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, and JOHN DOES and JANE ROES I-XX, inclusive,

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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PETITIONER'S RESPONSE TO RESPONDENT'S AMENDED MOTION TO REVISE STAY OF JUDGMENT

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I. IDENTITY OF RESPONDING PARTY

Petitioner Kitsap Rifle & Revolver Club (the "Club") hereby responds to *Kitsap County's Amended Motion to Revise Stay of Judgment*, dated April 15, 2015 ("Motion"), filed by Respondent Kitsap County (the "County").

II. RELIEF REQUESTED

The Club respectfully requests denial of the County's Motion.

III. SUMMARY OF RESPONSE ARGUMENT

The County's motion is an untimely request for discretionary review of an interlocutory decision made by the Court of Appeals in 2012 when it stayed the trial court's judgment pending the outcome of the Club's appeal. The County provides no legitimate grounds to revisit or modify the Court of Appeals' decision. The apparent intent of its motion is to present additional arguments and briefing to circumvent the 20-page limit on its answer to the Club's petition for review. The petition and answer, however, must stand on their own. The County is not entitled to modification of the Court of Appeals' stay order, and its motion should be denied.

Pursuant to RAP 8.6, the stay remains in effect until issuance of a mandate terminating this appeal. The stay does not allow the County to attempt to modify any of its terms prior to issuance of a mandate. When

the Club sought the stay and when the County later moved for the Court of Appeals to modify it in 2012, the County never once argued the stay should be reviewable, modifiable, or terminable prior to issuance of a mandate. Now, years later, the County seeks this relief in an unprecedented motion to modify the stay.

The County's motion is an untimely request for discretionary review of an interlocutory decision of the Court of Appeals, filed more than 30 days after the decision was made. There is no basis to disregard the deadline for discretionary review, and the County does not ask for relief from this deadline. The County also fails to even attempt to show that its motion satisfies the standards for discretionary review. Therefore, the motion should be denied.

The County argues the motion should be granted pursuant to general rules that allow the Court to issue orders necessary or appropriate for a fair, orderly, efficient, and equitable review of the case. The Court's review of the Court of Appeals' opinion, however, is entirely independent of the stay. Therefore, the motion fails to satisfy the County's own self-selected standard. The motion also fails to cite a single case in which a court granted the type of relief it seeks here. Therefore, the motion should be denied.

The County argues the stay should be modified because it is entitled to certain remedies now based on the decisions of the Court of Appeals and the issues raised by the Club in its petition for review. The Court of Appeals, however, ordered the trial court to decide any additional remedies on remand, and to do so subject to specific instructions that raise unresolved issues of fact and law.

Although the Court of Appeals affirmed the trial court's second injunction, which places specific limits on the Club's operations, it did so as a remedy for noise nuisance and possibly safety nuisance. The Club's petition for review seeks reversal of the second injunction and the noise and safety nuisance decisions. Therefore, the second injunction may never take effect.

The County argues the Club's petition for review raises no debatable issues, but the Court has already decided it will not consider the County's motion to modify the stay unless it has already decided to grant the Club's petition for review. If the Court is considering the motion, then it must have concluded the issues are debatable. The County's argument, therefore, proves only that its motion must be denied.

The trial court issued an injunction shutting down the Club. The Court of Appeals balanced the risks to each party and stayed that decision so that the Club could reopen and operate during its appeal. The Court of

Appeals' decision to reverse the injunction that shut down the Club affirms the wisdom of the stay order.

The stay will remain in effect, under RAP 8.6, until the issuance of a mandate terminating the Club's appeal. The Club's petition for review to this Court raises debatable issues of public importance and asks the Court to make decisions that will determine the issues and remedies to be decided on remand. The stay should remain in place until proceedings before this Court are concluded and a mandate is issued.

IV. RELEVANT FACTS

As discussed in greater detail in the Club's petition for review, this appeal is about the future of a gun club that has operated its shooting range for over 89-years, providing safety infrastructure, supervision, and training for "sport and national defense," pursuant to its 1926 charter, to the greater Kitsap County area. No bullet fired at the Club has ever been found to have left the Club's 72-acre property, let alone to have damaged any downrange person or property; and numerous witnesses at trial testified the sound from the Club did not bother them at all.

Nevertheless, on February 9, 2012, the trial court terminated the Club's property rights and declared it a public noise and safety nuisance. It then issued two permanent injunctions. The first enjoined the Club from operating unless it could obtain a conditional use permit (CUP).

The second placed specific limits on Club operations, including prohibitions on certain types of firearms and a reduction in the Club's operating hours. The Club appealed.

On October 28, 2014, the Court of Appeals issued a *Published Opinion* ("Opinion").[1] The Opinion reinstated the Club's nonconforming use right and reversed the trial court's first injunction. Opinion at 44. The Opinion affirmed the second injunction as a remedy to abate the sound nuisance and possibly also the safety nuisance. *Id.* at 45–46. It then ordered the case to be remanded, with instructions for the trial court to fashion any additional remedies in a way that takes into account the Club's right to lawfully change and intensify its use. *Id.* at 44, 47.

On March 12, 2015, the Club filed *Appellant's Amended Petition for Review* ("Petition"). The Club's Petition seeks review of five debatable issues of public importance. Petition at 2–3. The Petition seeks reversal of the second injunction and other decisions of the Court of Appeals. *Id.* at 2–3, 15–18. The outcome of the Petition will affect the issues and remedies to be decided on remand. Because the Petition is pending, the Court of Appeals' decision has not yet taken effect and no mandate has issued terminating the Club's appeal.

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[1] A copy of the Opinion and the Court of Appeals' February 10, 2015 order modifying the Opinion is attached as Appendix 4 to *Appellant's Amended Petition for Review*, dated March 12, 2015.

Although the trial court shut the Club down with its February 2012 judgment, on April 23, 2012, the Commissioner for Division II of the Court of Appeals stayed that judgment and allowed the Club to reopen and continue operating throughout its appeal, subject to certain conditions. Stay Order at 5–6 (App. 1).[2] These conditions included a prohibition on certain shooting activities, a limitation on the Club's operating hours, and a requirement for the Club to provide video of its operations to the County at the County's request, to allow the County to investigate any alleged violation of the stay. *Id.* at 6. The Court of Appeals included no provision in the stay allowing the County to have it terminated, reviewed, or modified prior to the issuance of a mandate terminating the Club's appeal.

On May 23, 2012, the County filed a timely motion to modify the stay pursuant to rules of procedure that allow a party to seek modification of a commissioner's ruling.[3] In the County's opposition to the stay and motion to modify the stay, not once did it argue that a stay should provide for early termination or revision prior to issuance of a mandate.[4] On August 27, 2012, the court denied the County's motion to modify the stay

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[2] A copy of the Stay Order (*Ruling Granting Stay on Conditions*, dated April 23, 2012) is attached as Appendix 1 to the Club's Appendix, filed herewith.

[3] *See Mot. to Modify Commissioner's Ruling Granting Stay on Conditions*, dated May 23, 2012 (Appx. 2); RAP 17.7 (allowing a motion to modify a commissioner's ruling if filed within 30 days of the decision).

[4] *See generally*, App. 2; *Resp. Brief for Appellant's Mot. to Stay Trial Court's Judgment Pursuant to RAP 8.1*, dated April 10, 2012 (Appx. 3).

and entered an order to clarify the Club's duty to provide video to the County.[5]

The County took no further action to attempt to appeal or modify the Court of Appeals' decisions regarding the stay until December 31, 2014, when it filed *Kitsap County's Motion to Revise Stay of Judgment.* On January 7, 2015, the Court advised the parties it would not consider the motion to revise the stay unless it had already decided to grant the Club's Petition.[6] On February 25, 2015, the County moved for leave to file an amended motion to revise the stay.[7] On April 15, 2015, the County filed its amended motion.

V. ARGUMENT

A. The County's Motion Is an Untimely Request for Discretionary Review of Interlocutory Decisions of the Court of Appeals.

The County argues it is "necessary and appropriate to revisit" the stay order and "the time has come to revisit and revise the stay analysis." Mot. at 2; 15. The County is asking this Court to review and reverse the Court of Appeals' decision to grant a stay that remains in effect until the issuance of a mandate. The Court of Appeals included no provision in the

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[5] *See Order Clarifying Stay and Denying Mot. to Modify and Mot. for Contempt*, dated August 27, 2012 (Appx. 4).

[6] Email from Supreme Court Deputy Clerk Susan Carlson to counsel for the Club and the County (January 7, 2015, 11:32 am) (Appx. 5).

[7] *See Kitsap County's Mot. to Revise Briefing Schedule for Mot. to Revise Stay of Judgment*, dated February 25, 2015.

stay that would allow it to be terminated or modified prior to the issuance of a mandate. The County had the opportunity to appeal the Court of Appeals' decisions regarding the stay, and its deadline for such an interlocutory appeal expired long ago. The County's motion, therefore, must be denied as time barred.

Once granted, a stay remains in effect until "[t]he issuance of the mandate as provided in rule 12.5 terminates any delay of enforcement of a trial court decision obtained pursuant to rule 8.1." RAP 8.6. This rule is consistent with the decisions of other courts. *See City of Miami v. Arostegui*, 616 So. 2d 1117, 1120 (Fla. Dist. Ct. App. 1993) (holding a stay "ends when the district court of appeal issues its mandate"); *Great Am. Mortgage Investors v. Republic of Texas Sav. Ass'n*, 538 S.W.2d 146, 149 (Tex. Civ. App. 1976) (affirming stay of injunction until "final action by the Supreme Court of Texas").

No mandate has issued in this case. There is no provision in the stay that allows the County to shorten its effective length, terminate it, or modify any aspect of it prior to issuance of a mandate. The Opinion is not a mandate terminating the Club's appeal. There is no reason to believe the Court of Appeals did not understand RAP 8.6 when it affirmed the stay or intended the stay to conclude prior to issuance of a mandate. By seeking

this relief now, the County's motion constitutes an untimely request for interlocutory review.

"An "interlocutory decision" is "any opinion, order, or judgment of the appellate court or ruling of a commissioner or clerk which is not a decision terminating review." RAP 12.3(b). The stay order of April 23, 2012, is an order of the appellate court commissioner that did not terminate review. *See* RAP 12.3(a)(1)–(3) (defining "decision terminating review"). Therefore, it is an interlocutory decision. The Court of Appeals' order of August 27, 2012, which clarifies the stay and denies the County's motion to modify the stay, is also an interlocutory decision.

"A party seeking review of an interlocutory decision of the Court of Appeals must file a 'motion for discretionary review' as provided in Rule 13.5." RAP 13.3(c). A motion for discretionary review must be filed "in the Supreme Court . . . within 30 days after the decision is filed." RAP 13.5(a).

The County's present motion asks this Court to review the Court of Appeals' interlocutory orders regarding the stay, reverse the Court of Appeals' decision that the stay would remain in effect until issuance of a mandate, and alter the terms of the stay while it remains in effect. The County was required to seek this relief within 30 days after the decision being appealed, but instead waited over two years after the stay

was issued. Therefore, the County's motion is untimely and should be denied. *See Shumway v. Payne*, 136 Wn. 2d 383, 396–97, 964 P.2d 349 (1998) (denying untimely motion for discretionary review of interlocutory decision).

This Court may "enlarge . . . the time within which an act must be done in a particular case in order to serve the ends of justice." RAP 18.8(a). A deadline to seek discretionary review, however, shall be extended "only in extraordinary circumstances." RAP 18.8(b). The appellate court "will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section." *Id.* The County has not moved for an extension under RAP 18.8, nor has it identified any extraordinary circumstances that would warrant such an extension or outweigh the desirable finality of the Court of Appeals' stay decisions.

The County argues it is the Club's burden to show the stay should remain in effect at this stage of its appeal. Mot. at 15. The Club, however, met its burden over two years ago when it obtained the stay. Pursuant to the terms of the stay and RAP 8.6, the stay remains in effect until the issuance of a mandate. The County has no right to ask the Court or the Club to revisit the Court of Appeals' interlocutory decisions so long after they were made.

B. The County's Motion Fails to Satisfy Any of the Standards for Discretionary Review of the Court of Appeals' Interlocutory Decisions Regarding the Stay.

Even if the County's motion were timely, it would need to be denied because it does not meet the standards for discretionary review of any of the Court of Appeals' interlocutory decisions regarding the stay. RAP 13.5(b) provides:

> "Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:
> (1) if the Court of Appeals has committed an obvious error which would render further proceedings useless; or
> (2) if the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
> (3) if the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court."

RAP 13.5(b). The County's motion should be denied because it does not attempt to satisfy any of these standards.

The Court of Appeals Commissioner concluded the Club's appeal raised debatable issues and allowing the Club to operate until issuance of a mandate, pursuant to the conditions of the stay, would prevent irreparable harm to the Club without exposing the community to unreasonable safety

risks. Stay Order at 5 (App. 1). When the County moved to modify that decision, the Court of Appeals denied the motion. Order Clarifying Stay at 1–2 (App. 4). In the County's opposition to the stay and motion to modify the stay, not once did it argue that a stay should provide for early termination or revision prior to issuance of a mandate.[8] The County did not seek timely discretionary review of any of the Court of Appeals' decisions regarding the stay.

In its current motion, the County does not argue that any of the Court of Appeals' decisions regarding the stay satisfy the discretionary review standards set by RAP 13.5(b). The County does not argue any of those decisions exhibited an obvious or probable error. It does not argue any of those decisions substantially limited the County's freedom to act. It does not argue any of those decisions departed so far from the accepted and usual course of judicial proceedings as to call for review by this Court.

On the contrary, it is the County's motion that departs from the accepted and usual course of judicial proceedings. This is evident in the County's failure to cite a single case in which the Washington Supreme Court granted the type of review or relief the County now seeks. Therefore, even if the County's motion were timely, it would need to be

[8] *See supra* n. 4 (citing County's response in opposition of the stay (Appx. 4) and motion to modify stay (Appx. 5)).

denied because it fails to satisfy the standards for discretionary review pursuant to RAP 13.5(b).

C. Modifying the Stay Is Not Necessary or Appropriate for the Court to Perform a Fair, Efficient, and Equitable Review of the Issues Presented in the Club's Petition for Review.

The County argues it is "necessary and appropriate" to revisit and revise the Court of Appeals' stay order. Mot. at 2. As authority for this proposition, the County cites RAP 7.3. This rule authorizes an appellate court "to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case." RAP 7.3 (emphasis added). Even if this rule applied here, the County's motion would need to be denied because whether the Court revises the stay has nothing to do with its review of the Opinion.

The Court can provide a fair and orderly review of the case while the stay remains in effect, without altering the stay or providing any other relief to the County under RAP 7.3. The stay exists independently of the Club's Petition, and will not affect the Court's review. The requested modification, if granted, would have no affect on the Court's review. Therefore, it is not necessary or appropriate to modify the stay for the purposes of review. Even if RAP 7.3 could theoretically allow modification of a stay, the County's motion would need to be denied.

The only possible connection between the County's motion to modify the stay and the Court's review of the issues presented arises from the County's argument that none of the issues are debatable. This argument fails because the Court has already decided it will only consider the County's motion to revise the stay if it has already decided to grant the petition for review.[9]

This means that if the Court is considering the County's motion at all, it will have already decided, in its review of the Club's petition, that the petition presents debatable issues. It will have reached this conclusion independently of the County's motion to revise the stay. It is not necessary or appropriate to modify the Court of Appeals' decisions regarding the stay in order to secure the fair and orderly review of this case pursuant to RAP 7.3.

The County suggests RAPs 17, 8.1(b), and 8.3 provide additional authority for its motion. Mot. at 1. None of these rules, however, alter the standard set by RAP 7.3 or expressly provide for modification of a stay previously put in place by the Court of Appeals.

RAP 17 provides that a party "may seek relief, other than a decision of the case on the merits, by motion[.]" RAP 17(a). This rule provides

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[9] Email from Supreme Court Deputy Clerk Susan Carlson to counsel (January 7, 2015, 11:32 am) (Appx. 5).

procedures for motions. It does not determine whether a specific motion is authorized; nor does it provide substantive standards by which motions are judged. RAP 17 does not allow the County to sidestep RAP 7.3 or any other Rule of Appellate Procedure.

RAP 8.1(b) provides rules for when a stay can issue. The Court of Appeals granted the stay pursuant to this rule. The County is now attempting to modify this stay. RAP 8.1(b) provides no rules for modification of an existing stay, so it does not apply here.

RAP 8.3 authorizes the appellate courts to "issue orders . . . to insure effective and equitable review[.]" This Court can effectively and equitably review the issues presented in the Club's Petition without modifying the stay order—for the same reason that the Court can provide a fair and orderly review without modifying the stay pursuant to RAP 7.3. Therefore, RAP 8.3 does not support the County's motion.

The County fails to cite a single case in which the Washington Supreme Court granted the type of relief it seeks in its Motion. If the Motion is not subject to the standards and time limits for discretionary review of an interlocutory decision, then it must be denied under RAP 7.3 and/or 8.3 because modification of the stay order is not necessary or appropriate for this Court to perform a fair, orderly, effective, and equitable review of the issues presented in the Club's petition.

D. The County's Request for This Court to Abort the Stay and Grant Remedies Now Is Premature and Contrary to the Stay Order, the Club's Petition for Review, and the Opinion.

The County appears to be arguing that it will be entitled to certain remedies when this appeal concludes so this Court might as well impose them on the Club now as operating conditions in a modified stay order. The remedies sought by the County, however, remain at issue, and may never take effect. The County's request for this Court to grant remedies now, when they are still in dispute and subject to further proceedings, should be denied as premature, contrary to the stay order, contrary to the Club's rights in this appeal, and contrary to the Opinion.

The County fails to clearly explain what terms it wants the Court to impose on the Club in a modified stay. It first asks the Court to:

> "restore the trial court's injunctions governing land uses found and upheld to be expanded uses of the subject property and against public nuisance conditions created at that property, while retaining the Court of Appeals' video recording protocol."

Mot. at 1. Later, it asks the Court to "restore the land use injunction in so far as it enjoins affirmed 'expanded uses' of the Property." *Id.* at 10. It then asks the Court to "restore the public nuisance injunction." *Id.* at 11. Finally, it clarifies it "does not seek cessation of all shooting activities at the Property." *Id.* at 19. Instead, it seeks "restoration of the trial court's

public nuisance injunction and enjoinment against [the Club's] 'expanded uses' that will require permits if they are to resume." *Id.*

Although the County's requests are unclear, it appears to be asking the Court to fashion remedies for expansion and public nuisance and enter them now as conditions of a modified stay order. The Court should deny the motion because whether and to what extent the County is entitled to any such remedies remains in dispute and subject to further proceedings pursuant to the Club's petition for review and the Court of Appeals' order and instructions for remand.

The Court of Appeals drew the following conclusions regarding the alleged expansions and public nuisances associated with the Club:

(1) For-profit commercial and military training at the Club between 2002 and 2010 constituted an expansion. Opinion at 15–16.

(2) "[F]requent and drastically increased noise levels found to exist at the Club" constituted an expansion. *Id.*

(3) The Club's expansions constituted public nuisances per se because they were in violation of Kitsap Count Code (KCC). *Id.* at 17 (citing KCC 17.530.030, 17.110.515).[10]

[10] KCC 17.530.030 ("Any use . . . in violation of this title is unlawful, and a public nuisance."); KCC 17.110.515 ("any violation of this title shall constitute a nuisance per se").

(4) "[E]xcessive noise, unsafe conditions, and unpermitted development work constituted a public nuisance[.]" Opinion at 2.

(5) The unpermitted development work consisted of "grading, excavating, and filling – and failing to comply with the critical areas ordinance" without obtaining the necessary "site development activity permits." *Id.* at 16.

(6) Increased noise levels did not begin until around 2005 or 2006, when they went from "occasional and background in nature, to clearly audible in the down range neighborhoods[.]" Opinion at 4.

(7) The Club was unsafe even though "the trial court did not find that any bullet from the Club had ever struck a person or nearby property" and "found only that it was possible, not probable, that bullets could strike persons or property[.]" *Id.* at 26.

(8) The trial court erred when it terminated the Club's nonconforming use right and issued the first injunction prohibiting the Club from operating without a CUP. *Id.* at 44.

(9) The trial court acted within its discretion when it issued the second injunction prohibiting certain Club activities and reducing its operating hours because this remedy was "reasonably related to the noise-related nuisance and possibly to the safety-related nuisance." *Id.* at 46.

(10) Remand is necessary "for the trial court to fashion an appropriate remedy for the Club's unlawful expansion of its nonconforming use and for the permitting violations." *Id.* at 3, 45. This remedy involves "specifically addressing the impermissible expansion . . . and unpermitted development activities while allowing the Club to operate as a shooting range." *Id.* This remedy must "reflect the fact that some change in use – 'intensification' – is allowed and only 'expansion' is unlawful." Opinion at 44.

In sum, the Court of Appeals reversed the first injunction, affirmed the second injunction, and ordered any additional remedies to be determined on remand pursuant to the court's specific instructions that require resolution of factual and legal issues.

Because the Court of Appeals affirmed the second injunction, the County argues it should immediately be given effect. The second injunction, however, is subject to reversal by this Court pursuant to the Club's petition for review. Petition at 2–3, 15–18 (seeking reversal of second injunction and public noise and safety nuisance decisions). If the Court is considering the County's motion, then it has already decided the Club's petition raises debatable issues warranting further review. Therefore, the County's request for the second injunction to take effect

now should be denied as premature, contrary to the stay order, and contrary to the Club's rights in this appeal.

The only other remedies the County might obtain in this action are subject to the Court of Appeals' order and instructions for further proceedings on remand. If such remedies could have been decided without further trial proceedings, the Opinion would have said so. Instead, the Opinion requires the trial court to resolve additional legal and factual issues. The County is not entitled to circumvent the Court of Appeals' order for remand by seeking relief from this Court in the form of a modified stay.

VI. CONCLUSION

For the reasons stated above, Petitioner Kitsap Rifle & Revolver Club respectfully requests that the Court deny Respondent *Kitsap County's Amended Motion to Revise Stay of Judgment.*

DATED: April 29, 2015

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APPENDIX NO. 1

Court of Appeals
Ruling Granting Stay on Conditions
dated April 23, 2012

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

Respondent/Cross-Appellant,

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,

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.

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

RULING GRANTING STAY ON CONDITIONS

Kitsap Rifle and Revolver Club (KRRC) moves to stay the trial court's order that concluded KRRC's operation of a shooting range (1) was no longer a legal non-conforming use and (2) constituted a public nuisance. The trial court's order enjoined KRRC from operating the shooting range until it had obtained a conditional use permit from Kitsap County and permanently enjoined certain activities at the shooting range.

Concluding that KRRC has demonstrated that it is entitled to a stay upon conditions, this court grants its motion.

KRRC began operating a shooting range in 1926. The active area of the range is an eight acre portion of a 72 acre parcel. Until 2009, KRRC leased the land for the range from the State of Washington. In 2009, after the State transferred ownership of the land to Kitsap County, the County conveyed ownership to KRRC. According to the County, KRRC began expanding the operations of the range in 1998 and by 2003 was hosting commercial small arms training exercises.

In 2010, Kitsap County commenced an action for injunction, declaratory judgment and abatement of nuisance. It alleged that while KRRC's use of the property as a shooting range had been a legal non-conforming use in the past, KRRC's expansion of the operations of the shooting range had terminated that legal non-conforming use. It also alleged that the operation of the shooting range constituted a public nuisance in that shooting occurred from 7:00 A.M. until 10:00 P.M., that automatic weapons were often fired, that cannons and other explosive devices were detonated, and that stray or ricocheted ammunition could strike homes adjoining the property. The County sought to abate the nuisance and to have the shooting range declared a non-conforming use. It asked the court to enjoin operation of the shooting range until it obtained a conditional use permit and to permanently enjoin certain activities.

KRRC responded to the action by noting that no evidence had been presented of stray ammunition injuring anyone on the adjoining properties or of striking anything on

those properties. After a lengthy trial, the court found that KRRC's operation of the shooting range constituted a nuisance in the following regards:

> 21. The failure of [KRRC] 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 [KRRC] 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.

Mot. for Stay, Ex. 1 at 27 (Findings of Fact and Conclusions of Law).

The court also found that KRRC's expansions of the use of the shooting range to include commercial small arms training, use of automatic weapons and professional competitions had terminated the legal nonconforming use status of the shooting range. The court enjoined any operation of the shooting range until KRRC had obtained a conditional use permit for a private recreational facility. It also permanently enjoined the following uses of the property: (a) use of fully automatic firearms, (b) use of rifles with calibers greater than .30, (c) use of exploding targets and cannons, and (d) shooting before 9:00 A.M. or after 7:00 P.M.

KRRC seeks a stay of the trial court's order pending its appeal. First, it contends that it is entitled to a stay under RAP 8.1(b)(2), which provides that "a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property . . . by filing in the trial court a supersedeas bond or cash . . . ." It contends that the trial court's order affects its rights to use its property, so it is entitled to a stay. *Henry v.*

Bitar, 102 Wn. App. 137, 139-40, 5 P.3d 1277 (2000), *review denied*, 142 Wn.2d 1029 (2001). Kitsap County responds that RAP 8.1(b)(2) is not applicable because the trial court granted injunctive relief, making RAP 8.1(b)(3) applicable instead.

To the extent the trial court's order found that KRRC's operation of the shooting range no longer constituted a legal nonconforming use of its property, the order affected KRRC's right to use of its real property and entitled it to a stay of that portion of the order, provided that it filed a supersedeas bond, cash or alternate security approved by the trial court. But KRRC did not file such a bond, cash or alternate security. While the property itself may serve as security if it has value, under RAP 8.1(c)(2), the parties dispute whether the property has an assessed value of $71,000 or whether the property is valueless because of lead contamination. KRRC has not shown that it is entitled to a stay under RAP 8.1(b)(2).

KRRC alternately seeks a stay under RAP 8.1(b)(3). Under that rule, it must first "demonstrate that debatable issues are presented on appeal." RAP 8.1(b)(3)(i). If it does, then this court must consider the injury that KRRC would suffer if a stay is not granted against the injuries that Kitsap County would suffer if a stay is granted. RAP 8.1(b)(3)(ii). If the fruits of an appeal would be totally destroyed in the absence of a stay, then a stay should be granted, unless the appeal is totally devoid of merit. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986), *rev'd on other grounds*, 108 Wn.2d 38 (1987).

KRRC argues that there are debatable issues about the trial court's findings of a risk of harm to the adjoining properties, among others. And it argues that without a stay of the trial court's order, it will suffer dire financial consequences that could lead to cessation of KRRC's activities and to vandalism and degradation of the property. Kitsap County responds that the trial court's extensive findings of fact and conclusions of law conclusively resolve all of the issues in its favor, so KRRC does not demonstrate any debatable issues on appeal. And it responds that a stay of the trial court's order would again expose the adjoining property owners to the risk of harm and to the nuisances created by the shooting range.

Given that Kitsap County did not commence this enforcement action until 2010, and that the increased operations of the shooting range had been occurring since at least 2003, Kitsap County does not show that the risk of harm to the adjoining property owners is so great that it overcomes the harm that will befall KRRC if all shooting range operations are enjoined while this appeal is pending. KRRC has shown that the harm it will suffer in the absence of a stay is greater than the harm that Kitsap County will suffer from the imposition of a stay. Therefore, KRRC has demonstrated that it is entitled to a stay under RAP 8.1(b)(3).

However, in granting a stay, this court must stay the trial court's order "upon such terms as are just." RAP 8.1(b)(3). Kitsap County, as a protector of the adjoining property owners' interests in peaceful enjoyment of their properties, has a valid concern about the amount of noise that the shooting range had been creating. In order to address that

concern, while still allowing KRRC some ability to operate, this court conditions its stay of the trial court's order as follows. The injunction against all operation of a shooting range on the KRRC property, until such time as it receives a conditional use permit, is stayed pending a decision in this appeal. However, KRRC's operation of the shooting range is subject to the following conditions:

> (1) Range safety officers must be present at all time that shooting is occurring. Video recordings must be made while shooting is occurring.
> (2) KRRC must allow officials from Kitsap County access to the property to monitor compliance with these conditions. It must allow those officials access to the video recordings.
> (3) Shooting must be restricted to between 8:00 A.M. to 8:00 P.M.
> (4) No fully automatic weapons may be fired.
> (5) No cannons may be fired, except on the Fourth of July, and no exploding targets may be used.

It is hereby

ORDERED that KRRC's motion for a stay of the trial court's order is GRANTED under RAP 8.1(b)(3), subject to the above conditions.

DATED this 23rd day of April, 2012.

Eric B. Schmidt
Court Commissioner

cc: Brian D. Chenoweth
Neil R. Wachter
Jennie Christensen
Hon. Susan Serko

APPENDIX NO. 2

Respondent Kitsap County's
Motion to Modify Commissioner's Ruling
Granting Stay on Conditions
dated May 23, 2012

CONSOL. NOS. 43076-2-II and 43242-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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

Respondent/Cross-Appellant,

vs.

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

Appellants/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

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

MOTION TO MODIFY COMMISSIONER'S RULING GRANTING STAY ON CONDITIONS

APP NO. 2

I. IDENTITY OF MOVING PARTIES

The Respondent, KITSAP COUNTY, by and through its attorney, Neil R. Wachter, Senior Deputy Prosecuting Attorney for the Kitsap County Prosecuting Attorney's Office (Civil Division), asks this Court for the relief designated in Part II of this Motion.

II. RELIEF REQUESTED

KITSAP COUNTY respectfully requests pursuant to RAP 17.7 that this Court modify the Commissioner's Ruling Granting Stay on Conditions dated April 23, 2012 granting the motion for stay of the trial court's verdict and judgment by the KITSAP RIFLE AND REVOLVER CLUB (hereinafter "Appellant", "KRRC" or "Club"), by lifting the stay and reinstating the two permanent, mandatory and prohibitive injunctions imposed by the trial court upon rendering verdict in this action.

III. RELEVANT FACTS

On April 23, 2012, the Court of Appeals Commissioner issued the Ruling Granting Stay on Conditions in this case ("Ruling"). The Ruling stayed the trial court's judgment and verdict entered by Pierce County Superior Court Judge Susan K. Serko on February 9, 2012, entitled Findings of Fact, Conclusions of Law and Orders ("Verdict").[1] Judge

[1] Declaration of Neil R. Wachter in Opposition to Appellant's Motion to Stay Judgment ("Wachter Declaration"), Exhibit C (Findings of Fact, Conclusions of Law and Orders), numbered paragraphs of which are hereinafter cited as "FOF", "COL" or "Order".

Serko presided over a bench trial requiring fourteen court days over the span of September 28, 2011 to October 27, 2011, and considered the evidence for approximately 90 days before pronouncing judgment. Verdict, pp. 1-2. The materials presented to the Commissioner included the Verdict, the operative complaint for injunction, declaratory judgment and abatement of nuisance[2], and the operative answer, affirmative defenses and counterclaims[3]. The Verdict, 35 pages in length exclusive of its attachment, is an obligatory starting point to understand the thoroughness with which the trial court considered and balanced the battery of contested issues before it issued rulings restricting the activities of a recreational shooting club property owner so as to protect many individual residential property owners' rights to the comfort and repose of their real property and to freedom from unreasonable intrusions upon their health and safety. In its stay motion, KRRC introduced a body of post-trial evidence to support its contention of "injury that would be suffered by the moving party if a stay [was] not imposed" under RAP 8.1(b)(3).[4] However, the Verdict demonstrates that the trial court already performed the balancing of relative harms contemplated by that Court Rule.

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[2] Wachter Declaration, Exhibit A (Third Amended Complaint for Injunction, Declaratory Judgment and Abatement of Nuisance) ("Complaint").
[3] Wachter Declaration, Exhibit B (Answer, Affirmative Defenses and Counterclaims to Third Amended Complaint ("Answer").
[4] *See generally* Appellant's Motion to Stay, pp. 8-10, and cited Declarations therein.

The Complaint is framed *in rem* and *in personam,* and pertains to a 72-acre parcel in Central Kitsap County, 8 acres of which have been operated as a shooting range by the KRRC for several decades and owned by the KRRC starting in approximately June 2009 ("Property"). The use pre-dated modern zoning, which would now require a conditional use permit for use of property as a "private recreational facility" under the Kitsap County Code ("KCC"). COL 24, 25. The Complaint describes public nuisance conditions of shooting noise and likely bullet escapement from the Property and describes dramatic changes in the use of the Property which post-date the construction and occupancy of many nearby and downrange residences. The Complaint sought declaratory judgment that KRRC had terminated its nonconforming land use as a result of one or more of a multitude of significant new uses of the Property and sought two injunctions: First, enjoinment of further use of the Property as a shooting range until the owner or occupant obtained a conditional use permit to restore the property's land use compliance. Second, enjoinment of public nuisance conditions consisting of (a) excessive, obnoxious and intrusive shooting and explosive sounds and (b) the ongoing threat to public safety of residents and occupants of properties in the vicinity resulting from escape of bullets from the Property. The public nuisance claims were framed as nuisance per se, statutory public nuisance and common law

nuisance claims. Complaint, ¶¶ 73-78.[5].

Kitsap County ("County") brought its Complaint pursuant to its Constitutional authority to make and enforce "local police, sanitary and other regulations" pursuant to Article XI, Section 11 of the Washington State Constitution. Complaint, ¶ 66. The County also brought this suit pursuant to its statutory authority to declare and abate nuisances under RCW 36.32.120(10). Complaint, ¶ 67. The County further brought this suit pursuant to Kitsap County Code ("KCC") § 17.530.030's declaration that "any use, building or structure in violation of [KCC Title 17 (zoning)] is unlawful, and a public nuisance" and its authorization for the County to bring an action "for a mandatory injunction to abate the nuisance in accordance with the law." Complaint, ¶ 68.

This Complaint and its cited authorities for the County's lawsuit were known to the Commissioner, who faulted the County for not filing the lawsuit at an earlier time, as will be discussed below.[6] The trial court affirmed these authorities and the premise of RCW 7.48.190 that no lapse of time can legalize a public nuisance. COL 11, 12, 14-16.

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[5] *See also*, Complaint, Relief Requested, ¶ 6.
[6] Ruling, p. 5.

A. JUDGE SERKO'S VERDICT IS A COMPREHENSIVE RECITATION AND ANAYLSIS OF NOISE AND RANGE SAFETY NUISANCE CONDITIONS, ILLEGAL SITE DEVELOPMENT ACTIVITIES, AND LAND USE VIOLATIONS WHICH SUPPORT IMPOSITION OF TWO MANDATORY, PROHIBITIVE AND PERMANENT INJUNCTIONS.

The trial court found for Kitsap County on each of its claims and granted declaratory judgment that the Club's dramatically changed uses of its Property and illegal uses of the Property acted to terminate its claimed nonconforming land use status. *See generally*, Verdict; Orders, ¶¶ 1,2,6. The Verdict includes two injunctions: First, an injunction enjoining use of the Property as a shooting range until violations of Title 17 KCC (zoning) are resolved by application for and issuance of a conditional use permit. Orders, ¶ 6. Second, an injunction enjoining specific uses of the subject property which the Court found to constitute or create public nuisance conditions. Orders, ¶ 7. The latter injunction enjoined the following activities:

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.

Orders, ¶ 7.

By their terms, the injunctions were effective immediately. Significantly, the injunctions provided a means for to use its Property as a shooting range again, albeit with restrictions, after application for and issuance of a conditional use permit. Orders, ¶ 6. To date, that application has not happened.

The Verdict itself provides the best roadmap to understanding the factual and legal underpinnings of the injunctions, and why one might dare to challenge whether the appeal presents "debatable issues". To follow are selected highlights of the Verdict, addressing proven changes in use, illegal uses made of the Property, and multiple public nuisance conditions resulting from the Club's activities.

1. Uses of the Property Circa 1993

The Court found that the Club used eight acres of the Property for shooting range purposes for several decades prior to 1993. FOF 7. 1993 was a benchmark in the case because of a letter from the Chair of the Kitsap County Board of County Commissioners to the then-existing shooting ranges, acknowledging that each was grandfathered as to land use. FOF 10. As of 1993, the Club operated a pistol range and a rifle range at the Property each with permanent shelters, and conducted miscellaneous shooting activities in wooded or semi-wooded areas of the of the Property, on the periphery of the pistol and rifle ranges and within a

claimed eight-acre "historic" area. FOF 29. As of 1993, shooting occurred at the Property during daylight hours only and was deemed to be an "occasional" use occurring primarily on weekends and during fall "sight-in" season for hunters. FOF 30.

2. Unpermitted Site Development

From approximately 1996 forward, significant earth work was conducted on the Property in phases revealed by aerial photography, none of which was done with the authorization or permitting by the relevant authority, the Kitsap County Department of Community Development. FOF 32-37; COL 2. This unpermitted development work included significant earthwork to build 11 "shooting bays", created from excavation and movement of soil to create earthen berms and backstops on at least three sides of each bay. FOF 33-36. The Club excavated into hillsides and performed earthwork near protected wetlands, without submitting application for required County permits or authorizations such as grading permits or site development activity permits. FOF 36, 60-65. The Club's clearing and earthwork included clearing a large wooded area in 2005 to create a proposed "300-meter range" in an area of the Property not previously used for shooting, and without application for County permits. FOF 40-41, 51. The Club abandoned the 300-meter range project in 2006 after the County insisted that the Club apply for and obtain a conditional

land use permit in addition to a site development activity permit, a position with which the Club disagreed. FOF 44-46. The Club's earthwork also included burying a 450-foot long pair of culverts in the ground in 2006 to transmit storm water from ditches along the nearby county road across the Property to protected wetland areas. FOF 52-54, 62. The Club performed this site development work, including the "underground" of culverts, without the benefit of a wetland delineation ordinarily submitted to the regulating authorities. FOF 58, 66.

The Court found that the Club's site development at the Property repeatedly exceeded KCC thresholds for quantities or acreage of soil moved and/or thresholds for "cut slopes" created. FOF 34, 35, 41, 54, 55, 65. The Court found that the Club's site development repeatedly took place within the Club's expert's regulatory buffer for the protected wetlands. FOF 61-64.

The trial court concluded that the Club's unpermitted site development activities constituted expanded uses of the Property in violation of the County nonconforming use statute, and served to terminate the nonconforming use of the Property as a shooting range. COL 26-27. The trial court further concluded that each of five separate elements of site development work performed at the property *independently* constituted illegal uses by virtue of violating applicable

KCC site development regulations, each thereby terminating the nonconforming use of the Property as a shooting range. COL 27-31.

3. Range Safety

The trial court found that the KRRC range is unsafe as presently configured. The Property's shooting areas constitute a "blue sky" range with no overhead facilities to stop errant bullets. FOF 67. The trial court found that surface danger zone diagrams presented by the County at trial were representative of the firearms used at the range and of the vulnerabilities of nearby residential properties to being hit by those firearms. FOF 67. The Court considered testimony of bullet impacts to nearby residences, several of which were located within five degrees of the center line of the KRRC rifle range shooting area. FOF 67. The trial court found by a preponderance of the evidence that bullets had escaped the Property's shooting areas in the past and that bullets will escape the Property's shooting areas "and will possibly strike persons or damage private property in the future." FOF 68. Most significantly, the trial court found that KRRC's range facilities "are inadequate to contain bullets to the Property, *notwithstanding existing safety protocols and enforcement.*" FOF 69 (emphasis added).

The trial court concluded that the Property's ongoing operation without adequate physical facilities to confine bullets to the Property

constitutes a public nuisance and furthermore concluded that nuisance conditions constitute illegal uses of land serving to terminate the nonconforming use of the Property as a shooting range. COL 3, 32.

4. Conversion to a Practical Shooting Center

The trial court found that the Property is now frequently used for regularly scheduled practical shooting practices competitions, using the shooting bays for rapid-fire shooting aimed in multiple directions. The Club has been allowing loud rapid-fire shooting often as early as 7 a.m. and as late as 10 p.m. FOF 70. The court concluded that shooting noise conditions, of which practical shooting is a primary component, constitute a public nuisance, and further concluded that routine rapid-fire shooting and the advent of regularly scheduled practical shooting practices and competitions constitutes a change in use serving to terminate the nonconforming use of the Property as a shooting range. COL 3, 32, 33.

5. Commercial and Military Uses of the Property

The trial court found that in approximately 2002, a for-profit business registered in the name of the wife of the Club's Executive Officer, began using the Property to present a variety of firearm and self-defense courses. FOF 73. Starting in approximately 2003 and up until the Spring of 2010, for-profit professional training businesses rented the Property's pistol range to provide "small arms" training to active duty

military personnel. FOF 74, 79. This training took place routinely during the cited period, and there was no history of for-profit firearm training at the Property and no application was ever made to Kitsap County for approval of this commercial use. FOF 77. The court cited a disturbing instance in November 2009 in which a Humvee with a fully automatic machine gun was deployed in the Property's rifle range. FOF 78.

The trial court found that these commercial and military uses were significant changes to the existing uses, and not intensifications as argued by KRRC. COL 8-9. The court further found that the commercial and/or business uses of the Property by the for-profit entities were disallowed under the KCC zoning tables, are not uses contemplated as uses of a "private recreational facility" under that Code, and constitute expanded uses of the Property and thereby terminate the nonconforming use of the Property as a shooting range. COL 25-26.

6. Noise Generated from the Property and Hours of Operation.

The trial court found that the Club had transformed from a place in the 1990's in which shooting sounds were occasionally audible for short periods on weekends or during hunter sight-in season to a place where shooting hours had expanded to 7 a.m. to 10 p.m., seven days a week. FOF 80. Shooting sounds had transformed from occasional and background to "frequently loud, disruptive, pervasive, and long in

duration." FOF 81. Rapid fire shooting has become common and occurs for hours at a time. FOF 81. The court found that use of automatic weapons at the Property now occurs with some regularity, and found that rapid fire shooting and automatic weapon use were infrequent occurrences in the 1990's. FOF 82, 83.

The court found that noise conditions caused significant number of residents living within two miles of the Property to experience interference with their comfort and repose and their use and enjoyment of real property. FOF 84. The court wrote:

> The interference is common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant fire 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.
>
> FOF 84.

The court further found that the expanded hours, advent of commercial use of the club, advent of exploding targets, and use of higher caliber weaponry, affect the neighborhood and surrounding environment by increasing the noise level emanating from the Property during the past five to six years. FOF 85, 86.

With this robust factual support, the trial court concluded that the Club's shooting activities constituted a public nuisance based upon

ongoing noise conditions. COL 3,11. These nuisance conditions have "caused and continue to cause the County and the public actual and substantial harm." COL 11. The court further concluded that the expanded hours and substantially increased noise levels caused by "allowing explosive devises, higher caliber weaponry greater than .30 caliber and practical shooting" significantly changed, altered, extended and enlarged the existing use of the Property. COL 8.

7. Public Nuisance Analysis

The trial court concluded that activities and uses of the Property constitute a public nuisance per se for each use of the Property not authorized by Kitsap County Code or not authorized pursuant to a conditional use permit. COL 19. The court also found the conditions to constitute a statutory nuisance pursuant to Chapter 7.48 RCW, citing the Property's transformation into a place which violates the comfort, repose, health and safety of the entire community or neighborhood. COL 20. The court further found that KRRC created a common law nuisance, issuing its sharpest indictment of KRRC:

> 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.***

COL 21 (emphasis added).

This, is the shooting range that has now been re-opened.

B. THE COMMISSIONER'S RULING RE-OPENS THE SHOOTING RANGE PENDING APPEAL BASED ON TIMING OF THE LAWSUIT, IMPOSES NO TIMELINE FOR BRINGING KRRC INTO LAND USE COMPLIANCE AND REVISES CONDITIONS FOR THE NUISANCE INJUNCTION.

The Commissioner's Ruling grants the Appellant's motion for stay and re-opens the shooting range pending appeal. The Ruling recited some of the procedural history of the case, noted that the County instituted this action in the year 2010, and was void of any discussion of Club-County interactions prior to that year except for the transfer of the property. Ruling, p. 2. The Ruling recited some of the Complaint's factual allegation and acknowledged that the trial court had found a common law nuisance. Ruling, p. 3 (quoting FOF 21). The Ruling failed to acknowledge the litany of public nuisance conditions recited above and disturbingly failed to acknowledge that the trial court had also concluded that KRRC's activities constituted both nuisances per se and statutory nuisances. Ruling, pp. 2-3. The Ruling also acknowledged that several of KRRC's changed uses of the Property acted to terminate the legal

nonconforming use status of the range. Ruling, p. 3. The Ruling acknowledged the two injunctions. Ruling, pp. 1, 4.

The Commissioner's Ruling analyzed the "stay" rule of RAP 8.1, and applied RAP 8.1(b)(3), which the County had advocated as the correct subsection for a case involving equitable relief. Ruling, p. 3-5. The Ruling applied that subsection's balancing provision, thusly:

> ***Given that Kitsap County did not commence this enforcement action until 2010***, and that the increased operations of the shooting range had been occurring since at least 2003, ***Kitsap County does not show that the risk of harm to the adjoining property owners is so great that it overcomes the harm that will befall KRRC if all shooting range operations are enjoined while this appeal is pending.*** KRRC has shown that the harm it will suffer in the absence of a stay is greater than the harm that Kitsap County will suffer from the imposition of a stay. Therefore, KRRC has demonstrated that it is entitled to a stay under RAP 8.1(b)(3).
>
> Ruling, p. 5 (emphases added).

The Ruling adopted revised conditions under which KRRC could operate a shooting range at the Property, stayed the trial court's land use injunction for terminated nonconforming use and supplanted the court's public nuisance injunction with the following conditions:

> (1) Range safety officers must be present at all time that shooting is occurring. Video recordings must be made

while shooting is occurring.[7]

(2) KRRC must allow officials from Kitsap County access to the property to monitor compliance with these conditions. It must allow those officials access to the video recordings.

(3) Shooting must be restricted to between 8:00 a.m. to 8:00 p.m.

(4) No fully automatic weapons may be fired.

(5) No cannons may be fired, except on the Fourth of July, and no exploding targets may be used.

Ruling, p. 6.

For the land use injunction, the Ruling sets no deadline for KRRC to remedy its now-terminated nonconforming use status. For the public nuisance injunction, the Ruling does away with the trial court's prohibition on rifles of greater than .30 caliber and revises the allowable hours of operation from 9 a.m. - 7 p.m. to 8 a.m. - 8 p.m.

IV. GROUND FOR RELIEF AND ARGUMENT

A. THE COMMISSIONER'S RULING APPLIED RAP 8.1(B)(3) TO IMPROPERLY POSTPONE IMPLEMENTING AN INJUNCTION NECESSARY TO PROTECT THE PUBLIC HEALTH AND SAFETY.

RAP 17.2 gives this Court the authority to entertain and act upon a motion to modify a ruling by the Commissioner. The crux is this Ruling is the Commissioner's application of RAP 8.1(b)(3), which provides:

[7] The Ruling is silent about the specifics of video recording, such as whether video recording must occur at each of the shooting areas and what retention schedule should apply to any video recordings, issues that are not waived by the bringing of this motion.

> **(3) Other Civil Cases.** Except where prohibited by statute, in other civil cases, ***including cases involving equitable relief ordered by the trial court, the appellate court has authority, before or after acceptance of review, to stay enforcement of the trial court decision upon such terms as are just.*** The appellate court ordinarily will condition such relief from enforcement of the trial court decision on the furnishing of a supersedeas bond, cash or other security. In evaluating whether to stay enforcement of such a decision, the appellate court will (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed. The party seeking such relief should use the motion procedure provided in Title 17.
>
> (emphasis added)

A stay pursuant to this rule is not a matter of right, and by the rule's terms, the moving party has the burden to demonstrate that debatable issues are presented on appeal. KRRC, in its Reply Brief in Support of Motion to Stay, identified selected issues: The Club's affirmative defenses of equitable estoppel and breach of contract, the abrupt termination of a nonconforming use right and the "excessive scope of injunction". Reply Brief, pp. 7-12. With these exceptions, the Club has not yet identified a single issue it intends to pursue in its appeal. Its failure to do so deprives this Court of the ability to evaluate whether there are in fact debatable issues. Its failure to do so suggests that the appeal will consist almost entirely of challenges to the voluminous factual findings.

This Court will have an obvious advantage over the Commissioner in examining the trial court's injunctions. Until the day can come for examining the actual trial record, there are several bedrock concepts that should assist in evaluating any stay or amendment of conditions pursuant to an injunction, *particularly when the injunction is designed to protect public health and safety* and is ordered only after a lengthy bench trial and prolonged period of consideration:

The appellate courts defer to the trial court and will not "disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). "'Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.'" *Pers. Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999). (quoting *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997)).

The trial court is presumed to have followed the law. See e.g. *Veit, ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 117, 249 P.3d 607 (2011) (Juries are presumed to follow the law). That law includes the subject of public nuisance, and the inherent balancing of property interests and the protection from injury to or interference with the comfort and repose in use of real property. The case authority for RAP

8.1(b)(3) is silent as to its application as contrasted with the trial court's balancing of the equities, but the County would posit that the County's alleged delay in filing this lawsuit is a non-factor, and this Court must honor Judge Serko's balancing. Furthermore, "[d]eference is given to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the general persuasiveness of the evidence." State v. Butler, 165 Wn.App. 820, 829, 269 P.3d 315 (Div. 3 2012), citing *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

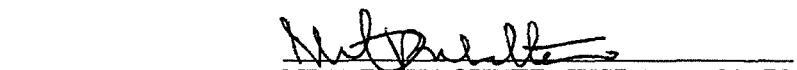
The Ruling must be modified to reinstate the Verdict's public nuisance injunction conditions regarding hours of operation and rifle caliber, to address a timeline for application to the County for a conditional use permit, and to bar the illegal uses such as commercial use or resumed military training on the Property.

V. CONCLUSION

KITSAP COUNTY respectfully requests that this Court grant the relief identified in Part II of this Motion.

Respectfully submitted this 23rd day of May, 2012.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



NEIL R. WACHTER, WSBA No. 23278
Senior Deputy Prosecuting Attorney,
Attorney for Appellant Kitsap County

APPENDIX NO. 3

Respondent Kitsap County's
Response Brief for Appellant's Motion to Stay Trial Court's Judgment Pursuant to RAP 8.1
dated April 10, 2012

April 18, 2012
9 a.m.

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,

Appellant,

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

COA NO. 43076-2-II

Superior Court No. 10-2-12913-3

RESPONSE BRIEF FOR APPELLANT'S MOTION TO STAY TRIAL COURT'S JUDGMENT PURSUANT TO RAP 8.1

I. IDENTITY OF RESPONDING PARTY

The Respondent, KITSAP COUNTY, by and through its attorney, NEIL R. WACHTER, Senior Deputy Prosecuting Attorney for Kitsap County, asks for relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

KITSAP COUNTY respectfully requests that this Court DENY Appellant KITSAP

APP NO. 3

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
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RIFLE AND REVOLVER CLUB's[1] motion for a stay of the trial court's judgment, permanent and mandatory injunctions and declaratory judgment entered in the Pierce County Superior Court civil enforcement action that is subject of this appeal.

III. FACTS RELEVANT TO MOTION

On February 9, 2012, the Hon. Susan K. Serko issued the trial court's Findings of Fact, Conclusions of Law and Order in this matter ("Verdict").[2] The Verdict followed a fourteen-day bench trial conducted last fall in Pierce County Superior Court. The Verdict granted Kitsap County's motion for declaratory judgment that a conditional use permit is required to use the KRRC's subject property[3] as a private recreational facility and immediately enjoining further use of the subject property as a shooting range. Orders, ¶¶ 1,2. The Verdict includes two injunctions: First, an injunction enjoining use of the subject property as a shooting range until violations of Title 17 Kitsap County Code (Land Use) are resolved by application for and issuance of a conditional use permit. Second, an injunction enjoining specific uses of the subject property which the Court found to constitute or create public nuisance conditions. Orders, ¶¶ 6,7.

In the trial, the Court considered Kitsap County's wide-ranging allegations concerning a non-profit shooting club's historic and changed use of its 72-acre parcel, including: Public nuisance based on noise pollution and bullet escapement, unpermitted site development in and proximate to protected critical areas, dramatic changes in use and intensity of use by a shooting range so as to void its non-conforming land use, and illegal uses made of the subject property so as to void its non-conforming land use. Wachter Declaration, Exhibit A (Third Amended

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[1] "KRRC" or "the Club".

2 Declaration of Neil R. Wachter in Opposition to Appellant's Motion to Stay ("Wachter Declaration"), Exhibit C (Findings of Fact, Conclusions of Law and Orders, hereafter "FOF", "COL" or "Orders")

3 The subject property is identified in the caption to this action.

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Complaint Third Amended Complaint for Injunction, Declaratory Judgment and Abatement of Nuisance). At trial, the Court also considered KRRC's counterclaims and affirmative defenses which – in sum - asserted that non-compliance with County Code development and land use standards was excused by the deed which transferred the subject property from the County to the Club and by the Club's reliance on the County's actions and inactions and its agents' representations made near the time of the transfer. Wachter Declaration, Exhibit B (Answer, Affirmative Defenses, and Counterclaims to Third Amended Complaint). Virtually all of the findings and conclusions of any moment were contested. The Verdict was and is therefore extremely fact-intensive. Any appeal will necessarily ask the Court of Appeals to disregard Judge Serko's credibility and factual determinations relating to finding after finding. Any appeal must prove negative upon negative – that substantive evidence did not exist in the record to support the highly detailed findings and multiple conclusions of law upon which a declaratory judgment and *two* analytically distinct permanent and mandatory injunctions were based. The motion for stay of this judgment calls for the Court to distinguish between issues that are "debatable" as a matter of theory and those that are debatable as a matter of practicality.

About one year before the trial, the Court heard and denied County's motion for a preliminary injunction. Wachter Declaration, ¶ 6, Exhibit D (Orders Denying Motion for Preliminary Injunction and Governing Use of KRRC Property Pending Trial). About eight months before the trial, the Court denied the County's motion to strike certain of KRRC's affirmative defenses. Wachter Declaration, ¶7, Exhibit E (Order Denying Plaintiff's Motion to Strike [Affirmative Defenses]). In its Verdict, the Court did not explicitly rule upon the claimed affirmative defense of equitable estoppel, but issued factual findings so as to render that defense a nullity.

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On February 15, 2012, KRRC filed a timely notice of appeal to this Court. On February 21, 2012, KRRC filed a motion for a "partial stay" with the trial court, which Judge Serko heard and denied on March 2, 2012. In so doing, the Court determined that the injunctive nature of the judgment would require that any motion for a stay be made to the Court of Appeals pursuant to RAP 8.1(b)(3). Wachter Declaration, ¶8. On March 30, 2012, KRRC filed the instant motion to stay Judge Serko's judgment.

RAP 8.1 governs the "supersedeas procedure" or rules for delay of enforcement of a trial court decision, which dovetail with the provisions of CR 62.

The Court Rules ordinarily contemplate a stay for judgments pending appeal, but such is not the rule for injunctions. CR 62(a) provides:

> **a) Automatic Stays.** Except as to a judgment of a district court filed with the superior court pursuant to RCW 4.56.200, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Upon the filing of a notice of appeal, enforcement of judgment is stayed until the expiration of 14 days after entry of judgment. ***Unless otherwise ordered by the trial court or appellate court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until appellate review is accepted or during the pendency of appellate review.***
>
> (emphasis added).

By its terms, CR 62(a) sets the presumption against staying injunctive judgments at both the trial and appellate court levels.

RAP 8.1 provides procedures which supplement CR 62(a). RAP 8.1(a). In the trial court "stay" motion, the parties cited to RAP 8.1(b)(2) and (b)(3) as governing the unique situation of this case where the Court has enjoined certain uses of property and has enjoined nuisance conditions created at the property. RAP 8.1(b) first provides:

> **(b) Right To Stay Enforcement of Trial Court Decision.** A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay

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> enforcement of a money judgment or a decision affecting real, personal or intellectual property, pending review. Stay of a decision in other civil cases is a matter of discretion.

RAP 8.1(b) is then divided into three subsections, addressing (a) money judgments, (b) decisions affecting possession, ownership or use of property, and (c) other civil cases. KRRC cites subsection (b)(2), which provides in pertinent part:

> **(2) Decision Affecting Property.** Except where prohibited by statute, a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property or of tangible personal property, or intangible personal property, by filing in the trial court a supersesdeas bond or cash, or alternate security approved by the trial court pursuant to subsection (b)(4).

Although subsection (b)(2) speaks in terms of "use of real property", there is no authority for the proposition that this subsection applies to a declaratory judgment addressing how a property may be used in the context of *land use*. KRRC remains the fee owner of the subject property and can use and possess the property so long as it is consistent with the law, generally, and the Verdict, specifically. If it is applicable at all, Subsection (b)(2) could apply only in conjunction with Subsection (b)(3), which addresses *injunctive* judgments:

> **(3) Other Civil Cases.** Except where prohibited by statute, in other civil cases, ***including cases involving equitable relief ordered by the trial court, the appellate court has authority, before or after acceptance of review, to stay enforcement of the trial court decision upon such terms as are just.*** The appellate court ordinarily will condition such relief from enforcement of the trial court decision on the furnishing of a supersedeas bond, cash or other security. In evaluating whether to stay enforcement of such a decision, the appellate court will (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed. The party seeking such relief should use the motion procedure provided in Title 17.
>
> (emphasis added)

By its terms, RAP 8.1(b)(3) governs this case involving equitable relief ordered by the trial court.

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Together, CR 62(a) and RAP 8.1(b)(3) make clear that only the appellate court can consider a motion for stay and that a stay is not a matter of right in this case. The Court should decline KRRC's invitation to remand the stay issue to Judge Serko for a determination under RAP 8.1(b)(2).

Historically, the test for whether a stay should be granted pending review is whether the appellant can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant *after considering the equities of the situation. Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998) (emphasis added), citing *Boeing Co. v. Sierracin Corp.*, 43 Wn.App. 288, 291-92 (1986); *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985), *cert. dismissed*, 478 U.S. 1029 (1986), citing *Shamley v. Olympia*, 47 Wn.2d 124, 286 P.2d 702 (1955); *Kennett v. Levine*, 49 Wn.2d 605, 304 P.2d 682 (1956). The *Boeing Co. v. Sierracin Corp.* case appears to go a step beyond, holding that "if the harm occasioned by the appellate delay can be met by a bond, the supersedeas should always be granted." *Boeing Co.*, 43 Wn.App. at 292 (citation omitted). However, that opinion addressed a suit to enjoin alleged violations of the Uniform Trade Secrets Act, and the harm could arguably be quantified. There appears to be no case authority in Washington governing the situation where the harm is an ongoing public nuisance, where, as here, the trial court found a danger to the public's health and safety. Such harm cannot be calculated or quantified, and that is the rub for the Appellant to the degree that a bond is proposed to cure the enjoined harm.

As stated above, RAP 8.1(b)(3) provides the modern two-prong test, providing that the appellate court will (a) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (b) compare the injury that would be suffered by the moving party if

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a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed. By the rule's terms, the burden of proof is on the appellant. The exact verbiage is notable because it is *not* the same as the historical standard cited in most of the authorities on RAP 8.1(b)(3). In fact, in 1990, the state Supreme Court adopted most of the current-day verbiage for this "other civil cases" subsection of the rule. 115 Wn.2d 1124-26 (1990).[4] The Club's own citation to the amendment's commentary seems to support the application of RAP 8.1(b)(3).

A. KRRC Cannot Demonstrate that Debatable Issues are Presented on Appeal

1. The Merits of the Appeal

KRRC has not yet identified a single error of law it intends to pursue in its appeal which could constitute reversible error. Its failure to do so deprives this Court of the ability to evaluate whether there are debatable issues. Its failure to do so suggests that this appeal is being pursued solely for the purposes of delay. Furthermore, KRRC has made no showing that it is prepared to finance the cost of its appeal, which will require several hundred hours of attorney time.

In its brief, KRRC concedes that the case authority does not squarely address the question of what is a "debatable issue", citing to the standard for frivolity instead. As a matter of common sense, whether an issue was debatable at trial cannot equate to whether an issue is debatable upon appeal. KRRC's brief and supporting materials spend considerable time building an additional factual record, but the appellate courts will consider only the record at trial, through the lens of the trial court's findings and conclusions.

This Court issued a very fact intensive ruling. To the extent that the KRRC disagrees with this Court's resolution of the conflicting testimony, the appellate courts offer no relief. *See, e.g., State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (the appellate courts "defer to the

4 Wachter Declaration, Exhibit F (state Supreme Court archival records collected for RAP 8.1, 1986-2006).

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fact finder on issues of witness credibility").

2. Citation to Preliminary Injunction and Motion to Strike

In its brief, KRRC cites to the trial court's denial of Kitsap County's motions for preliminary injunction and motion to strike certain of the affirmative defenses.

The object of a "preliminary injunction" or a "temporary restraining order" is to preserve the "status quo," which is the last actual, peaceable, noncontested condition which preceded the pending controversy, and the court will generally not grant such an order where its effect would be to change the status." *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 531, 98 P.2d 680 (1940). A party may be granted injunctive relief if it shows (1) that it has a clear legal or equitable right, (2) that it has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual or substantial injury to the party. *Tyler Pipe Indus., Inc. v. Department of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982); see also RCW 7.40.0201 (grounds for issuance of preliminary injunction).

In ruling upon a motion for preliminary injunction, the court does not adjudicate the ultimate merits of the case. *Rabon v. City of Seattle*, 135 Wn.2d 278, 286, 957 P.2d 621 (1998). A trial court's denial or grant of a temporary injunction is no intimation of what the final judgment, after trial, should be. *Marion Richards Hair Design v. Journeymen B.*, 59 Wn.2d 395, 396, 367 P.2d 806 (1962).

In a similar vein, the trial court declined to grant Kitsap County's motion to strike, citing its desire to hear all of the evidence to be presented by the parties on the claims and defenses. Wachter Declaration, ¶9.

B. KRRC Cannot Demonstrate that the Harm of Enforcing the Judgment would Outweigh the Harm of Staying a Judgment Based on Public Health and Safety.

There are two injunctions to address in considering the equities, each having similar

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effect upon use of the subject property but each having different origins in law and fact. The land use injunction stems from the Court's declaratory judgment that the Club had terminated its previous nonconforming use status by (a) failing to obtain permitting for site development activities, both before and after the County deeded the subject property to the Club in 2009, (b) dramatically changing its use of the range as a shooting range as a result of increased hours of operation, increased calibers of weapons, use of automatic weapons, regularly hosting practical shooting practices and competitions, and routinely allowing prolonged periods of rapid-fire, (c) changing its use of the range by hosting for-profit businesses which provided tactical weapons training to locally stationed Navy personnel, and (d) allowing creation of ongoing public nuisance conditions of noise and safety impacts to residential areas. Any one of these factual findings would act to "reset" the Club's land use status to square one pursuant to Title 17 Kitsap County Code and this state's case authority strongly disfavoring the perpetuation of nonconforming land uses. COL 25-33. The declaratory judgment and land use injunction recognize the reality that the subject property may still have use as a shooting range – after application for and issuance of a conditional use permit. COL 34.

The public nuisance injunction is based on a phalanx of factual findings regarding the impact of the changed shooting range upon large residential areas, many of which predated the Club's reinvention of its shooting range. This Court placed restrictions upon operation of a shooting range on the subject property consistent with factual findings of substantial impact upon public health and safety – not health and safety in the abstract, but profound and consistent intrusions on the right and ability of private citizens to use and enjoy their homes without unreasonable interference and the finding that bullets had escaped the subject property and would continue to escape the property to land downrange of the Club's rifle range. To be blunt,

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citing each of the findings of public nuisance activity would be far less productive than a careful reading of the Verdict itself. The findings are as comprehensive as may ever be seen from a bench trial concerning public nuisance and the Court is presumed to have followed the law in applying the balancing test that is inherent in reaching any conclusion that the County proved public nuisance conditions.

The Club suggests that continued enforcement of the Court's judgment will result in unchecked use of its property for shooting and that it will essentially fold as a result of the judgment. These contentions, even if true, do not outweigh the Court's collective findings that the Club's activities endanger the public health and safety of a sufficient number of County residents to comprise a *public* nuisance. COL 3.

C. KRRC Cannot Offer its Property for a Bond or its Promise in Lieu of a Bond

KRRC suggests that the subject property could constitute security for enforcement of the Court's judgment. The trial record establishes that the property is worthless, with an appraised value of zero as a result of suspected contamination. FOF 19, 21 and 22. Even at the cited assessed value (not part of the trial record), the property's value could not be measured against the ongoing nuisance conditions that the trial court has enjoined.

V. CONCLUSION

For the reasons cited herein, the Court should deny the motion for stay of Judge Serko's Verdict.

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Respectfully submitted this 10th day of April, 2012.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

/s/
NEIL R. WACHTER, WSBA No. 23278
Senior Deputy Prosecuting Attorney
Attorney for Appellant Kitsap County

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CERTIFICATE OF SERVICE

I, Kathleen Martens, 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
501 SW Fifth Ave., Ste. 500
Portland, OR 97204

[x] Via U.S. Mail
[X] Via Email: *As Agreed by the Parties*
[] Via Hand Delivery

SIGNED in Port Orchard, Washington this 10th day of April 2012.

Kathleen Martens

KATHLEEN MARTENS, Legal Assistant
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
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APPENDIX NO. 4

Court of Appeals
Order Clarifying Stay and Denying Motion to Modify and Motion for Contempt
dated August 22, 2012

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,

Appellant,

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. 43076-2-II

ORDER CLARIFYING STAY AND DENYING MOTION TO MODIFY AND MOTION FOR CONTEMPT

Respondent has moved to modify the Commissioner's ruling granting Appellant's request for a stay, with conditions, of the trial court's order enjoining its operation of a shooting range. Respondent also has moved for a coercive contempt order and for remedial sanctions designed to ensure compliance with the Commissioner's stay ruling.

After due consideration, this court denies the motion to modify and declines to hold Appellant in contempt. Under RAP 8.3, however, this court clarifies the Commissioner's stay ruling by imposing these additional conditions:

(1) Following Respondent's request, Appellant must produce and deliver to Respondent copies of requested video footage or recordings in a DVD or CD format within three business days.

(2) For the video footage produced, Appellant shall identify the custodian of these records, and for footage recorded with hand-held devices, Appellant shall identify the camera operator and specific location of the filming.

(3) Appellant shall video record all shooting activities at its property and preserve such recordings for not less than 60 days.

(4) Appellant shall continue to operate and maintain all permanently mounted video cameras at its property.

(5) Respondent shall identify an incident when requesting a recording, but Appellant may not condition the production thereof on its agreement that the request is based on a good-faith allegation that it has violated a condition of the stay.

Finally, Appellant must produce the requested June 1, 2012 video footage and recordings within five days of the date of this ruling. It is

SO ORDERED.

DATED this 27th day of August, 2012.

Johanson, A.C.J.
ACTING CHIEF JUDGE

APPENDIX NO. 5

Supreme Court Deputy Clerk's Email
dated January 7, 2015

Patrick Graves

From:	OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent:	Wednesday, January 07, 2015 11:32 AM
To:	Brooks Foster
Cc:	Carrie A. Bruce; Shelley E. Kneip; Christine M. Palmer; jchriste@co.kitsap.wa.us; matt@sherrardlaw.com; mann@gendlermann.com; cmichel@michellawyers.com; rsanders@goodsteinlaw.com; Lisa Heath; 'nwachter@auburnwa.gov' (nwachter@auburnwa.gov); Batrice Fredsti (bfredsti@co.kitsap.wa.us); Brian Chenoweth; Patrick Graves; Elaine Nahar
Subject:	RE: Email filing for: Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Counsel: To clarify the e-mail below, the motion to revise stay of judgment will likely be set for consideration at the same time as the petition for review. If the petition for review is granted, the Department would then also decide the motion. If the petition for review is denied, the motion would likely be denied as moot. Therefore, any answer to the motion to revise stay of judgment should be served and filed prior to the Department's consideration of the petition for review. In light of the motion for reconsideration that remains pending at the Court of Appeals, the due date for an answer to the motion to revise stay of judgment will be 20 days after the Court of Appeals decision on the motion for reconsideration.

Susan L. Carlson
Supreme Court Deputy Clerk

From: Brooks Foster [mailto:bfoster@northwestlaw.com]
Sent: Wednesday, January 07, 2015 10:25 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Carrie A. Bruce; Shelley E. Kneip; Christine M. Palmer; jchriste@co.kitsap.wa.us; matt@sherrardlaw.com; mann@gendlermann.com; cmichel@michellawyers.com; rsanders@goodsteinlaw.com; Lisa Heath; 'nwachter@auburnwa.gov' (nwachter@auburnwa.gov); Batrice Fredsti (bfredsti@co.kitsap.wa.us); Brian Chenoweth; Patrick Graves; Elaine Nahar
Subject: RE: Email filing for: Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Dear Supreme Court Clerk,

My client, Kitsap County Rifle & Revolver Club (the "Club"), appreciates the efficient and courteous manner in which you addressed Kitsap County's premature filing of *Kitsap County's Motion to Revise Stay of Judgment*. As stated in your email below, the Supreme Court has accepted that filing but will consider it only after it grants a petition for review.

Unfortunately, this raises a question about when the Club must answer the motion. Under RAP 17.2, "any answer must be filed and served no later than 10 days after the motion is served on the answering party." Although Kitsap County served its motion, the Club cannot file its answer because the Supreme Court does not have jurisdiction, as a petition for review has not been filed with the Supreme Court. In addition, there is a pending motion for reconsideration before the Court of Appeals, and the Club's answer will need to take the decision on reconsideration into account. Finally, as your email explains, the Supreme Court will not consider the County's motion until after it grants a petition for review.

For these reasons, the Club requests confirmation that the deadline for filing and service of its answer to the County's motion will be ten days after the Club receives notice that the Supreme Court has granted a petition for review.

APP NO. 5

If a formal motion is a better way to confirm the deadline for the Club's answer, please let me know. This request relates to the emails below so I thought I would try this informal approach first.

Very Truly Yours,

Brooks M. Foster

CHENOWETH / LAW GROUP PC

510 SW FIFTH AVENUE / FIFTH FLOOR / PORTLAND OREGON 97204
T 503.221.7958 / F 503.221.2182 / NORTHWESTLAW.COM
Please Consider the Environment. Think Green.

From: Neil Wachter [mailto:nwachter@auburnwa.gov]
Sent: Wednesday, December 31, 2014 5:16 PM
To: 'OFFICE RECEPTIONIST, CLERK'; Batrice Fredsti
Cc: Carrie A. Bruce; Shelley E. Kneip; Christine M. Palmer; Brian Chenoweth; jchriste@co.kitsap.wa.us; Brooks Foster; Brian Chenoweth; matt@sherrardlaw.com; mann@gendlermann.com; cmichel@michellawyers.com; rsanders@goodsteinlaw.com; Lisa Heath
Subject: RE: Email filing for: Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Greetings,

Kitsap County asks that the motion to revise stay of judgment be filed in the Supreme Court file, subject to delayed consideration following the Court's receipt of and acceptance for filing of a petition for review.

Thank you for your attention.

Sincerely,

Neil R. Wachter
Assistant City Attorney
Office of the Auburn City Attorney
25 W. Main Street
Auburn, WA 98001
Direct Line: 253-804-5027

From: OFFICE RECEPTIONIST, CLERK [mailto:SUPREME@COURTS.WA.GOV]
Sent: Wednesday, December 31, 2014 4:51 PM
To: Batrice Fredsti
Cc: Neil Wachter; Carrie A. Bruce; Shelley E. Kneip; Christine M. Palmer; brianc@northwestlaw.com; jchriste@co.kitsap.wa.us
Subject: RE: Email filing for: Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1
Importance: High

The purpose of this responsive email is to acknowledge receipt of "KITSAP COUNTY'S MOTION TO REVISE STAY OF JUDGMENT". It is noted, that this Court has not even received a petition for review yet. In any event, until such time as this Court were to grant a petition for review, it would not be the appropriate forum to address the motion to revise stay of judgment. Any request in that regard should be directed to the Court of Appeals if the moving party wishes immediate action on the motion. Of course once the Court of Appeals were to act on any such motion, it's interlocutory decision would be subject to a review request by any of the parties in the form of a motion for discretionary review. Therefore, no action will be taken at this time on Kitsap County's motion to revise stay of judgment. However, the motion has been placed in the file without further action, until such time if any, as this Court were to grant any petition for review. In that regard, counsel for Kitsap County is requested to advise this Court whether or not it wishes it's motion to revise stay of judgment to be filed subject to delayed consideration as indicated above or whether alternatively it will be filing the appropriate motion to revise stay of judgment in the Court of Appeals and therefore does not want this Court to consider the motion at some future date.

From: Batrice Fredsti [mailto:bfredsti@co.kitsap.wa.us]
Sent: Wednesday, December 31, 2014 4:08 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Neil Wachter (nwachter@auburnwa.gov); Carrie A. Bruce; Shelley E. Kneip; Christine M. Palmer
Subject: Email filing for: Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Good Afternoon,

Attached for filing with the court is Kitsap County's Motion to Revise Stay of Judgment (prepared by Neil R. Wachter, WSBA No. 23278) for the following case:

Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Please let us know if you have any questions.

Sincerely,

Batrice Fredsti
Legal Assistant to Ione George
Kitsap County Prosecutor's Office
614 Division Street, MS-35A
Port Orchard, WA 98366
Phone: (360) 337-7032
Fax: (360) 337-7083
bfredsti@co.kitsap.wa.us

CERTIFICATE OF FILING AND SERVICE

I, Lisa A. Heath, 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 *Petitioner's Response to Kitsap County's Amended Motion to Revise Stay of Judgment* was electronically filed with Division II of the Washington Court of Appeals and served upon the following individuals by e-mail and U.S. Mail, postage prepaid, at Portland, Oregon:

Christine M. Palmer
Kitsap County Prosecutor's Office
Civil Division
614 Division St., MS-35A
Port Orchard, WA 98366

C.D. Michel
Michel & Associates, PC
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802

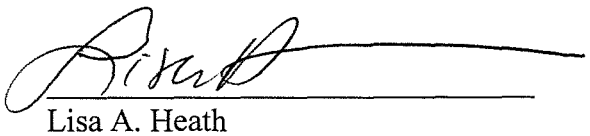
David S. Mann
Gendler & Mann, LLP
936 N. 34th St., Suite 400
Seattle, WA 98103-8869

Matthew A. Lind
Sherrard McGonagle Tizzano, PS
Post Office Box 400
Poulsbo, WA 98370-0400

Richard B. Sanders
Goodstein Law Group
501 South G St.
Tacoma, WA 98405-4715

DATED: April 29, 2015

CHENOWETH LAW GROUP, PC



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