grundy*, 155 Wn.2d at 7 n.5. "[A] lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner." *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 325, 154 P. 450, 451 (1916).

2. Excessive Noise

The Club argues that the trial court erred in ruling that noise generated from the shooting range's activities constituted a nuisance. We disagree.

a. Unchallenged Findings of Fact

The Club does not assign error to any of the trial court's findings of fact regarding noise, but it challenges the trial court's "conclusion" that the conditions constituted a nuisance. But the trial court's determination that the conditions constituted a nuisance actually is a factual finding. *Lakey*, 176 Wn.2d at 924; *Tiegs*, 135 Wn.2d at 15. Therefore, our review is limited to determining whether the record contains substantial evidence to support the trial court's finding that the noise generated from the Club's activities was a substantial and unreasonable

interference with neighbors' use and enjoyment of their property. *Casterline*, 168 Wn. App. at 381.

The trial court made unchallenged findings that (1) loud rapid fire shooting occurred 7:00 AM to 10:00 PM, seven days a week; (2) the shooting sounds were "clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration," CP at 4073; (3) at times, the use of fully automatic weapons or the constant firing of semi-automatic weapons made residents feel exposed to the "sounds of war," CP at 4073; (4) the Club allowed the use of exploding targets, including Tannerite and cannons, which caused loud "booming" sounds in residential neighborhoods within two miles of the Club property and caused houses to shake, CP at 4074; (5) the noise from the range interfered with the comfort and repose of nearby residents, interfered with their use and enjoyment of their property, and had increased in the past five to six years; (6) the interference was common, occurred at unacceptable hours, and was disruptive of both indoor and outdoor activities; and (7) the description of noise interference was representative of the experience of a significant number of homeowners within two miles of the Club property.

Based on these findings of fact, the trial court found that the ongoing noise caused by the shooting range – specifically the Club's hours of operation, caliber of weapons allowed to be used, use of exploding targets and cannons, hours and frequency of "practical shooting," and automatic weapons use – was substantial and unreasonable, and therefore constituted common law public nuisance and statutory public nuisance conditions under RCW 7.48.120, KCC 17.530.030, and KCC 17.110.515. CP at 4078. The undisputed facts were sufficient to support this finding.

The trial court heard testimony, considered the evidence, and found that the noise was significant, frequent, and disruptive, and that it interfered with the surrounding property's use and enjoyment. The record contains substantial evidence to support these findings. Accordingly, we hold that the trial court did not err in finding that excessive noise from the Club's activities constituted a nuisance.

b. Noise Ordinances

The Club argues that despite the trial court's factual findings, noise from its activities cannot constitute a nuisance because the County failed to present evidence that it violated state and County noise ordinances and provided no objective measurement of noise. We disagree.

Although WAC 173-60-040 provides maximum noise levels, related regulations generally defer to local governments to regulate noise. *See* WAC 173-60-060, -110. Chapter 10.28 KCC provides maximum permissible environmental noise levels for the various land use zones. KCC 10.28.030-.040. But a violation may occur without noise measurements being made. KCC 10.28.010(b), .130. KCC 10.28.145 also prohibits a "public disturbance" noise.

The Club cites no Washington authority for the proposition that noise cannot constitute a nuisance unless it violates applicable noise regulations and Code provisions. None of the nuisance statutes or Code provisions require that a nuisance arise from a statutory or regulatory violation. A nuisance exists if there has been a substantial and unreasonable interference with the use and enjoyment of property. *Grundy*, 155 Wn.2d at 6. The trial court's unchallenged findings of fact support a determination that noise the Club generates constitutes a nuisance regardless of whether the noise level exceeds the specified decibel level.

c. Noise Exemption for Shooting Ranges

The Club argues that noise from the shooting range cannot constitute a nuisance as a matter of law because noise regulations exempt shooting ranges. Because this argument presents a legal issue, we review it de novo. *Recreational Equip.*, 165 Wn. App. at 559. We disagree with the Club.

Sounds created by firearm discharges on authorized shooting ranges are exempt from KCC 10.28.040 (maximum permissible environmental noise levels) and KCC 10.28.145 (public disturbance noises) between the hours of 7:00 AM and 10:00 PM. KCC 10.28.050. The Washington Department of Ecology also exempts sounds created by firearms discharged on authorized shooting ranges from its maximum noise level regulations. RCW 70.107.080; WAC 173-60-050(1)(b). The Code broadly defines "firearm" as "any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion," including rifles, pistols, shotguns, and machine guns. KCC 10.24.080. As a result, the noise from the weapons being fired at the Club's range falls within the noise exemption provisions of KCC 10.28.050, and thus is exempt from the maximum permissible environmental noise levels and public disturbance noise restrictions.[8]

But once again, the Club cites no authority for the proposition that an exemption from noise ordinances affects the determination of whether noise constitutes a nuisance. Because a nuisance can be found even if there is no violation of noise ordinances, the exemption from such ordinances is immaterial.

[8] However, the noise from the use of exploding targets, including Tannerite targets, is not noise from the discharge of firearms and therefore is not exempt from the noise ordinances.

The Club also argues that the exemption of shooting range noise from the state and local noise ordinances should be considered an express authority to make that noise. This argument is based on RCW 7.48.160, which provides that nothing done or maintained under the express authority of a statute can be deemed a nuisance.

Our Supreme Court addressed a similar issue in *Grundy*. In that case, a private person brought a public nuisance claim against Thurston County and a private nuisance claim against her neighbor for raising his seawall which left her property vulnerable to flooding. *Grundy*, 155 Wn.2d at 4-5. The public nuisance claim was based on assertions that Thurston County had wrongfully and illegally allowed the project by deciding that the seawall qualified for an administrative exemption from substantial permitting requirements. *Grundy*, 155 Wn.2d at 4-5. Rather than challenge Thurston County's administrative decision, the objecting neighbor sought to abate the seawall as a nuisance. *Grundy*, 155 Wn.2d at 4-5. Although the Supreme Court did not reach the public nuisance issue, it disagreed with the Court of Appeals' suggestion that the public nuisance was foreclosed based on the rule that nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. *Grundy*, 155 Wn.2d at 7 n.5. The Supreme Court stated that a lawful action may still be a nuisance based on the unreasonableness of the locality, manner of use, and circumstances of the case. *Grundy*, 155 Wn.2d at 7 n.5.

We interpret RCW 7.48.160 as requiring a direct authorization of action to escape the possibility of nuisance. *See Judd v. Bernard*, 49 Wn.2d 619, 621, 304 P.2d 1046 (1956) (State's eradication of fish in lake is not a nuisance because a statute authorizes the fish and wildlife department to remove or kill fish for game management purposes). There is no such direct

authorization here. We hold that the noise exemption and RCW 7.48.160 do not foreclose the County's nuisance claim based on noise.

Finally, the Club argues that even if the noise exemption does not automatically determine whether a nuisance exists, the noise statutes and ordinances (including the shooting range exemption) portray the community standards. The Club claims that the exemption reflects the community's decision that authorized shooting range sounds during designated hours are not unreasonable. Regulations affecting land use may be relevant in "determining whether one property owner has a reasonable expectation to be free of a particular interference resulting from use of neighboring property." 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 3.13, at 150 (4th ed. 2013). But the shooting range exemption is merely one factor to consider in determining the reasonableness of the Club's activities. The exemption does not undermine the trial court's findings that the Club's activities constituted a nuisance.

We hold that the trial court's unchallenged factual findings supported its determination that the noise generated from the Club's activities constituted a statutory and common law nuisance.

3. Safety Issues

The Club argues that the trial court erred in ruling that safety issues associated with the shooting range's activities constituted a nuisance. We disagree because the trial court's unchallenged factual findings support its ruling.

a. Unchallenged Findings of Fact

The Club did not assign error to any of the trial court's findings of fact regarding safety, but it challenges the trial court's "conclusion" that the conditions constituted a nuisance. However, as discussed above regarding noise, the trial court's determination that the unsafe conditions constituted a nuisance actually is a factual finding. *Lakey*, 176 Wn.2d at 924; *Tiegs*, 135 Wn.2d at 15. Therefore, once again our review is limited to determining whether the record contains substantial evidence to support the trial court's finding that safety issues arising from the Club's activities were a substantial and unreasonable interference with neighbors' use and enjoyment of their property. *Casterline*, 168 Wn. App. at 381.

The trial court made unchallenged findings that (1) the Club's property was a "blue sky" range, with no overhead baffles to stop accidently or negligently discharged bullets, CP at 4070; (2) more likely than not, bullets have escaped and will escape the Club's shooting areas and possibly will strike persons or property in the future based on the firearms used at the range, vulnerabilities of neighboring residential property, allegations of bullet impacts in nearby residential developments, evidence of bullets lodged in trees above berms, and the opinions of testifying experts; and (3) the Club's range facilities, including safety protocols, were inadequate to prevent bullets from leaving the property.

Based on these findings of fact, the trial court determined that the ongoing operation of the range without adequate physical facilities to confine bullets to the property creates an ongoing risk of bullets escaping the property to injure persons and property and constitutes a public nuisance under RCW 7.48.120, KCC 17.530.030, and KCC 17.110.515. The undisputed facts were sufficient to support a finding that the safety issues arising from the Club's activities

were unreasonable and constituted a "substantial and unreasonable interference" with the surrounding property's use and enjoyment. *Grundy*, 155 Wn.2d at 6.

The trial court heard testimony, considered the evidence, and found that the safety issues were significant and interfered with the surrounding property's use and enjoyment. Accordingly, we hold that the evidence was sufficient to support the trial court's determination that safety issues from the Club's activities created a nuisance.

b. Probability of Harm

The Club also argues that the trial court's findings do not support its conclusion that the range is a safety nuisance because the trial court did not find that any bullet from the Club had ever struck a person or nearby property. Similarly, the Club points out that the trial court found only that it was possible, not probable, that bullets could strike persons or property, and argues that the mere possibility of harm cannot constitute a safety nuisance. We disagree.

The Club provides no authority that a finding of actual harm is necessary to support a determination that an activity constitutes a safety nuisance. And contrary to the Club's argument, nuisance can be based on a reasonable fear of harm. "Where a defendant's conduct causes a reasonable fear of using property, this constitutes an injury taking the form of an interference with property." *Lakey*, 176 Wn.2d at 923. "[T]his fear need not be scientifically founded, so long as it is not unreasonable." *Lakey*, 176 Wn.2d at 923.

In *Everett v. Paschall*, our Supreme Court enjoined as a nuisance a tuberculosis sanitarium maintained in a residential section of the city where the reasonable fear and dread of the disease was such that it depreciated the value of the adjacent property, disturbed the minds of residents, and interfered with the residents' comfortable enjoyment of their property despite that

the sanitarium imposed no real danger. 61 Wash. 47, 50-53, 111 P. 879 (1910). And in *Ferry v. City of Seattle*, the Supreme Court affirmed the trial court's decision to enjoin as a nuisance the erection of a water storage reservoir in a city park due to residents' very real and present apprehension that it may collapse and flood the neighborhood damaging property and imperiling residents. 116 Wash. 648, 662-63, 666, 203 P. 40 (1922). The court held that "the question of the reasonableness of the apprehension turns again, not only on the probable breaking of the reservoir, but the realization of the extent of the injury which would certainly ensue; that is to say the court will look to consequences in determining whether the fear existing is reasonable." *Ferry*, 116 Wash. at 662.

In any event, whether an activity causes actual or threatened harm or a reasonable fear is not the dispositive issue. The crucial question for nuisance liability is whether the challenged activities are reasonable when weighing the harm to the aggrieved party against the social utility of the activity. *Lakey*, 176 Wn.2d at 923. For instance, in *Lakey*, neighbors of Puget Sound Energy (PSE) alleged that the electromagnetic fields (EMFs) emanating from its substation constituted a private and public nuisance. 176 Wn.2d at 914. Our Supreme Court concluded that even though the neighbors had demonstrated reasonable fear from EMF exposure, as a matter of law PSE's operation of the substation was reasonable based on weighing the harm against the social utility. *Lakey*, 176 Wn.2d at 923-25.

Here, the trial court found after weighing extensive evidence that the Club's range facilities and safety protocols were inadequate to prevent bullets from leaving the property and that more likely than not bullets will escape the Club's shooting areas. The trial court also found that the Club's property was close to "numerous residential properties and civilian populations."

CP at 4078. These undisputed facts support the trial court's determination that the Club's shooting activities created a risk of property damage and personal injury to neighboring residents, and therefore were unreasonable under the circumstances.

The trial court's unchallenged factual findings support its implicit conclusion that the Club's activities were unreasonable with respect to safety issues. We hold that the trial court's factual findings supported its determination that the safety issues arising from the Club's activities constituted a statutory and common law nuisance.

4. Expansion of Use/Unpermitted Development

The Club does not directly challenge the trial court's ruling that the Club's unlawful expansion of its nonconforming use and violation of various Code provisions represented a public nuisance. KCC 17.110.515 provides that "any violation of this title shall constitute a nuisance, per se." KCC 17.530.030 provides that "any use . . . in violation of this title is unlawful, and a public nuisance." We held above that the Club's expansion of its nonconforming use violated former KCC 17.455.060. Similarly, the Club's unpermitted development work violated Code provisions. *See, e.g.*, KCC 12.10.030 (activities requiring site development activity permits). Accordingly, it is undisputed that the Club's use expansion and unpermitted development work at the property constituted a nuisance as a matter of law.

5. Existence of a Public Nuisance

The County brought this action against the Club on behalf of the public. As a result, in order to prevail the County must show not only that the Club's activities constitute a nuisance, but that they constitute a *public* nuisance. The Club argues that the trial court erred in determining that the Club's activities constituted a public nuisance. We disagree.

RCW 7.48.130 provides that a public nuisance is one that "affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." An example of a public nuisance was presented in *Miotke v. City of Spokane*, where the city of Spokane discharged raw sewage into the Spokane River. 101 Wn.2d 307, 309, 678 P.2d 803 (1984). The plaintiffs were the owners of lakefront properties below a dam on the river. *Miotke*, 101 Wn.2d at 310. The court held that the release constituted a public nuisance because it affected the rights of all members of the community living along the lake shore. *Miotke*, 101 Wn.2d at 331.

a. Excessive Noise

The trial court made no express ruling that the excessive noise from the Club's activities affected equally the rights of an entire community. But the trial court made a finding accepting as persuasive the testimony of current and former neighbors who described noise conditions that "interfere[d] with the comfort and repose of residents and their use and enjoyment of their real properties" and who "describe[ed] their everyday lives as being exposed to the 'sounds of war.' " CP at 4073. The trial court also found that "[t]he testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the [Club's] Property." CP at 4073. This finding implicitly identifies the relevant "community" as the area within two miles of the Club. Finally, the trial court cited to RCW 7.48.130 (and other nuisance statutes) in entering a conclusion of law stating that the Club's property "has become and remains a place violating the comfort, repose, health and safety *of the entire community or neighborhood*." CP at 4078. (Emphasis added.)

The Club argues that the noise conditions are not a public nuisance because the evidence shows that noise from the Club does not affect the rights of all members of the community equally. The Club points to testimony from witnesses that stated that the noise from the Club did not disturb them. However, every neighbor testifying discussed the noise caused by the Club, which the trial court found affected all property within a two mile radius of the Club. In this respect, the facts here are similar to those in *Miotke*, where the pollutants affected every lakefront property owner. The fact that some residents were not much *bothered* by the noise does not defeat the public nuisance claim because it relates to the extent of damage caused by the condition, which need not be equal.

We hold that the trial court's unchallenged factual findings support its determination that noise from the Club constituted a public nuisance.

b. Safety Issues

Regarding safety, the trial court entered findings referencing the testimony of range safety experts and finding that "more likely than not, bullets will escape the Property's shooting areas and will possibly strike persons or damage private property in the future." CP at 4070. The trial court also found that the Club's facilities were inadequate to contain bullets inside the property. However, once again the trial court made no factual findings regarding safety that specifically addressed the public nuisance question.

The Club argues that fear of bullets leaving the Club's property does not equally affect all members of the community. As with the noise, the Club argues that some witnesses testified that they were not afraid of the Club. However, the trial court cited to RCW 7.48.130 in stating that the Club's property "has become and remains a place violating the . . . safety of the *entire*

community or neighborhood." CP at 4078 (Emphasis added.) And the trial court's finding that it was likely that bullets would escape the shooting areas and possibly cause injury or damage supports a conclusion that the risk of injury or damage is equal in all areas where bullets might escape. Although the trial court did not address the exact parameters of the affected area, the failure to identify the applicable community does not preclude a public nuisance finding.

We hold that the trial court's unchallenged factual findings support its determination that safety issues constituted a public nuisance.

c. Expansion of Use/Unpermitted Development

As noted above, KCC 17.530.030 provides that any use in violation of the zoning ordinances is a public nuisance, and KCC 12.32.010 provides that violation of certain permitting requirements is a public nuisance. This is consistent with the principle that one type of public nuisance involves an activity that is forbidden by statute or ordinance. 17 STOEBUCK & WEAVER, § 10.3, at 663. As a result, the trial court ruled that the Club's unpermitted development work constituted a public nuisance.

The Club does not directly challenge the trial court's finding of a public nuisance on this basis. Because the Club's expansion of use and unpermitted development work violated various Code provisions, it is undisputed that the Club's unpermitted development work constituted a public nuisance.

D. EFFECT OF DEED OF SALE

The Club argues that even if its activities were unlawful as discussed above, the language of the deed of sale transferring the property title from the County to the Club prevents the County from challenging any part of the Club's status or operation as it existed in 2009,

including expansion of its nonconforming use status, permitting violations, and nuisance activities. According to the Club, the deed represented a settlement of any potential disputes regarding the Club's nonconforming use, including any Code violations, and was an affirmation that the Club may operate as it then existed and improve its facilities within the historical eight acres. The Club argues that this settlement is enforceable as an accord and satisfaction affirmative defense or a breach of contract counterclaim. The Club also argues that the deed provisions and extrinsic evidence estop the County from attempting to terminate the Club's nonconforming use or denying that the Club's then-existing facilities and operations were not in violation of the Code or a public nuisance.

The trial court ruled that the deed did not prevent or estop the County from challenging the Club's unlawful uses of its property. We agree with the trial court.

1. Standard of Review

Interpretation of a deed is a mixed question of fact and law. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 459 n.7, 243 P.3d 521 (2010). Our goal is to discover and give effect to the parties' intent as expressed in the deed. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 745, 844 P.2d 1006 (1993). The parties' intent is a question of fact and the legal consequence of that intent is a question of law. *Affiliated FM Ins.*, 170 Wn.2d at 459 n.7. We defer to the trial court's factual findings if they are supported by substantial evidence and review questions of law and conclusions of law de novo. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw. Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012); *Casterline*, 168 Wn. App. at 381.

2. Accord and Satisfaction Defense/Breach of Contract Counterclaim

The Club argues that the trial court erred in failing to interpret the deed as incorporating a covenant by the County to allow the Club to continue the shooting range as it then existed, enforceable under contract law, or as a settlement of potential land use disputes under principles of accord and satisfaction.[9] The Club relies on (1) deed clauses providing for improvement and expansion of the shooting range, (2) a claimed implied duty to allow the Club to perform the deed's public access clause, (3) a claimed implied duty not to frustrate the purpose of the deed – for the Club to continue operating the shooting range, and (4) extrinsic evidence that allegedly confirms the Club's interpretation of the parties' intent. We disagree with the Club.

a. Improvement and Expansion Clauses

The deed addresses improvement and expansion of the shooting range. The Club refers to the "improvement clause," which provides:

> [The Club] 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 [the Club] may upgrade or improve the property and/ or facilities within the historical approximately eight (8) acres in a manner consistent with "modernizing" the facilities consistent with management practices for a modern shooting range.

CP at 4088. The deed also contains an "expansion clause," which states that "[the Club] may 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

[9] The Club also argues that the deed guaranteed its right to continue operating as a nonconforming shooting range as it existed at the time of the deed. Because we hold below that the Club's unlawful property use does not terminate its nonconforming use status, we need not address this issue.

said expansion is consistent with public safety, and conforms with the terms and conditions [in this deed] . . . and the rules and regulations of Kitsap County for development of private land." CP at 4088.

The Club argues that the juxtaposition of the improvement clause and the expansion clause (which requires an application and compliance with rules and regulations) means that improvements within the historical eight acres are allowed uses and do not need to comply with county development regulations. We disagree.

First, the improvement clause makes no reference to the Club's existing use, except to limit the Club's use to eight acres. Specifically, the clause says nothing about the lawfulness of the Club's existing use, the County's position regarding that use, or the settlement of any potential land use disputes.

Second, the language regarding improvements refers only to future modernization. The clause does not ratify unpermitted development activities that occurred in the past. Even if the two clauses could be interpreted as waiving any Code requirements for future work, the deed by its clear language does not apply to past work. And most of the development work the trial court referenced in its decision took place before the deed's execution.

Third, the deed states that the conveyance of land is made subject to certain covenants and conditions, "the benefits of which shall inure to the benefit of the public and the burdens of which shall bind the [Club]." CP at 4087. The improvement clause is one such restrictive covenant: it restricts the Club's property use to its active shooting range facilities consistent with its eight acres of historical use and then makes an exception for certain improvements within the eight acres and further expansion by application. It would be unreasonable to view a restrictive

covenant in the deed as an affirmative ratification of past development and a waiver of future development permitting violations. Accordingly, we reject the Club's argument that the improvement and expansion clauses preclude the County from challenging the Club's shooting range activities.

b. Public Access Clause

The deed provides that access by the public to the Club's property must be offered at reasonable prices and on a nondiscriminatory basis. The Club argues that the trial court erred in "failing to give effect to the County's implied duty to allow the Club to perform the public access provision in the [d]eed." Br. of Appellant at 43. The Club states that it was depending on the County's approval of its then-existing facilities and operations when it agreed to provide public access. The Club also claims that the County's attempt to shut down the shooting range would prevent the Club from performing its side of the contract. We disagree.

The language in the public access clause does not restrict the County from enforcing zoning regulations or seeking to abate nuisance conditions on the conveyed property. And the Club has cited no authority for the proposition that its agreement to provide public access somehow prevents the County from taking actions that would limit Club activities. Accordingly, we reject the Club's argument that the public access clause precludes the County from challenging the Club's shooting range activities.[10]

[10] Because we hold below that terminating the Club's nonconforming use is not an appropriate remedy for the Club's unlawful activities, we need not address whether the public access clause would prevent the County from shutting down the Club.

c. Implied Duty Regarding Frustration of Purpose

The Club contends that the trial court erred in "failing to give effect to the County's implied duty not to frustrate the [d]eed's purpose of allowing the Club to continue operating its nonconforming shooting range as it existed within the historical eight acres of active use." Br. of Appellant at 45. The Club argues that the deed expressed the understanding that the Club was purchasing the property for that purpose and that as the grantor/seller, the County implied that what was sold was suitable for that purpose and bore the risk if it was not. We disagree.

Under the Code, the Club did have the right to continue its nonconforming use. KCC 17.460.020. But the County's lawsuit alleged that the Club had expanded outside its nonconforming use right, developed the land without proper permits, and operated the range in a manner that constituted a nuisance. Those alleged conditions are all within the Club's control. The County's sale of the land even for the purpose of facilitating the Club's continued existence does not prevent the County from insisting that it be operated in a manner consistent with the law. We reject the Club's argument.

d. Extrinsic Evidence

The Club argues that extrinsic evidence demonstrated that the County intended to resolve all land use issues at the Club's property by the terms of the deed. The Club claims that (1) the County's statements in conjunction with the deed were an expression of its intent to approve and ratify any potentially actionable existing conditions on the property, and (2) the County's knowledge of potential issues involving the Club shows that the County intended to settle or waive those issues with the deed. We hold that the record supports the trial court's factual findings.

The Club relies on four pieces of extrinsic evidence. First, the minutes and recordings of the Board's meeting include statements by a county official and two county commissioners in support of the land sale so that its existing use as a shooting range may continue. Second, a Board resolution supported the Club's continued shooting range operation and stated that it is "in the best economic interest of the County to provide that [the Club] continue to operate with full control over the property on which it is located." CP at 858. Third, a letter from one of the county commissioners entered into the public record stated that the Board earlier had assured a state agency (that was considering providing grant funds to the Club), that the "[Club] and its improvements were not at odds with the County's long-term interest in the property." CP at 3793. Fourth, the evidence shows that at the time the deed was executed the County was aware of possible existing permitting violations, unlawful expansion, and complaints from neighbors about the Club.

However, the trial court's findings show that it considered this evidence and concluded that the evidence did not support the Club's arguments. The Club argues that the trial court erroneously found that "[t]he only evidence produced at trial to discern the County's intent at the time of the 2009 Bargain and Sale Deed was the deed itself," CP 4058, because the Club produced substantial evidence bearing on the County's intent and the trial court failed to consider it. But we interpret the court's factual finding to mean that the trial court considered the deed as the only *credible* evidence of the County's intent. The finding cannot be read to mean that the deed was the only evidence produced because it is clear that the trial court did consider other evidence bearing on the parties' intent.

After considering the extrinsic evidence, the trial court found that (1) the Board's minutes and recordings do not reveal an intent to settle disputed claims or land use decisions or land use status at the property, and (2) the parties did not negotiate for the resolution of potential civil violations of the Code at the property or to resolve the property's land use status.[11] The trial court also made an *unchallenged* factual finding that the deed does not identify or address any then-existing disputes between the Club and County. The Club disagrees with these findings, but the weight given to certain evidence is within the trial court's discretion.

In essence, the Club is asking us to substitute our view of the evidence for the trial court's findings. That is not our role.

> [W]here a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Yet, that is what appellant wants this court to do. There was conflicting evidence in this case. The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.

Bale v. Allison, 173 Wn. App. 435, 458, 294 P.3d 789 (2013) (quoting *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009)) (emphasis omitted). Accordingly, we reject the Club's argument that extrinsic evidence supports its interpretation of the deed language.

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[11] The County argues that these findings of fact should be treated as verities because the Club did not assign error to them in its initial brief and fails to assign error to the trial court's failure to adopt any of its proposed findings. RAP 10.3(g), 10.4. However, the County acknowledges and responds to the findings of fact that the Club disputes in the body of its brief – findings 23, 35, 26, and 57. Although the Club violated RAP 10.3(g), we exercise our discretion to waive the Club's failure to strictly comply with the procedural rules. *See In re Disciplinary Proceedings Against Conteh*, 175 Wn.2d 134, 144, 284 P.3d 724 (2012).

3. Estoppel Defense

The Club assigns error to the trial court's denial of its equitable estoppel defense. Apparently the Club contends that the County is estopped from asserting all of its claims. We need not decide whether the County should be estopped from seeking termination of the Club's nonconforming use because we hold below that termination is not an appropriate remedy for the Club's allegedly prohibited activities. But we disagree that estoppel applies to the County's other claims.

Equitable estoppel against a governmental entity requires a party to prove five elements by clear and convincing evidence:

> (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is 'necessary to prevent a manifest injustice'; and (5) estoppel will not impair governmental functions.

Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868, 887, 154 P.3d 891 (2007) (quoting *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993)). Whether equitable relief is appropriate is a question of law. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005).

The Club's estoppel defense is not viable because the County's enforcement of its Code and nuisance law is not inconsistent with its earlier position. The County's general support for the shooting range's continued existence is not inconsistent with its current insistence that the range conform to development permitting requirements and operate in a manner not constituting a nuisance. Moreover, the County's enforcement of its zoning code and nuisance law is a government function. *See City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 482, 513 P.2d

80 (1973). If the County was estopped from enforcing those laws, it would certainly impair governmental functions. Finally, estoppel is not required to prevent manifest injustice here, especially because the Club's allegation of the County's inconsistency is tenuous.

The Club has failed to prove the essential elements of estoppel. We hold that the trial court did not err in rejecting the Club's estoppel defense.

REMEDY FOR THE CLUB'S UNLAWFUL USE

A. TERMINATION OF NONCONFORMING USE

The Club argues that the trial court erred in concluding that an unlawful expansion of the Club's nonconforming use, unpermitted development activities, and public nuisance activities terminated the Club's legal nonconforming use of the property as a shooting range. As a result, the Club argues that the trial court erred in issuing a permanent injunction shutting down the shooting range until the Club obtains a conditional use permit. We agree, and hold that the termination of the Club's nonconforming use is not the appropriate remedy for its unlawful uses.

1. Standard of Review

Injunctive relief is an equitable remedy, and we review a trial court's decision to grant an injunction and the terms of that injunction for an abuse of discretion. *Early Dawn Estates*, 173 Wn. App. at 789. However, whether termination of a property's nonconforming use is an appropriate remedy for unlawful uses of that property is a question of law, which we review de novo. *See King County DDES*, 177 Wn.2d at 643 (reiterating that legal questions "are reviewed de novo."). If termination of the nonconforming use is an appropriate remedy as a matter of law, we apply the abuse of discretion standard in reviewing the trial court's decision to select that remedy.

2. Kitsap County Code

The KCC chapter on nonconforming uses, KCC 17.460.010, allows nonconforming uses to continue until they are removed or discontinued. KCC 17.460.020 further states that a nonconforming use may be continued as long as it is "otherwise lawful." The County argues that this ordinance allows termination of the Club's operation as a shooting range because the Club's unlawful expansion, permitting violations, and/or nuisance prevents the nonconforming use from being "otherwise lawful." We disagree with the County's interpretation of the Code.

First, based on the plain language of the Code it is the nonconforming *use* that must remain lawful. KCC 17.460.020. A "use" of land means "the nature of occupancy, type of activity or character and form of improvements to which land is devoted." KCC 17.110.730. The Club's use of the property is as a shooting range. Therefore, the question under KCC 17.460.020 is whether a *shooting range* is a lawful use of the Club's property (other than the fact it does not conform to zoning regulations), not whether specific activities at the range are unlawful. For instance, termination of the Club's nonconforming use may be an appropriate remedy under KCC 17.460.020 if that use would not be allowed to continue under any circumstances, such as if the County or the State passed a law prohibiting all shooting ranges. But here the use of the Club's property as a shooting range remains lawful, and therefore any unlawful expansion of use, permitting violations, or nuisance activities cannot trigger termination of the otherwise lawful nonconforming use.

Second, the penalty and enforcement provisions of the Code do not support a termination remedy. KCC 17.530.020, which is a section entitled "penalties" in the enforcement chapter of the zoning title, provides that violation of any provision of the zoning title constitutes a civil

infraction and that the County may seek civil penalties. There is no mention of forced termination of an existing nonconforming use based on a Code violation. And the Code expressly provides for a less drastic remedy. KCC 17.530.050, which also is within the enforcement chapter, provides that "the director may accept a written assurance of discontinuance of any act in violation of this title from any person who has engaged in such act." In support of this position, we note that the County's chief building official Jeffrey Rowe testified that the Code allows a landowner to get back into conformity by retracing a prohibited expansion, enlargement, or change of use.

Specifically regarding nuisance, KCC 17.530.030 provides that any person may bring an action to abate a nuisance. But there is no authority supporting a proposition that an activity on property that constitutes a nuisance operates to terminate that property's nonconforming use status.

Third, the County's interpretation allowing any expansion of use, permitting violation, or nuisance activity to terminate a nonconforming use would eviscerate the value and protection provided by a legal nonconforming use. Nonconforming use status would have little value if an expansion of that use would prevent the owner from continuing the lawful use in place before the expansion. And this would be contrary to the Code's stated purpose in KCC 17.460.010: to permit nonconforming uses to continue.

We hold that the Code does not provide for a termination remedy for Code violations or unlawful expansion of nonconforming uses.

2. Common Law

The common law also does not support the trial court's remedy. We have found no Washington case holding that an unlawful expansion of a nonconforming use, permitting violations, or nuisance activities terminates a nonconforming use. Further, no Washington case has even suggested such a remedy. In *Keller*, the plaintiffs challenged as unlawful the enlargement of a chlorine manufacturing facility that was a nonconforming use. 92 Wn.2d at 728-29. Although the Supreme Court did not specifically address the remedy for an unlawful expansion, it gave no indication that the entire facility could be shut down if the enlargement constituted an unlawful expansion.

Courts in other jurisdictions have concluded that in the absence of statutory authority, an unlawful expansion of a nonconforming use does not operate to terminate that use. *Dierberg v. Bd. of Zoning Adjustment of St. Charles County*, 869 S.W.2d 865, 870 (Mo. App. 1994); *Garcia v. Holze*, 94 A.D.2d 759, 462 N.Y.S.2d 700, 703 (1983). Instead, the remedy is to discontinue the activities that exceed the lawful nonconforming use. *See Dierberg*, 869 S.W.2d at 870.

Similarly, no Washington court has held that permitting violations associated with a nonconforming use terminates that use. In *Rhod-A-Zalea*, the Supreme Court held that the owner of a peat mine operated as a nonconforming use had violated permitting requirements for grading activities. 136 Wn. 2d at 19-20. Again the court did not specifically address the remedy for this violation, but did not even suggest that the failure to obtain required permits would allow termination of the mining operation.

And no Washington court has held that nuisance activities associated with a nonconforming use terminate that use. Historically, public nuisances were prosecuted only

criminally (fine or jail time), but in more modern times legislators have enacted measures emphasizing abatement of the nuisance over assessing criminal penalties. 8 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 73.08(d), at 479-80 (David A. Thomas ed. 2013). *See also* RCW 7.48.200 (providing that "[t]he remedies against a public nuisance are: Indictment or information, a civil action, or abatement").

3. Appropriate Remedy

We hold that termination of the Club's nonconforming use status is not the proper remedy even though the Club did expand its use, engage in unpermitted development activities, and engage in activities that constitute a nuisance. Neither the Code nor Washington authority supports this remedy, and such a remedy would impermissibly interfere with legal nonconforming uses.

In order to implement its conclusion that the Club's nonconforming use had terminated, the trial court issued an injunction enjoining the Club from operating a shooting range on its property until it obtained a conditional use permit for a private recreational facility or some other authorized use. We vacate this injunction because it is based on an incorrect conclusion that the nonconforming use was terminated.

The appropriate remedy for the Club's expansion of its nonconforming use must reflect the fact that some change in use – "intensification" – is allowed and only "expansion" is unlawful. For the permitting violations, the Code provides the appropriate remedies for the Club's permitting violations. *See* KCC 12.32.010, .040, .050; KCC 19.100.165. We address the appropriate remedy for public nuisance in the section below.

We remand to the trial court to determine the appropriate remedies for the Club's expansion of its nonconforming use and the Club's permitting violations.

B. REMEDY FOR PUBLIC NUISANCE

The trial court issued a second permanent injunction designed to abate the public nuisance conditions at the Club's property, which prohibited the use of fully automatic firearms, rifles of greater than nominal .30 caliber, exploding targets and cannons, and use of the property as an outdoor shooting range before 9:00 AM or after 7:00 PM. The Club argues that the court erred in entering the injunction because the activities enjoined do not necessarily constitute a nuisance, and therefore the injunction represents the trial court's arbitrary opinions regarding how a shooting range should be operated. We disagree.

The trial court had the legal authority to enter an injunction designed to abate a public nuisance under both RCW 7.48.200 and KCC 17.530.030. Therefore, the only issue is whether the terms of the injunction were appropriate. Injunctive relief is an equitable remedy, and we review a trial court's decision to grant an injunction and the terms of that injunction for an abuse of discretion. *Early Dawn Estates*, 173 Wn. App. at 789. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Recreational Equip.*, 165 Wn. App. at 559. We will not reweigh the trial court's equitable considerations. *Recreational Equip.*, 165 Wn. App. at 565.

Here, the trial court's findings are supported by substantial evidence and those findings support its discretionary determination that it should grant equitable relief. Therefore, we hold that the trial court did not abuse its discretion in issuing this injunction as a remedy for the Club's

nuisance activities. The limitation of the activities is reasonably related to the noise-related nuisance and possibly to the safety-related nuisance.

The trial court also issued a warrant of abatement, with terms to be determined at a later hearing. The Club argues that this warrant of abatement was issued in error because it fails to set forth the conditions of abatement. However, the trial court had statutory authority to issue the warrant of abatement, and under the circumstances it was not inappropriate to defer entry of specific details.

ISSUES RAISED ONLY BY AMICUS BRIEFS

Two amicus briefs raise additional arguments against terminating the Club's nonconforming use right. The Kitsap County Alliance of Property Owners argues that substantive due process rights prevents the Code from being interpreted to terminate the Club's nonconforming use right. And the National Rifle Association argues that such a remedy violates the Second Amendment. Neither of these issues was raised at the trial court or in the parties' appellate briefs.

We do not need to consider the arguments raised solely by amici. *See, e.g., State v. Hirschfelder*, 170 Wn.2d 536, 552, 242 P.3d 876 (2010) (courts "need not address 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"). Moreover, because we hold that termination of the Club's nonconforming right was error, there is no need to consider these constitutional arguments. We refrain from deciding constitutional issues if the case can be decided on non-constitutional grounds. *Isla Verde Int'l. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002).

CONCLUSION

We affirm the trial court's rulings that (1) the Club's commercial use of the property and dramatically increased noise levels constitute an impermissible expansion of its nonconforming use; (2) the Club's development work unlawfully violated various County land use permitting requirements; and (3) the excessive noise, unsafe conditions, and unpermitted development work constituted a public nuisance. We reverse the trial court's ruling that increased hours of operation constitute an expansion of its nonconforming use.

Regarding the remedy for the Club's unlawful activities, we reverse the trial court's ruling that termination of the Club's nonconforming use status as a shooting range is a proper remedy. We vacate the trial court's injunction enjoining the property's use as a shooting range. But we affirm the trial court's injunction limiting certain activities at the Club in order to abate the Club's nuisance activities. We remand for the trial court to determine the appropriate remedy for the Club's expansion of its nonconforming use and permitting violations.

Maxa, J.
MAXA, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Melnick, J.
MELNICK, J.

Appendix No. 2

Findings of Fact, Conclusions of Law and Orders (Feb. 9, 2012) *Kitsap County v. Kitsap Rifle and Revolver Club,* Pierce County Superior Court Cause No. 10-2-12913-3

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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.

NO. 10-2-12913-3

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

THIS MATTER having come on regularly for trial before the undersigned Judge of the above-entitled Court, and the matter having been tried to the bench; presentation of preliminary motions and evidence commenced on September 28, 2011 and concluded on October 27, 2011; the Court allowed submission of written closing arguments and submissions of Findings of Fact

and Conclusions of Law no later than 9:00 a.m. on November 7, 2011. The parties' briefs and proposed Findings of Fact were received timely; the parties appeared through their attorneys of record Neil Wachter and Jennine Christensen for the Plaintiff and Brian Chenoweth and Brooks Foster for the Defendant; and the Court considered the motions, briefing, testimony of witnesses, argument of counsel, proposed Findings of Fact and Conclusions of Law, and the records and files herein, and being fully advised in the premises, now, therefore, makes the following findings of fact, conclusions of law and orders, which shall remain in effect until further order of this court:

I. FINDINGS OF FACT

JURISDICTION

1. All events cited in these Findings took place in unincorporated Kitsap County, Washington, except where noted. Port Orchard is the county seat for Kitsap County, and references to official action by the Kitsap County Board of County Commissioners ("BOCC") or to meetings or BOCC proceedings at the Kitsap County Administration Building refer to events at County facilities located in Port Orchard, except where noted to the contrary.

2. On October 22, 2010, the Court denied defendant Kitsap Rifle and Revolver Club's motion to change venue in this action, finding that the Pierce County Superior Court has jurisdiction over the parties and is the proper venue for the action pursuant to RCW 2.08.010 and RCW 36.01.050. The Court denied the motion without prejudice, and the defendant did not renew its motion.

PARTIES

3. Plaintiff Kitsap County ("County") is a municipal corporation in and is a political subdivision of the State of Washington.

4. Defendant Kitsap Rifle and Revolver Club ("KRRC" or "the Club", more particularly described below) is a Washington non-profit corporation and is the owner of record of the subject property, which is located at 4900 Seabeck Highway NW, Bremerton, Washington (hereinafter referred to as the "Property") and more particularly described as:

36251W

PART OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER AND PART OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER, SECTION 36, TOWNSHIP 25 NORTH, RANGE 1 WEST, W.M., KITSAP COUNTY, WASHINGTON, LYING NORTHERLY OF THE NORTH LINES OF AN EASEMENT FOR RIGHT OF WAY FOR ROAD GRANTED TO KITSAP COUNTY ON DECEMBER 7, 1929, UNDER APPLICATION NO. 1320, SAID ROAD BEING AS SHOWN ON THE REGULATION PLAT THEREOF ON FILE IN THE OFFICE OF THE COMMISSIONERS OF PUBLIC LANDS AT OLYMPIA, WASHINGTON.******IMPROVEMENTS CARRIED UNDER TAX PARCEL NO. 362501-2-002-1000******

5. Defendant Sharon Carter (d/b/a "National Firearms Institute") was dismissed from this action on February 14, 2011 upon Plaintiff's motion. No other defendants have been named.

KRRC

6. Defendant Kitsap Rifle and Revolver Club (the "Club" or "KRRC") is a non-profit organization founded by charter on November 11, 1926 for "sport and national defense." Exhibits 475–76. It was later incorporated in 1986. Exhibit 271.

7. From its inception, the Club occupied the 72-acre parcel (the "Property") identified above. For many decades, the Club leased the Property from the Washington State Department of Natural Resources ("DNR"). Exhibits 135–36.

8. The Property consists of approximately 72 acres, including approximately eight acres of active or intensive use and occupancy containing the Club's improvements, roads, parking areas, open shooting areas, targets, storage areas, and associated infrastructure

("Historical Eight Acres"). Exhibits 135-36, 438, 486. The remaining acreage consists of timberlands, wetlands and similar resource-oriented lands passively utilized by the Club to provide buffer and safety zones for the Club's shooting range. Id.

ZONING

9. The property is zoned "rural wooded" under Kitsap County Code Chapter 17.301. The Property has had this same essential zoning designation since before the year 1993.

10. On September 7, 1993, then-BOCC Chair Wyn Granlund authored a letter to the four shooting ranges in unincorporated Kitsap County at the time, stating that the County recognized each as "grandfathered." Exhibit 315.

THE SUBJECT PROPERTY - OWNERSHIP, LEASES AND DNR USES

11. Until June 18, 2009, the 72-acre subject property was owned by the State of Washington Department of Natural Resources ("DNR"). DNR owned several contiguous parcels to the north of the subject property, and managed parts of these contiguous properties and parts of the subject property for timber harvesting. DNR leased the Property to KRRC under a series of lease agreements, the two most recent of which were admitted into evidence. Exhibits 135 and 136. The lease agreements recite that eight acres of the property are for use by the Club as a shooting range and that the remaining 64.4 acres are for use as a "buffer". The lease agreements do not identify the specific boundaries of these respective areas. Id.

12. Prior to the instant litigation, the eight acres of the property claimed by KRRC to be its "historic use" area had not been surveyed by a professional surveyor or otherwise specifically defined.

13. Over the decades of its ownership of the Property and adjacent properties, DNR periodically conducted timber harvesting and replanting. The most recent DNR timber harvest on the Property was in approximately 1991, when the eastern portions of the Property were clear-cut and successfully replanted.

14. On June 18, 2009, deeds were recorded with the Kitsap County Assessor's Office transferring the Property first from the State of Washington to Kitsap County and immediately thereafter from Kitsap County to KRRC. The first deed was a quit claim deed transferring DNR land including the Property from the State to the County. Exhibit 146. The second deed was a bargain and sale deed ("2009 Deed") transferring the Property from the County to KRRC. Exhibit 147 (attached to these Findings of Fact).

15. For purposes of these factual findings, the Court will use the names the Club has given to shooting areas at the Property, which include a rifle range, a pistol range, and shooting bays 1-11 as depicted in Exhibits 251 and 251A (June 2010 Google earth imagery). The well house referenced in testimony is located between Bays 4 and 5 and the "boat launch" area referenced in testimony is west of Bay 8.

PROPERTY TRANSFER

16. For several years dating back to the 1990's, Kitsap County sought to acquire property in Central Kitsap County to be developed into a large greenbelt or parkland area. Prior to 2009, Kitsap County acquired several large parcels in Kitsap County for use in a potential "land swap" with the State DNR. DNR owned several large parcels including the Subject Property, which were the object of the County's proposed transaction ("DNR parcels").

17. In early 2009, negotiations with the State reached a stage when the DNR and the County began to discuss specific terms of the contemplated transaction. DNR informed the

County that it would be deeding the DNR parcels including the subject property to Kitsap County, so that the County would take over DNR's position as landlord to KRRC.

18. KRRC became aware that the County could become the Club's landlord as a result of the land swap and became concerned that the County might exercise a "highest and best use" clause in the lease agreements between the Club and DNR, so as to end the Club's use of the Property for shooting range purposes.

19. In March 2009, Club officials met with County officials including Commissioner Josh Brown, in an effort to secure the County's agreement to amend the lease agreement to remove the highest and best use clause. Soon after, the County and Club began discussing whether the County should instead deed the property to KRRC. KRRC very much wanted to own the property on which its shooting range was located and Kitsap County was not interested in owning the Property due to concern over potential heavy metals contamination of the Property from its use as a shooting range for several decades.

20. In April and May 2009, Club officers and club member/attorney Regina Taylor negotiated with Kitsap County staff members, including Matt Keough of the County Parks Department and Deputy Prosecuting Attorney Kevin Howell of the County Prosecutor's Office Civil Division. A bargain and sale deed was drafted by Mr. Howell, and the parties exchanged revisions of the deed until they agreed upon the deed's final terms.

21. At the County's request, certified appraiser Steven Shapiro conducted an appraisal of the KRRC property, which he published as a "supplemental appraisal report" dated May 5, 2009. Exhibit 279. This appraisal report presumed that the Property was lead-contaminated and that a $2-3 million cleanup may be required for the property. The appraisal report valued the Property at $0, based upon its continued use for shooting range purposes and

the potential costs of environmental cleanup. The appraisal did not split out values to be assigned to the "historic use" and "buffer" areas of the Property.

22. On May 11, 2009, the BOCC voted on and approved the sale of the Property from Kitsap County to the Club, pursuant to the terms of the 2009 Deed. Exhibit 147 (attached). The County did not announce or conduct a sale of the Property at public auction pursuant to Chapter 36.34 RCW because the County and KRRC relied upon the value from Mr. Shapiro's supplemental appraisal report.

23. The minutes and recordings of BOCC meetings on and around May 11, 2009 do not reveal an intent to settle disputed claims or land use status at the Property.

24. At the time of the property transaction, Kitsap County had no plan to pursue a later civil enforcement or an action based upon land use changes or site development permitting.

25. During the negotiation for the property transaction, the parties did not negotiate for the resolution of potential civil violations of the Kitsap County Code at the Property and the parties did not negotiate to resolve the Property's land use status.

THE BARGAIN AND SALE DEED

26. The only evidence produced at trial to discern the County's intent at the time of the 2009 Bargain and Sale Deed was the deed itself. While the Club argues in closing that ". . . the Commissioners decided to support the Club. . . ." (KRRC's Brief on closing Arguments, p.3), the Commissioners were not called as witnesses in the case and the parties' intent is gleaned from the four corners of the document. (Exhibit 147).

27. The deed does not identify nor address any then-existing disputes between the Club and the County, other than responsibility for and indemnification regarding environmental issues and injuries or death of persons due to actions on the range.

28. By virtue of the deed, the County did not release the Club from current or future actions brought under public nuisance or violation of County codes or violation of its historical and legal nonconforming uses.

PROPERTY USAGE - 1993 AND PRIOR

29. For several decades prior to 1993, the Club operated a rifle range and a pistol range at the Property. As of 1993, the pistol range consisted of a south-to-north oriented shooting area defined by a shooting shed on its south end and a back stop on the north end and the rifle range consisted of a southwest-to-northeast oriented shooting area defined by a shooting shed on its southwest end and a series of backstops going out as far as 150 yards to the northeast. As of 1993, the developed portions of the Property consisted of the rifle range, the pistol range, and cleared areas between these ranges, as seen in a 1994 aerial photograph (Exhibit 8). During and before 1993, the Club's members and users participated in shooting activities in wooded or semi-wooded areas of the Property, on the periphery of the pistol and rifle ranges and within its claimed eight-acre "historic use" area.

30. As of 1993, shooting occurred at the Property during daylight hours only. Shooting at the Property occurred only occasionally, and usually on weekends and during the fall "sight-in" season for hunters.

SITE DEVELOPMENT AT THE PROPERTY

31. On July 10, 1996, the Kitsap County Department of Community Development ("DCD") received from KRRC a "Pre-Application Conference Request" form, which was admitted as Exhibit 134. Under "project name", KRRC listed "Range Development – Phase I" and under "proposed use", KRRC stated:

"Due to 50C-1993, KRRC is forced to enhance its operations and become more available to the general public. Phase I will include a water and septic system(s), a class room/community facility and a 200 meter rifle line. Material will not be removed from the premissis [sic]; it will be utilized for safety berms and acoustical baffeling [sic]. These enhancements will allow KRRC to generate a profit to be shared with the State School Trust (DNR). Local business will also profit from sportsmen visiting the area to attend our rich sporting events."

Id.

32. There is no evidence of application by the Club or by DNR or by any agent of either, for any county permits or authorizations before or after the Club's 1996 pre-application conference request, other than a pre-application meeting request submitted by the Club in 2005 (discussed below) and a County building permit for construction of an ADA ramp serving the rifle line shelter in 2008 or 2009.

33. From approximately 1996 forward, the Club undertook a process of developing portions of its claimed "historic eight acres", clearing, grading and sometimes excavating wooded or semi-wooded areas to create "shooting bays" bounded on at least three sides by earthen berms and backstops. Aerial photography allowed the Court to see snapshots of the expansion of shooting areas defined by earthen berms and backstops and verify testimony of the time line of development: 2001 imagery (Exhibits 9 and 16A) depicts the range as consisting of the pistol and rifle ranges, and shooting bays at the locations of present-day Bays 1, 2, 3, 9, 10 and 11. Comparing the 2001 imagery with March 2005 imagery (Exhibit 10), no new shooting bays were established during that interval. "Birds Eye" aerial imagery from the MS Bing website from an unspecified date later in 2005 provided the clearest evidence of the state of development at the Property (Exhibits 462, 544, 545, 546, 547), which included clearing and grading work performed in the eastern portion of the Property after the March 2005 imagery. (See discussion below under the subject of the proposed 300 meter range). June 2006 and

August 2006 imagery (Exhibits 11 and 12) reveals clearing and grading to create a new shooting bay at the location of present-day Bay 7. February 2007 imagery (Exhibit 13) reveals clearing and grading work to create new shooting bays at the locations of present-day Bay 8 and present-day Bay 6, and reveals clearing to the west of Bays 7 and 8 to accommodate a storage unit or trailer at that location. February 2007 imagery also reveals that the Club extended a berm along the north side of the rifle range and extended the length of the rifle range by clearing, grading and excavating into the hillside to the northeast of that range. April 2009 imagery (Exhibit 14) reveals establishment of a new shooting bay, Bay 4, and enlargement of Bay 7. May 2010 imagery (Exhibit 15) reveals establishment of a new shooting bay, Bay 5, enlargement of Bay 6, and additional clearing to the west of Bays 8 and 7 up to the edge of a seasonal pond (the easternmost of two ponds delineated as wetlands on club property, discussed below).

34. Bay 6, Bay 7 and the northeast end of the rifle range are each cut into hillsides, creating "cut slopes" each in excess of five feet in height and a slope ratio of three to one. The excavation work performed to create Bay 6 and Bay 7 and to extend the rifle range to the northeast required excavation significantly in excess of 150 cubic yards of material at each location. The excavation work into the hillside for Bay 7 took place in phases after 2005 and before April 2009. The excavation work into the hillside for Bay 6 took place in phases between August 2006 and May 2010, and the excavation work at Bay 6 between April 2009 and May 2010 required excavation in excess of 150 cubic yards of material. The excavation work into the hillside at the northeast end of the rifle range took place between August 2006 and February 2007.

35. One of the earthen berms constructed after February 2007 is a continuous berm that separates Bay 4 and Bay 5 and other developed areas on the Property from the Property's undeveloped areas to the north and west. Starting at the northeast corner of Bay 3, this berm runs to the east to define the northern edge of Bay 4, then turns northeast and curves around a cleared area used for storage around the Property's well house, and then turns north to form the western and northern edges of Bay 5. This berm was constructed in phases after February 2007, and the part of this berm forming the western and northern edges of Bay 5 was constructed between April 2009 and May 2010. This latter phase of the berm's construction between April 2009 and May 2010 required movement of more than 150 cubic yards of material. This berm also is more than five feet in height and has a slope ratio of greater than three to one.

36. For each hillside into which there was excavation and creation of cut slopes at the Property, there were no applications for County permits or authorizations, and no erosion or slope maintenance plans were submitted to or reviewed by the County. For each location on the Property where clearing, grading, and/or excavation occurred, there were no applications made for County permits such as grading permits or site development activity permits.

37. Over the years, the Club used native materials from the Property to form berms and backstops for shooting areas, usually consisting of the spoils from excavating into hillsides on the Property.

38. There is no fence around the active shooting areas of the Property to keep out or discourage unauthorized range users.

SITE DEVELOPMENT AT THE PROPERTY - 300 METER RANGE

39. In approximately 2003, KRRC began the process of applying to the State of Washington Interagency Committee for Outdoor Recreation ("IAC") for a grant to be used for

improving the range facilities. KRRC identified the project as a "range reorientation" project to build a rifle range that did not have its "back" to the Seabeck Highway.

40. In March of 2005, DCD received complaints that KRRC was conducting large scale earthwork activities and that the noise from shooting activities from the range had substantially increased. The area in which earth-moving activities took place is a large rectangular area in the eastern portion of the Property, with a north-south orientation. This area would become known as the proposed "300 meter range", and it is clearly visible in each aerial image post-dating March 2005. In March of 2005, DCD staff visited the 300 meter range area and observed "brushing" or vegetation clearing that appeared to be exploratory in nature.

41. In April of 2005, DCD staff visited the 300 meter range and discovered recent earthwork including grading, trenching, surface water diversion, and vegetation removal including logging of trees that had been replanted after DNR's 1991 timber harvest. The entire area of the cleared 300 meter range was at least 2.85 acres and the volume of excavated and graded soil was greater than 150 cubic yards.

42. DCD staff issued an oral "stop work" directive to the Club, with which the Club complied. DCD recommended to the Club that it request a pre-application meeting to discuss various permits and authorizations that would be required in order to proceed with the project.

43. KRRC submitted a "pre-application meeting request" to DCD on May 12, 2005 along with a cover letter from the Club president and conceptual drawings of the proposed project (Exhibits 138 and 272). The letter stated that the range re-alignment project was "not an expansion of the current facilities."

44. On June 21, 2005, KRRC officers met with DCD staff, including DCD representing disciplines of code enforcement, land use and planning, site development and

critical areas. County staff informed KRRC that the Club needed to apply for a Conditional Use Permit ("CUP") per Kitsap County Code Title 17 because the site work in the 300 meter range area constituted a change in or expansion of the Club's land uses of the property. County staff also informed the Club that it would need to apply for other permits for its work, including a site development activity permit per Kitsap County Code Title 12. County staff identified several areas of concern, which were memorialized in a follow-up letter from the County to the Club dated August 18, 2005 (Exhibit 140).

45. Later in 2005 and in the first half of 2006, the Club asked the County to reconsider its stance that the Club was required to apply for a CUP in order to continue operating a shooting range on the Property. The County did not change its position. Nor did the County issue a notice of code violation or a notice informing the Club that it had made an administrative determination pursuant to the County's nonconforming use ordinance, KCC Chapter 17.460.

46. In the summer of 2006, KRRC abandoned its plans to develop the 300 meter range and re-directed its efforts and the grant money toward improvements of infrastructure in its existing range.

47. DCD staff persons visited the Property on at least three occasions during 2005, and on at least one occasion walked through the developed shooting areas en route to and from the 300 meter range area.

48. In approximately 2007, the Club replanted the 300 meter range with several hundred Douglas fir trees, and believed that by so doing it was satisfying the requirements of the landowner, DNR. The Club did not develop any formal plan for the replanting and care of the new trees. All of the new trees died, and today the 300 meter range continues to be devoid of any trees.

49. The 300 meter range has been and continues to be used for storage of target stands, barrels, props and building materials, as confirmed by photographs taken during the County's January 2011 discovery site visits to the Property and by Marcus Carter's (Executive Officer of KRRC and Club Representative at trial) testimony.

50. KRRC asserts the position that by abandoning its plans to develop the 300 meter range, it has retreated to its eight acre area of claimed "historic use" and has not established a new use that would potentially terminate the Club's claimed nonconforming use status.

51. KRRC never applied for a conditional use permit for its use of the property as a shooting range or private recreational facility, and has never applied for a site development activity permit for the 300 meter range work or for any of the earth-disturbing work conducted on the Property.

SITE DEVELOPMENT AT THE PROPERTY - TIGHTLINING WATERCOURSE ACROSS THE RANGE

52. The Seabeck Highway has been in its present location for several decades. The Seabeck Highway is a county road served by storm water features including culverts and roadside ditches. Two culverts under the Seabeck Highway were identified as particularly relevant to the litigation. First, a 42-inch diameter culvert to the east of the Club's gated entrance onto the Seabeck Highway flows from south-to-north and onto the Property ("42-inch culvert"). Second, a 24-inch diameter culvert to the west of the Club's parking lot typically flows from north-to-south, away from the Property ("24-inch culvert"). Storm and surface water flows through the 42-inch culvert during the rainy seasons.

53. Prior to the late summer of 2006, water discharged from the 42-inch culvert followed a channel leading away from the Seabeck Highway and into a stand of trees south of

the rifle range. The channel reached the edge of a cleared area to the south of the rifle range and the drainage continued across the rifle range in a northerly direction, primarily in the open and low areas (or depressions) and through and between three and five culverts of not greater than 20 feet in length. There was conflicting testimony about what the drainage did as it approached the wetland areas to the north of the rifle range. The Club's wetland expert Jeremy Downs opined that the water was absorbed into the gravelly soil present between the rifle range and the wetland areas to the north, while the County's wetland expert Bill Shiels opined that the water would be of sufficient quantity during times of peak rain fall that it would have to travel in a channel or channels as it neared the wetlands.

54. In the late summer and early fall of 2006, the Club replaced this water course with a pair of 475-foot long 24-inch diameter culverts. These "twin culverts" crossed the entire developed area of the range, from their inlets in the stand of trees by the Seabeck Highway to their outlets north of the developed areas of the range. To achieve this result, the Club used heavy earth-moving equipment to remove existing culverts and to excavate a trench the entire length of the new culverts, installed the culverts, covered up the trench with fill, then brought in additional fill from elsewhere on the Property to raise the level of the formerly depressed areas in the rifle range. Excavation and re-grading for this project required movement of far more than 150 cubic yards of soil.

55. After the Club "undergrounded" the water course into the 475-foot long culverts but prior to February 2007, the Club extended the earthen berm along the north side of its rifle range and over the top of the newly-buried culverts, nearly doubling the berm's length. Extending this berm involved excavating and re-grading soil far in excess of 150 cubic yards.

56. KRRC never applied to the County for review or approval of the cross-range culvert project, or the berm construction that followed. KRRC never developed engineering plans for this project or undertook a study to determine whether the new culverts have capacity to handle the water from the 42-inch culvert or to determine whether the outlet of the culverts is properly engineered to minimize impacts caused by the direct introduction of the culvert's storm and surface water into a wetland system. KRRC offered evidence that during July 2011 it consulted with agents of the state Department of Ecology (DOE), the Army Corps of Engineers, the state Department of Fish and Wildlife and the Suquamish Tribe with regard to its activities proximate to wetlands, but the record contains no evidence that any of these agencies evaluated subjects within the County's jurisdiction such as critical areas including wetland buffers, or assessed the capacity of the cross-range culverts.

57. Prior to the discovery site visits by County staff and agents in January 2011, the County was unaware of the cross-range culverts.

WETLAND STUDY, DELINEATIONS AND PROTECTED BUFFERS

58. The parties each commissioned preliminary delineations of suspected wetland and stream features on the Property. Wetland delineations are ordinarily conducted prior to site development activities which may affect a suspected wetland, and are ordinarily submitted to the regulating authorities (e.g. counties and DOE) for review and comment. In this instance, there was no application for a permit or authorization.

59. The County's wetland consulting firm, Talasaea Consulting, and the Club's consulting firm, Soundview Consultants, each studied wetlands to the north and west of developed areas of the Property, as well as the drainage crossing the range originating from the 42-inch culvert, and suspected wetlands in the 300 meter range. For purposes of these findings,

the Court adopts the County's suggestion to limit its findings to areas of the Property about which there are undisputedly wetlands. The Court makes no finding as to whether the County has proven that wetlands currently exist in the 300 meter range area and makes no finding as to whether the County has proven that the water course from the 42-inch culvert ever followed a channel which is capable of hosting salmonid species, prior to entering the Property's wetlands. Therefore, the Court confines its remaining analysis of the Property's wetlands and streams and their associated habitats and buffers, to the wetlands to the north and west of the developed portions of the range ("wetlands").

60. The Property's wetlands are connected to and part of a larger wetland system in the DNR parcels to the north of the Property. Ecologically, this wetland system is of high value because it is part of the headwaters of the Wildcat Creek / Chico Creek watershed, which supports migrating salmon species. The wetlands on the Property are directly connected to a tributary of Wildcat Creek, and are waters of the State of Washington, both as a finding of fact and a conclusion of law.

61. The Court heard testimony of and received the reports and maps by the parties' respective wetland expert witnesses. The County's expert, Bill Shiels of Talasaea Consultants, determined that the Property's wetlands constitute a single wetland denoted as Wetland A, and concluded that this wetland is a "category I" wetland, for which the Kitsap County Code provides a 200-foot buffer area. The Club's expert, Jeremy Downs of Soundview Consulting, determined that the wetlands on the Property constitute two separate wetlands denoted as Wetlands A and B, and concluded that each wetland is a "category II" wetland, for which the Kitsap County Code provides a 100-foot buffer area. Both experts determined that an additional 50 feet should be added to the buffer to reflect high intensity of adjacent uses, i.e. the KRRC

shooting ranges. Therefore, the County's expert and the Club's expert concluded that 250-foot and 150-foot buffers apply to the Property's wetlands, respectively. For purposes of these findings of fact, the Court will accept the Soundview conclusion that there are two protected wetlands on the Property (A and B) and that a 150-foot buffer applies to those wetlands. For purposes of these findings, the Court will further accept Soundview's delineation and mapping of the wetlands B which is nearest the active shooting portions of the Property.

62. To install its cross-range culverts in 2006, the Club excavated and re-graded fill in the wetland buffer within 150 feet of Wetland B. This project involved excavation and grading far in excess of 150 cubic yards of material.

63. The cross-range culverts now discharge storm water and surface water directly into Wetland B, replacing the former system which ordinarily absorbed storm water and surface water into the soil and more gradually released it into the wetlands on the Property.

64. To construct the berm that starts at the northeastern corner of Bay 3 and travels east along the edge of Bay 4, then travels northeast along the storage / well house area, and then travels north along the edge of Bay 5, the Club placed fill in the wetland buffer within 150 feet of Wetland B. This project also involved excavation and grading in excess of 150 cubic yards of material.

65. At least five locations at the property have slopes higher than five feet in height with a slope ratio of greater than three to one: (1) a cut slope at the end of the rifle range; (2) berms at Bays 4 and 5 and the berm between these bays; (3) cut slope at Bay 6; (4) cut slope at Bay 7; and (5) the extension of the rifle range berm. Each of these earth-moving projects took place after 2005, and the Club did not apply for permits or authorizations from Kitsap County.

66. Prior to this litigation, KRRC never obtained a wetland delineation for the Property or otherwise determined potential wetland impacts for any site development projects proposed for the Property.

RANGE SAFETY

67. The parties presented several experts who opined on issues of range safety. The Property is a "blue sky" range, with no overhead baffles to stop the flight of accidentally or negligently discharged bullets. The Court accepts as persuasive the SDZ diagrams developed by Gary Koon in conjunction with the Joint Base Lewis-McChord range safety staff, as representative of firearms used at the range and vulnerabilities of the neighboring residential properties. The Court considered the allegations of bullet impacts to nearby residential developments, some of which could be forensically investigated, and several of which are within five degrees of the center line of the KRRC Rifle Line.

68. The County produced evidence that bullets left the range based on bullets lodged in trees above berms. The Court considered the expert opinions of Roy Ruel, Gary Koon, and Kathy Geil and finds that more likely than not, bullets escaped from the Property's shooting areas and that more likely than not, bullets will escape the Property's shooting areas and will possibly strike persons or damage private property in the future.

69. The Court finds that KRRC's range facilities are inadequate to contain bullets to the Property, notwithstanding existing safety protocols and enforcement.

ACTION OR PRACTICAL SHOOTING

70. The Property is frequently used for regularly scheduled practical shooting practices and competitions, which use the shooting bays for rapid-fire shooting in multiple directions. Loud rapid-fire shooting often begins as early as 7 a.m. and can last as late as 10 p.m.

COMMERCIAL AND MILITARY USES OF THE PROPERTY

71. KRRC and the military shared use of the adjacent federal Camp Wesley-Harris property's shooting range facilities until sometime shortly after World War II.

72. During the early 1990's, U.S. Naval personnel are said to have conducted firearm qualification exercises at the Property on at least one occasion.

73. Sharon Carter is the owner of a sole proprietorship established as a business in Washington in the late 1980's. In approximately 2002, this sole proprietorship registered a new trade name, the "National Firearms Institute" ("NFI") and registered the NFI at the Property's address of 4900 Seabeck Highway NW., Bremerton, WA. Since 2002, the NFI provided a variety of firearms and self-defense courses, mostly taught at the Property by Ms. Carter's husband, Marcus Carter. The NFI kept its own books and had its own checking account, apart from the Club. Mr. Carter is the long-time Executive Officer of KRRC, and NFI's other primary instructor is Travis Foreman, who is KRRC's Vice-President and the Carters' son-in-law.

74. In approximately 2003, a for-profit business called Surgical Shooters, Inc. ("SSI"), began conducting official small arms training exercises at the Property's pistol range for active duty members of the United States Navy, primarily service members affiliated with the submarines based at the Bangor submarine base. For approximately one year, SSI conducted this training at the Property on a regular basis. SSI held a contract with the Navy to provide this training, and SSI had an oral arrangement with NFI. On a per-day basis, SSI paid NFI a fee for the use of the Property, one-half of which would then be remitted to the Club itself. NFI coordinated the SSI visits to the Property and made sure that a KRRC Range Safety Officer was present during each SSI training session at the Property.

75. In approximately 2004, SSI ceased providing training at the Property and was replaced by a different business, Firearms Academy of Hawaii, Inc. ("FAH"). From approximately 2004 until Spring 2010, FAH regularly provided small arms training at the Property to active duty U.S. Navy personnel, under an oral arrangement with NFI. Again, on a per-day basis, FAH paid NFI a fee for the use of the Property, one-half of which would then be remitted to the Club itself. NFI coordinated the FAH visits to the Property and made sure that a KRRC Range Safety Officer was present during each FAH training session at the Property. FAH training at the Property consisted of small weapons training of approximately 20 service members at a time. Each FAH training course took place over three consecutive weekdays at the Property's pistol range, as often as three weeks per month. At the conclusion of this arrangement, FAH paid $500 to NFI for each day of KRRC range use, half of which the NFI remitted to the KRRC.

76. The SSI and FAH training took place on the Property's pistol range. During FAH's tenure at the Property, U.S. Navy personnel inspected the pistol range and determined that it was acceptable for purposes of the training.

77. Prior to the SSI and FAH training, there is no evidence of for-profit firearm training at the Property, and these businesses did not apply for approvals or permits with Kitsap County to authorize their commercial use of the Property.

78. In November 2009, U.S. Navy active duty personnel were present on the property on at least one occasion for firearms exercises not sponsored or hosted by the FAH. On one such occasion, a military "Humvee" vehicle was parked in the rifle range next to the rifle range's shelter. A fully automatic, belt-fed rifle (machine gun) was mounted on top of this Humvee, and the machine gun was fired in small bursts, down range.

79. Official U.S. Navy training at the Property ceased in the Spring of 2010.

NOISE GENERATED FROM THE PROPERTY AND HOURS OF OPERATION

80. The Club allows shooting between 7 a.m. and 10 p.m., seven days a week. Shooting sounds from the Property are commonly heard as early as 7 a.m. and as late as 10 p.m. In the early 1990's, shooting sounds from the range were typically audible for short times on weekends, or early in the morning during hunter sight-in season (September). Hours of active shooting were considerably fewer.

81. Shooting sounds from the Property have changed from occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration. Rapid fire shooting sounds from the Property have become common, and the rapid-firing often goes on for hours at a time.

82. Use of fully automatic weapons at KRRC now occurs with some regularity.

83. Rapid-fired shooting, use of automatic weapons, and use of cannons at the Property occurred infrequently in the early 1990's.

84. The testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the Property. The noise conditions described by these witnesses interfere with the comfort and repose of residents and their use and enjoyment of their real properties. The interference is common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the "sounds of war" and the Court accepts this description as persuasive.

85. Expanded hours, commercial use of the club, allowing use of explosive devices (including Tannerite), higher caliber weaponry and practical shooting competitions affect the neighborhood and surrounding environment by an increase in the noise level emanating from the Club in the past five to six years.

EXPLOSIVES AND EXPLODING TARGETS

86. The Club allows use of exploding targets, including Tannerite targets, as well as cannons, which cause loud "booming" sounds in residential neighborhoods within two miles of the Property, and cause houses to shake.

87. Use of cannons or explosives was not common at the Club in approximately 1993.

AMENDMENT OF KITSAP COUNTY CODE CHAPTER 17.460

88. On May 23, 2011, the Kitsap County Board of County Commissioners adopted ordinance 470-2011 in a regularly scheduled meeting of this Board, amending the Kitsap County Zoning Ordinance's treatment of nonconforming land uses at Chapter 17.460.

89. Notice of the May 23, 2011 meeting was published in the Kitsap Sun, which is the publication used in Kitsap County for public notices of BOCC meeting agenda items.

90. There is no evidence in the record supporting the contention that this amendment was developed to target KRRC or any of the County's gun ranges.

BASED UPON the foregoing FINDINGS OF FACT, the Court hereby makes the following

II. CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over the real property, the named Defendant, and the Parties' claims and counterclaims in this action, and venue is proper.

2. The Kitsap County Department of Community Development is the agency charged with regulating land use, zoning, building and site development in unincorporated Kitsap County and enforcing the Kitsap County Code.

3. The conditions of (1) ongoing noise caused by shooting activities, and (2) use of explosives at the Property, and (3) the Property's ongoing operation without adequate physical facilities to confine bullets to the Property each constitute a public nuisance.

4. Defendant Kitsap Rifle and Revolver Club is the owner and occupant of the real property, and these orders shall also bind successor owners or occupants of the Property, if any.

5. Non-conforming uses are uniformly disfavored, as they limit the effectiveness of land use controls, imperil the success of community plans, and injure property values. Rhod-A-Zalea v. Snohomish County, 136 Wn.2d 1, 8 (1998).

> Although found to be detrimental to important public interests, non-conforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. *[cite omitted]*. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right **1028 to significantly change, alter, extend, or enlarge the existing use.

Id.

6. KRRC enjoyed a legal protected nonconforming status for historic use of the existing eight acre range.

7. KRRC was not granted the right to significantly change, alter, extend or enlarge the existing use, by virtue of the 2009 deed from Kitsap County.

8. The actions by KRRC of:

(1) expanded hours;

(2) commercial, for-profit use (including military training);

(3) increasing the noise levels by allowing explosive devises, higher caliber weaponry greater than 30 caliber and practical shooting

significantly changed, altered, extended and enlarged the existing use.

9. Such actions noted above under Conclusion of Law #8 were "expansion" of use and were not "intensification" as argued by KRRC.

10. Intensification was clarified by the Washington Supreme Court in Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). The Court stated that intensification is permissible ". . . where the nature and character of the use is unchanged and substantially the same facilities are used." Id. As noted above, the nature of the use of the property by KRRC changed, expanded and intensified from 1993 through 2009.

11. Defendant has engaged in and continues to engage in creating and/or maintaining a public nuisance by the activities described herein. The activities are described by statute and code to be public nuisances. These acts constitute public nuisances as defined by both RCW 7.48.120 and KCC 17.530.030 and 17.110.515. The activities described above annoy, injure, and/or endanger the safety, health, comfort, or repose of others. Furthermore, Kitsap County Code authorizes this action "for a mandatory injunction to abate the nuisance in accordance with the law" for any use, building or structure in violation of Kitsap County Code Title 17 (land use). KCC 17.530.030. Kitsap County Code provides that "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." KCC 17.455.110.

12. No lapse of time can legalize a public nuisance. RCW 7.48.190.

13. The continued existence of public nuisance conditions on the subject Property has caused and continues to cause the County and the public actual and substantial harm.

14. Kitsap County has clear legal and equitable authority to protect the health, safety, and welfare of the public against public nuisances.

15. Article XI, Section 11 of the Washington State Constitution authorizes counties to make and enforce "local police, sanitary and other regulations."

16. RCW 36.32.120 (10) authorizes Kitsap County to declare and abate nuisances as follows:

> The legislative authorities of the several counties shall: ....(10) Have power to declare by ordinance what shall be deemed a nuisance within the county, including but not limited to "litter" and "potentially dangerous litter" as defined in RCW 70.93.030; to prevent, remove, and abate a nuisance at the expense of the parties creating, causing, or committing the nuisance; and to levy a special assessment on the land or premises on which the nuisance is situated to defray the cost, or to reimburse the county for the cost of abating it. This assessment shall constitute a lien against the property which shall be of equal rank with state, county, and municipal taxes.

17. The state statutes dealing with nuisances are found generally at Chapter 7.48 RCW. Injunctive relief is authorized by RCW 7.48.020. RCW 7.48.200 provides that "the remedies against a public nuisance are: Indictment or information, a civil action, or abatement." RCW 7.48.220 provides "a public nuisance may be abated by any public body or officer authorized thereto by law." RCW 7.48.250; 260 and 280 provide for a warrant of abatement and allow for judgment for abatement costs at the expense of the Defendant.

18. Kitsap County has no plain, adequate, or speedy remedy at law to cure this nuisance, and the neighbors and public-at-large will suffer substantial and irreparable harm unless the nuisance conditions are abated and all necessary permits are obtained in order for the Defendant's shooting operations to continue or to resume after imposition of an injunction.

19. The Property and the activities described on the Property herein constitute a public nuisance per se, because the Defendant engaged in new or changed uses, none of which

are authorized pursuant to Kitsap County Code Chapter 17.381 or authorized without issuance of a conditional use permit.

20. The Property and the above-described activities on the Property constitute a statutory public nuisance. The Property has become and remains a place violating the comfort, repose, health and safety of the entire community or neighborhood, contrary to RCW 7.48.010, 7.48.120, 7.48.130, and 7.48.140 (1) and (2), and, therefore, is a statutory public nuisance. Defendant has engaged in and continues to engage in public nuisance violations by the activities described herein. The activities are described by statute and code to be public nuisances as defined by both RCW 7.48.120 The activities described above annoy, injure, and/or endanger the safety, health, comfort, or repose of others.

21. The failure of the Defendant to place reasonable restrictions on the hours of operation, caliber of weapons allowed to be used, the use of exploding targets and cannons, the hours and frequency with which "practical shooting" practices and competitions are held and the use of automatic weapons, as well as the failure of the Defendant to develop its range with engineering and physical features to prevent escape of bullets from the Property's shooting areas despite the Property's proximity to numerous residential properties and civilian populations and the ongoing risk of bullets escaping the Property to injure persons and property, is each an unlawful and abatable common law nuisance.

22. To invoke the Uniform Declaratory Judgments Act, chapter 7.24 RCW, a plaintiff must establish: "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial

determination of which will be final and conclusive. Coppernoll v. Reed, 155 Wn.2d 290, 300, 119 P.3d 318 (2005); citing To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), and Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

23. As applied to the relief sought by the County in this action, an actual, present, and existing dispute is presented for determination by the Court, based upon the County's claim that any non-conforming land use status for use of the Property as a shooting range has been voided by the substantial changes in use of the Property and unpermitted development of facilities thereupon.

24. The subject property is zoned "rural wooded", established in KCC Chapter 17.301. KCC 17.301.010 provides in part that this zoning designation is intended to encourage the preservation of forest uses, retain an area's rural character and conserve the natural resources while providing for some rural residential use, and to discourage activities and facilities that can be considered detrimental to the maintenance of timber production. With this stated purpose, the zoning tables are applied to determine if any uses made of the property are allowed.

25. KCC Chapter 17.381 governs allowed land uses, and KCC 17.381.010 identifies categories of uses: A given land use is either Permitted, Permitted upon granting of an administrative conditional use permit, Permitted upon granting of a hearing examiner conditional use permit, or Prohibited. Where a specific use is not called out in the applicable zoning table, the general rule is that the use is disallowed. KCC 17.381.030. The zoning table for the rural wooded zone, found at KCC 17.381.040(Table E), provides and the Court makes conclusions as the following uses:

a. Commercial / Business Uses – With exceptions not relevant here, all commercial uses are prohibited in rural wooded zone. None of the activities occurring at the subject property

appear to be listed as commercial/business uses identified in the table. The Court concludes that the Property has been used for commercial and/or business uses for-profit entities including the National Firearms Institute, Surgical Shooters Inc. and the Firearms Academy of Hawaii, starting in approximately 2002. Furthermore, "training" generally or "tactical weapons training" specifically are uses not listed in the zoning table for the rural wooded zone.

b. Recreational / Cultural Uses – the Club is best described as a private recreational facility, which is a use listed in this section of KCC 17.381.040 (Table E) for rural wooded. KCC 17.110.647 defines "recreational facility" as "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. Public recreational facilities are those owned by a government entity." No other uses identified in the recreational/cultural uses section of the rural wooded zoning table are comparable.

The Court concludes that a private recreational facility does not include uses by a shooting range to host official training of law enforcement officers or military personnel, and that these uses are new or changed uses of the Property. The Court concludes that a private recreational facility use does not encompass the use of automatic weapons, use of rifles of calibers greater than common hunting rifles, or of professional level competitions.

26. The Court finds that the land uses identified here, other than use as a private recreational facility, are expansions of or changes to the nonconforming use at the Property as a shooting range under KCC Chapter 17.460 and Washington's common law regarding nonconforming land use. By operation of law, the nonconforming use of the Property is terminated.

27. The Club's unpermitted site development activities at the 300 meter range (2005) constituted an expansion of its use of the property in violation of KCC 17.455.060 because the use of the Property as a private recreational facility in the rural wooded zone requires a conditional use permit per KCC Chapter 17.381. Furthermore, the Club's failure to obtain site development activity permitting for grading and excavating each in excess of 150 cubic yards of soil as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

28. The Club's unpermitted installation in 2006 of the twin 24-inch culverts which cross the range and empty into the wetland constituted an expansion and change of its use of the Property, and the Club's failure to obtain SDAP permitting for its excavation, grading and filling work in excess of 150 cubic yards of soil as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

29. The Club's earth moving activities within the 150-foot buffer for Wetland B violated KCC 19.200.215.A.1, which requires a wetland delineation report, a wetland mitigation report and erosion and sedimentation control measures and/or a Title 12 site development activity permit for any new development. The Court concludes that these illegal uses terminate the nonconforming use of the Property as a shooting range.

30. The Club's unpermitted construction of earthen berms starting at Bay 4 and proceeding to the north adjacent to the wetland, constituted an expansion and change of its use of the Property, and the Club's failure to obtain SDAP permitting for excavation, grading and filling work in excess of 150 cubic yards of soil and for its construction of berms with slopes greater than five feet in height with a steepness ratio of greater than three to one (KCC

12.10.030(4)) as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

31. The Club's unpermitted cutting into the hillsides at Bays 6 and 7 and at the end of the rifle range, excavating in excess of 150 cubic yards of soil at each location and creating cut slopes far greater than five feet in height with a steepness ratio of greater than three to one as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range. The Court further concludes, based on the timing of maintenance work at each cut slope location post-dating the June 2009 deeding of the Property from the County to the Club, that SDAP permitting was required for work conducted after June 2009. These illegal uses of the land terminate the nonconforming use of the Property as a shooting range.

32. The nuisance conditions at the range further constitute illegal uses of the land, which terminate the nonconforming use of the Property as a shooting range. The Club's expansion of days and hours in which shooting, generally, and rapid-fire shooting in particular, takes place on a routine basis, and the advent of regularly scheduled practical shooting practices and competitions constitute a change in use that defies and exceeds the case law's definition or understanding of "intensification" in the area of nonconforming use. These changes act to terminate the nonconforming use of the Property as a shooting range.

33. The Club's conversion from a small-scale lightly used target shooting range in 1993 to a heavily used range with an enlarged rifle range and a 11-bay center for local and regional practical shooting competitions further constitutes a dramatic change in intensity of use (and of sound created thereby), thereby terminating the nonconforming use of the Property as a shooting range.

34. By operation of KCC Chapter 17.381, the KRRC or its successor owner or occupier of the Property must obtain a conditional use permit before resuming any use of the Property as a shooting range or private recreational facility.

35. KRRC has not proven that Ordinance 470-2011, amending KCC 17.460, is unconstitutional or suffered from any defect in service or notice. This Ordinance did not amend or alter the effect of KCC 17.455.060 (existing uses) which remains in full force and effect. KCC 17.455.060 provides that uses existing as of the adoption of Title 17 (Zoning) may be continued, but also prohibits their enlargement or expansion, unless approved by the hearing examiner pursuant to the Administrative Conditional Use Permit procedure of Title 17.420. Washington case law, as in Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998), also holds that uses that lawfully existed before the enactment of zoning ordinances may continue, but the existing use may not be significantly changed, altered, extended, or enlarged.

36. The 2009 Bargain and Sale Deed cannot be read as more than a contract transferring the Property from the County to the KRRC, with restrictive covenants binding only upon the Grantee KRRC. Paragraph 3 stands as an acknowledgement of eight geographic acres of land that were used for shooting range purposes. The language in the 2009 Bargain and Sale Deed does not prohibit Kitsap County from enforcing its ordinances or otherwise acting pursuant to the police powers and other authorities granted to it in Washington's Constitution and in the Revised Code of Washington.

37. The Court furthermore concludes that the Washington Open Public Meetings Act, chapter 42.30 RCW, limits the effect of the enacting resolution and accompanying proceedings to the property transfer itself. Absent specific agreement voted upon by the governing body

during a public meeting, the 2009 Deed cannot be interpreted as a settlement of potential disputes between the parties.

BASED UPON THE FOREGOING FINDINGS OF FACT and CONCLUSIONS OF LAW the Court hereby enters the following ORDERS:

III. ORDERS

IT HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff Kitsap County's requests for affirmative relief shall be granted as follows:

DECLARATORY JUDGMENT

1. Kitsap County's Motion pursuant to chapter 7.24 RCW for judgment declaring 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, is hereby GRANTED.

2. The Property may not be used as a shooting range until such time as a County conditional use permit is issued to authorize resumption of use of the Property as a private recreational facility or other recognized use pursuant to KCC Chapter 17.381.

JUDGMENT

3. Defendant is in violation of Chapter 7.48 RCW and Chapter 17.530 Kitsap County Code;

4. The conditions on the Property and the violations committed by the Defendant constitute statutory and common law public nuisances; and

5. Representatives of the Kitsap County Department of Community Development are hereby authorized to inspect and continue monitoring the Property before, during and after any abatement action has commenced; and

INJUNCTION (EFFECTIVE IMMEDIATELY UNLESS NOTED TO CONTRARY)

6. A permanent, mandatory and prohibitive injunction is hereby issued enjoining use of the Property as a shooting range until violations of Title 17 Kitsap County Code are resolved by application for and issuance of a conditional use permit for use of the Property as a private recreational facility or other use authorized under KCC Chapter 17.381. The County may condition issuance of this permit upon successful application for all after-the-fact permits required pursuant to Kitsap County Code Titles 12 and 19.

7. A permanent, mandatory and prohibitive injunction is hereby issued further enjoining the following uses of the Property, which shall be effective immediately:

a. Use of fully automatic firearms, including but not limited to machine guns;

b. Use of rifles of greater than nominal .30 caliber;

c. Use of exploding targets and cannons; and

d. Use of the Property as an outdoor shooting range before the hour of 9 a.m. in the morning or after the hour of 7 p.m. in the evening.

WARRANT OF ABATEMENT

8. The Court hereby authorizes issuance of a WARRANT OF ABATEMENT, pursuant to RCW 7.48.260, the detail of which shall be determined by the Court at a later hearing before the undersigned.

9. The costs of abatement shall abide further order of the Court.

10. This Court retains jurisdiction to enforce this order by all lawful means including imposition of contempt sanctions and fines.

COSTS AND FEES

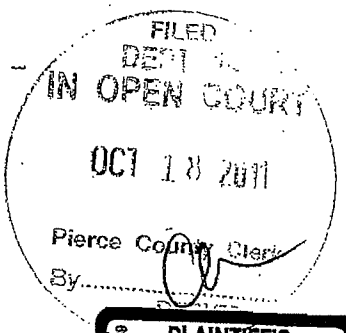
11. Pursuant to KCC 17.530.030, Defendant Kitsap Rifle and Revolver Club shall pay the costs of the County to prosecute this lawsuit, in an amount to be determined by later order of the Court.

DATED this 9 day of February, 2012.

JUDGE SUSAN K. SERKO

FILED
DEPT. 14
IN OPEN COURT
FEB 09 2012
Pierce County Clerk
By..... DEPUTY

FILED FOR RECORD AT REQUEST OF:
Kevin M. Howell
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35A
Port Orchard WA 98366



10-2-12-7

LAND TITLE 200906180292
Deed Rec Fee: $ 89.00
06/18/2009 03:16 PM
Walter Washington, Kitsap Co Auditor

BARGAIN AND SALE DEED WITH RESTRICTIVE COVENANTS

E-2302760

GRANTOR: Kitsap County

GRANTEE: Kitsap Rifle and Revolver Club, a Washington Non-Profit Corporation

LEGAL DESCRIPTION: SE/SW&SW/SE 36-25N-1W KITSAP COUNTY TREASURER EXCISE 06/18/2009
2009EX03102
Total : $10.00 Clerk's Initial

ASSESSOR'S TAX PARCEL NO: 362501-4-002-1006

For and in consideration of $10.00 and other good and valuable consideration, Kitsap County, as Grantor, bargains, sells and conveys all of it's right, title and interest in and to the real property described on Exhibit A hereto to the Kitsap Rifle and Revolver Club, a Washington Non-Profit Corporation, as Grantee.

This conveyance is made subject to the following covenants and conditions, the benefits of which shall inure to the benefit of the public and the burdens of which shall bind the Grantee and the heirs, successors and assigns of the Grantee in perpetuity.

1. Grantee for and on behalf of itself, its heirs, successors and assigns, and each subsequent owner of the property described in Exhibit A hereto, hereby releases and agrees to hold harmless, indemnify and defend Kitsap County, its elected officials, employees and agents from and against any liabilities, penalties, fines, charges, costs, losses, damages, expenses, causes of actions, claims, demands, orders, judgments, or administrative actions, including, without limitation, reasonable attorneys' fees, arising from or in anyway connected with (1) injury to or

the death of any person or the physical damage to any property, resulting from any act, activity, omission, condition or other matter related to or occurring on or about the property, regardless of cause, unless due solely to the gross negligence of any of the indemnified parties; (2) the violation or alleged violation of, or other failure or alleged failure to comply with, any state, federal, or local law, regulation or requirement, including, without limitation, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC Sec. 9601, et seq. and Model Toxics Control Act (MTCA), RCW 70.105 D, by any indemnified person or entity in anyway effecting, involving, or relating to the property; (3) the presence or release in, on, from, or about the property, at any time, past or present, of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state or local law regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or soil, or anyway harmful or threatening to human health or the environment.

2. Grantee shall maintain commercial general liability insurance coverage for bodily injury, personal injury and property damage, subject to a limit of not less than $1 million dollars per occurrence. The general aggregate limit shall apply separately to this covenant and be no less than $2 million. The grantee will provide commercial general liability coverage that does not exclude any activity to be performed in fulfillment of Grantee's activities as a shooting range. Specialized forms specific to the industry of the Grantee will be deemed equivalent, provided coverage is no more restrictive that would be provided under a standard commercial general liability policy, including contractual liability coverage.

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 in a manner consistent with "modernizing" the facilities 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 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. It is the intent of the parties that the activities of Grantee shall conform to the rules and regulations of the Firearms Range Account, administered by the State Recreation and Conservation Office. This account

is established by the legislature upon the following finding: "Firearms are collected, used for hunting; recreational shooting, and self-defense, and firearm owners as well as bow users need safe, accessible areas in which to shoot their equipment. Approved shooting ranges provide that opportunity, while at the same time, promote public safety. Interest in all shooting sports has increased while safe locations to shoot have been lost to the pressures of urban growth." (Wash. Laws 1990 ch. 195 Section 1.)

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 this 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.

6. Mineral Reservations, held by the State of Washington, that run with the land.

7. Existing Habitat Conservation Plan (HCP), as detailed below:

The site has been publicly identified for conservation provisions applying to, but not limited to: murrelet habitat; spotted owl nest sites; wolves; grizzly bears; nests, communal roosts, or feeding concentrations of bald eagles; peregrine falcon nests; Columbian white-tailed deer; Aleutian Canada geese; and Oregon silverspot butterflies. The existing Habitat Conservation Plan is to remain in effect, regardless of parcel segregation or aggregation or potential sale or land transfer.

8. Riparian Management Zones, as detailed below:

Bodies of water, including but not limited to those streams, rivers and lakes and other lakes and wetlands have been identified and/or may be located on the Premises. All activities within the Riparian Management Zone, as defined in the existing and publicly-filed Habitat Conservation Plan (HCP) and including that portion of the inner riparian ecosystem between the aquatic zone and the direct influence zone (uplands) and including the outer wind buffer, must comply with and remain in compliance with the current HCP Procedures. Activities in a Riparian Management Zone, including but not limited to cutting or removing any tree and/or timber (including hardwood, merchantable and unmerchantable timber, downed timber, windthrow and snags), and road, trench and/or trail use, and/or maintenance, may be restricted or not permitted during specific times. All activities must provide for no overall net loss of naturally occurring wetland function. These protective measures are to run with the

land, regardless of parcel segregation or aggregation or potential sale or land transfer.

DATED this 13th day of May, 2009.

BOARD OF COUNTY COMMISSIONERS
KITSAP COUNTY, WASHINGTON

CHARLOTTE GARRIDO, Chair

STEVE BAUER, Commissioner

JOSH BROWN, Commissioner

ATTEST:

Opal Robertson, Clerk of the Board

ACCEPTANCE OF BARGAIN AND SALE DEED WITH RESTRICTIVE COVENANTS

By signature affixed below, the Kitsap Rifle and Revolver Club by and through _____ its President/Executive Officer hereby and with full authority of the Board of Directors of said corporation, hereby accept the terms and conditions of the Deed with Restrictive Covenants above dated this 13th day of May, 2009.

BRADFORD SMITH, President - KRRC

MARCUS A. CARTER, Executive Officer - KRRC

STATE OF WASHINGTON)
) ss:
COUNTY OF KITSAP)

I certify that I know or have satisfactory evidence that Brad Smith is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as the President of the Kitsap Rifle and Revolver Club, to be the free and voluntary act of the KRRC for the uses and purposes mentioned in the instrument.

Dated this 13 day of May, 2009.

SALLY K COPPINGER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 09-26-09

Sally K. Coppinger
PRINT NAME: Sally K. Coppinger
Notary Public in and for the State of Washington,
residing at: Port Orchard 98366
My Commission Expires: 9/26/09

STATE OF WASHINGTON)
) ss:
COUNTY OF KITSAP)

I certify that I know or have satisfactory evidence that Marcus Carter is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as the Executive Director of the Kitsap Rifle and Revolver Club, to be the free and voluntary act of the KRRC for the uses and purposes mentioned in the instrument.

Dated this 13 day of May, 2009.

SALLY K COPPINGER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 09-26-09

Sally K. Coppinger
PRINT NAME: Sally K. Coppinger
Notary Public in and for the State of Washington,
residing at: Port Orchard 98366
My Commission Expires: 9/26/09

EXHIBIT A

Legal Description of Premises & Reservations

Part of the Southwest quarter of the Southeast quarter and part of the Southeast quarter of the Southwest quarter of Section 36, Township 25 North, Range 1 West, W.M., lying northerly of the North lines of an easement for right of way for road granted to Kitsap County on December 7, 1929, under Application No. 1320, said road being as shown on the regulation plat thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington, the above described lands having an area of 72.41 acres, more or less.

RESERVATIONS/SUBJECT TO:

Easement #50-CR1320: Road granted to Kitsap County on 12/07/1927 for an indefinite term.

Easement #50-047116: Road granted to E.F. Howerton on 05/09/1985 for an indefinite term.