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

NO. 43076-2-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/Cross Respondents,

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, Defendant.

APPELLANT'S AMENDED ANSWER TO BRIEF OF AMICUS CURIAE CK SAFE & QUIET, LLC

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I. INTRODUCTION

Like respondent Kitsap County (the "County"), amicus CK Safe & Quiet, LLC ("CKSQ") urges the Court to affirm the trial court and overlook the numerous legal and factual errors related to its injunctions and its conclusion of law that sound from appellant Kitsap Rifle & Revolver Club (the "Club") is a public nuisance. CKSQ attempts to present new ideas, but offers meritless arguments with little substance.

CKSQ first argues the Court should decide this appeal based on vague notions of "deference" and "implied credibility determinations." These arguments fail to appreciate that the trial court's numerous legal errors are subject to de novo review.

CKSQ also fails to apply its concepts of deference and implied credibility to the four findings of fact to which the Club assigns error in this appeal. Instead, it applies them to three findings of fact regarding sound from the Club, which the Club has not challenged. CKSQ argues these findings support the conclusion that sound from the Club is a public nuisance, but addresses only one of the Club's several legal arguments as to why they are not. In addressing that argument, CKSQ misconstrues the public nuisance statute, the findings of fact, and the record of evidence.

As show in the Club's briefs on the merits, the findings regarding sound do not establish a public nuisance affecting the rights of every

member of the community equally, which is required to prove a "public nuisance" as defined in RCW 7.48.130. At most, the findings establish an aesthetic offense to some members of the community, while confirming the remainder of the community is not offended by the Club and suffers no harm at all. The sound from the Club does not fit the statutory definition of a "public nuisance," and it was error for the trial court to conclude otherwise.

Turning to the trial court's injunctions, CKSQ argues the first injunction shutting the Club down unless it can obtain a conditional use permit (CUP) must be affirmed because the Club's nonconforming use right was correctly terminated. Yet the Club has shown termination was in error, and CKSQ does not even attempt to address the Club's arguments on this critical issue. The first injunction must be set aside.

As for the second injunction, which prohibits certain shooting range activities and reduces the Club's operating hours by one-third, CKSQ argues it is appropriately tailored to prevent proven harms. Yet CKSQ fails to prove any of the prohibited activities are harmful under any circumstance. CKSQ also fails to address the findings and evidence proving each prohibited activity was part of the Club's historical operations, before it was ever alleged a nuisance. Thus, the second injunction would not be appropriately tailored to address a sound

nuisance, even if one had been proven, because it prohibits a substantial amount of lawful activity.

CKSQ's amicus brief fails to provide grounds to affirm any of the challenged findings of fact. It fails to provide grounds to affirm the trial court's conclusion that sound from the Club is a nuisance. It fails to provide grounds to affirm either of the injunctions. The trial court committed multiple legal and factual errors, which must be corrected.

II. ARGUMENT

A. CKSQ's "Implied Credibility" Arguments Have No Bearing on This Appeal.

According to CKSQ, the Club mistakenly asserts "the trial court was required to make express written 'credibility determination' [sic] within the decision."[1] Yet the Club has never argued the trial court was required to make an express credibility determination, nor has the Club assigned error to its failure to do so.

The Club's argument is that the only role played by "credibility" in this appeal is to reduce the amount of deference that might otherwise have been afforded if the trial court had made an express credibility determination in its findings of fact.[2] The Club made this argument in response to the County's attempt to use "credibility" to distort the correct

[1] *Brief of Amicus Curiae CK Safe & Quiet, LLC* ("Br.") at 4.
[2] *See Amended Reply Brief of Appellant* ("Club's Reply") at 9–10.

standards on review.[3] Like the County, CKSQ is suggesting this Court need not apply those standards rigorously, and should instead affirm based on loose concepts of "credibility" and "deference." The Court should reject these suggestions and apply the correct substantial evidence, de novo, and abuse of discretion standards to the issues on appeal.

CKSQ is mistaken in suggesting "credibility" can be used to prove the trial court did not err. The Club assigns error to four findings of fact while showing that many of the trial court's legal conclusions and all of its remedies are in error.[4] The trial court's legal errors are reviewed de novo, with no deference.[5] Therefore, credibility plays no role in reviewing and correcting a legal error. Likewise, under the abuse of discretion standard applied to injunctive and declaratory relief, it is an abuse of discretion if the trial court fails to apply the correct legal rules in fashioning those remedies.[6] Therefore, credibility plays no role in correcting a declaratory judgment or an injunction premised on a legal error.

The Club has shown that the declaratory judgment and injunctions

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[3] *See Brief of Respondent Kitsap County* ("County's Resp.") at 41–42.
[4] *See Amended Brief of Appellant* ("Club's Opening Br.") at 53 (assigning error to FOFs 23, 25, 26); *id.* at 52 (assigning error to FOF 57).
[5] *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash. 2d 873, 880, 73 P.3d 369 (2003) ("[q]uestions of law and conclusions of law are reviewed de novo").
[6] *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

issued by the trial court are premised on erroneous legal conclusions.[7] The declaratory judgment and injunctions are not supported by the correct legal standards correctly applied. Therefore, they must be reversed.

Meanwhile, the four challenged findings of fact are reviewed for substantial evidence.[8] Substantial evidence is the amount of evidence "sufficient to persuade a rational fair-minded person the premise is true."[9] In an appeal involving substantial evidence review, each party has an opportunity to show why substantial evidence does or does not exist.[10] The substantial evidence rule is more deferential to certain types of evidence than others.[11] For example, documents have no "demeanor" so their meaning is just as easily determined by the court of appeals as by the trial court.[12] Concepts of credibility and deference do not always apply

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[7] *See generally,* Club's Reply at 60–69.

[8] *Sunnyside Valley Irrigation Dist.,* 149 Wash. 2d at 879 ("[f]indings of fact are reviewed under a substantial evidence standard").

[9] *Id.*; *see also, Raven v. Dept. of Social and Health Svcs.*, 177 Wn.2d 804, 809, 829, 306 P.3d 920 (2013) (reversing finding of neglect for lack of substantial evidence); *Miles v. Miles*, 128 Wash. App. 64, 71, 114 P.3d 671 (2005) (reversing finding for lack of substantial evidence and declining to infer credibility determination where none was expressed by factfinder).

[10] *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 880; *see also, Sommer v. Dept. of Soc. & Health Servs.,* 104 Wash. App. 160, 175, 15 P.3d 664 (2001) (reversing and remanding where appellant showed evidence of trial court's error and respondent failed to show contrary evidence).

[11] *Dolan v. King Cnty.*, 172 Wash. 2d 299, 311, 258 P.3d 20 (2011) ("[a]ppellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required").

[12] *Id.*; *see also, Carlson v. City of Bellevue*, 73 Wash. 2d 41, 48, 435 P.2d 957 (1968) (applying de novo review where evidence referenced on appeal consisted of objective, documentary evidence); *Anderson v. Island Cnty.*, 81 Wash. 2d 312, 318, 501 P.2d 594 (1972) (applying de novo review and reversing trial court when record on review consisted of public hearing testimony and documentary evidence); *Smith v. Skagit Cnty.*,

during substantial evidence review, and they certainly do not substitute for it.

The Club's opening brief expressly challenged findings of fact 23, 25, 26, and 57.[13] These findings should receive no deference because documentary evidence disproves them. The Club argued in its opening brief that findings of fact 23, 25, and 26 are plainly erroneous because documents prove that the County intended the 2009 Deed to settle claims about the Club's land use status during the negotiation and execution of the Deed.[14] Similarly, the Club argued finding of fact 57 is in error because an August 2006 email to a County official proves the County was given notice of the Club's intent to replace "culvert pipes" at its facility.[15] This Court "stands in the same position as the trial court in looking" at this documentary evidence, and should reverse the findings that contradict it.[16]

With respect to the four findings of fact challenged by the Club,

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75 Wash. 2d 715, 718, 453 P.2d 832 (1969) *holding modified State v. Post*, 118 Wash. 2d 596, 826 P.2d 172 (1992) (observing de novo review is appropriate where the "court of review stands in the same position as the trial court in looking at the facts of the case").

[13] *See* Club's Opening Br. at 52–53.

[14] *Id.* at 53 (assigning error to FOFs 23, 25, and 26). The Club's opening brief cites ample documentary evidence that plainly shows the County negotiated and intended the Deed to resolve the Club's land use status. *See* Ex. 477 (resolution approving the Deed); Ex. 552 (adopting resolution); Ex. 555 (audio recording of May 9, 2009 BOCC meeting); Exs. 330, 332, 336, 293, 405 (letters drafted by County officials regarding intent of Deed). The County has not shown how these pieces of evidence could be reasonably interpreted as anything other than expressions of intent in support of the Club's interpretation of the Deed. Of particular interest is the resolution (Ex. 477), which states the Club should maintain control over its property.

[15] *See* Club's Opening Br. at 52 (citing Ex. 416 at 2–3). The County has never argued or submitted evidence suggesting it did not receive the email.

[16] *Smith*, 75 Wash. 2d at 718.

the operative question in this appeal is not whether any of them could be supported by an "implied" credibility determination. The question is whether the County has shown substantial evidence to support any of them. It has not, and neither has CKSQ. In fact, CKSQ has not even so much as argued that these findings of fact are supported by substantial evidence. CKSQ ignores the substantial evidence standard and fails to show any of the challenged findings are correct. They must be reversed as erroneous.

B. Sound from the Club Is Not a Public Nuisance.

CKSQ attempts to support the trial court's conclusion that sound from the Club is a public nuisance, but its analysis fails to address the substance of the Club's arguments for reversal of that conclusion.[17] CKSQ ignores the Club's argument that the legislature has exempted the Club from sound limitations between 7 am and 10 pm.[18] It also ignores the Club's argument that the absence of objective decibel evidence or findings means the Club is not a noise nuisance.[19]

Instead, CKSQ focuses entirely on the Club's third argument, which is that sound from the Club cannot be a public nuisance because it

[17] Br. at 7–11.
[18] *See* Club's Reply at 17–19.
[19] Club's Reply at 19–22.

does not affect the rights of the entire community equally.[20] In attempting to defeat this argument, CKSQ misconstrues the law and misapplies it to the undisputed evidence in the record. Its conclusion and analysis are unsound, and should be rejected.

CKSQ's first error is in mischaracterizing as a "finding" the trial court's legal conclusion that sound from the Club is a public nuisance.[21] It repeats this error when it argues the trial court expressly "found" the sound from the Club rose "to the level of a public nuisance."[22] A determination that a public nuisance exists is a conclusion of law, not a finding of fact.[23] None of the trial court's findings of fact state that the Club is a "nuisance" or "public nuisance."[24] The trial court correctly understood that whether sound from the Club is a public nuisance is a question of law.[25] Therefore, whether the trial court committed legal error in concluding sound from the Club is a public nuisance is a matter of de novo review in this appeal. CKSQ cannot benefit from a more lenient standard no matter how many times it mischaracterizes a legal conclusion as a "finding" of fact.

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[20] Br. at 7.
[21] *Id.* at 7 (heading "B").
[22] *Id.* at 8.
[23] *Hauser v. Arness*, 44 Wn.2d 358, 361–62, 267 P.2d 691 (1954) (treating a "finding in the record" that a public nuisance existed as a "conclusion of law"); *Tinsley v. Monson & Sons Cattle Co.*, 2 Wash. App. 675, 677, 472 P.2d 546 (1970) (same).
[24] *See generally,* CP 4053–4074 (FOFs 1–90).
[25] *See* CP 4075–78 (COLs 3, 11, 20, 21).

CKSQ's next error is in its argument that findings of fact 84 and 86 satisfy the applicable legal standards for proving sound is a public nuisance. In finding 84, the trial court accepted as true certain subjective descriptions of sounds from the Club, including hyperbolic testimony that they are the sounds of "war."[26] The trial court adopted these descriptions without reference to any decibel standard or other objective measurement that could be used to establish when and under what circumstances sounds constitute a nuisance. The trial court then found the subjective experiences of these witnesses "representative of a significant number of homeowners within two miles of the Property."[27] Conspicuously absent is a finding that each member of the putative "two-mile" community was harmed or suffered a nuisance due to sound from the Club. Based on these findings, the trial court concluded sound from the Club is a public nuisance to parts of the community located within two miles of the Club.

The Club did not assign error to findings 84 or 86 because they do not prove sound from the Club is a public nuisance when the correct legal standards are applied. Overlooking this, CKSQ argues these findings "cannot be disturbed on appeal."[28] While making this irrelevant argument, CKSQ fails to address the Club's legal argument that sound from the Club

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[26] Br. at 8 (citing FOF 84).
[27] CP 4073 (FOF 84).
[28] Br. at 8.

is exempt from limitation between 7 am and 10 pm.[29] CKSQ also fails to address the Club's legal argument that whether a sound is a nuisance depends on whether it exceeds the objective decibel standards of the community, which are set by local ordinance in Kitsap County.[30]

Because these arguments are correct, the court need not reach CKSQ's argument that a public nuisance exists even when some members of a community testify they suffer no harm or nuisance from a sound whatsoever. Moreover, that argument is flatly contradicted by the plain language of RCW 7.48.130 and Washington case law.[31] As CKSQ correctly states, RCW 7.48.130 defines a "public nuisance" to be:

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

CKSQ then argues, "as the trial court determined, the sounds of the Club . . . did affect the entire community."[32] None of the cited findings,

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[29] *See, e.g.*, Club's Reply at 17–18 (citing RCW 7.48.160 ("[n]othing which is done or maintained under the express authority of statute, can be deemed a nuisance; WAC 173-60-050(1)(b) (exempting shooting ranges from regulatory noise limits between 7 am and 10 pm); KCC 10.28.050(2) (same)).

[30] *See* Club's Reply at 17–18 (citing KCC 10.28.050(2); *Judd v. Bernard,* 49 Wn.2d 619, 304 P.2d 1046 (1956) (dismissing nuisance claim because alleged nuisance activity was authorized by statute); *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 P. 976 (1922) (defining "nuisance" as "the unlawful doing of an act")).

[31] *See* Club's Reply at 20–21 (citing *Mathewson v. Primeau*, 64 Wn.2d 929, 938, 395 P.2d 183 (1964) (holding "[t]hat a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance")); *see also*, *Concerned Citizens of Cedar Height—Woodchuck Hill Road v. DeWitt Fish & Game Club*, 302 A.D.2d 938 (N.Y. App. 2003) (affirming summary judgment dismissal of sound nuisance claim against gun club because there was no evidence of a violation of local noise control ordinances).

[32] Br. at 9 (citing CP 4073–74 (FOFs 81, 84–86)).

however, contain any such language or determination. The findings and evidence regarding sound from the Club do not satisfy the definition of public nuisance set forth in RCW 7.48.130.

RCW 7.48.130 uses the word, "one," such that "[a] public nuisance is one which . . . ."[33] In this context, "one" can only mean "nuisance." To paraphrase, "a public nuisance is a [nuisance] which . . . ." This is the plain meaning of the statute and comports with common sense because the very term "public nuisance" suggests it is a type of "nuisance." This, in turn, explains the meaning of the word, "rights," in RCW 7.48.130. Public nuisance law is not concerned with all variety of rights. It is only concerned with the right to be free from substantial and unreasonable interference with the use and enjoyment of one's property.[34] Where some members of a community suffer no substantial and unreasonable interference—or no interference at all—their "rights" are not affected for the purposes of RCW 7.48.130.

The next statutory term, "equally," is the adverb form of "equal," which means, "the same in number, amount, degree, rank, or quality."[35] RCW 7.48.130 dictates that a public nuisance is one that affects "equally"

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[33] RCW 7.48.130 (emphasis added).

[34] *E.g., Grundy v. Thurston County,* 155 Wn.2d 1, 6, 117 P.3d 1089 (2005) (requiring interference with use and enjoyment of property to be "substantial and unreasonable" in order to prove a nuisance)).

[35] *Merriam-Webster Online*, http://www.merriam-webster.com/dictionary/equal (last visited March 21, 2014)).

the rights of an entire community even though "the extent of the damage may be unequal." This phrase clarifies that the amount of harm caused by a public nuisance need not be equal throughout a community. By the same token, the requirement that the nuisance must affect the "rights" of the entire community "equally" can only mean that each member of the community must experience a nuisance of some degree for a public nuisance to exist. Barring that, the rights of some are not affected at all and there is no public nuisance within the meaning of RCW 7.48.130.

The County chose the alleged "two-mile" community as the subject of its public nuisance claim. Yet multiple witnesses from that community testified they are not bothered by sound from the Club at all.[36] Consistent with this, the trial court did not find that sound from the Club is a nuisance to every member of the community. Likewise, the County and CKSQ have not attempted to show that the record would support such a finding. In fact, CKSQ candidly acknowledges, "some neighbors might have testified they weren't bothered by [the Club's] noise."[37] Apart from the word, "might," that statement is accurate. The sound from the Club is not a public nuisance because it does not affect the rights of the entire community equally. The community is a checkerboard divided among people who are not bothered by the sound and those who are. That does

[36] *See* Club's Opening Br. at 14, n. 4 (compiling testimony of numerous witnesses).
[37] Br. at 10.

not fit the definition of a public nuisance under RCW 7.48.130.

If the term, "public nuisance," was intended to refer to any activity that is a nuisance to a "significant" number of people in a community, as CKSQ appears to advocate, the statute could have easily been drafted that way. Because it was not, CKSQ's interpretation is not persuasive.

CKSQ might complain that the plain language of RCW 7.48.130 makes it difficult to prove a sound is a public nuisance. Perhaps that is why the County and CKSQ have failed to cite a single Washington case in which a sound was affirmed to be public nuisance. The statute, however, does not mean sound can never be a public nuisance. It was the County's burden to prove a public nuisance within the statute, and the record shows it failed to do so. Therefore, it was error for the trial court to conclude sound from the Club is a public nuisance.

With no case law to support its interpretation of RCW 7.48.130, CKSQ can only attempt to distinguish the two cases cited by the Club on this topic. It fails to do so persuasively. The first is *State v. Hayes Investment Corp.*[38] There, witnesses who complained about a public beach disagreed about whether it was the noise, profane language, or drinking that was the problem.[39] If one witness from an alleged community complains of noise, but another's complaints are limited to

[38] 13 Wn.2d 306, 125 P.2d 262 (1942).
[39] *Id.* at 313–14.

profanity or drinking, the noise is not a public nuisance under RCW 7.48.130. The same is true if one community witness complains of noise while another testifies she has no complaint at all, as in this case.

CKSQ also fails to meaningfully distinguish *Crawford v. Central Steam Laundry*.[40] In *Crawford*, the court held a stream laundry was not a nuisance because some neighbors were not bothered by it.[41] CKSQ fails to appreciate that, under RCW 7.48.130, an activity must be a nuisance before it can be a public nuisance. If the activity in *Crawford* was not a nuisance due to some neighbors not being damaged, then, for the same reason, the sound of the Club cannot be a public nuisance.

RCW 7.48.130 reflects a state-wide policy decision that an activity should not be deemed a public nuisance if some members of the alleged community are not harmed by it in any way. Otherwise, tort law could deprive those members of the benefits of an activity they support. Because the "public nuisance" label is so powerful, it should be applied sparingly. The label does not apply to the sounds from the Club because the findings and substantial evidence do not satisfy RCW 7.48.130 and the other applicable legal standards discussed in the Club's briefs on the merits.

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[40] 78 Wash. 355, 356, 139 P. 56 (1914).
[41] *Id.* at 357–58.

C. The First Injunction Must Be Set Aside Because Termination of the Club's Nonconforming Use Right Was in Error.

CKSQ argues the trial court's first injunction, which prohibits the Club from operating without a CUP, is an appropriate act of discretion based on the trial court's conclusion that the Club's "non-conforming use had terminated."[42] Yet CKSQ offers no new arguments, authority, or citations to the record to support termination of the Club's nonconforming use right. CKSQ also fails to articulate any grounds upon which the first injunction might be affirmed if the nonconforming use right is retained. The Club has shown termination was in error so the first injunction must be set aside.

The trial court's first injunction is one of the reasons it is so important to reverse the trial court's termination of the Club's nonconforming use right. The County sought to take away that valuable property right, shut the Club down, and assert broad control over the Club by requiring a CUP for it to reopen. The County did this after deeding the property to the Club pursuant to a resolution that stated the Deed was intended "to provide that [the Club] continue to operate with full control over the property."[43] It did so in spite of the testimony of the County's own planning director, who explained that a nonconforming use in

[42] Br. at 13.
[43] Ex. 477 at 3 (emphasis added).

violation of the code could be brought "back into nonconformity."[44] In spite these facts and the Club's other arguments for retaining its nonconforming use right, the trial court agreed with the County and declared the right permanently terminated.

The Club's nonconforming use right honors its historical use of the property as an organized shooting range and the immeasurable investment its members have made in its maintenance and improvement since 1926. If the right remains terminated, the Club will have the same legal status as a landowner who seeks to open a new shooting range at a location where a range has never existed. A CUP will be required for the Club to reopen, and there is no certainty that a CUP will issue. Even if a CUP were guaranteed, there is no way to predict what its terms will be. A CUP would give the County inordinate power to control and condition the Club's activities, even those that are indisputably lawful, reasonable, or consistent with its historical activities. Termination of the Club's nonconforming use right was in error so the first injunction must be set aside.

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[44] VT 278:17–279:15.

D. The Second Injunction Must Be Set Aside Because It Is Unreasonable and Prohibits Lawful Activities.

The second injunction prohibits shooting before 9 am or after 7 pm. It also prohibits, at any time, the use of rifles of greater than "nominal .30 caliber," fully automatic firearms, cannons, and exploding targets. CKSQ argues this injunction is "narrowly tailored" and "narrowly grounded in the trial court's findings and conclusions."[45] CKSQ then cites three findings of fact that supposedly identify the harms the second injunction is narrowly tailored to prevent.[46] Yet the Club has shown these findings do not prove a public nuisance under Washington law. Therefore, they provide no basis to enjoin any activities.

Furthermore, even if the findings did prove sound from the Club is a public nuisance, they would not justify the second injunction because there is no finding that any of the banned activities are categorically unlawful, nuisances per se, or unable to be engaged in at the property under any circumstances without creating a nuisance. The second injunction is not narrowly tailored to prevent specific harms. Instead, it prohibits a substantial amount of reasonable and lawful activity that was not proven to constitute a public nuisance.

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[45] Br. at 14.
[46] Br. at 15 (citing FOFs 84–86).

According to findings of fact 84, 85, and 86:

> "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.
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> "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."
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> "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."[47]

As the Club has shown, these findings do not prove sound from the Club is a nuisance under Washington law between 7 am and 10 pm because State and local regulations exempt shooting ranges from sound limitations during that time. In addition, the findings describe only a subjective offense to the aesthetic sensibilities of some members of the community, which is not legally cognizable because aesthetic harm does

[47] CP 4073–74 (FOFs 84–86).

not constitute a nuisance.[48] Still further, the findings describe the experience of only a "significant number" of homeowners within two miles of the property.[49] The trial court never found this "significant number" comprises a majority or any other percentage of the community. According to the findings themselves, the remaining members of the community suffer no harm at all from the sound, which means they experience the Club's proximity as aesthetically neutral or desirable. Regardless of whether a vocal minority have testified they dislike the Club, there is no public nuisance, and CKSQ's concerns about sound from the Club do not support the second injunction.

Assuming, for the sake of argument, that the findings quoted above establish a nuisance, the second injunction would remain inappropriately tailored to address it because the injunction prohibits lawful activities that do not necessarily cause or contribute to a nuisance. Findings and undisputed evidence show each prohibited activity was part of the Club's historical operations, before it was ever alleged a nuisance. Historically, the Club allowed shooting during all daylight hours, which run from as early as 6 am to as late as 10:15 pm.[50] It allowed use of cannons, fully

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[48] *See Mathewson v. Primeau*, 64 Wn.2d 929, 938, 395 P.2d 183 (1964) ("[t]hat a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance").

[49] CP 4073 (FOF 84).

[50] *See* Club's Opening Br. at 36 (compiling findings and testimony).

automatic weapons, and exploding targets.[51] It allowed rifles larger than nominal .30 caliber, as Andrew Casella and Marcus Carter both testified.[52] The Club pointed out these findings and facts in its reply brief, and CKSQ neglected to address them. CKSQ has failed to explain how the second injunction can be appropriately tailored to prevent significant harm when it prohibits lawful activities that should be allowed to continue.

At its core, even if there were a public nuisance due to sound from the Club, the second injunction would suffer from the fundamental problem that the prohibited activities have only an indirect relationship to the sound produced at the Club. The injunction represents, at best, a guess as to what might make the Club acceptable to its detractors. The County is the source of this error because it prosecuted its sound nuisance claim without the type of objective evidence necessary to create an objective standard that could be used to determine whether a given set of conditions at the Club is or is not a nuisance.

III. CONCLUSION

For the foregoing reasons, CKSQ's amicus brief fails to provide grounds to affirm any of the challenged findings of fact, conclusions of law, or remedies at issue in this appeal.

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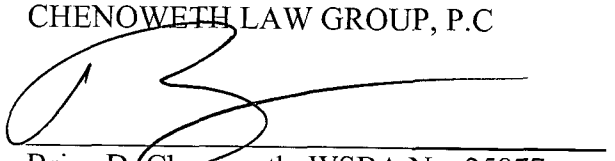
[51] *See* Club's Opening Br. at 32 (compiling findings and testimony).
[52] VT 1854:13–1855:2, 1720:1–1721:13, 1782:21–1784:24.

DATED: March 21, 2014

CHENOWETH LAW GROUP, P.C



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CERTIFICATE OF SERVICE

I, J. Patrick Graves, Jr., declare under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned have been a resident of the State of Oregon, over the age of eighteen years, not a party to or interested in this cause of action, and competent to be a witness herein.

On the date stated below, a copy of *APPELLANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER TO BRIEF OF AMICUS CURIAE CK SAFE & QUIET, LLC* and *APPELLANT'S AMENDED ANSWER TO BRIEF OF AMICUS CURIAE CK SAFE & QUIET, LLC* was served upon the following individuals by placing it in the U.S. Mail, postage prepaid, at Portland, Oregon:

Neil R. Wachter
Jennine Christensen
Kitsap County Prosecutor's Office
Civil Division
614 Division Street, MS-35A
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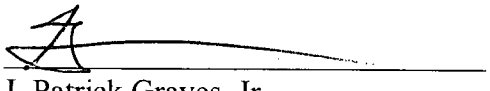
DATED this 27th day of March, 2014.

CHENOWETH LAW GROUP, PC



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