

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KITSAP COUNTY, a political subdivision of the  
State of Washington

Plaintiff,

v.

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

Defendants,

and,

IN THE MATTER OF NUISANCE AND  
UNPERMITTED CONDITIONS LOCATED AT  
One 72-acre parcel identified by Kitsap County  
Tax Parcel ID No. 362501-4-002-1006 with street  
address 4900 Seabeck Highway NW, Bremerton  
Washington.

NO. 10-2-12913-3

KITSAP COUNTY'S CLOSING  
ARGUMENT BRIEF

**I. INTRODUCTION**

It is a challenge to convey in writing the sense of outrage that residents of Central Kitsap  
County feel because of the intense sounds of rapid-fire and sometimes fully automatic shooting that are

1 forced upon them for hours at a time, anytime between 7 a.m. and 10 p.m. any day of the week. This  
2 Court heard from representative witnesses from neighborhoods that were built 15 or more years ago,  
3 all of whom have said that the past five or so years have not been business as usual at the local gun  
4 club; the sounds of shooting and even sometimes exploding targets are now front and center in these  
5 residents' everyday lives. It's not occasional background noise anymore. Moreover, for seven years,  
6 KRRC became a "range for rent" used by third party firearms training contractors.  
7

8 This isn't a case of not in-my-backyard whiners. This is a case of loud, rattling shooting  
9 sounds that regularly shake residents and steal their repose outdoors and indoors, in back yards, side  
10 yards and front yards. Their local gun range isn't a good neighbor; it's the neighborhood bully.  
11

12 The Kitsap Rifle and Revolver Club ("KRRC" or "Club") has existed on an island, oblivious or  
13 indifferent to the impact of its loud and intense shooting noises and in denial about the past and future  
14 escape of bullets from its Property to the outside world. KRRC has existed on an island free of County  
15 regulation, treating its nonconforming use status as license to reshape the land in a 12-to-15 year-long  
16 program of clearing, grading, excavating and filling its Property without applying for a single site  
17 development permit and without the benefit of professional engineering and planning required under  
18 the Kitsap County Code ("KCC"). KRRC has existed on an island free from consideration of the  
19 wetlands on its Property, expanding formal shooting areas toward the wetlands and reshaping the land  
20 within wetland buffers without ever delineating or mitigating the impacts upon these critical areas.  
21

22 Over the years, KRRC has reinvented itself from a modest shooting facility with two defined  
23 ranges and small-scale shooting events in the wooded or semi-wooded periphery of its pistol and rifle  
24 ranges, to a fully developed shooting center with a lengthened rifle range and *eleven* bermed shooting  
25 bays routinely used for "practical shooting" practice and competitions. From about 2002 to 2010,  
26 KRRC also become a range for rent, available at nominal cost to third party vendors who trained  
27  
28

1 military personnel at the Property notwithstanding the availability of the military's own ranges.

2  
3 The Club contends its site and use changes are intensifications, all legitimized by the Club's  
4 nonconforming use status in its eight acres of "historic use". At some point, the word "intensification  
5 does not capture the essence of what happened at the KRRC Property over the past 12-15 years. It is  
6 more aptly termed a sea change. The first clue to the breadth of this change is that KRRC ignored  
7 every County permit requirement save for permitting of an ADA ramp in 2008. By so doing, KRRC  
8 denied the County the opportunity to really gauge whether the Property was being used within the  
9 scope of its unpermitted nonconforming use.

10  
11 This case is brought both *in personam* and *in rem*, because the County asks the Court's  
12 intervention and declaratory judgment over both the activities and uses engaged in by KRRC and over  
13 the activities or uses that may be engaged in at the Property by *any* person or entity in the future. In  
14 this action, the County does not ask the Court to make final determination of which wetland  
15 delineation is right or of what specific mitigation should follow a given violation. The County does  
16 not ask the Court to identify with precision exactly when the Club conducted each phase of its site  
17 development. The County does ask the Court to declare several activities to be public nuisances and to  
18 enter declaratory judgment that the Club terminated any legal nonconforming land use status by  
19 embarking on changed uses and illegal uses of the land.

20  
21 Most importantly, the County asks the Court to enjoin shooting until facilities can be built to  
22 prevent escape of bullets from the Property to the neighborhoods down range, and to enjoin shooting  
23 activities that by their intensity and their hours create obnoxious and intolerable noise conditions for  
24 residents of Central Kitsap.

## 25 26 27 **II. FACTS AND LEGAL ARGUMENT**

### 28 **A. KRRC: Nuisance Based on Ongoing Risk of Bullets Escaping the Property**

1 In this contentious trial, not one witness could deny a fundamental truth:

2 Bullets can escape from blue sky shooting ranges.

3  
4 In fact, bullets do escape from blue sky shooting ranges, despite range rules and enforcement of  
5 those rules. Bullets escape from blue sky shooting ranges, even when all of the users point their guns  
6 only at the target down range. Bullets escape from blue sky shooting ranges even when everyone –  
7 users, safety officers and range leaders – have the best of intentions.  
8

9 Repeatedly, the phrase “aimed and controlled” was used to describe the shooting at KRRC.  
10 Whether at KRRC or at another range, “aimed and controlled” shooting tells us little about a range’s  
11 ability to contain bullets. Mr. Kranz’s observation that KRRC’s users appeared to be very good shots,  
12 doesn’t answer the challenge. This is so because aimed and controlled shooting doesn’t mean error-  
13 free shooting, it only means that the range users aren’t being reckless, thoughtless shooters. One hopes  
14 that range users everywhere are using aimed and controlled shooting. Notwithstanding witness Roy  
15 Ruel’s speculation about shooting at birds or power lines, the fact remains: Firearms will occasionally  
16 discharge on a range at a time and in a direction other than the user intends, whether through operator  
17 error or mechanical error, during the normal course of a shooting range’s operations. Accidental  
18 discharges are part of the life of a shooting range, and KRRC is not immune from these events (see e.g.  
19 Exhibit 174, Range Safety Officer Report Dated 2-20-09). Moreover, when a range has no fencing to  
20 exclude unauthorized users during off-hours, the chances of bullets escaping the range only go up.  
21

22 Mr. Ruel testified that to clear the backstop at the rifle range, a rifle’s muzzle would have to lift  
23 only approximately two degrees above where it would be properly aimed at the 200-yard target line.  
24 This fact is unrebutted. In fact, Mr. Noedel’s field measurements using his rangemaster device  
25 measured the number of degrees above *level* when measured from the shooter’s position at the rifle  
26 range. In other words, Mr. Noedel didn’t account for the need to elevate a rifle muzzle to reach the  
27  
28

1 rear targets at KRRC's rifle range in the first place. The AHBL survey drawings confirm that the rifle  
2 range is built as a series of benches that rise toward the end of the range. Two degrees of muzzle rise  
3 leaves little room for error, when you consider that the next level of protection is a very thin line of  
4 trees left standing at the top of the rifle range backstop. Mr. Koon found multiple bullet hits on the  
5 trees at that location, and there is plenty of daylight between the trees. Bullets have escaped the rifle  
6 range, and they will continue to escape so long as it is a blue sky range. At KRRC, a rifle shot that  
7 clears the rifle range's backstop and gets through the line of trees will land well beyond the range  
8 property.  
9

10  
11 The County isn't claiming that users of shooting ranges are aiming above the berms or  
12 backstops, because users don't have to aim that way for bullets to escape. Some of KRRC's own range  
13 safety officer reports acknowledge shooting over or striking the tops of berms:  
14

15 10:00 I asked a FAH Instructor to move his target down. He was shooting an AR  
16 [rifle] laying down, hitting the top of the 25 yard berm.

17 Exhibit 176, Range Safety Officer Report Dated 6-18-09.

18 Public User . . . fired a .22 cr at an arial (sic) target on rifle line . . .

19 Exhibit 184, Range Safety Officer Reported Dated 1/2/10

20 1125. Found target on pistol line . . . that was set too high. At least 20-30 rounds of .22  
21 may have left the range.

22 Exhibit 197, Range Safety Officer Report Dated 12-27-09.

23 Down range of the pistol line is where witness William Fernandez described a bullet whizzing  
24 overhead and hitting a nearby conifer as he walked through the park land to the north of the Property,  
25 consistent with Gary Koon's SDZ for the pistol range and adjacent Bays (exhibit 211).  
26

27 Overhead baffles stop bullets, and KRRC's ranges are completely open to the blue sky, save for  
28 weather shelters at the rifle and pistol lines. The Poulsbo Sportsman Club (PSC) spent its grant monies

1 and sweat equity to build separate baffled shooting areas for each target distance at its pistol and rifle  
2 shelter. PSC'S baffles were designed by a professional engineer, based on examples in the NRA Range  
3 Source Book. By contrast, KRRC spent \$16,000 of its grant money on 24-inch culvert materials (by  
4 Mr. Carter's admission), and KRRC focused its efforts on building more and more un-engineered  
5 shooting bays for its practical shooting competitions. Exhibit 81 shows the aerial view of what the  
6 PSC range with overhead baffles looks like. Exhibits 75 through 80 show the PSC baffles, including  
7 the gravel-filled baffles at the 100 and 200-yard rifle lines. Jim Reynolds of PSC testified that there  
8 are a few bullet impacts on their club's overhead baffles, *and the baffles successfully stopped rifle*  
9 *bullets!* There's nothing to suggest that PSC's users don't shoot their firearms in an aimed and  
10 controlled manner, and yet bullets still reach the overhead baffles on occasion. None of the Club's  
11 "independent" expert witnesses set foot at the Poulsbo Club, which is only a few miles north of KRRC.

12  
13  
14  
15 Surface Danger Zones warrant the Court's consideration. Gary Koon testified that there are  
16 really only two ways to foreclose the escape of bullets from shooting areas into populated areas: The  
17 range must either own the property within the SDZ or implement engineered solutions to keep bullets  
18 inside shooting areas. Mr. Koon wasn't testifying as a not-in-my-backyard type; he said he personally  
19 wasn't bothered by gun noise like other neighbors. After deployments with the USMC to Iraq and  
20 Afghanistan charting SDZ's for numerous operations in and around populated areas, it's easy to see  
21 why his concern is safety. Somewhat ironically, Matthew Noedel's stated opinion that the Slaton shot  
22 originating from a distance farther away from the Slaton home than KRRC's Property underscore's  
23 Koon's concern: Nominal .30 cal. rifles shot at KRRC can reach to the El Dorado Hills neighborhood  
24 and *beyond*. Beyond lies State Highway 3 and the densely populated environs of Silverdale.

25  
26  
27 The rifle range and shooting bay berms are insufficient in height. Mr. Ruel testified that these  
28 berms were not tall enough and summarized his rifle range opinion in exhibit 160. Even Mr. Kranz

1 opined that eight feet was a minimum height for a practical shooting bay's berms. The AHBL surveys  
2 are drawn to one-foot contour intervals, meaning that each foot of elevation gain or loss is indicated on  
3 the survey drawings. For the shooting bays, the AHBL surveys (exhibits 491, 64-68) depict  
4 approximate berm elevations above the ground elevation as follows (in feet):  
5

Bay	Closed end of berm/backstop	Side berms
1	8	6 – 8
2	8	6 – 7
3	7	7 – 8
4	8 – 9	8 – 9
5	7	7
6	20	7 – 20
7	8 – 11	8 - 11
8	7 – 8	4 – 6 (north berm)
9	9 – 10	7 – 8
10	9 – 10	7 – 9
11	7 – 10	10 - 11

17  
18 Several parts of KRRC's berms barely reach eight feet in height, and some areas fall short. An  
19 independent evaluation may support the conclusion that even taller berms are appropriate, because the  
20 bullets from practical shooting matches are shot in 180 or more degrees of variation.  
21

22 The County seeks a judgment that KRRC must cease shooting operations until it obtains a  
23 range safety evaluation by the NRA Range Technical Team program, introduced in the First  
24 Declaration of Neil R. Wachter and discussed during Marcus Carter's testimony. Contrary to Mr.  
25 Carter's testimony, the Club did not obtain an independent range safety evaluation. Despite his final  
26 opinions, the Club's expert Scott Kranz acknowledged that the NRA Range Source Book is a primary  
27 reference used for designing or modifying shooting ranges, and he could name no other reference for  
28

1 range design published by the USPSA or other organizations. The safety issues at KRRC demand a  
2 more independent assessment, and the Court should order KRRC to apply for the NRA Range  
3 Technical Team's evaluation within 14 days of the Court's order. KRRC must submit the results of  
4 this evaluation to the Court and the County, and must modify its range facilities consistent with the  
5 recommendations of the NRA evaluation. In lieu of obtaining this evaluation and modifying its range  
6 to address all safety issues identified therein, the Court should order the Club to make the following  
7 safety modifications before resuming shooting operations, all based upon the plans of a professional  
8 engineer after obtaining County building and site development permitting and authorizations:  
9

- 11 1. Install a fence around the perimeter of the active shooting areas, to exclude unauthorized users  
12 when the range is not open for use. This step must occur immediately, because the remaining  
13 steps will require time in which to develop and execute specific plans and it is doubtful that the  
14 KRRC can keep a person on site 24/7 to discourage trespassers.
- 16 2. Install overhead baffles at the pistol range and the rifle range, consistent with the NRA Range  
17 Source Book, to eliminate "blue sky" shooting from each range's shooting shed. This  
18 construction can be done in phases so that a section of each range's shelter can be used once the  
19 baffles are in place for that section, provided that the sides of each baffled section are bermed  
20 or walled.
- 22 3. Modify shooting bay and rifle range berms so that all berms are no less than eight feet in height  
23 above the shooter's position and are otherwise consistent with the NRA Range Source Book.
- 25 4. Build a berm along the southern edge of the rifle range (right-hand side, from the shooter's  
26 perspective in the shelter) consistent with the NRA Range Source Book.

27 This list does not assume that there aren't other appropriate safety improvements, such as subdividing  
28 the rifle and pistol ranges into sections of varying lengths with actual backstops rather than



1 intermediate berms, such as has been done at the Poulsbo Sportsman's Club. However, this list  
2 addresses the most significant safety concerns for which compelling evidence was presented at trial.  
3

4 Roy Ruel testified that in his opinion, KRRC should cease operating until it addresses several  
5 safety shortcomings, including the lack of a right hand berm for the rifle range, the lack of overhead  
6 baffles, rocks in the berms and the short height of some of the shooting bay berms. These  
7 recommendations make sense, particularly when considering the evidence outside KRRC's property:  
8 The terrain, the history of impacts and the geography.  
9

10 There are no hillsides or other features to stop bullets from traveling far beyond the Club's  
11 shooting areas. The forest beyond the edge of the rifle range, pistol range and several shooting bays is  
12 thin and not comparable to the thickly wooded stands of trees at other ranges described by witness  
13 Marty Hayes (see e.g. exhibit 544, depicting the effect of 1991 clear-cutting to nearly the edge of the  
14 Club's shooting areas). The Club's shooting areas are at approximately 370 feet above sea level and  
15 the El Dorado Hills top out at around 500 feet above sea level – there's no dramatic uplift in the  
16 landscape between these locations.  
17

18 The County presented six incidents from the past 15 or so years in which houses were hit by  
19 bullets: The recent Linton incident plus five incidents in the El Dorado Hills between the mid-1990's  
20 and 2008. Of these incidents, three have been susceptible to scientific study.  
21

22 The Court heard testimony from two fine forensic investigators, Ms. Geil and Mr. Noedel.  
23 Ms. Geil developed back-calculations for bullet hits at the Linton, Fairchild, and Slaton residences,  
24 which occurred in late July 2011, March 2008, and July 3, 2007, respectively. Ms. Geil's maps  
25 depicted the back-calculated trajectory for each shot, with 5 and 10 degree margins of error. Mr.  
26 Noedel took issue with the Linton and Fairchild trajectories, arguing that a greater margin of error was  
27 appropriate due to the lack of a second point in space with which to calculate the geometry at the  
28

1 Linton back deck and the very short distance between the two points measured on either side of the  
2 Fairchild garage door. Mr. Noedel agreed with Ms. Geil's trajectory for the Slaton incident, but  
3 disagreed that KRRC could have been the source of that nominal .30 cal. Rifle shot because it was too  
4 far from the Slaton residence. Mr. Noedel hedged a bit when it was pointed out that the bullet might  
5 not have been at the very end of its range before hitting the Slaton house. Mr. Noedel questioned the  
6 likelihood of "downloading" a rifle's cartridge to achieve a shorter range, and he is probably right  
7 about this. Both experts left out the possibility of a nominal .30 cal rifle shot from KRRC reaching the  
8 Slaton residence, because it could be shot at an even higher angle than the experts considered thereby  
9 shortening the effective range. Accidental or unintentional discharges happen, and some of these shots  
10 will be into the blue sky. Why not the Slaton shot?

11  
12  
13 Regarding the Linton incident, Mr. Noedel opined that the Federal .357 magnum ammunition  
14 was not likely to be reloaded, and thus not likely to have an enhanced range. With a maximum range  
15 of about 1.4 miles, this shot was beyond the 1.6 mile distance between the Linton deck and the KRRC  
16 pistol range, though this range would not exclude all of the KRRC property.

17  
18 Together, the work of Ms. Geil and Mr. Noedel underscores the feasibility of shots escaping  
19 from KRRC striking residential areas. Both scientists opined that the Slaton and Fairchild strikes were  
20 not at close range, and not likely to originate from the neighborhood itself.

21  
22 In his second declaration, Gary Koon offered this observation:

23 12. The contention that bullets can be safely contained on a range using impact  
24 berms and range safety rules alone, is a false premise. Even if every single bullet fired  
25 down range were to hit precisely where the shooter intended, the bullet may still  
26 ricochet off the impact berm itself.

27 Mr. Noedel took some issue with the ricochet testimony offered by Mr. Koon. The Court will recall  
28 that Mr. Koon wasn't describing all ricochets while describing the ability of bullets to travel onward at  
nearly the same speed after the ricochet and that Mr. Noedel was focused on pistol bullets when he

1 discussed how bullets hitting a steel target are apt to break apart or simply drop. With the higher  
2 energy rifle shots observed by Mr. Koon during extensive field exercises, he saw the full spectrum of  
3 ricochet possibilities. No expert could rule out the scenario of a high-powered rifle shot ricocheting  
4 out of the range and away from the Property.  
5

6 The Club's rifle line points directly at the El Dorado Hills neighborhood. Exhibit 2 deserves  
7 the Court's attention when considering the history of bullet impacts. Any incident taken alone could  
8 arguably be discarded as an anomaly, and the Evans skylight incident could have been caused by a  
9 projectile other than a bullet. But taken together, these incidents should give the Court pause. Each of  
10 the El Dorado Hills incidents took place within 5.05 degrees or less from the center line of the rifle  
11 range. Each of the El Dorado Hills "hits" were impacts to the sides of structures exposed to the  
12 southwest. Exhibit 2 isn't the product of someone's imagination; these lines are more likely than not  
13 the approximate flight paths of bullets. The struck houses on these lines are alarmingly close to one  
14 another and to one other feature: The center line for the KRRC rifle range.  
15

16 In trial, much speculation was made about possible sources of bullets in the vicinity of the  
17 Club. None of this speculation took into account that there is one spot on the map from which all rifles  
18 are aimed in the same direction. That spot is the KRRC rifle range, and that direction is northeast.  
19 That direction leads to the very neighborhood where five residences are known to have been struck by  
20 bullets over a span of 15 years. No witness offered up anything more than a lay opinion about the  
21 danger revealed by this pattern, because no witness really could. This is the province of the Court.  
22

23 Only the Court can connect the dots, and only the Court can assimilate all of the trial record  
24 about these incidents and the KRRC range facility's failings in order to answer the question of whether  
25 the currently configured range will more likely than not allow one or more bullets to escape the  
26 Property and reach populated areas in the future. That answer should be yes. Because a fired bullet  
27  
28

1 can cause great bodily injury or death, a finding of likely future escape of a bullet from the KRRC  
2 property into populated areas is a finding of an ongoing nuisance condition. With this conclusion, the  
3 remaining task is to consider whether the nuisance should be enjoined.  
4

### 5 **Balancing the Equities**

6 The term “industry standard” is admittedly ironic, because shooting clubs don’t comprise an  
7 industry, they comprise a sport. No one can deny the role of recreational shooting, or of self-defense  
8 training for those who seek it, but shooting ranges exist for sport.  
9

10 Every sport comes with risks. Even the relatively benign sport of baseball imposes a risk upon  
11 its participants and upon its spectators in the form of a line-drive foul ball. Closer to the other end of  
12 the spectrum is hockey. Fans readily attend hockey games, where there’s always a risk that the puck  
13 will clear the glass wall around the edge of the rink.  
14

15 Few sports pose risks to persons outside the playing field or viewing stands. One obvious  
16 comparison is a golf course community where residential properties abut the fairways. With some  
17 frequency, errant golf balls will land in a back yard or even break a house’s window. The comparison  
18 ends there however, because the odds of tragic consequences from a golf ball are infinitesimal.  
19 There’s no analogy for the sport of shooting, especially where residents move into this sport’s zone of  
20 impact years before their neighboring range turns up the volume of noises produced at its property.  
21

22 The balancing in this case is somewhat puzzling. State law recognizes the importance of  
23 shooting ranges, and Kitsap County agrees that ranges play a role in our community by channeling  
24 recreational shooting into designated locations. However, there is little evidence in the record to place  
25 KRRC into context – such as how many members KRRC claims over the years, how many training  
26 sessions it offers in a given year, how many out-of-town guests visit the range, and so on. In short,  
27 what is the Club’s utility and does this utility in any way justify withholding an injunction when public  
28

1 safety is at stake?

2  
3 **KRRC as a Noise Nuisance**

4 Overall, shooting and explosive noises have increased by several orders of magnitude over the  
5 past 10 or so years. While accounts vary, some basic conclusions can be drawn about the frequency,  
6 intensity, hours and sources of shooting noises. This trial demonstrated that not all shooting or related  
7 noises are created equal. Naturally, not all witnesses to the variety of sounds coming from KRRC will  
8 testify to the same experience.  
9

10 As noted in the trial briefing, the County presented qualitative not quantitative evidence of the  
11 shooting noises and it is appropriate for the Court to consider evidence other than decibel levels. State  
12 and local noise regulation is geared to average decibel levels measured over time, not the intermittent  
13 bursts of sound that come from gun ranges. Further, state law and KCC chapter 10.28 (noise) exempts  
14 “authorized shooting ranges” from maximum permissible environmental noise level regulations. Also,  
15 the County declined to present Kevin Gross’s audio recordings, which were not representative of what  
16 he could hear at his home due in part to the low quality of his equipment. Defense witness Jerry  
17 Casella’s description of the sound from a .50 cal BMG rifle should answer any question about Mr.  
18 Gross’s recitation of hearing the lower frequency “boom” of that firearm (or equivalent cartridge)  
19 through his neighborhood. Some of the Club’s own Range Safety Officer reports only corroborate the  
20 neighbors’ accounts of increasing noise levels:  
21  
22

23 Donna Huebert [phone omitted]

24 From the Huebert Tree Farm, called concerned about seemingly an increase in noise.  
25 She called about noise during regular operational hours. Marcus called her back &  
26 talked to her.

27 Exhibit 172, Range Safety Officer Report Dated 7-01-08 (misspellings in original).

28 1038 Wife of Kevin Gross [phone omitted] called & wanted to know why noise level  
was so high & that she was going to call county because we had gone above what

should be allowed.

Exhibit 181, Range Safety Officer Report Dated 11-30-09 (notes U.S. Navy training that day).

William Fernandez – [phone omitted] called @ 10:15 – noticing more “Bigger” noise wanted to know if we had changed or new program. Very polite – good conversation.

Exhibit 183, Range Safety Officer Report Dated 11-23-09.

The County called witnesses to testify to noise and its impact, and their testimony can be summarized thusly:

<i>Name</i>	<i>When moved in or out</i>	<i>Sounds of Gunfire Initially</i>	<i>Noted Changes in Sounds of Gunfire</i>	<i>Description of Changes in Use</i>	<i>Description of Sounds in Recent Years</i>	<i>Impact Quality of Life and Use and Enjoyment of Property?</i>
<b>Donna Hubert</b>  <b>Testified 10/11/11</b>  <b>4536 Seabeck Hwy NW, Home located on ridge across Seabeck Hwy</b>	<b>In: 1973</b>	➤ It was quite quiet and hardly noticeable ➤ She only heard a shot now and then ➤ Camp Wesley Harris (CWH) was louder than KRRC	<b>2003 or 2004</b>	➤ Gunfire started escalating, became more frequent and repetitive as late as 10 p.m. ➤ Has heard explosions a dozen times since 2005	➤ Now the gunfire is steady ➤ They hear huge blasts like dynamite which are accompanied by gunfire ➤ It sounds like its right in her backyard ➤ It's like the constant sound of fireworks seven days a week	➤ She and husband no longer enjoy sitting outside because it is not comfortable ➤ They no longer enjoy entertaining ➤ Sometimes shooting just makes her want to scream
<b>Steve Coleman</b>  <b>Testified 10/11/11</b>  <b>Formerly lived across Seabeck Hwy</b>	<b>In: 1979</b>  <b>Out: 2006</b>	➤ Gunfire was occasional, mainly on weekends and in the fall	<b>2004</b>	➤ Shooting every day of the week ➤ Repetitive rifle shooting, sounded like full automatic fire ➤ Shooting occurred routinely as late as 10 p.m. and even after 10 p.m.	➤ Rifle fire is louder, more noticeable ➤ Sounds of cannon fire began 2005	➤ Felt trapped ➤ Began having “irrational thoughts” like cutting down KRRC’s light poles ➤ Felt he had no recourse, forced to sell his dream home to get away from KRRC

<i>Name</i>	<i>When moved in or out</i>	<i>Sounds of Gunfire Initially</i>	<i>Noted Changes in Sounds of Gunfire</i>	<i>Description of Changes in Use</i>	<i>Description of Sounds in Recent Years</i>	<i>Impact Quality of Life and Use and Enjoyment of Property?</i>
twice in 2005						
Terry Allison	In: 1988	<ul style="list-style-type: none"> <li>➤ Primarily a hunter's club back then so didn't get a lot of use, occasional target shooting, more use early fall before hunting season</li> <li>➤ Shooting mainly daylight hours only, not before 9am or after 6pm, except for hunters sight-in (6am in Sept.)</li> <li>➤ Shots were paced, controlled slow fire</li> <li>➤ Couldn't hear gunfire inside</li> <li>➤ Little shooting most days, otherwise shooting usually only between 4:00- 6:00</li> </ul>	2001 intensity, frequency, volume began increasing ➤ Begins hearing .50 BMG in 2008 ➤ Begins hearing full auto fire in 2001 ➤ Begins hearing Tannerite explosions in 2003-4 ➤ Notes the sound changed when left rifle line berm was installed ➤ Notes CWH moved shooting activities indoors in 2003 and shut down 2004	➤ Hears gunfire right up to 10 p.m. regularly, not uncommon at 11 pm, shooting a number of times 2 am ➤ Details pattern of use that regularly begins at 7 am and continues all day until 10 pm starting in early spring 2011 ➤ Automatic gunfire picked up in 2005, now it's frequent ➤ Military personnel begins training, using automatic rifles ➤ 2001 the competitions and practices increase in frequency, duration, and number of shooters	➤ Gunfire can be so loud he can't hear the TV ➤ Tannerite explosions make his windows shake and have a "robust boom" ➤ Hears cannon fire which has a higher volume than Tannerite, vibrates windows in his home ➤ Can hear the pinging of the steel targets used in competitions	➤ He and his family leave their property at times of most intense shooting and explosions, cited leaving on the 4 <sup>th</sup> of July and during competitions. ➤ He no longer allows his grandchildren to play outside during shooting. ➤ Had to stop hosting Boy Scouts in 2003, adults would dive for cover when gunfire went off ➤ They are no longer able to use the north side of the property
Colby Swanson	In: 1990	Not asked	Not asked	Not asked	Not asked	➤ Noise became an issue

<i>Name</i>	<i>When moved in or out</i>	<i>Sounds of Gunfire Initially</i>	<i>Noted Changes in Sounds of Gunfire</i>	<i>Description of Changes in Use</i>	<i>Description of Sounds in Recent Years</i>	<i>Impact Quality of Life and Use and Enjoyment of Property?</i>
Testified 10/12/11  Formerly 5779 El Dorado Pl.	Out: 2009	➤ Notes he heard target shooting as background noise			➤ Notes he and his wife worked outside the home, children went to school, and they spent all weekends away from home after 2001	late at night when there was shooting until 10 pm
Arnold Fairchild  Testified 10/12/11  5414 El Dorado Blvd. Lives on the east side of El Dorado, just over the crest of the hill	In: 1990	➤ Heard very little gunfire ➤ Started on weekends at 9 or 10 am and ended by 5 or 6 pm	Mid-1990s	➤ Number of shots fired increased dramatically ➤ Shooting starts at 7 or 8 am and ends 9 or 10 pm	➤ Has heard .50 caliber being fired	➤ His wife is afraid to use the yard or garden ➤ The noise doesn't particularly bother him, he is concerned with safety
Molly Evans  Testified 10/12/11  5414 El Dorado, Lives on ridgeline	1991	➤ Doesn't recall hearing gunfire when they moved in	Became very noticeable in the last several years	➤ Hears gunfire almost daily ➤ As early as 7 and late as 10	➤ Gunfire is loud and disconcerting ➤ Hears gunfire inside even with music or TV on and windows and doors closed ➤ Startles her 5 year old granddaughter	➤ Doesn't garden or read on the outside patio during shooting ➤ Doesn't let granddaughter play outside ➤ No longer plan events like birthday parties at home ➤ No longer runs on the power line trail ➤ Coupled with her belief her home and others have



<i>Name</i>	<i>When moved in or out</i>	<i>Sounds of Gunfire Initially</i>	<i>Noted Changes in Sounds of Gunfire</i>	<i>Description of Changes in Use</i>	<i>Description of Sounds in Recent Years</i>	<i>Impact Quality of Life and Use and Enjoyment of Property?</i>
						been struck, the sounds of gunfire have become a source of fear
Eva Crim Testified 10/12/11  7156 Cobi Place NW, Lives on El Dorado Hills Ridgeline	1997	<ul style="list-style-type: none"> <li>➤ Gunfire typically heard in the mornings but not every day</li> <li>➤ Gunfire sounded distant, it was infrequent and wasn't a nuisance</li> <li>➤ Near time of purchase neighbor told them they couldn't hear gunfire</li> </ul>	2003-2004, Shooting got more louder and frequent 2004- 2005 Noise really became a nuisance	<ul style="list-style-type: none"> <li>➤ Shooting increased to 7 days a week</li> <li>➤ Intensity continued to increase since 2005</li> <li>➤ Hears explosions</li> <li>➤ Frequency of gunfire increased</li> </ul>	<ul style="list-style-type: none"> <li>➤ Sounds like a small war being waged</li> <li>➤ Sometimes reaches point</li> <li>➤ Became a nuisance</li> <li>➤ Noise is unrelenting and becomes intolerable</li> </ul>	<ul style="list-style-type: none"> <li>➤ She no longer can use and enjoy her property as she used to</li> <li>➤ She doesn't enjoy gardening or sitting outside and watching the sun set</li> <li>➤ She doesn't walk her dog in the park</li> <li>➤ She has to use headphones or go elsewhere to jog</li> <li>➤ Has considered selling her home but was told disclosing KRRC would negatively impact their home's value</li> </ul>
Craig Hughes Testified 10/11/11  557 English Hill Ct. Lives in SW corner of El	1989	<ul style="list-style-type: none"> <li>➤ Shooting was infrequent and didn't start as early in the morning</li> </ul>	Frequency began gradually increasing until suddenly about 2006 it got a lot louder	<ul style="list-style-type: none"> <li>➤ Hears shooting 7 days a week now</li> <li>➤ Hears something loud other than gunfire occasionally</li> </ul>	<ul style="list-style-type: none"> <li>➤ On clear days can hear gunfire inside with windows and doors shut</li> </ul>	<ul style="list-style-type: none"> <li>➤ He finds it nerve wracking to be outside</li> <li>➤ When it is loud they stop having family functions and inviting their grandchildren over</li> <li>➤ Noise is their secondary concern to</li> </ul>

<i>Name</i>	<i>When moved in or out</i>	<i>Sounds of Gunfire Initially</i>	<i>Noted Changes in Sounds of Gunfire</i>	<i>Description of Changes in Use</i>	<i>Description of Sounds in Recent Years</i>	<i>Impact Quality of Life and Use and Enjoyment of Property?</i>
<b>Dorado Hills Platt</b>						<b>safety given the rifle bullet that struck their home</b>
<b>Deborah Slaton</b>	<b>1999</b>	<b>Not asked</b>	<b>Not asked</b>	<b>Not asked</b>	<ul style="list-style-type: none"> <li>➤ Notes it is much noisier at the top of the hill than it is from their home</li> <li>➤ She can hear popping sounds that are obviously gunfire in her home, some louder than others</li> </ul>	<ul style="list-style-type: none"> <li>➤ She doesn't walk as far down the power line trail due to safety concerns</li> <li>➤ From their location downhill noise is not a big issue for her or her husband</li> </ul>
<b>Testified 10/12/11 regarding a bullet striking her home</b>  <b>5142 El Camino Blvd, Lives on E. slope of El Dorado Hills</b>						
<b>William Fernandez</b>	<b>In: 2002</b>  <b>Out: 2011</b>	<ul style="list-style-type: none"> <li>➤ Gunfire was sporadic</li> <li>➤ Mainly heard in the afternoons</li> </ul>	<b>Noticed noise becoming a major problem 2008</b>	<ul style="list-style-type: none"> <li>➤ Increase in activity</li> <li>➤ There is shooting every day but some days are worse than others</li> <li>➤ Would hear shooting as late as 10 pm even before 2008</li> <li>➤ Frequently hears automatic gunfire</li> </ul>	<ul style="list-style-type: none"> <li>➤ Sounds real obvious from the living room all day long even with the windows closed</li> <li>➤ Louder than nearby lawnmowers, his vacuum, dishwasher, and popcorn popping inside</li> <li>➤ Hears explosions accompanied by gunfire on holidays and non-holidays</li> </ul>	<ul style="list-style-type: none"> <li>➤ Can't enjoy barbequing</li> <li>➤ Stopped inviting people over</li> <li>➤ Emotionally tired dealing with the noise</li> <li>➤ The explosions disturb his enjoyment of his property</li> <li>➤ No longer walks in Heritage Park due to the noise and fears KRRC is unsafe</li> </ul>
<b>Kevin Gross</b>	<b>2002</b>	<b>➤ Very infrequently heard</b>	<b>2008</b>	<b>➤ Became more frequent and</b>	<b>➤ Loudest shooting echoes through</b>	<b>➤ They don't entertain at home</b>

<i>Name</i>	<i>When moved in or out</i>	<i>Sounds of Gunfire Initially</i>	<i>Noted Changes in Sounds of Gunfire</i>	<i>Description of Changes in Use</i>	<i>Description of Sounds in Recent Years</i>	<i>Impact Quality of Life and Use and Enjoyment of Property?</i>
<b>Testified 10/17/11</b>  <b>5619 Iskra Blvd, Lives in Whisper Ridge</b>		<b>gunfire, not bothersome</b> ➤ Most shots heard during the day, neither very early nor late		<b>louder</b> ➤ Shooting started going later in the evening ➤ Shooting starts as early as 7 am ➤ Holidays became exception-ally active and noisy ➤ Created activities log from KRRC's calendars showing recent increased usage ➤ Very loud and frequent shooting, notes the Falling Plate competition every Tuesday and USPSA every week until 9pm	<b>community; the sharp crack of rifle shots bounce around and reverberate off the trees and houses</b> ➤ Can hear the quick pop, pop, pop of rapid fire during competitions ➤ Can hear and feel the vibration from rifle fire with his windows closed ➤ Pistol fire is less bothersome than rifle except during falling plate competitions	➤ They only use Heritage Park after consulting KRRCs online calendar of shooting events and go less often ➤ His wife was stressed further during her cancer treatment
<b>Robert Kermath</b>  <b>Testified 09/29/11</b>  <b>5626 Rydan Court, Lives in Whisper Ridge</b>	<b>2006,</b>	➤ Mainly heard small arms (pistol) fire ➤ Gunfire was sporadic and distant sounding	<b>Became a problem 2007</b>	➤ Hears high caliber and automatic fire ➤ Noise becomes frequent and daily ➤ Shooting often starts at 7 am and goes to 10 pm	➤ Can hear shooting sounds over the radio or TC when inside ➤ It sounds like a war	He and his wife spend less time in their yard, and don't like to invite visitors to home. Cited Daughter's 2007 wedding in side yard, which he wouldn't host today due to

<i>Name</i>	<i>When moved in or out</i>	<i>Sounds of Gunfire Initially</i>	<i>Noted Changes in Sounds of Gunfire</i>	<i>Description of Changes in Use</i>	<i>Description of Sounds in Recent Years</i>	<i>Impact Quality of Life and Use and Enjoyment of Property?</i>
<b>shooting noises.</b>						
<b>Jeremy Bennett</b>	<b>2009</b>	<b>N/A</b>	<b>N/A</b>	<ul style="list-style-type: none"> <li>➤ Shooting starts as early as 7 or 8 am and goes well into the dark.</li> <li>➤ Has heard what he knows to be automatic gunfire</li> </ul>	<ul style="list-style-type: none"> <li>➤ He can hear gunfire over the noise of his own mower</li> <li>➤ Some shots are louder than others and sometimes it seems like a war zone.</li> <li>➤ Can hear gunfire inside with the windows and doors closed</li> <li>➤ the noise gets excessive</li> </ul>	<ul style="list-style-type: none"> <li>➤ He doesn't use his hot tub</li> <li>➤ He had to hire gardener because his wife won't go outside during shooting.</li> <li>➤ They rarely use the family room that was struck</li> <li>➤ They spend much of their weekends and vacation time away from home</li> <li>➤ He is uncomfortable living there and is looking for new home despite concern about disclosures</li> <li>➤ Without noise abatement and reduced hours and frequency of shooting activities they cannot remain in their home</li> </ul>

#### **Use of exploding targets or cannons**

KRRC's use of exploding targets may present the simplest analysis for the Court in this entire case: The sounds of explosions from KRRC are nuisance sounds for which the Club can articulate no purpose other than its users' possible amusement. Mr. Carter minimized the use of tannerite

1 explosives at the Club. However, Terry Allison's and other witnesses' descriptions of the sounds of  
2 explosions are uncontradicted, and the use of tannerite even made it into one of the range safety officer  
3 reports at 7:45 p.m.:

4 1 shot of ½ lb tannerite 1945

5 1 shot of 1 lb tannerite 1945

6 Exhibit 194, Range Safety Officer Report Dated 9-08-10.

7 Similarly, cannons have been used on the property with some frequency over the years. Mr. Casella  
8 acknowledged that exploding targets, if not cannons, have been part of the Club's annual Independence  
9 Day festivities when Club members are invited to discharge all of their weapons at once. He  
10 acknowledged preparing a tannerite explosion at the Club's 2009 Independence Day event.

### 11 **.50 Cal BMG and High-Powered Rifles**

12 The Court heard several definitions of a "high-powered rifle". There was general  
13 acknowledgement by witnesses from both sides that a high-powered rifle is one of a nominal .30  
14 caliber rifle or greater. Mr. Noedel agreed that "nominal .30 caliber" is a term of art describing this  
15 approximate caliber range. If the Court allows shooting to continue at KRRC at all, it should draw a  
16 line for rifles: No rifles of greater than nominal .30 caliber should be allowed. Unlike .308 hunting  
17 rifles for instance, the Club can articulate no utility for the .50 cal. rifles, and the sound of this rifle  
18 cannot be described as anything other than an unacceptable intrusion into the comfort and repose of  
19 nearby residents' lives. Shooting a .50 cal. BMG may be a thrill for some of the Club's users, but the  
20 noise from shooting this cartridge type creates an impact that outweighs what can only be described as  
21 entertainment for the shooter.

### 22 **Automatic Shooting**

23 Testimony varied dramatically as to whether automatic weapons have been used with any

1 frequency at KRRC. Jeremy Bennett testified to hearing them during his short time at his home in the  
2 El Dorado Hills, and he clearly should know this sound from his U.S. Navy training. The County  
3 presented YouTube video clips of machine guns being tested at the KRRC rifle range at different times  
4 within the past three or four years by witness Chris Lefort, the federally licensed firearms dealer. Mr.  
5 Lefort's videos have audio, and the sound of an automatic machine gun is worth hearing if only to  
6 confirm that at least *some* of the residents' testimony to automatic firing is accurate. The burst of a  
7 machine gun is a unique sound that belongs on military reservations and in the movies. Mr. LeFort's  
8 machine guns are not isolated incidents – several witnesses testified to hearing automatic weapons fire  
9 from their properties. Of all of the rapid firing sounds, automatic weapons fire is particularly  
10 troublesome – not only is it a loud, disruptive and repetitive sound, but it can only do harm to the  
11 psyche of the involuntary listener: This sound, perhaps more than any sound, is the sound of war. The  
12 Court must enjoin the use of fully automatic firearms at the Property, as it is obnoxious and without  
13 any real utility, i.e. it is a prototype nuisance. Clearly, KRRC will not restrict automatic weapons on  
14 its own, despite the tendency of automatic weapons to present control problems as described by Gary  
15 Koon.

16 KCSO Sheriff visits range due to report of machine gun fire – M-60 x 2 / M-16 fire  
17 allowed per executive officer – offered to let Deputy shoot . . .

18 Exhibit 177, Range Safety Officer Report Dated 6-14-09

### 19 **Practical Shooting**

20 Several witnesses testified to the dramatic uptick in practical shooting competitions and  
21 practices at the Property. Time was short in trial, and among the “should haves” in this case was  
22 playing the YouTube practical shooting videos from the Club, Exhibits 28 and 132. Exhibit 28 was a  
23 participant's video from the August 2011 “Courage Classic” event sponsored by the club. Exhibit 132  
24 was a participant's video from a USPSA match in May 2010. The Court should watch and listen to

1 these mpg (video) files, for a number of reasons. First, there's really nothing quite like a USPSA  
2 shooting sequence in competitive sports. Events are timed and competitors are scored based on their  
3 efficiency at hitting a variety of moving and non-moving targets. Many of the competitors are in fact  
4 very talented shooters (see e.g. Exhibit 504, Club's newsletter encouraging new shooters to "practice"  
5 in competition). The practical shooting videos are exciting to watch, so one can only imagine the  
6 adrenaline rush experienced by the participants. Second, the practical shooting videos confirm the  
7 intensity of shooting sounds described by the neighbors. At several moments during the videos, one  
8 can hear the sounds from other shooting bays at the Property. In other words, there are multiple layers  
9 of rapid firing going on at once on the Property. Third, the videos allow the Court to consider the  
10 utility of practical shooting. The Club presented some testimony that it sponsors the various practical  
11 shooting events and encourages participation in practices and competitions to teach shooters how to  
12 defend themselves or others. The Court should watch the practical shooting videos with some  
13 questions in mind: At what point does practical shooting go from educational to simply entertainment,  
14 something akin to a video game for adults except that the guns and bullets are real? How does the  
15 community benefit from the Club hosting practical shooting matches in which literally several hundred  
16 rounds of ammunition are discharged in each match?

#### 21 **Changes in Uses vs. "Same as it ever was"**

22 The Club's theme through trial could be summed up with the refrain from a Talking Heads  
23 song: Same as it ever was. The Court may have to make some credibility determinations here,  
24 because there may be no way to reconcile the dramatically different testimony about uses in the early  
25 1990's as compared to uses over the past 10 or so years. Based on the trial testimony and declarations  
26 in the record, the Court should find:

- 28 - The hours in which intrusive and obnoxious shooting sounds can routinely be heard from

1 Properties outside the range have dramatically increased over the past 5-10 years;

- 2 - The Club has greatly expanded its practical shooting practices and competitions, dramatically
- 3 increasing the frequency and intensity of rapid-fire shooting that is heard from Properties
- 4 outside the range.
- 5
- 6 - The Club has not mitigated its noises of its changed shooting uses and from its shooting bays.
- 7
- 8 - Fully automatic weapons and .50 Cal. BMG rifles are shot at the Club, whereas these firearms
- 9 were not used there with any regularity before the last decade.

10 The evidence supports the conclusion that collectively, the Club's shooting noises constitute a nuisance  
11 and that the Club's changed uses go beyond mere intensification.

12 The Club has cited *Keller v. City of Bellingham*, as support for its argument that the changes to  
13 the property and uses are merely intensification not expansion, as the same *kind* of use, a shooting  
14 range, is being operated. However, not all the uses to which the Club has recently been put, including  
15 the official training of military personnel and competitive action shooting, were a part of the Club's  
16 normal historical use. As to the increase in usage, though it is true a certain growth in membership and  
17 use is to be expected, there are limits that nonconforming use law places. Our Supreme Court has  
18 stated that if nonconforming uses were allowed unfettered expansion of volume of trade, zoning laws  
19 would be rendered ineffectual and such nonconforming parcels would benefit from unfair value.

20  
21 *Coleman v. City of Walla Walla*, 44 Wn.2d 296, 300-301, 266 P.2d 1034 (1954). As *Keller* holds,  
22 intensification is only allowed where the nature and character of the use is unchanged and substantially  
23 the same facilities are used. *Keller v. City of Bellingham*, 92 Wn.2d 726, 600 P.2d 1276 (1979). This  
24 cannot be said of KRRC's changed uses and landscape.

## 25 **Wetland Buffers and Site Development Activity Permits**

26 Perhaps more than any other subject in the case, the matter of wetlands and their associated



1 buffers was studied in reverse of the normal order. Ordinarily, a land owner or developer studies  
2 potential wetlands and develops a delineation to submit to the relevant jurisdictions as part of applying  
3 for permits and to determine the degree to which there must be mitigation or other compensation for  
4 possible encroachment into buffers or into wetlands themselves. Here, the wetland study was forensic  
5 and yet preliminary, and, far from as thorough as the County's wetland expert might like.  
6

7         There is a way to make sense of the wetland and buffer questions, and it lies in paring down the  
8 decisions to be made by the Court without reaching the detailed questions that might be better left to  
9 regulators.  
10

11         The County's wetland consulting firm, Talasaea Consultants, and the Club's consulting firm,  
12 Soundview Consultants, each studied wetlands to the north and west of developed areas of the  
13 Property, as well as the drainage crossing the range originating from the 42-inch culvert, and suspected  
14 wetlands in the 300 meter range. For purposes of the findings in this case, the County suggests that the  
15 Court decline to make findings of whether the County has proven that wetlands currently exist in the  
16 300 meter range area and whether the County has demonstrated that the water course from the 42-inch  
17 culvert ever followed a channel which is capable of hosting salmonid species, prior to entering the  
18 Property's wetlands. In so doing, the Court would confine its analysis of the Property's wetlands and  
19 streams (and their associated buffers) to the wetlands to the north and west of the developed portions  
20 of the range. This is not to say that the 24-inch twin culverts across the range didn't impact wetlands,  
21 but rather to focus the discussion on the areas on the Property where it cannot be disputed that  
22 wetlands exist.  
23  
24

25         The Property's wetlands are connected to and part of a larger wetland system in the DNR  
26 parcels to the north of the Property. Ecologically, this wetland system is of high value because it is  
27 part of the headwaters of the Wildcat Creek / Chico Creek watershed, which supports migrating  
28

1 salmon species. The wetlands on the Property are directly connected to a tributary of Wildcat Creek,  
2 and are waters of the State of Washington, both as a finding of fact and a conclusion of law.  
3

4 The next wetland subject that can be pared down is categorization, the process under which a  
5 wetland is ranked as a category I, II, III or IV wetland per KCC Chapter 19.200, with “Category I”  
6 receiving the highest level of protection. The County’s expert, Bill Shiels of Talasaea Consultants,  
7 determined that the Property’s wetlands constitute a single wetland denoted as Wetland A, and  
8 concluded that this wetland is a “category I” wetland, which receives a 200-foot buffer per KCC  
9 19.200.220. The Club’s expert, Jeremy Downs of Soundview Consultants, determined that the  
10 wetlands on the Property constitute two separate wetlands denoted as Wetlands A and B, and  
11 concluded that each wetland is a “category II” wetland, which receives a 100-foot buffer per KCC  
12 19.200.220. Both experts have determined that an additional 50 feet should be added to the buffer to  
13 reflect high intensity of adjacent uses, i.e. the KRRC shooting ranges (per the tables in KCC  
14 19.200.220). Therefore, the County’s expert and the Club’s expert have concluded that 250-foot and  
15 150-foot buffers apply to the Property’s wetlands, respectively. The County suggests that for purposes  
16 of these findings of fact, the Court should adopt the Soundview conclusions that there are two  
17 protected wetlands on the Property (A and B) and that a 150-foot buffer applies. By so doing, the  
18 Court can focus its attention on Soundview’s denoted Wetland B. By Mr. Downs’s testimony, the  
19 150-foot wetland buffer for Wetland B extends to approximately the edge of the road that extends  
20 north from the well house.  
21

22 This is where some reading between the lines and comparing of maps and photos will be  
23 useful. Talasaea’s maps, exhibits 496 and 497, are the only wetland maps in the record in which the  
24 locations of shooting areas are visible. Soundview’s maps in its report (exhibit 442) depict the  
25 wetlands and other water features, absent the berms and Bays. One might think this was unintentional,  
26  
27  
28

1 but another look at exhibit 462 reveals the misdirection: Mr. Downs's 2005 MS Bing Bird's Eye  
2 photos of the rifle range in that exhibit *are* very clear photos, but these screen shots fail to show the  
3 real blockbuster images of KRRC's site as it existed six years ago. The County submitted its own set  
4 of images from the same 2005 "Bing" imagery, Exhibits 544 through 549. This photography from  
5 2005 post-dates the 300-meter range development and it pre-dates the slope cutting into the hillsides at  
6 the end of the rifle range and at Bays 6 and 7. Using the well house and the ponds north of the  
7 developed shooting areas as landmarks, exhibits 544 through 548 demonstrate that the boat launch  
8 *buffer* area was cleared and graded consistent with Doug Frick's testimony and that the berms to the  
9 north and east of Bay 3 were all constructed after this point in 2005, and the timing of culvert  
10 undergrounding in the third quarter of 2006 means that this berm construction almost certainly took  
11 place no earlier than 2006. There can be no interrupted buffer on land where the wetland buffer has  
12 not been developed in the first place.

13  
14  
15  
16 To install its cross-range culverts in 2006, the Club excavated and placed fill in the wetland  
17 buffer within 150 feet of Wetland B. Part though not all of this length of the new culvert had been  
18 developed before wetland buffer regulation took effect. The cross-range culverts now discharge storm  
19 water and surface water directly into Wetland B, replacing the former system which ordinarily  
20 absorbed storm water and surface water into the soil and more gradually released it into the wetlands  
21 on the Property. Soundview's own report entitles a photo of the culverts' outlets as "Photograph 3:  
22 Showing the two 24-inch culverts *that drain into Wetland B.*" Exhibit 442, Soundview Preliminary  
23 Wetland and Habitat Assessment, p. 14 (emphasis added).

24  
25 This change to the Property's storm water conveyances required SDAP permitting, per KCC chapter  
26 12.10 The culvert construction project involved excavation and re-grading of far more than 150 cubic  
27 yards of earth in and around the culverts, per the unrebutted testimony of Doug Frick, which also  
28

1 requiring SDAP permitting. Similarly, the subsequent extension of the left-hand (northern) berm of  
2 the rifle line in late 2006 required re-grading of well over 150 cubic yards of fill.  
3

4 The undergrounding also required wetland delineation, per KCC 19.200.215.A.1:

5 Application Procedures for New Development. Any new development, except as  
6 provided in subsection (C)(1) below, containing a regulated wetland or its buffer, or  
7 proposed within the largest potential wetland buffer width, shall provide the special  
8 reports listed below, as required by the department, prior to any development  
9 authorization by the department. Additional reports or information to further identify  
10 potential impacts to any part of the environment may also be required.

- 11 a. Wetland delineation report (Section 19.700.710);  
12 b. Wetland mitigation report (Section 19.700.715); and  
13 c. Erosion and sedimentation control measures and/or a site development activity  
14 permit as required by Title 12 of the Kitsap County Code (Stormwater Management).

15 To construct the berm that starts at the northeastern corner of Bay 3 and travels east along the  
16 edge of Bay 4, then travels northeast along the storage / well house area, and then travels north along  
17 the edge of Bay 5, the Club placed fill in the wetland buffer within 150 feet of Wetland B. Little if any  
18 of this area had been developed before county wetland buffer regulations took effect. Building these  
19 berms required more than 150 cubic yards of re-grading.

20 Finally, the 2005 “Bing” photos confirm Doug Frick’s testimony that the Club has created at  
21 least five areas with slopes requiring SDAP permitting in recent years:

- 22 1. Cut slope at the end of the rifle range;  
23 2. Berms at and between Bays 4 and 5.  
24 3. Cut slope at Bay 6;  
25 4. Cut slope at Bay 7; and  
26 5. Extended rifle line berm (left-hand side from shooter’s perspective).

27 Each of these slopes were created after 2005, and each slope is greater than three-to-one in slope ratio  
28

1 and greater than five feet in height, thereby triggering SDAP permitting under KCC Chapter 12.10  
2  
3 Incidentally, little if any of the post-2005 site development work would be known to the County as a  
4 part of ordinary due diligence for the 2009 pass-through property transaction, and no where in the  
5 record is there any discussion of code violations relating to site development or the need for after-the-  
6 fact permitting, between the County and KRRC.

7  
8 Prior to this litigation, KRRC had never obtained a wetland delineation for the Property.  
9 KRRC has never applied for a site development activity permit for any of its earthmoving and slope  
10 creating activities. The Court should find these Code violations proved, and determine as a matter of  
11 law that the unpermitted site development constituted an illegal use of the Property, terminating its  
12 legal nonconforming land use status.

#### 13 IV. SELECTED LEGAL AUTHORITIES

14  
15 The County submits this briefing to supplement prior legal authorities on file with the Court.

##### 16 A. Application of “Industry Standards”

17 In the context of shooting range cases, the County has found none that support, even  
18 anecdotally, the argument that part of a court’s consideration in a nuisance case should be whether a  
19 defendant range conforms or differs from the standards and practices of other shooting ranges. “If a  
20 nuisance exists, the fact that due care was exercised and due precautions were taken against the  
21 annoyance or injury” complained of are immaterial.<sup>1</sup> A nuisance may exist even if the highest degree  
22 of care is used.<sup>2</sup> Likewise, attempting to mitigate the nuisance using the ordinary means used within  
23 the particular business is no defense.<sup>3</sup>

24  
25  
26 Specific to an environmental noise claim rather than one relating to nuisance noise or safety,  
27

28 <sup>1</sup> *Anthony v. Construction Products, Inc.*, 677 S.W.2d 4, 7 (Tenn. Ct. App. 1984).

<sup>2</sup> *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 880 (Mo. 1985).

1 one court compared the noise impacts of other area ranges to the defendant's gun club. The plaintiff in  
2 that case sought to enjoin a trap and skeet shooting club operating adjacent to a lake and wetland  
3 alleging noise pollution under Minnesota's Environmental Rights Act.<sup>4</sup> The trial court considered  
4 testimony as to decibel levels and the negative impacts impulsive noises have on the environment as  
5 well as the use schedule and noise generated by three neighboring ranges.<sup>5</sup>

6  
7  
8 Recently an Ohio appellate court upheld a preliminary injunction based on bullets allegedly  
9 escaping an outdoor shooting range and striking neighboring property.<sup>6</sup> The trial court made findings  
10 as to the existence and height of berms and other safety features on the defendant range but did not  
11 compare these features to any other range.<sup>7</sup> The court compared the range only to the NRA Source  
12 Book's recommendations for covered backstops, overhead and side baffles, and the overall  
13 requirement that projectiles be confined to the property before granting the injunction.<sup>8</sup>

14  
15 Looking to other areas of law, in one of the cases stemming from the Love Canal tragedy, the  
16 defendant urged the court to consider state-of-practice evidence on the issue of punitive damages.<sup>9</sup>  
17 The defendant, Hooker Chemicals & Plastics Corp., asserted that evidence of industry practice in  
18 negligence law is admissible to show whether it exercised due care as a means of mitigating an award  
19 of punitive damages stemming from the public nuisance claim.<sup>10</sup> Nuisance and damages in that case  
20 were brought under the theory the defendant acted in reckless disregard for the health, safety and  
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24 <sup>3</sup> 66 C.J.S. Nuisances § 43.

25 <sup>4</sup> *Minnesota Public Interest Research Group v. White Bear Rod and Gun Club*, 257 N.W.2d 762 (1977).

26 <sup>5</sup> *Id.* at 771-776.

27 <sup>6</sup> *Battelle Memorial Inst. v. Big Darby Creek Shooting Range*, 192 Ohio App.3d 287, 295, 948 N.E.2d 1019 (2011).

28 <sup>7</sup> *Id.* at 295.

<sup>8</sup> *Id.*

<sup>9</sup> *U.S. v. Hooker Chemicals & Plastics Corp.*, 850 F.Supp. 993, 1048 (1994).

<sup>10</sup> *Id.*

1 wellbeing of residents.<sup>11</sup> The first step in deciding if custom evidence comes in, according to the  
2 Court, is to determine whether or not standards and practices actually do exist.<sup>12</sup> The Court noted that  
3 where the hazard is extreme industry practice may be wholly inadmissible much less persuasive.<sup>13</sup>  
4 The Court stated, “[m]oreover, even if the defendant can show a practice existed, if that practice is  
5 demonstrably hazardous, the defendant is nonetheless liable for injury.”<sup>14</sup> The Court adopted the  
6 State’s position that industry practice cannot be given any weight unless widespread use confirms it is  
7 a custom. “In order to show a custom existed, there must be uniform, recurring circumstances.”<sup>15</sup>  
8 Though that court allowed industry practice evidence, it should be noted that in Washington State,  
9 nuisance and negligence are not to be conflated; only intentional and unreasonable acts are nuisances,  
10 while unintentional or reckless nuisances should be dealt with under negligence law principles.<sup>16</sup>  
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#### 15 **B. Defendant’s First Counterclaim Re: Constitutionality of Nonconforming Use Ordinance**

16 The Defendant’s first counterclaim seeks a declaratory judgment that Ordinance 470-2011,  
17 codified by KCC 17.460, is unconstitutional. The County incorporates the legal authority and  
18 argument set forth in Kitsap County’s Motions *in Limine* to Bar KRRC’s Counterclaims and Defense  
19 of Offset herein. The County further incorporates the Declaration of Dana Daniels and the Declaration  
20 of Karen Ashcraft filed September 27, 2011, and the Declaration of Neil Wachter filed August 10,  
21 2011 and the attachment thereto.  
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25 <sup>11</sup> *Id.* at 998.

26 <sup>12</sup> *Id.* at 1048.

27 <sup>13</sup> *Id.*

28 <sup>14</sup> *Id.*, citing *Saglimbeni v. West End Brewing Co.*, 274 A.D. 201, 80 N.Y.S.2d 635 (1948).

<sup>15</sup> *Id.*

<sup>16</sup> *Atherton Condominium Apartment Owners Ass’n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 527, 799 P.2d 250, 263 (1990), *Lewis v. Krussel*, 101 Wn. App. 178, 2 P.3d 486 (2000), Restatement (Second) of Torts § 822(a) and (b) (1979).

1 *Void for Vagueness*

2  
3 Among its constitutional arguments, the Club claims that the word “hazard” in 17.46.040(D) is  
4 vague. The Club states that it was not clear whether the County is proceeding under this section.<sup>17</sup>  
5 However, nowhere within the County’s pleadings, trial memoranda, or trial evidence has it asked the  
6 court to find that a structure on the KRRC property is a hazard and to divest such structure or the  
7 Property as a whole of its nonconforming use right. The Club has no standing to challenge the term  
8 “hazard” or this subsection of the code. As it has no relation to this matter, the County requests the  
9 Court deny the request for declaratory judgment on this issue.  
10

11 *Procedural Due Process*

12 KRRC presented no evidence at trial in support of their assertion that the Ordinance enactment  
13 process violated its right to procedural due process. The County, on the other hand, filed declarations  
14 that public notice was provided, in accordance with RCW 36.32.120(7), RCW 65.16.160 and KCC  
15 21.04.090.<sup>18</sup> The Club claims that the County was required to provide direct notice specifically to  
16 KRRC. The Club provides no legal authority for this position because there is no such requirement for  
17 a government to provide personalized notice to anyone who may have an interest before it may pass  
18 legislation. The Club also cites *Matthews v. Eldridge*, for the proposition that a property owner must  
19 be afforded an opportunity to be heard before the State can deprive that person of their property or  
20 liberty.<sup>19</sup> Having just concluded a fourteen day bench trial it is hard to know what more opportunity  
21 the Club demands. As briefed in the County’s Motions in Limine, ordinances are presumed  
22 constitutional and the burden of proving otherwise is on the Defendant. KRRC has not met that burden  
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27 <sup>17</sup> Defendant’s Response to Plaintiff’s Motions in Limine to Bar Counterclaims and Affirmative Defense of Offset, p. 11.

28 <sup>18</sup> Declaration of Karen Ashcraft, Declaration of Dana Daniels.

<sup>19</sup> *Matthews v. Eldridge*, 424 U.S. 319 (1976) (holding due process requires an evidentiary hearing prior to deprivation of a property interest such as social security benefits).



1 and the County requests the first counterclaim be denied.

2  
3 *Substantive Due Process*

4 In considering the reasonableness of a regulation protecting the public health, safety and  
5 welfare, the inquiry is whether the police power has exceeded its constitutional limits.<sup>20</sup> KRRC's  
6 Response to the County's motions *in limine* promised that "the Club will present evidence and  
7 arguments showing that the County's position that it can strip the Club of its vested non-conforming  
8 use status for even a single trivial or technical violation of law is unduly oppressive and is not  
9 reasonably necessary to solve any genuine problem of public welfare or prevent any real harm to the  
10 public."<sup>21</sup> The Club presented no such evidence at trial. As previously briefed, zoning is roundly  
11 recognized as an important exercise of police power. Nonconforming uses are protected only against  
12 immediate termination by due process concerns; their eventual termination is encouraged as  
13 nonconforming uses are disfavored. KCC 17.460 does not immediately, automatically, or definitively  
14 terminate nonconforming uses. To the contrary, the latest version lengthens the time before which a  
15 nonconforming use is deemed abandoned. KCC 17.460 also does not grant unreasonable or unfettered  
16 power to DCD to terminate nonconformities at will or impose any restriction on use it can imagine. In  
17 the instant the case, the Court will be making the initial determination on whether KRRC has  
18 impermissibly expanded so as to vitiate its grandfathered status. In the broader application of the  
19 ordinance, determinations of nonconformity are Director's decisions that may be tested against the  
20 appeal process pursuant to the standards of KCC Title 21.

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24 Finally, the Club's argument that the Ordinance is unreasonably burdensome should fail

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27 <sup>20</sup> *Powers v. Skagit County*, 67 Wn. App. 180, 185, 835 P.2d 230 (1992) citing *Presbytery of Seattle v. King County*, 114  
28 Wn.2d 320, 787 P.2d 907 (1990).

<sup>21</sup> KRRC'S Response to Kitsap County's Motions in Limine to Bar Counterclaims and Affirmative Defense of Offset, p.  
8:9-13.

1 because the Club has shown neither that the new version creates any greater burden on landowners  
2 than the previous statute or the prevailing nonconforming use law; nor that the burden to remain lawful  
3 is unreasonable. Nonconforming uses may not be expanded, may be terminated if abandoned, and are  
4 subject to subsequently enacted health and safety regulation.<sup>22</sup> To obtain a vested right, the use must  
5 have been lawful before the land use change and it must remain lawful and in compliance with health  
6 and safety regulations.<sup>23</sup> KRRC may attempt to trivialize the Count's suit, but its violation is not  
7 merely a trifling past act, KRRCs violations are numerous and ongoing. Quite distinct from the corner  
8 store immediately shut down because of an unpermitted electrical socket imagined in the Club's Trial  
9 Brief, KRRC has refused to submit to after-the-fact permits, apply for a conditional use permit, or  
10 otherwise correct or mitigate its violations.  
11

12  
13  
14 The Club may argue the County's position is that minute or technical changes in use, no matter  
15 how small, will nonetheless extinguish nonconforming use status. In fact, the County is not alleging  
16 that every conceivable change in use serves to terminate this status. The County does ask that the  
17 Court apply the standards of KCC 17.460.020 to the Club. KRRC agrees that the most analogous  
18 "use" listed in the Title 17 Use table is "recreational facility".<sup>24</sup> The Club argues that because  
19 recreational uses are allowed in the zone they are lawful thus the Club cannot be deemed an unlawful  
20 nonconforming use.<sup>25</sup> Initially, it is noteworthy that recreational facilities in rural wooded zones  
21 require a conditional use permit. More importantly, this argument ignores the very definition of a  
22 nonconforming use; that is, a use that is not allowed within a zone but is nevertheless lawful because it  
23 precedes the zoning. The Club argues that no violation of law, be it trespass, nuisance, site  
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27 <sup>22</sup> *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6-7, 959 P.2d 1024 (1998).

28 <sup>23</sup> *McMilian v. King County*, 161 Wn. App. 581, 255 P.3d 739 (Div. 1, 2011), *Rhod-A-Zalea*, 136 Wn.2d at 8.

<sup>24</sup> Defendant's Trial Memorandum, p. 28.

1 development violations, or otherwise, will terminate a nonconforming use right. Under this theory the  
2 only circumstance other than abandonment that would terminate the right is where the “use” itself,  
3 such as recreational use, becomes unlawful in the zoning code. This understanding would render  
4 meaningless nonconforming use law.

5  
6 The Club further argues that the County’s interpretation of KCC 17.460 and the “hazard”  
7 provision in subsection 17.460.040(D) unconstitutionally exceeds the County’s police power. As  
8 discussed above, the hazardous structure provision has no bearing on this case. Ironically, this  
9 argument that the County’s “unfettered and arbitrary power to strip the Club of its valuable property”  
10 is an unreasonable exercise of police power throws into sharp relief the very fact that the County has  
11 *not* done so. Though Mr. Mount testified the shoot house located in Bay 7 meets the definition of a  
12 structure, the County has never asked the Club to obtain a building permit or for the Court to find the  
13 failure to do so terminates the Property’s nonconforming use status.

14  
15  
16 Kitsap County’s nonconforming use statute comports with the accepted body of case law in  
17 Washington State; and, if anything, is less restrictive. Nonconforming use legislation was left to local  
18 governments to establish according to their local circumstances.<sup>26</sup> “In Washington, local governments  
19 are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of  
20 applicable enabling acts and the constitution.”<sup>27</sup> Kitsap County’s statute serves a valid public  
21 purpose, is appropriately targeted to affect its goal, and is not unduly burdensome on property owners.  
22 KRRC must establish proof beyond a reasonable doubt that the nonconforming use statute is  
23 unconstitutional. It has not met that burden. However, even should the Court agree with the Club, the  
24 proper remedy is invalidation of Ordinance 470-2011. Such a remedy does not prevent the County  
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28 <sup>25</sup> Defendant’s Trial Memorandum, p. 28.

<sup>26</sup> *Rhod-A-Zalea*, 136 Wn.2d at 7, *citing* R. Settle, *Washington Land Use* § 2.7(d).

1 from prevailing on its claims under the preceding ordinance, also cited in its Complaint, or the case  
2 authority.  
3

### 4 **C. Equitable Estoppel Claims Stand Apart from the Nuisance Determination**

5 Kitsap County's pre-trial motions and briefing outline the different nuisance theories under  
6 which the County has proceeded. It became clear in the Defendant's presentation at trial that it may be  
7 asking the Court, however implicitly, to merge questions of nuisance and equitable estoppel.<sup>28</sup> The  
8 Washington Practice Series discusses the questions to be addressed in a nuisance case, be it public or  
9 private.<sup>29</sup> Noting the definition of nuisance involves an unreasonable interference with the use of  
10 land, a preliminary inquiry, the treatise states, is a balancing between the rights of both plaintiff and  
11 defendant to use their properties.<sup>30</sup> Courts may also look beyond the immediate parties to see how the  
12 defendant's activities fit within the general neighborhood.<sup>31</sup> In the instant case, the consideration of  
13 whether the shooting range is suitable to the area will have limited importance given the County's  
14 contentions that the range is also a nuisance *per se*.  
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19 Though the court may use a balancing test to determine the reasonableness or utility of  
20 KRRC's nuisance noises, the Defendant's estoppel arguments relating to its dealings with the County  
21 have no bearing on whether KRRC is in fact a nuisance. The only time an equitably based argument  
22 comes into play is when a court, having determined a nuisance does exist, next decides whether the  
23 nuisance should be enjoined. Though RCW 7.48.020 states that a successful plaintiff may obtain  
24 either a warrant of abatement or an injunction, Washington courts have not held that an injunction  
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26 <sup>27</sup> *Id.*

27 <sup>28</sup> Defendant's Memorandum in opposition to Motion for Preliminary Injunction also asks the Court to equitably estop the  
County from claiming KRRC is a public nuisance, p. 16.

28 <sup>29</sup> 17 WAPRAC § 10.3.

<sup>30</sup> *Id.*

1 must necessarily be granted.<sup>32</sup> In such cases, courts may attempt to “balance the hardships” by  
2 considering the harm to the plaintiff an injunction would cause versus the harm to the public and the  
3 plaintiff should the nuisance be allowed to remain.<sup>33</sup> Within this context, should this Court find a  
4 nuisance has been created or maintained by the Club it may be appropriate to then consider the utility  
5 of the Club within the community, such as whether the community will be harmed by forcing users to  
6 go to other area shooting ranges, or whether lesser alternatives to a full injunction will correct the  
7 nuisance. However, any attempt by the Club to confuse that limited equitable decision with arguments  
8 relating to its equitable estoppel defense is inappropriate. Whether the Club relied on County actions  
9 and whether the Deed is actually a contract or a settlement has no bearing on whether the public is  
10 harmed as part of the Court’s nuisance analysis.  
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14

#### 15 IV. CONCLUSION

16 The time has come for KRRC to join the rest of Kitsap County’s property owners who obtain  
17 permits to shape their real property and who either live within the land uses allowed by zoning code or  
18 obtain a conditional use permit to engage in land uses not specifically authorized by the zoning code.  
19 Regrettably, this change won’t come voluntarily, as might have happened when the County confronted  
20 the Club with some of the land use and site development issues over five years ago. Rather, the  
21 County asks this Court to bring KRRC into the modern-day universe of local regulation and to apply  
22 Washington nuisance law to balance the equities between KRRC and the people who live, work, and  
23 play in the rest of civilization downrange. In so doing, the County asks the Court to order that the  
24 Property cease being used as a shooting range until it can apply for and receive a conditional use  
25  
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28 <sup>31</sup>*Id.*

<sup>32</sup> *Woodard v. West Side Mill Co.*, 43 Wash. 308, 86 P. 579 (1906).

1 permit, to order that the Property cease being used for shooting until physical facilities can be  
2 upgraded to prevent the escape of bullets from the Property, to order that a fence be erected around the  
3 shooting areas to keep out unauthorized users and to order that – once reopened - the Property be used  
4 for a shooting range with reasonable limits on hours of operation and on types and caliber of firearms  
5 and shooting allowed.  
6

7         The County expects that KRRC will engage in all kinds of second guessing about this lawsuit.  
8 The County trusts that the Court will make its decision on the issues absent speculating about the  
9 different theoretical avenues that might have been pursued short of a lawsuit. It is worth saying though  
10 that the disputed issues between Kitsap County and KRRC are broad enough and the outcome of this  
11 lawsuit is important enough to the quality of life for both users of the range and the range's neighbors  
12 that an injustice might have been done without submitting the parties' claims to the standard of the  
13 courtroom evidence rules and to the scrutiny of an interested and engaged judiciary. Whatever the  
14 outcome, the parties and our community owe a debt of gratitude for the Court's time and attention.  
15

16         Returning to the metaphor of an island, this case isn't about voting KRRC off of the island.  
17 Rather, the case is about restoring balance and reuniting the island with the mainland of which it is  
18 geographically already a part. Washington land use law demands that the nonconforming uses either  
19 cease or be permitted. Regulation won't be the end of life for KRRC; it will instead be the beginning  
20 of a new chapter of the Club's history in which the Club fulfills its ultimate purpose as a recreational  
21 shooting range while living within reasonable limits.  
22

23         In the same vein, an injunction to address noise and safety won't be the end for KRRC; it will  
24 force a critical re-evaluation that this Club needs in order to become the good neighbor that the  
25 residents of Central Kitsap have a right to expect. To these ends, Kitsap County asks this Court to  
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<sup>33</sup> *Hardin v. Olympic Portland Cement Co.*, 89 Wash. 320, 154 P. 450 (1916).

1 adopt its proposed findings, conclusions and orders.  
2

3 Respectfully submitted this 7<sup>th</sup> day of November, 2011.

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5 Kitsap County Prosecuting Attorney

6 *15/*  
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