Hon. Susan Serko
Department 14
November 7, 2011

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF PIERCE

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 DOES 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.

Defendant.

Case No.: 10-2-12913-3

KITSAP RIFLE AND REVOLVER CLUB'S CLOSING ARGUMENTS

INTRODUCTION

At the beginning of the trial, the Club referenced the County's organizational "schizophrenia" and bizarre, self-contradictory words and actions leading to this litigation. At the close of evidence it should be clear that the County's elected Commissioners at the highest level of authority not only agreed to set aside the concerns of a few opponents of the

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Club and chart a new course in relations with the Club, but actually championed the County's sale of the Club's formerly leased land to the Club, all the while singing the Club's praises. While the Commissioners were contemplating, planning and negotiating the land sale, there can be no doubt other elements within DCD as well as neighboring property owners brought their many concerns and criticisms about the Club to the Commissioners, including:

1. Noise from gun fire, military training, alleged automatic weapon fire, cannons, and exploding targets;
2. Safety and alleged stray bullets from the Club striking residential properties;
3. Unpermitted grading, expansion and other development allegedly in violation of County Code; and
4. The need to inspect the Club's leased property to see what violations existed.

Fully aware of these concerns, Commissioner Josh Brown, who had personally visited the Club's leased property, and the other Commissioners, made a decision that the alleged problems with the Club were outweighed by benefits it was already providing and the additional benefits it was offering to the County and its residents. Those benefits came in several forms including: 1) for decades, the Club had provided a well maintained facility for small arms civilian, law enforcement, and military training, which it is the express policy of Washington State to support; 2) the Club's timely support for the County's land swap with DNR allowed the land transaction to occur in time for the County to receive a monetary grant for its acquisition; 3) the Club's support ensured the land swap would occur because DNR wanted a three-party solution that would not jeopardize the Club, its long-time tenant; 4) the Club agreed to indemnify the County against any potential environmental liability associated with its facility and historic operations, allowing the County to briefly take title to the Club

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

property as DNR required, without assuming the unmitigated risk of environmental liability that can attach to even fleeting ownership; and 5) the Club was willing to commit to keeping its facility open to the public, thereby ensuring the availability of its significant safety infrastructure and practices to all firearms users, including those who might otherwise shoot unlawfully or in a less controlled, unsupervised environment, and aiding in the county's goal of removing shooting from smaller properties and onto established ranges.

Despite the support of the Commissioners, the evidence presented reveals that not everyone within the County supported the sale. DCD, primarily Steve Mount, did not believe the Club to be in compliance with County Code and harbored a strong desire to terminate the Club's historic nonconforming use right and place any number of conditions on the Club to restrict its operations. The Club had avoided Mr. Mount's previous efforts to condition its land use in 2005 and 2006. In 2007, when Mr. Mount was asking DNR to take some additional action against the Club regarding the cleared but abandoned 300 meter range, the Club went over Mr. Mount's head to Commissioner Josh Brown, who told the Club it would not have to deal with Mount anymore. No doubt Mr. Mount was not pleased with the Club's actions. At the time of the 2009 sale, Mount and DCD Director Larry Keaton advised the Commissioners of their opposition to the Club's then-existing facility and operations and advocated for code compliance inspections prior to the sale of the Club. Fully informed, the Commissioners decided to support the Club, then acted within their authority, laid these issues to rest, and agreed to sell the property to the Club subject only to the terms of the 2009 Deed. These terms were negotiated with the assistance of counsel and include no requirements for the Club to apply for any permits or take any corrective action whatsoever for any existing conditions.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Coincidentally, the public hearings surrounding the land transfer and the establishment of the Heritage Park allowed the Club's detractors a means to identify one another and become better organized. There is no evidence that anything changed at the Club after May 2009 to make it any less safe or less quiet, yet the complaints increased. The increase in complaints allowed Steve Mount to continue his investigation of the Club. He later learned about the details of the County's sale to the Club. The post-Deed complaints fielded by Mr. Mount were no different in nature than the ones he reviewed before the sale to the Club. Nevertheless, Mount was successful in arranging a meeting for others at DCD and the County Prosecutor's office in 2010. After hearing Mount's allegations, Prosecutor Hauge agreed to file suit, without any real discussion with the Club, investigation of the facts, or any attempt to mediate. It is telling that the DCD had the ability to issue citations or notices of violations and never did, either before or after the 2009 Deed — and it is clear the Commissioners never supported such action. DCD accomplished an end run around the Commissioners by enlisting the support of the Prosecutor's office.

Like the County Commissioners, the County Prosecutor is an elected official responsive to the voters and vested with certain areas of authority. The authority of the Commissioners includes the authority exercised in May 2009 to enter into the deed, set aside disputable issues, and insist on none of the corrective actions now sought by the Prosecutor's Office in this lawsuit.

The Prosecutor is not controlled by the Commissioners - if he were, this lawsuit would never have existed. Nevertheless, the Prosecutor's office, is a part of the County, and is bound by the prior acts and decisions of the Commissioners. The Court's first task in analyzing this case should be to determine the effect of the County's affirmative statements

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

and silent concealment regarding material issues, and the language in the 2009 Deed. By analogy, if a corporation's board of directors resolves a threatened or potential dispute, the corporate counsel cannot later file suit on it. The corporation as a whole is bound by its actors.

The written terms of the 2009 Deed overtly manifest the County's intent not to shut the Club down or require abatement of any alleged code violations or nuisance conditions, and further require the Club to remain open to the public while continuing to maintain, improve, and modernize within its historic eight acres of active or intensive use, as it had been doing. The Court should dismiss the County's claims in their entirety based on the contract and/or estoppel theories as detailed below.

If the Court finds that the 2009 Deed does not resolve noise and safety issues alleged to have existed prior to May 13, 2009, then the evidence on those issues failed to rise to the level of a nuisance for several reasons. First, the County's own witnesses on the issues of noise exaggerated the level of noise, and their testimony was inconsistent and conflicting. On the issue of safety, not one expert could state that the handful of bullets impacting the neighborhoods came from the range, especially in light of the unchallenged testimony that shots are frequently heard and makeshift shooting areas are seen in the vicinity of the Club. Moreover, the County's experts failed to prove that the Club's facility suffered from any particular design defect. In contrast, the Club presented strong evidence that the Club's facilities are comparable to or better than other similar ranges in the area, including law enforcement training ranges in Pierce and Kitsap County. Not one of the County's experts could give the County any specific long term modifications to the Club's facility. Finally, the County's reliance on the testimony of an interested witness and resident (Gary Koon)

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

who went so far as to advocate that military surface danger zones must be applied to civilian ranges, was insufficient to show the activities or considerations underlying the creation of surface danger zones have a sufficient nexus to a civilian recreational shooting range. Koon also failed to show how the U.S. Department of Energy range guidelines were appropriate for a civilian range. No County witness was able to state with any scientific evidence the likelihood that bullets are in fact leaving the range and have reached nearby houses. The evidence as to noise and safety issues has not provided the Court enough to grant any injunction to abate a nuisance.

Finally, as to the remedy sought by the County, it has not met its burden for an injunction, and it has not provided the Court with sufficient, competent evidence on which the Court can fashion the types of remedies sought.

BREACH OF CONTRACT COUNTERCLAIM/ACCORD AND SATISFACTION/SETTLEMENT DEFENSE

In early 2009, the Club learned that a land swap between the County and DNR looked likely. As part of the transaction, the Club's leased 72 acres was to become the property of the County. The Club had serious concerns as to the County becoming its landlord given an early termination provision allowing for termination before 2018. DNR expressed its desire to make sure the Club would not be adversely affected. Options discussed included extending the lease and eliminating the early termination provision.

In March 18, 2009, Commissioner Josh Brown placed comments into the public record relating to the Club's fate:

> "For over 80 years, [KRRC] has provided a much needed amenity in Central Kitsap. The land swap currently being discussed provides both DNR and Kitsap County the opportunity to consolidate parcels for mutual benefits … In the spirit of partnership, I committed to the Club members that I would

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

> recommend to the [Board of Commissioners] an extension of [the] KRRC lease to a 15 year term … I expect this planning process [for the Newberry Hill Heritage Park] will recognize the lease and the presence of the KRRC."

Ex. 291.

Regina Taylor testified she was assisting the Club to secure its position as a lessee on its leased property. She drafted an email summarizing her understanding of what was covered at a meeting. Ex. 550. The summary stated that she understood that the parties were discussing a "partnership." To that summary, she attached two draft leases which contained provisions acknowledging the Club's "grandfathered" status. No one at the County ever responded to her drafts stating that the Club's status was in question.

Taylor testified that talks regarding the land swap turned from changing the Club's lease to an outright purchase. The County wanted to insulate itself from liability by not owning the property on which the Club operated. Taylor knew that the County had obtained an appraisal stating that the 72 acres was worthless due to potential environmental liability.

Kevin Howell then suggested that the parties could avoid selling the 72 acres at a public auction because sale of land less than $2500 did not require a public auction. Howell drafted the initial deed, which contained the provision that the Club "shall confine its active shooting range facilities on the property consistent with its historical use of approximately eight acres of active shooting ranges." Taylor testified that she understood this provision to be a recognition of the validity of the Club's operations on those eight acres. The Club's surveyor then documented its active use area as eight acres. Later, Jeremy Downs documented that the area of active use at the time the lawsuit was filed was still eight acres.

Taylor testified that in her review of the draft deed she chose not to insert the term "grandfathered" because it was not a technical legal term. Instead, she chose to make clear

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

that the Club had a legal nonconforming use right that could be intensified by inserting the following language (which was an exception to the language Howell drafted regarding confining its range to the historical eight acres):

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

Then she added language about expanding beyond the historical eight acres after applying for a permit. It is clear from the final 2009 Deed that the parties were distinguishing between intensification versus expansion, which is the essential determination in whether a party has lost a legal nonconforming use right.

Taylor testified that from her discussions with Keough and Howell, there was never any doubt in her mind that the parties were acknowledging the Club's lawful status as of the date of the 2009 Deed. If the Court find that agreement is not expressly stated, there can be no doubt that covenant is implied in the Deed. See *Fuller Market Basket, Inc. v. Gillinghmam and Jones, Inc.*, 14 Wash. App. 128, 133 (1975) and *Tiegs v. Boise Cascade Corp.*, 83 Wash. App. 411, 426–27 (1996).

The 2009 Deed requires the Club to operate a shooting range for the benefit of the public. Section 4 requires the Club to conform to the FARR program to provide "increased general public access to ranges," including access by "law enforcement personnel." Access "by the public" to the Club's property "shall be offered…." It strains reason to suggest that the parties did not contemplate that the Club's operations were agreed to continue as a lawful nonconforming use right as of the date of the Deed.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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In addition, section 1 of the 2009 Deed requires the Club to indemnify the County from environmental liability. The County, though it owned the property briefly before transferring it to the Club, is an "owner or operator" under the Model Toxics Control Act. *See* RCW 70.105D.020(17). Therefore, it is partially liable. RCW 70.105D.040(1)(b). Both Marcus Carter and Regina Taylor testified that once the Club ceases to operate as an active shooting range, it is no longer viewed as a metal recycling operation and is then viewed as a hazardous waste disposal site. It makes absolutely no sense as to why the Club would have ever agreed to indemnify the County if the ongoing operations were not contemplated and agreed to by the parties—the Club would essentially be buying a useless piece of property and a large liability.

Furthermore, Matt Keough, the County's own designee for purposes of the County's deposition and an established County agent handling the sale to the Club, clearly admitted that the parties contemplated the Club's operations would continue as of the date of the Deed. Furthermore, the County could not produce a single witness who would testify that the agreement did not include an understanding consistent with Mr. Keough's, Mr. Carter's, and Ms. Taylor's. Kevin Howell was the Deputy Prosecutor who worked with Ms. Taylor to draft the Deed. He is in the same office of the Prosecutor who spearheaded this lawsuit. If he had any contradictory understanding or discussions, the Court can be sure he would have testified, given he was on the County's witness list.

Accordingly, all outstanding issues regarding the Property were settled by the Deed and the parties agreed that the Club's facility could continue to operate as it existed in May 2009. The County prosecution of this cause is a breach of the parties' agreement, and the Club asks this Court to declare it as such. If the Court is persuaded by the County's

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510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
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argument against estoppel - that the County's regulatory arm cannot be estopped by its statements and conduct of its proprietary arm - then the Club asks the Court to find the County's proprietary arm in breach. Damages will not be ascertainable until the Club discovers what if anything it will be required to do or pay. Those damages will be determined by a supplemental proceeding and entered by supplemental judgment.

ESTOPPEL

The same facts that relate to the contract claim and defense, also apply to estoppel, with some additional considerations. Given that the DCD chief code enforcement officer, Steve Mount, thought there were potential violations, the County had an absolute duty as a seller of land to disclose that belief to the Club. All of the violations that the County complains of in its lawsuit were complained about prior to May 2009. Prior to the sale, Mount specifically gave the Commissioners a status update on all outstanding issues from DCD's perspective. Oddly, this update was never communicated to the Club.

Among these issues was the replanting of the cleared area that was the proposed 300 meter range. DNR told the Club to replant it, and it did so, although it was not as successful as planned due to scotch broom growth. The Club has tried to eradicate the scotch broom. The County did not communicate that anything in particular needed to be done, and certainly did not inform the Club that any after-the-fact permitting was required. The County was also aware of complaints about noise, hours of operation, and types of firearms and targets allowed. There were also complaints about military use, alleged development and use of heavy equipment. Other complaints addressed safety. In fact, the County Sheriff had investigated several bullet strikes, but never told the Club that it believed it to be the place of origin. Neither the Club nor any person at the Club was ever cited for anything.

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Portland, OR 97204
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In addition, the County had been to the property to inspect it in 2005. Mr. Carter testified that he escorted the County investigators, including Steve Mount, through the shooting bays. These investigators never stated that any permits were needed for the berms. In fact, Mount told Carter that the grading on its historic eight acres did not require grading permits. The County again inspected the Club's facility prior to taking title to the 72 acres and then selling it to the Club. Marcus Carter testified that Matt Keough personally inspected the property and was shown anything he wanted to see. According to Keough, the County performed a Phase I environmental site assessment as a part of this pre-sale due diligence. Moreover, the County hired an appraiser to value the property and assess the contamination issues. The County did not tell the appraiser that it believed there were code violations, as is clear from the appraisal.. Had the appraiser been notified that there were potential code violations, potential litigation, and potential loss of the Club's legal nonconforming use rights, the appraisal could have been found the property to be a million dollar liability instead of assigning it a value of zero. These facts suggest that the County improperly induced the Club into the transaction so as to insulate itself from liability. In fact, the County admitted that the impetus behind the sale to the Club was the transfer of risk for liabilities associated with the property.

The County seeks equitable relief, and "[e]quity is offended by unfair dealing." *Sorrell v. Young*, 6 Wn. App. 220, 225, 491 P.2d 1312 (1971). When a seller of property fails to disclose a material fact that is not apparent to the buyer, the seller acts unfairly. *Id.* A material fact is one that significantly affects the value of the property. *Id.* In *Sorrell*, the Court held that a seller had a duty to disclose the presence of fill at an undeveloped property where the fact was not apparent to or readily ascertainable by the buyer. *Id.* The Court held

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

the seller's breach of this duty supported the equitable remedy of rescission. *Id.* The County's failure to disclose the fact that it considered the Property and the Club's operations to be in violation of law and a nuisance supports the equitable dismissal of those claims.

Under *Sorrell*, a seller's duty to disclose applies to any material fact not known or easily discoverable by the buyer, i.e., any fact that "materially affect[s]" the "value of the property." *Id.*; *see also* RCW 18.86.010(9) (defining "material fact" in the context of a real estate sale as any "information that substantially adversely affects the value of the property . . . or operates to materially impair or defeat the purpose of the transaction"). The fact that the County considered the Property and the Club's operations to be in violation of law and a nuisance is a material fact that was not known or easily discoverable by the Club at the time of the May 2009 Deed. Further, the fact that the County intended to file suit to rectify these alleged violations was also a material fact that should have been disclosed. The County had a duty to disclose that fact and failed to do so.

This conclusion is supported by case law from other jurisdictions where the presence of code violations has been deemed a material fact that the seller must disclose to the buyer. In *Barder v. McClung*, the court found the sellers, who had knowingly violated a building code ordinance by adding a noncomplying kitchen to their house, had a duty to disclose the violation to the buyer because they had "superior knowledge." 93 Cal. App. 2d 692, 694, 697, 209 P.2d 808 (1949). The court affirmed a judgment in favor of the buyers for the decrease in the property's net worth due to the violation, and noted that the duty to disclose arises when the seller "knows [the relevant facts] are not to be within the reach of the diligent attention and observation of the [buyer]." *Id*. at 697. The County's allegation that the Club property was subject to code violations at the time of the May 2009 Deed was a material fact

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

that should have been disclosed to the Club. These violations were not apparent to the Club because the County never gave the Club notice of them despite the fact that it toured the facility as part of the sale negotiations. The County had "superior knowledge" of any violations and therefore had a duty to disclose any violations to the Club at the time of the May 2009 Deed because the facts of the alleged violations were within the knowledge of the County and "could not be readily obtained" by the Club and Club did not have "means of acquiring the information." *Oates v. Taylor*, 31 Wn.2d 898, 904, 199 P.2d 924 (1948). Instead, the County "t[ook] advantage of the situation by remaining silent." *Id.*

Courts also hold that the presence of nuisance conditions is a material fact that must be disclosed to potential purchasers. In *Alexander v. McKnight*, the court found the seller owed a duty to inform potential buyers of an ongoing nuisance at its neighbor's property involving a tree trimming business, late night basketball games, and other activities resulting in excessive noise. 7 Cal.App. 47th 973, 976, 9 Cal.Rptr.2d 453 (1992). The seller argued it did not need to disclose the nuisance because they intended to comply with a court order to abate the nuisance. *Id.* The court explained that "a seller cannot take a revisionist view of history ignoring what has occurred in the past with its implicit representation to a potential buyer that the neighborhood is—and has been—an oasis of tranquility in our otherwise oppressive urban environment." *Id.* The court affirmed an award of damages to the buyer and determined the presence of a nuisance was "not a matter which will ordinarily come to the attention of a buyer" and the buyer was entitled to be "fully informed on matters affecting the value of the property," including the noise nuisance. *Id.* at 977. Here, the County never informed the Club at the time of the 2009 Deed that it considered its operations to be a nuisance, a material fact that affected the value of the property. The Club had no reason to

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

believe its operations constituted a nuisance since the County led it to believe its historic operations would be allowed to continue. If the Club's operations constituted a nuisance at the time of the 2009 Deed that is a material fact the County was required to disclose.

Finally, at the time of the 2009 Deed, the County was well aware of any code violations or nuisance conditions it now alleges are present at the Club. Thus, it had a duty to disclose this threat of litigation to the Club in the deed negotiations. In *Morgera v. Chiappardi*, the Connecticut Superior Court found that seller of real property had proven fraudulent concealment by "clear and convincing evidence" where her uncle, the seller, lead her to believe the property could be used for three and four family residences under the zoning code. *Morgera v. Chiappardi*, CV990172388S, 2003 WL 22705753, at *3 (Conn. Super. Ct. Oct. 28, 2003) *aff'd*, 87 Conn. App. 903, 864 A.2d 885 (2005). In reality, the seller had already received a letter from the city's zoning inspector informing him that he had violated the zoning regulations that restricted the property's use to two family residences. *Id*. The seller told his niece "that his attorney was handling the situation and that he was doing what the City wanted." *Id*. On remand, the court denied foreclosure of the buyer's mortgage due to equitable considerations since the seller's "intentional withholding of information for the purpose of inducing action" was fraudulent misrepresentation. *Id*.

The County's lack of disclosure is particularly glaring given the fact that it had full notice of the issues it now raises in trial. In fact, in trial, Steve Mount made it clear that the County believed as of or prior to the 2009 Deed that the Property and the Club's operations were in violation of law and a nuisance. Not only did the County's own DCD hold these beliefs prior to the 2009 Deed, but complaining neighbors had raised these issues directly to the attention of the Board of Commissioners. Terry Allison admitted this in his trial

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

testimony, agreeing that he had spoken out at public meetings in opposition to the sale to the Club and had written to Commissioner Josh Brown raising concerns regarding noise, safety, unpermitted development work, and expansion of a nonconforming use. Commissioner Brown signed the 2009 Deed without disclosing any of these material facts to the Club, which were not apparent at the time due to the County's lack of enforcement action, long silence, and prior words and actions. Conversely, the County cannot complain that the relevant information was concealed from the County prior to the2009 Deed. Prior to the sale, DNR and the Club gave the County full access to the Property. Matt Keough walked the Property, as did the County's appraiser. The County controlled the scope of its due diligence, without limitation. There was no concealment by the Club.

Moreover, it is also undisputed that the Club reasonably relied on several statements made by the County. First, in 1993, pursuant to Ordinance 50-B-1993, the County asked the Club to serve on an advisory committee for developing an ordinance covering requirements for new ranges. Marcus Carter testified that in response to concerns as to whether the pending ordinance (50-C-1994) applied to existing ranges or new ranges, a County Commissioner wrote a letter to the Club stating it was a lawful use and was "grandfathered." Further, the County never took any action related to the clearing of the proposed 300 meter range in 2005. Mount stated he issued a verbal stop work order, but there is no such thing under the County's code. At that time, Mount told the Club that if it continued with its proposed 300 meter range a CUP would be implicated, but not if the Club abandoned the project. Further, Mount told Marcus Carter that grading permits were not needed on the historic eight acres of active use. Even the pre-application meeting summary in 2005 never informed the Club that it was in violation or needed an after-the-fact permit for grading.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Thereafter, the County sent two letters to the Club stating that any open files were being closed. The Club never heard anything further until approximately nine months after the Deed was signed, when it was putting up a fence to restrict access to the Club. Given these statements, and the fact that there is no evidence that the Club knew the County deemed it to be in violation of the code, the County should be equitably estopped from asserting any of its current claims.

In light of the County's actions and inactions, and the Club's reliance on the County, it bears emphasis that the government is held to an even higher equitable standard than an ordinary seller of real estate. The Washington Supreme Court emphasizes the importance of applying the doctrine of equitable estoppel to government actions:

> "We ordinarily look to the action of the state to be characterized by a *more scrupulous* regard to justice than belongs to the ordinary person. The state is formed for the purpose of securing for its citizens impartial justice, and it must not be heard to repudiate its solemn agreement, relied on by another to his detriment, nor to perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

Strand v. State, 16 Wash. 2d 107, 118–19, 132 P.2d 1011 (1943) (quoting *State v. Horr*, 165 Minn. 1, 205 N.W. 444 (1925)) (emphasis added). Taylor was working with the County under the spirit of cooperation, partnership, and a "win-win" resolution. She was not dealing with a sharp developer, which would have required a heightened sense of caution—she was dealing with her own elected County government.

Because the County knew of these issues yet never disclosed them when selling the Property to the Club, its claims are estopped. The County has argued that doing so will impair an important governmental function and hamper its regulatory ability. That is not so. The County enjoys regulatory authority for any conduct after the Deed was executed; it is

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

only estopped from bringing claims based on issues of which it was aware in May 2009. In addition, estoppel against a local government is still appropriate where there is manifest injustice. Here, in reliance on the County's representations as well as silence the Club contractually took on an indemnity obligation it did not previously have. Moreover, the Club has invested about $40,000 of its own money plus countless hours of donated labor to improve the facility after the sale. Finally, the Court will recall that the County could not guarantee that any of the permits it wants to Club to obtain, including the conditional use permit, would be granted or on what conditions would be imposed. Without this evidence, the Court must assume that ruling in favor of the County on the change in use will result in the complete loss of the Club's nonconforming use right.

EVIDENCE REGARDING NOISE

The County had 13 witnesses testify who either had lived or were living near the Club at the time of trial. Some of those witnesses complained about sounds coming from the Club. Their testimony was inconsistent as to the dates it became a problem and the intensity of the sounds, showing that the evidence of noise based nuisance was highly subjective. The relevant testimony of those witnesses concerning the sound of gunfire is summarized below.

- **Donna Hubert:** Ms. Hubert moved several hundred yards away from the Club approximately 40 years ago. Ms. Hubert testified that a change in the noise level took place in approximately 2003 or 2004, and that now the noise is like "constant fireworks," although she admits she only hears shooting from the Club "on occasion" with her doors and windows closed. She hears shooting from 8:30 a.m. to 9 or 10 p.m. at night. As for exploding targets, she states she may have heard them a dozen times beginning in 2005. The sounds from the Club haven't stopped her from family or visitors at her house—she just doesn't enjoy sitting and listening to it.

- **Bob Kermath:** Mr. Kermath was not aware the Club was there when he moved to Whisper Ridge in 2006, and did not even hear gun fire until he heard "popping" noises in October 2007. He did not hear any explosive sounds in 2007. The noise

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
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Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

was not a problem for him until October 2007. He admitted he was not able to distinguish the sounds of automatic and semi-automatic firearms. Mr. Kermath claims the noise has become louder since 2007, and as of 2009 or 2010 he began hearing "explosions" that "rattle" his windows. Mr. Kermath's exaggerated testimony is evidenced by this last statement, which no other witness has made. He claims it is unpleasant to be inside and is awoken by gunfire, though he turns on the radio to minimize the sounds. Despite this, he hosted his daughter's wedding in 2007 and heard no gunfire that day.

- **William Fernandez:** Mr. Fernandez has lived in the area since 2002, and was not aware of the Club when he bought him home. He is about 1.5 miles from the Club. He candidly admits he had an obligation as a purchaser to investigate the surrounding property but never did so. He claims that he began hearing the noise in 2002, but that it did not become a problem until 2008. He never complained to the County until 2009, which suggests that it was not much of a problem at all. He has heard gunshots from 7 a.m. to 10 p.m. The noise is "sporadic and distant," yet he claims that somehow the gunfire is louder than his vacuum cleaner and other loud sounds in his home, even his neighbor's lawnmower.

- **Eva Crim**: Ms. Crim moved to the area in 1997 and lives about 1.8 miles from the Club. She claims she wanted a quiet environment but knew she was moving near Camp Wesley Harris. She did not know the Club existed when she moved into her residence. She lived there for seven years until she realized the Club was there (2004). She claims there has been an increase in noise and intensity since 2005. Although she hears gun fire during the Club's hours of operation, on some days she hears nothing from the Club. She has not heard any "explosions" since the Navy training stopped, which is odd, because the Navy did nothing in its training that involved explosions. Defying common sense, she has called 911 to complain about noise, perhaps to assist with the County's case, although she admits she was not in any pain from the noise. She specifically wrote to Commissioner Lent complaining about noise in 2005. Despite all of her testimony, she still admits community shooting ranges are "necessary"; she apparently just doesn't think the Club is necessary. Interestingly, her husband is not retired and is presumably home much more often; however, he never testified or complained. She does not garden as much but still gardens.

- **Terry Allison:** Mr. Allison has lived next door to the Club since 1988. He was aware that the number of people using it might increase when he purchased his home. He testified that the sounds from the Club have increased since 2001 and he believed he has heard a lot more pistol shooting. He recalls hearing exploding targets in the early 2000s. He claims shooting has increased since 2005 and that he hears shooting between 7 a.m. and 10 p.m. Mr. Allison contributed to the sound levels when he illegally shot from his property toward the East and onto and over Club property, allegedly until 2004. As for frequency, Mr. Allison recounted very limited

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

occurrences of exploding targets, cannons, and 50 BMG cartridges. He only hears "big booms" ten times a year, which includes cannons and tannerite or other exploding targets. Tannerite is rarely heard during the winter and is shot only six to eight times a year. Cannons are shot four times a year, on national holidays when noise and the sound of explosions is commonplace and expected. Mr. Allison wears hearing aids. He claims that in 1988 he would hear gunfire as early as 6 a.m. Now Mr. Allison hears shots between 7 a.m. and 10 p.m. He has no idea whether shooting was allowed until 10 p.m. prior to 2001. Mr. Allison claims that he heard shots at the Club at 2 a.m. and has had to call persons in charge, who responded right away and very well. Mr. Allison's testimony seriously undercuts the County's claims that living near the Club is like living in a "war zone" - a phrase the County used in its early pleadings and which most of the witnesses have adopted in their testimony.

- **Molly Evans:** Ms. Evans has lived in the El Dorado Hills since 1991, but claims the noise coming from the direction of the Club has only become noticeable in the last few years. She testified that there has been logging in the woods behind her house.

- **Jeremy Bennett:** Mr. Bennett testified that he moved to El Dorado Hills in January 2009, when he purchased his home from Colby Swanson (see below). Mr. Swanson apparently didn't see the noise as an issue and never informed Mr. Bennett of this supposed nuisance. Apparently, the noise issue was not significant enough for the real estate agents for the buyers and sellers to even regard the presence to the Club as a nuisance, because Bennett's agent didn't inform him of noise from the Club. Bennett's wife has friends in that neighborhood too, and they never warned them of noise either. Bennett never even knew the Club existed until a year after he moved in. He claimed when he first moved in he heard no more than what sounded like distant construction. There is no evidence of any particular sound increase during that time due to activities or changes at the Club. This is indicative of the type of "group-think" mentality of the few vocal residents who have convinced themselves that the Club is unsafe (or perhaps bad for property values) and use the noise issue as another reason to justify shutting down the Club. Mr. Bennett's "overall concern" is with safety, not noise. Sounds from the Club have not prevented him from doing yard work or using his home. His wife found out about alleged errant bullets when a neighbor came by with a petition - until then they hadn't realized there was a gun range nearby. Since he became aware of the Club in approximately January 2010, he has filed 10 to 15 complaints with the online County complaint site "Kitsap One." Bennett formed a group with other neighbors and was "instructed" by others that this site was the best place to make or file complaints. His most recent complaint against the Club was filed within the six months preceding trial.

- **Craig Hughes:** Mr. Hughes has lived in El Dorado Hills since 1989. He claims the noise has gradually increased but it is "hard to tell" when the increase occurred—"five years ago, maybe." His house has double paned windows, and so with the windows and doors closed, he does not hear gunfire much if it's raining or "socked

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

in." When it is clear, the sound is muffled, and he can then hear it with all windows and doors closed. He claims he won't have family functions in the back yard if it's "real loud out there," however, he has never tried to sell his home.

- **Steve Coleman:** Mr. Coleman moved into a house near the Club on Calamity Lane in 1981 and moved out in 2007. Coleman claims that noise increased in 2004, stating that shots became more repetitive and lights were installed at that time. Coleman states he complained to the County and communicated with Steve Mount. His complaints were about noise, automatic weapons, cannons, lighting, and hours of operation. He testified that the County was well aware of his complaints, and he had specific conversations about them with Steve Mount. Coleman testified that he actually moved because of the noise. Yet, despite all his complaints about how bad it was to live by the Club, Coleman admitted that when he sold his property to the Deals, he did not disclose it to them. They have never threatened to sue him for not disclosing the alleged nuisance conditions, and he enjoys socializing with them out on their deck to this day.

- **Kevin Gross:** Mr. Gross is a former Navy employee who has lived in Whisper Ridge since 2002. Despite living there for a number of years, the sound of gunfire only became an issue for him in 2008 after he learned that the Navy had shut down its outdoor shooting facility at Camp Wesley Harris. He "just didn't hear" gunfire prior to 2008—maybe he heard a rifle once a week or month prior to 2008. He claims the frequency and intensity of gunfire have increased from 2008 until early 2011, but has seemed to diminish since then. Gross has no intention of moving and enjoys his house. He claims to have made a number of recordings of the sounds, but never played any of them at trial or took any decibel readings. What is surprising is that given the amount of time and energy Gross put into compiling information about the Club's activities, including creating complicated summaries of events posted on the Club's calendar, he had little to say about the noise itself and whether it bothered him. Nevertheless, he called 911 several times, even though he was not in danger. He has found the noise annoying but it has never caused him headaches. He did not say he has ever lost sleep due to noise.

What is telling is that several of the County's own witnesses admitted that noise was not a problem. The following witnesses who were called for the County contradicted the other witnesses:

- **Arnold Fairchild:** Mr. Fairchild has lived in El Dorado Hills since 1989. He thinks the gunfire increased in the mid 1990s, but is unsure as to which year. The noise from the Club doesn't bother him and he does not think the Club should be shut down.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

- **Debra Slaton:** Ms. Slaton has lived in El Dorado Hills since 1999. She does not consider the sounds of gunfire an annoyance at all. Over the last several years, while walking her dog on the nearby power line trail, she hasn't noted any changes in sounds.

- **Lee Linton:** Mr. Linton has lived in El Dorado Hills for about two years. He never hears gunfire before 8 a.m. When asked whether noise is an issue, he stated that "When it's loud, it might be a bit of an annoyance, it really depends on the wind, but no. We bought within the area of the range. Ranges make noise…" Mr. Linton has never been motivated to complain about noise.

- **Colby Swanson:** Mr. Swanson purchased a home in 1990 in El Dorado Hills. He has not been awakened on the weekends or disturbed by gunfire. The only time noise was ever an issue for him was at 10 p.m., although he never lost any sleep. He sold his house in 2009 to the Bennetts for fair market value.

In addition to the County's witnesses who said noise was not an issue for them, the Club presented the following testimony:

- **Jo Powell:** Ms. Powell has lived in El Dorado Hills since 1971 and has not noticed a change in the noise. The sounds of gunfire have never caused a loss in her use and enjoyment of her home.

- **Frank Jacobsen**: Mr. Jacobsen moved to Calamity Lane in 1993. This neighborhood is very close to the Club. He lives there with his cancer-afflicted wife and autistic child. Neither he nor his family is bothered by the gunfire. He cannot hear it with his doors and windows closed.

- **Ken Barnes:** Mr. Barnes lives on Calamity Lane. He thinks the noise levels have been "just fine" since he has lived there. Barnes does not have a problem with the range as far as guns go. He believes that 99% of time the Club stays within hours of operation. He has never heard of complaints.

As this varied testimony demonstrates, perceptions regarding noise impacts are wildly inconsistent. Witnesses claim that it has gotten louder at the Club anywhere from the mid 1990s to 2009. Ten of the County's witnesses complained about noise at varying levels, while four of the County's own witnesses are not bothered by it. Of the ones who are, only a few testified with any specificity as to the intensity and frequency of the noise. Of all the County's witnesses, the person most able to perceive the sounds emanating from the Club is

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Terry Allison. However, his testimony stated that the louder noises are very infrequent and confined to holidays.

With this much subjective, exaggerated, and conflicting testimony, the glaring lack of any objective sounds measurements should be fatal to the County's case. Steve Mount admitted that the County has sound measuring equipment and that Jeff Smith even spoke with a sound expert to possibly conduct studies. The fact that the County did not produce any objective evidence speaks volumes as to how loud the sound of gunfire from the Club really is, especially at 1.5 miles away. The Court should not be left at the end of trial to guess as to how loud the Club is based on a few subjective complaints of a few sensitive people or ones motivated to see a gun range be shut down. By counting them on the County's maps, there are approximately 288 houses combined in Whisper Ridge and El Dorado Hills, with a least twice as many residents. The fact that only ten persons complained about noise is highly relevant.

Furthermore, this is a gun club that predated any of the residents who testified at trial. The fact that shooting has increased over the years should not come as a surprise, given that the County's own ordinances were designed to channel persons shooting in uncontrolled situations on private property and require them to shoot at ranges like the Club. As for the alleged impact on residents' daily lives, the testimony has been exaggerated and is also inconsistent. The witnesses who complain about the loss of use of their properties seem to conflate noise with the perceived safety risks. They must be evaluated independently. Most of the witnesses appear to limit their use of their property based on their safety concerns, which are addressed below.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

In contrast to the County's subjective and conflicting evidence, the Club's evidence shows that there has not been any significant increase in conditions producing noise. Prior to September 1993, the Club conducted military training. Military training again occurred in 2001 and 2002, and then later in 2004. However, this training was very limited and involved small arms tactical training. Marcus Carter testified that the type of training did not increase the amount of shooting, and, in fact, there were less people using the range during these trainings than there otherwise might be. Even if there were more shooting during the day when most people are at work, this cannot be considered unreasonable. The military training simply involved basic slow-fire, small-arms training similar to any legal civilian practice, and never anything like grenades, rocket launchers, or tanks. The testimony regarding automatic weapon fire is that it occurred prior to September 1993, and has always been very limited. Because it is very expensive to shoot in this manner, fully automatic weapons are shot rarely and then only in short bursts. Mr. Carter testified to these facts and Mr. LeFort verified them.

The most that could be said regarding the noise issues relates to how early or how late shooting occurs. However, not all witnesses say they can hear gunfire as early as 7 a.m. or as late as 10 p.m., and the evidence on how big of an alleged annoyance this causes is spotty. With 72 acres of buffer surrounding it, it is not unreasonable for the Club to be open during these hours so that working people can use the facility. As evidence of the reasonableness, Washington Statute provides that shooting may occur from 7 a.m. to 10 p.m. *See* WAC 173-060-050(1)(b) ("[B]etween the hours of 7:00 a.m. and 10:00 p.m. … [s]ounds created by the discharge of firearms on authorized shooting ranges" are exempt from the state regulation on maximum permissible environmental noise levels). Most of the testimony confirmed

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

shooting was generally limited to these hours, except for unauthorized persons or members who had not remembered to account for day light savings adjustments.

EVIDENCE REGARDING SAFETY

At the outset, the Court should recognize that as it relates to safety, the County has brought a public nuisance case - not a negligent range design case (although it does not appear the result would be any different under this theory). The County sought to present its nuisance case by introducing evidence of a small handful of bullet strikes in neighborhoods over a mile away. However, not one of the County's expert witnesses could say within a reasonable degree of scientific certainty that any of the three alleged bullet strikes originated from the range. On the contrary, all of the experts included a wide swath land in the area where the bullets could have originated, including areas where unsupervised shooting in known to have occurred.

- **Kathy Geil**: Ms. Geil, the only County witness who is a qualified forensic scientist in ballistics, testified that based on her evaluation, the .357 magnum Federal Ammunition brand bullet found on the Linton deck had a maximum range of 1.43 miles, when the gun was angled upward at 28–30 degrees when discharged. The Club's shooting range, including its nearest shooting bay and pistol range, was hundreds of yards farther away from the Linton property. As for the Slaton residence, to hit the house with the same angle of fall observed, Geil calculated that the muzzle velocity for 30-06 or 7.62 x 54 cartridges would have had to be 1000 feet per second, and that the bullet would need to have been shot at a 10 degree angle. However, she acknowledged that the standard muzzle velocity for those types of cartridges is approximately 2900 feet per second. Therefore, the shot likely originated well to the south and west of the Club. Mathew Noedel agreed with this aspect of her opinion. Finally, the Fairchild residence strike had too many missing variables to render any scientifically based opinion on its origin, although she was able to conclude that the bullet entered the garage door at a 45 degree angle.

- **Roy Ruel**: Mr. Ruel rendered his opinion without ever seeing the range. His work history is as a mechanical engineer in food processing, pulp and paper, and energy sectors. He has worked on approximately 13 range cases, although he only ever personally visited one or two of them. In his life, he has only shot at about 5 ranges.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

In terms of his training, he was "self taught" on ballistics and relied on two books. He categorically believes that all "blue-sky" ranges are a hazard if people are within the down-range impact zone. Mr. Ruel usually shoots at the Koko Head range in Hawaii (which is a blue sky range), but he believe that range is safe because he doesn't shoot into the blue sky. Ruel never opined there was any potential danger from ricochet. Further, he agreed that he couldn't determine the three residential bullet strikes originated from the Club, and that they could have originated elsewhere. Finally, Ruel never testified that military surface danger zones (SDZs) were appropriate to apply to a civilian community range.

- **Gary Koon**: Mr. Koon lives downrange from the Club and has a stake in the outcome of the case. He has taken basic math, and has never taken a physics course. Further, he does not have a science degree, but does have a B.A. in liberal arts. His experience relates to creating shooting ranges in the field of combat, and he works with Army's guidelines for establishing surface danger zones. He claims to know of one range on the east coast that used military SDZ, but cannot name any others. The document he refers to is the Department of Army Pamphlet 385-63. Koon relied on a third party, Dale Richter, to prepare maps of SDZs. Because Richter did not testify, the Club was not allowed to cross examine him and test the assumption underlying the maps. As such, it is unclear what Koon told Richter as it relates to the Club. All that is known is that Koon was unable to prepare the maps on his own, other than some hand drawn sketches. The SDZ maps do not account for the Club's topography, berms, or the types of targets fired on or the type of exercises performed. He was not able to say that the bullets from the three residences came from the Club. In his opinion, ricochets can go "anywhere." However, he didn't cite any source of his knowledge about ricochet because aside from his use of tracer ammunition.

Without any proof that bullets fired from the Club had actually left the property, much less struck any residences, the Court is left to evaluate whether the County proved that the mere potential of errant shots warrants an injunction. As will be discussed, the County has cited nuisance cases that deal with fear of harm and has jumbled them with cases in which actual interference has been proven. Because the County has not sufficiently proved any actual interference from errant bullets, the Court must carefully analyze the "fear" type cases which do not involve actual interference, only potential future interference.

By contrast, the Club's evidence showed that the Club has always been a safe place to shoot. There was extensive testimony as to the safety rules and ongoing education at the

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Club. The range officers undergo extensive training, and have done a good job of supervising shooters. The range has officers on-site whenever the Club is open to the public, and often when the Club is open to members only. In addition to the range officers supervising shooting, there is also video monitoring in the Club's office. The video files are kept for a period of time so that if there is a safety issue, they can be replayed to ascertain what happened. There are some members who can shoot without a range officer present, but they must first undergo a five hour training course. Few members are allowed access to the shooting bays, which are rarely used, and those members must undergo additional training. Guests are allowed, but only with a member who must monitor that guest's activities. Everyone who shoots at the Club must sign a document accepting responsibility for his/her conduct, and the "four commandments" must be read and acknowledged. There is also good signage at the Club which reinforces the safety rules.

As for the facility, the berms and backstops are primarily used to stop bullets from leaving the range. Targets are placed near the middle of the berms or backstops, or lower, to prevent bullets from going over them. The County's evidence of bullets in trees is not persuasive because there was no attempt to date the bullets, which could have been fired 50 years ago. As such, these bullets are not indicative of present day safety conditions. Ricochets are minimized using paper or steel targets. The steel targets are perpendicular to the ground, or slightly downward-facing so as to control ricochets. Terry Allison's testimony that he has found ricochets on his property is doubtful, because had he actually found ricocheted bullets on his property, he would have immediately turned them over to the County and they would have been an exhibit. Also telling is the fact that in several days of site visits not one person for the County could locate a bullet over the Club's property line.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

The Club's experts did not see any safety concerns, and noted the severe evidentiary deficiencies related to the County's suggestion that the bullets found at nearby residencies actually came from the Club. In addition, all of the Club's independent experts did not see a safety concern with the height of the berms and backstops.

- **Scott Kranz:** Mr. Kranz is a consultant at AMEC. He has significant expertise in hands on work assisting facilities with range design and safety issues, and has worked with private, public, military, and law enforcement use ranges. He is not a professional witness. Shortly after the County sued the Club, Kranz conducted a preliminary assessment of the Club's property. He had no concerns. Closer to trial, Kranz revisited the Club and spent more time inspecting the facility and evaluating the Club's rules, policy and procedures. He also inspected the Club's berms and backstops. Next, Kranz studied other ranges in the Pacific Northwest (including the Bremerton Police Department range where the County's Sheriff's Office shoots) so that he could compare them to the Club. Kranz concluded that the Club's facility meets or exceeds the local standards of the shooting range industry. His testimony and photos of the Bremerton Police Department show that its berms are shorter than the Club's. The Bremerton range is a fair comparison to the Club because both ranges are used for standard target shooting and small arms tactical training. The Club asks the Court to read his report in full prior to rendering a decision.

- **Marty Hayes**: Mr. Hayes is a former law enforcement officer and has extensive experience with ranges and small arms training. He designed and built his own blue sky range. Mr. Hayes conducted an additional assessment of ranges near Pierce County and Kitsap County. He concluded the Club meets or exceeds the industry standards for ranges in the Puget Sound area. He also saw no unusual hazards with the Club's facility that would create an unreasonable risk of harm to shooters or the public. Of the nine ranges in Hayes' report, seven out of the nine were partially or completely blue sky ranges. Of these seven ranges, six had houses within striking distance. Five of these seven ranges allowed practical/action shooting or tactical shooting. Only two out of nine ranges were fully baffled. Hayes' photos reveal that a number of fully or partially blue sky ranges operate in areas where houses, roads and business are a short distance away. Based on the testimony, the Club is just as safe (if not more) as the Tacoma Police Firing Range and the Pierce County Sheriff's Training Range. These ranges have tactical/practical shooting as well as standard target shooting, with housing developments directly down-range. Hayes testified that law enforcement training is not any safer because of the skill of the shooters than a community range, and that in fact, it is actually the opposite. Finally, Hayes testified that the there are no extra risks presented by the Club due to the action shooting sports that periodically occur at the range. It is one of the safest sport shooting disciplines, is heavily supervised, and requires additional training for participants.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Such shooters balance speed and style with accuracy, but accuracy is what wins the competition.

- **Mathew Noedel**: Mr. Noedel explained the serious limitations in attempting to scientifically calculate trajectories with missing data. He testified that the Linton and Slaton bullets did not likely come from the Club because of the distance of the Club to the Linton residence and the fact that the shot that struck the Slaton residence was likely shot from well behind and to the west of the Club (based on the estimated angle of fall). Geil agreed with Noedel regarding his analysis of the Linton residence and agreed that the Slaton bullet has a muzzle velocity of about 2900 feet per second (the bullet would have had to have been fired with a muzzle velocity of about 1000 feet per second to reach the Slaton residence in the way that it did). Noedel noted that there was no real explanation as to why anyone would have wanted to modify a bullet to reduce its velocity for basic target shooting. Noedel further explained that ricochets are not as unpredictable as Gary Koon stated, and that shooting at properly placed paper or metal targets allowed for predictable ricochet. He also explained that bullets typically lose much of their energy when they strike a berm or a metal target and thus did not see any unusual hazard presented by ricochet. Noedel commented on the SDZs advocated by Koon, including the "bat wings," and stated that the manual used by Koon has a small section on small arms fire and primarily addresses activities such as rocket propelled grenades and other tools of war. As such, shooting at irregular military targets like a jeep or tank would present greater variation in predictability of ricochets than would shooting into a berm or shooting a steel target. Finally, Noedel testified that it would be difficult for a shooter to be aiming at a target and launch a bullet over the berms or backstops.

In addition to this expert testimony, other strong evidence exists which provides further confirmation the Club operates safely:

- Arnold Teves stated the Navy came out to check the range before it allowed training to occur. The fact that training was allowed necessarily means that the Navy found the Club's facility safe for the Navy's purposes.

- Marcus Carter testified that he provided the Navy with access to inspect the range and overhead photos of the surrounding area and layout of the Club prior to the Club being approved for Navy training.

- Mr. Carter also testified that the Club, in partnership with the County and DNR, developed a "take it to the range" program where County personnel handed out vouchers to persons caught shooting in the woods that entitled them to a free visit to the Club.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

- Kitsap County Sheriff deputies continue to shoot at the Club's charity events, such as the Courage Classic, as do a number of other law enforcement agency personnel. The fact that the County's own personnel shoot at the Club demonstrates that these trained County law enforcement officers believe the Club is safe. If the County really thought the Club was unsafe, it should have instructed its employees not to shoot at the Club.

- In a resolution related to the sale of the property to the Club, the County Commissioners stated that a portion of the property to be transferred currently leased to the Club was "[f]or use as a shooting range." This resolution "recognized a need to preserve and rehabilitate shooting ranges that provide important benefits to the public for access and recreation, use by law enforcement and military personnel, use for firearm training, competition and hunter safety education classes," and that the Club" currently meets the stated need for Kitsap County by its operation of the shooting range as a private nonprofit facility." The resolution concluded "it is in the public interest for firearm safety as well as in the best economic interest of the County to provide that KRRC continue to operate with full control over the property on which it is located."

- Finally, the Court must seriously consider the lack of evidence that in 86 years anyone has ever been hurt downrange, or that a bullet strike has been scientifically linked to Club activities.

NUISANCE

The County brought this action under theories of statutory nuisance, common law nuisance, public nuisance, and nuisance per se.

As an initial matter, the Club's operation is not a "nuisance per se" under state law, which sets forth an enumerated and finite list of what constitutes a nuisance per se. *See* RCW 7.48.140; RCW 9.66.010. In addition, the Kitsap County Code's definition of nuisance per se requires finding that an activity is unlawful - the very question at issue here - and so provides no guidance in determining whether the noise and safety issues raised constitute a nuisance. *See* KCC 17.110.515. Furthermore, the County concedes that nuisances per se are "not permissible or excusable under any circumstances." Pl. Trial Brief at 29 (citing *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998)). However, because the Club's operations are

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

not forbidden under state or local law, and because the County believes that a conditional use permit could allow the Club to operate as a recreational use facility, the County did not prove the Club's operations are not impermissible under all circumstances. Therefore, they cannot constitute a nuisance per se under the Kitsap County Code.

Despite the different claims and labels for nuisance forwarded by the County, the relevant question in each boils down to whether the Club's use of property is unreasonable under the circumstances so as to constitute a "public nuisance."[1] *See Shields v. Spokane Sch. Dist. No. 81*, 31 Wash. 2d 247, 257, 196 P.2d 352, 358 (1948). A public nuisance arises from an act that "*significantly* affects, injures, or endangers" (i.e. safety) or by acts "*unreasonably offensive* to the senses" (i.e. noise). KCC 9.56.020(10)(a) (emphasis added); *see also* RCW 7.48.120; 9.66.010(1) (providing similar terminology). Determining reasonableness ultimately involves equitable balancing and examination of the totality of the circumstances. PROSSER ON TORTS 604 (4th ed. 1971) (cited in *McKinney v. Ostrovsky*, 126 Wash. App. 1014, 2005 WL 518985, at *11 (2005)). Because the County has failed to establish that the Club's activities *significantly* endanger the public or that the noise caused is *unreasonably* offensive, the claims for public nuisance must fail, especially considering the equitable factors that tip in favor of the Club.

A. The County has Not Proven Sufficient Fears to Establish a Public Nuisance

Realizing that it had no competent, scientific evidence that could establish that errant bullets had originated from the Club, the County instead relies upon various cases in which a community's non-speculative, well-founded fears of an imminent harm were sufficient to

[1] RCW 9.66.010(1); RCW 7.48.130; *see* KCC 9.56.020(10)(a).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

constitute a nuisance after showing that the fears also resulted in a decrease in property values. Pl. Trial Brief at 28–29. The Club's operations do not meet the high standard established in these cases.

"[An activity will be] enjoined as a nuisance where its construction creates fear and dread of [imminent harm], which will result in a depreciation of the value of adjacent property, and where it will affect the mind, health, and nerves of the occupants thereof." *Ferry v. City of Seattle*, 116 Wash. 648, 663–664, 203 P. 40 (1922). For the fear to be grounds for a nuisance claim, there must be a reasonable expectation of significant disaster to sufficiently proximate individuals that would result in the depreciation of property values. *City of Cle Elum v. Owens & Sons, Inc.*, 143 Wash. App. 1057, 2008 WL 934080, at *5 (2008) (paraphrasing the holding in *Ferry*). The evidence and testimony offered by the County failed to prove a reasonable expectation of significant disaster, which causes a depreciation of property values. Thus, the naked fears held by the neighbors are not sufficient to rise to the level of a public nuisance under the safety line of nuisance cases.

For a fear to be reasonable, there must be "*no speculation* that the objects of fear … were either already present or would be manifest due to the very operation or existence of the facility." *City of Cle Elum*, 2008 WL 934080, at *5 (emphasis added). Instead, there must be "*evidence* of the *probable breaking* of the reservoir … [and] a *reasonable expectation that disaster would happen*." *Aubol v. City of Tacoma*, 167 Wash. 442, 449, 9 P.2d 780 (1932) (emphasis added). This fear must be "well-founded," as was the fear that a garbage dump would allow for the breeding and spreading of pests, and would create smoke, odor, and fire hazards to nearby residents. *See Harris v. Skirving*, 41 Wash. 2d 200, 202, 248 P.2d 408 (1952). Here, there is much speculation, but very little hard evidence that the Club's

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

activities pose a risk of harm. As such, any fears harbored by neighbors are not well founded.

Not only must these fears be non-speculative, but the fear must address a potential public consequence of great magnitude to very proximate[2] citizens. *Aubol*, 167 Wash. at 450; *see also City of Cle Elum*, 2008 WL 934080, at *5 (describing this factor as "the inherent magnitude of potential disaster"). In *Ferry*, if the dam collapsed onto residential neighborhoods below, very serious consequences would ensue. In *Everett v. Paschall*, building a tuberculosis sanitarium in an established residential neighborhood could have led to mass disease outbreak. *See* 61 Wash. 47, 51-53, 111 P. 879 (1910). Likewise, in *Champa v. Washington Compressed Gas Co.*, the potential consequence of a natural gas explosion in a residential neighborhood was a very serious consequence. *See* 146 Wash. 190, 262 P. 228 (1927). In this case, by comparison, the County's experts testified about a grand total of three bullet strikes over a 20 year period, and the forensic ballistics expert's analysis actually suggested the bullet strikes at Linton and Slaton could not have come from the Club. The Fairchild strike was inconclusive. This dubious and skimpy evidence of potential consequences from the Club's activities in this case do not rise to the level of mass destruction, disease outbreak, or the potential to be located within a blast radius.

In addition, the County has offered no evidence that these fears have "continuously depreciate[d] the values of [their] properties to a material extent." *Cf. Park*, 24 Wash.2d at 800; *see also Ferry*, 116 Wash. at 663–64. In *Park*, because the sanitarium for mentally

[2] A fear is reasonable when those affected by the fear are in immediate proximity to the alleged hazard. *Compare Ferry*, 116 Wash. at 663 (fearful residents lived within the "shadow of the reservoir") with *Aubol*, 167 Wash. at 443 (residents living eight miles away from a similar dam lacked immediate proximity and thus their fears were unreasonable).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

handicapped would be *placed* into "a community which has been settled and long used as a residential district," decreases in property values were going to ensue. 24 Wash.2d at 800. In this case, the Club pre-exists residential development in the area such that any depreciation in property values was likely capitalized on by the very neighbors now complaining about the Club's impact. No property owner testified that he or she could not sell their house or lost money on a sale. On the contrary, both Colby Swanson and Steve Coleman sold their houses for fair market value. In the case of Coleman's home, he was one of the closest residents near the Club and has received no complaints from the new owners with whom he socializes at their (his former) home. In the absence of evidence suggesting the Club's activities have substantially or unreasonably interfered with the public at large, its claim of a public nuisance is without merit and must be dismissed.

B. Even Assuming Errant Bullets Have Occasionally Left the Club Property, There Would Still Be No Actionable Nuisance

The County has offered no credible, reliable scientific evidence that bullets have actually left the range, and instead presents merely speculative circumstantial evidence of bullet strikes in areas where there is no dispute that other shooting is occurring. Nevertheless, the mere possibility of bullets occasionally leaving the range does not mean that the Club constitutes a "nuisance." In an analogous factual setting, the Michigan Supreme Court held that the possibility of errant bullets leaving an outdoor shooting range and even killing or injuring someone is insufficient grounds for finding a nuisance. The court explained:

> "Plaintiffs urge, however, that if a gun is raised 3 1/2 degrees from level, a bullet will clear the backstop and could kill someone upon its descent; further, that a gun can accidentally be discharged over the side walls. *These things*

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

> *conceivably could happen*. The fact that baseballs may be hit out of parks, *that golfers may hook or slice out of bounds*, that motorists may collide with pedestrians or other motorists (an automobile is considered 'a dangerous instrumentality') *does not render such uses nuisances*, subject to being enjoined."

Smith v. Western Wayne County Conservation Ass'n, 380 Mich. 526, 543, 158 N.W.2d 463, 472 (1968); *accord Lehman v. Windler Rifle and Pistol Club*, 1986 WL 20804, *2 (Pa. Com. Pl. April 9, 1986) (testimony that neighbors heard bullets "whizzing by them" and that bullets were found "embedded in their barn" was insufficient to support injunction against gun club). The court in *Smith* further explained that there was no history of any accidental shootings at the range in question in all its years in operation, indicating that "chances of an accidental shooting are remote, largely speculative and conjectural, and completely insufficient to establish a nuisance in fact." *Smith*, 158 N.W.2d at 471. More recently, the Indiana Court of Appeals held that a shooting range did not constitute a nuisance even though it was theoretically possible for bullets to leave the property and neighbors testified about bullets landing on their property. *Woodsmall v. Lost Creek Townsend Conservation Club, Inc.*, 933 N.E.2d 899 (Ind. Ct. App. 2010).

In addition, to find and actionable nuisance, the court must balance the equities in determining whether the challenged activity is unreasonable. PROSSER, *supra*. Whether the plaintiff has "come to the nuisance" one such important equitable factor in considering whether an actionable nuisance exists. *Id*. at 611. Under the doctrine of "coming to the nuisance," a "[p]laintiff is barred by his voluntary choice of a place to live, particularly where the defendant activity is one in which the public has a major interest." *Id*. at 611 (citing *Powell v. Superior Portland Cement*, 15 Wash. 2d 14, 129 P.2d 536 (1942)). In

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Powell, the court noted that plaintiffs who moved into a town centered on a cement company knew what they were getting, and because of the company's public value, refused to find a nuisance. 15 Wash. 2d at 18. Similarly, in this case, the residents have moved into the neighborhoods surrounding the Club and knew or should have known they would be exposed to the sound of gunfire. Ex. 296. Also, ample evidence at trial has demonstrated the Club's public value in teaching the public, law enforcement officers, and members of the military how to properly and safely handle and shoot firearms.

Courts have applied similar balancing with respect to coming to the nuisance in the rather analogous situation of golf courses, which pose the risk of errant golf balls leaving the range at great speed. For example, in *Hellman v. La Cumbre Golf & Country Club*, the court found that the golf course did not constitute a nuisance because the neighbors came to the nuisance. 6 Cal. App. 4th 1224, 1231, 8 Cal. Rptr. 2d 293 (2d Dist. 1992). Further, in *Patton v. Westwood Country Club Co.*, the court found that a golf course was not a nuisance because property owners had come to the nuisance, and, importantly, the course had taken steps to increase safety. 18 Ohio App. 2d 137, 141–42, 247 N.E.2d 761 (8th Dist. Cuyahoga County 1969). By comparison, where a golf course was designed so as to actually allow balls to continuously escape the range, a nuisance was found. *Gellman v. Seawane Golf & Country Club, Inc.*, 24 A.D.3d 415, 417, 805 N.Y.S.2d 411 (2d Dep't 2005).

The County cannot meaningfully distinguish these instructive cases, especially considering the equitable factors that heavily weigh in the Club's favor. During the 80-plus years in which the Club has operated at the property, there have been no reports of injuries or accidental shootings. Thus, the record does not establish that the Club's normal shooting activities pose an unreasonable risk of harm, especially considering that many neighbors

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

have come to the alleged nuisance, and the Club has attempted to increase safety. Unlike *Gellman*, the County has not proved that the Club has deficiently designed the range so as to allow bullets to continuously escape. In fact, the evidence actually shows that the Club's range is comparable to or better than other similar ranges in the area. Moreover, the range was recognized as an important controlled location for firearm discharge and a safe alternative to unregulated shooting in the nearby woods.

C. The County has not Proved that the Club's Noise Constitutes a Nuisance

Having provided no decibel readings or objective measurements to quantify unreasonableness, and in the face of conflicting testimony from neighbors, the County has failed to show that the noise emanating from the Club is "*unreasonably offensive* to the senses" of the public. KCC 9.56.020(10)(a) (emphasis added). "[S]ound … whenever it becomes sufficient to injuriously affect residents in the neighborhood, is actionable … To become actionable … the inconvenience must be '*something more than fancy, delicacy, or fastidiousness*.'" *Rea v. Tacoma Mausoleum Ass'n*, 103 Wash. 429, 434-35, 174 P. 961 (1918) (emphasis added). "[O]ccasional minor annoyances" and "ordinary noise" are not sufficient grounds to establish a nuisance. *McKinney*, 2005 WL 518985, at *11. In the context of gun club-neighbor disputes, "[r]elief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff. To be workable, relief must be based upon an objective standard of reasonableness." *Smith*, 158 N.W.2d at 470.

In this case, the standard cannot be based on how particularly sensitive individuals perceive the noise impacts. Here, the County relied upon particularly sensitive residents, as is evidenced by the fact that Kevin Gross, Molly Evans, and Eva Crim all called 9-1-1 when

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

they thought the noise from the Club was too loud. Their irresponsible conduct is not reasonable, especially when they tie up emergency operators to complain about gunfire from a supervised, orderly, and well established range over a mile away.

The County's failure to establish an objective standard for reasonableness likewise makes it very difficult for the Court to fairly or rationally abate the nuisance to limited extent required. PROSSER, *supr*a ("[A] public nuisance may be abated … only to the extent necessary to protect" the interests at stake). As such, this indicates insufficient proof of the alleged nuisance.

Not only has the County failed to demonstrate that the Club has exceeded an objective standard for noise, but the balance of the equities again tips in favor of the Club. As noted above, the complaining residents came to the nuisance and the Club provides sufficient benefits to the community. *See Superior Portland Cement,* 15 Wash. 2d at 18; Ex. 296. Moreover, "the extent to which others in the vicinity are causing a similar interference" should be considered. PROSSER, *supra*. As such, the fact that residential growth has caused a number of noise-buffering trees to be felled is an important factor for the Court to note. Combined, these various factors militate against finding a public nuisance based on noise impacts to hypersensitive neighbors.

D. The Fact that the Club is Within Industry Design Standards is Another Highly Relevant Factor for the Court to Consider in its Nuisance Analysis

Ultimately, the key question in any nuisance case is whether a defendant's conduct is reasonable. While the presence of similar activities or annoyances in the vicinity does not operate as an absolute defense to a claim of nuisance, the existence of similar activities and businesses in the community is still a factor to be considered when determining whether a

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

challenged activity and its effect on neighboring properties is unreasonable. 66 C.J.S. *Nuisances* § 22 (2011); *Waier v. Peerless Oil Co.*, 251 N.W. 552, 552-53 (Mich. 1933) (presence of other industrial plants in area which were also causing odors can be considered in evaluating whether defendant oil refinery constituted nuisance). This is especially true when the plaintiff itself maintains similar types of activities. 66 C.J.S *supra*; *Carter v. Chotiner*, 291 P. 577, 578 (Cal. 1930) (court could properly consider fact that plaintiffs themselves maintained sources of water pollution in determining that neighboring cemetery that allegedly fouled groundwater did not constitute a nuisance). The fact that the Kitsap County Sheriff's Office shoots at a similar range is highly relevant.

Similarly, the court can also consider whether the challenged activity complies with the customary standards and practices used in the specific industry or type of business at issue. *See, e.g.*, *Wymer v. Dagnillo*, 162 N.W.2d 514, 518-19 (Iowa 1968) (42 inch fence topped by sharp prongs did not constitute nuisance where evidence established that the type of fence at issue was "commonly used and a standard of the industry"); *Daigle v. Continental Oil Co.*, 277 F. Supp. 875, (W.D. La. 1967) (emission of black substances and dust from coke plant did not constitute nuisance where defendants "have shown that the design and operation of their plants are in accordance with the highest standards and practices of the industry"); *Pelletier v. Transit-Mix Concrete Corp*., 174 N.Y.S.2d 794, 802 (N.Y. Supr. Ct. 1958) (concrete facility did not constitute nuisance where evidence established facility operated "with the best and most modern equipment and in conformity with usual custom and proper practices."); *Gray v. Grand Trunk W. Railroad*, 91 N.W. 828, 832-33 (Mich. 1958) (annoyances caused by "necessary and proper" operation of railroad did not constitute nuisance). For example, a brass foundry that operated until 3 a.m. and was "seriously

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

annoying and disturbing to nearby residents" was found to not constitute a public nuisance where the foundry "operated in conformity with usual custom and practices, and possibly in accordance with best known practices." *People v. Accurate Brass Co.*, 69 N.Y.S.2d 306, 306-07 (N.Y. Supr. Ct. 1947); *see also Alexander v Wilkes-Barre Anthracite Coal Co.*, 98 A. 794, 795 (Pa. 1916) (vibrations and dust from mining plant did not unreasonably interfere with neighboring property where plant "adopts and uses the precautions usually and customarily prevailing in the operation of such plants" and community contained similar operations). In another case, the operation of chicken houses which kept neighbors awake with the sound of squawking, banging of crates, and truck noise, and produced odors from manure and dead chickens, did not constitute an actionable nuisance where the operation was otherwise customary for similar farms in the area and waiting two days to remove dead chickens was "standard practice." *Wetstone v. Cantor*, 127 A.2d 70, 72 (1956).

The other reason that a comparison of the Club to other ranges is relevant is that the County in selling the property to the Club required:

> "5. Grantee agrees to operate the shooting range at all times in a safe and prudent manner and conform its activities to accepted industry standards and practices."

The County has made no showing whatsoever that the Club has not complied with this requirement. It is telling that the County's lawsuit is completely devoid of a claim to enforce the contract that set the standard for the Club's operations. The County could have drafted much more specific language, limiting the hours, the type of shooting, the firearms allowed, requiring baffles, yet it consciously chose not to, despite the prior citizen complaints. The Court should hold the Club to the standards of conduct negotiated by the parties in the Deed.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

The Club has faithfully complied with Section 5 of the Deed. Rather than abide by the agreement in the Deed, the County asks this Court to play range designer, deciding whether baffles are needed, and whether berm height is sufficient. The County's experts could not tell the Court what specific improvements were required. Moreover, the County's reference to the NRA Range Sourcebook is unhelpful—it says it does not create standards. The Club specifically requests the Court to review the following section of this NRA publication: Sections 1.02.5, 2.01.1, 2.01.4, and 3.04.5. Finally, Forcing the Club to undergo a CUP process, when the County cannot say that the Club will be granted a CUP or under what conditions, fundamentally alters the bargain struck between the two entities, thus changing the material terms, understanding and agreements.

RELIEF REQUESTED

I. DECLATORY RELIEF

A. The County has not Shown that the Club Changed its Nonconforming Use, and so it is not Entitled to Declaratory Relief

The County alleges the Club has lost its non-conforming use right because it has changed its use. The Club's historic use prior to 1993 was that of a gun club or shooting range, which Kitsap County considers a type of "recreational facility" under its Zoning Code. *See* KCC 17.110.647. The Zoning Code does not distinguish between different types of gun clubs or shooting ranges. The Club's current and past use since 1993 has always been that of a gun club or shooting range for use by civilians, law enforcement, and military. The Club's use of its property for educational activities, such as self-defense classes and small arms military training, is, according to the testimony of Jeff Rowe, a subordinate use that does not change the nature of the predominate use of the property. If Boy Scouts engage in

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

educational activities at a public park—which is another type of recreational facility under the Zoning Code—that does not make the park an educational facility or constitute a change in use. The Club's predominate use of its property has always been that of a recreational facility, and that remains the present use today. Therefore, the County's request for declaratory relief that the Club's use has changed should be denied.

B. The County has not Proved that the Club's Use is Unlawful within the Meaning of the Amended Nonconforming Use Right, and so it is not Entitled to Declaratory Relief

The County alleges the Club's "use" of its property is "not otherwise lawful" within the meaning of its recently amended nonconforming use statute. The relevant evidence does not lead to this conclusion. Jeff Rowe testified that "recreational facility" is not a prohibited or unlawful land use in Kitsap County. Further, the Club is not located in a "no shooting" zone. Moreover, the 1993 and 1994 shooting range permit ordinances (Ordinance 50-B-1993 and its subsequent amendment, Ordinance 50-C-1994) were intended to apply only to new, proposed shooting ranges, and not to the established shooting ranges existing at that time. This intent is apparent from the ordinance and was communicated to the Club while it was sitting on the Committee created by Ordinance 50-B-1993 to advise the County regarding the amendments that would be codified in Ordinance 50-C-1994. Until this lawsuit, the County never communicated to the Club that any portion of its operations within its historic eight acres would require a shooting range permit under the 1993 or 1994 ordinances.

The only alleged illegality arising at the Club property subsequent to the 2009 Deed relates to the accidental fill introduced into a wetland at the location of the Club's historic boat launch. However, the Club has used this area since prior to 1993 for hunter safety

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

education and it was historically used for duck hunting. The area of fill is approximately 61 square feet, its volume is approximately 1/3 of a cubic yard (about the amount of dirt one can haul in a wheel barrow). Further, the U.S. Army Corps of Engineers and the State Department of Ecology, which are the Federal and State regulatory agencies with jurisdiction over wetlands, have taken no formal enforcement action of any type related to the boat launch. As such, any further action under State or Federal law related to the boat launch will be in the form of "coverage" under Clean Water Act Nationwide Permit 18, which is routinely used after-the-fact to approve small amounts of accidental fill in a wetland.

II. INJUNCTIVE RELIEF

As discussed above, the evidence and testimony will prove that none of Kitsap County's allegations have any merit, let alone support the "extraordinary" remedy of an injunction. *Venegas v. United Farm Workers Union*, 15 Wash. App. 858, 860, 552 P.2d 210, 212 (1976). ("Injunction is an extraordinary and discretionary remedy.") However, if the Court does find in favor of the County on some of its claims, it does not mean that an injunction should automatically follow. Even if an injunction is issued, it should be narrowly tailored to remedy the actual violations identified by the Court.

A. The County Has Failed to Prove Sufficient Safety Concerns as to Warrant the Enjoining of the Club's Operations

Siting concerns about safety, the County seeks to enjoin the Club's operations until it is in compliance with all applicable regulations. Apart from the fact that the County has failed to adequately prove that the fears harbored by neighbors violate any legal standards, its request for an injunction regarding compliance with *all* standards—including those related to development—is not narrowly tailored and lacks sufficient nexus to the alleged issues. *See Kitsap County v. Kev, Inc.*, 106 Wash. 2d 135, 143, 720 P.2d 818, 823 (1986) ("Injunctions

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law."). Thus, it makes no sense to shut the range even if the Court finds some technical code violations. The scope of injunctive relief requested is thus too broad. Accordingly, the Court should deny the County's request for relief.

B. The County's Request for Injunctive Relief Requiring Permits for all Past Changes and all Future Uses is too Broad and Vague to Enforce, Especially Considering the Equities Tipping in the Favor of the Club

As a starting point, the County has failed to prove with any specificity which uses or activities violate which code provisions, when these violations occurred, and which permit must be obtained so as to remedy the particular violations. The County has provided a series of aerial photos, but has not proven when the alleged violations occurred, or if individual instances of work actually violated the County Code. County witnesses testified that a project involving movement of more than 150 cubic yards of fill (approximately 12-15 dumptrucks) requires a permit. The County never proved that any one project exceeded that threshold. The Club frequently hosts day-time work parties, and these features such as berms were changed incrementally as time permitted through a series of separate projects. An aerial photo in a particular year does not prove that one single project accounts for any changes seen from the prior year..

Further, in determining whether to issue an injunction, courts should only look only to current violations and the likelihood of future harm, and not past events. *Braam v. State*, 150 Wash. 2d 689, 708-09, 81 P.3d 851, 861-62 (2003). Accordingly, only the threat of future harm or ongoing violations can support injunctive relief and the Court should not consider allegations of past violations or conduct in deciding whether to grant relief.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

With that in-mind, in order to issue an injunction requiring the Club to obtain permits for future uses, the Court will have to determine whether the ongoing violations or threat of future harm is significant enough to warrant an injunction. *San Juan County v. No New Gas Tax*, 160 Wash. 2d 141, 153, 157 P.3d 831, 837 (2007) (setting forth standard for granting injunctive relief). To this end, the court must also consider various factors, including:

> "(a) the character of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if any, in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interest of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment." *Lenhoff v. Birch Boy Real Estate, Inc.*, 22 Wash. App. 70, 75, 587 P.2d 1087, 1091 (1978).

These factors weigh heavily against granting broad injunctive relief even if the Court finds ongoing violations or significant threat of future harm. For instance, the County's inexplicable delay in bringing this enforcement action, when it knew of the same accusations of code violations against the Club since at least 2005, indicates the County felt whatever was occurring at the facility did not pose a serious or immediate threat to the public. In addition, the Club has not engaged in "misconduct" because not only did the County acquiesce in the Club's modernization of the range, it expressly allowed it under the 2009 Deed.

More importantly, the court must balance the harm to the Club with the interests of the public. Under this balancing of the equities, Washington courts have denied injunctive relief where the burdens on the defendant in strictly complying with the restrictions on use of property outweigh the harm caused by the non-compliance. For example, it was proper to deny an injunction that would force a property owner to remove a building that was out of

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

compliance with a subdivision's covenants and restrictions where the burden on the property owner would by high and the harm to the other residents of the subdivision was minor. *Hoff*, 22 Wash. App. at 76; *see also Hanson v. Estell*, 100 Wash. App. 281, 289-90, 997 P.2d 426, 451 (2000) (refusing to grant injunction to require removal of building encroaching one foot onto another's property where burden of removing building substantially outweighed harm to neighboring property caused by encroachment). Accordingly, the Court should deny the County's request for relief.

C. The County's Request to Prohibit Shooting at the Range until it is in Compliance with all Code and Range Safety Standards is too Broad and Vague to Enforce, and will Lead to an Increase in Unsanctioned, Unmonitored Shooting Activities

In addition to the vagueness of the relief sought, and the insufficient nexus shown between safety concerns and non-compliance with development codes, the County has failed to establish a concrete set of range safety standards that should apply to the Club, and that the Club has failed to comply with those standards. In fact, expert studies show that the Club is operated just as safely, if not more safely, than other comparable ranges in the Northwest, including some used by law enforcement agencies.

Moreover, prohibiting shooting operations on the Club property would lead to unsanctioned, unmonitored shooting on the Club property's in unincorporated Kitsap County. Under the current gun range ordinance in Kitsap County, shooting is prohibited on any parcel less than five acres in size. KCC 10.24.090(b)(2). Thus, as owners of 72 acres of land in unincorporated Kitsap County, the Club's owners would be allowed to discharge firearms on their land. *Id*. As such, due to the vagueness of the County's request, prohibiting the Club from operating its range would not prevent people from shooting on the Club's land, but

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

would prevent the Club from offering its valuable public safety resources. *See* Ex. 296. Accordingly, the Court should deny the County's request for relief.

D. The County has Not Adequately Identified and Demarcated the Offending Development, Clearing, and Wetland/Stream Buffer Activities and so Injunctive Relief is Inappropriate

Some development activities require a permit whereas others do not. For example, Steve Mount admitted in his testimony that "brushing out" does not require a permit. Moreover, there is clearly conflicting testimony regarding wetland and stream identification on the property. The County presented expert testimony and a figure attempting to identify areas where the Club violated the CAO by impacting critical area "buffers." The County's identification of impacted buffers, however, is grossly inaccurate for a number of reasons, and therefore cannot be relied upon to prove the location of any buffer violations.

The County's identification of impacted buffers is inaccurate for the following reasons:

(a) The allegedly impacted buffers include areas that were already impacted by the Club and in use when the CAO was enacted in 1998. The County did not accurately exclude these areas and identify only those buffer areas that were newly impacted by the Club after 1998.

(b) The County miscalculated the alleged buffer around the wetlands adjacent to the Club's area of active use as a 250-foot buffer. This 250-foot buffer assumes the wetlands are a single wetland with a "Category One" rating. In reality, there are two wetlands, each with a "Category Two" rating, yielding a buffer of no more than 150-feet. The County did not attempt to accurately identify impacted buffer areas using the correct 150-foot buffer.

(c) The County assumed the wetlands have always been exactly where they were in January 2011, but according to Mr. Downs they have been expanding for a number of years due to problems with the County's exit culvert and clear-cutting in the area. The County did not accurately account for the expansion of the wetland and its prior location when identifying wetland buffer impacts.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

(d) The alleged buffer areas include an alleged buffer around Drainage Z, but there is no buffer around Drainage Z because it is not a critical area.

(e) Mr. Shiels testified that on January 20, 2011, Talasaea dubbed these areas in question wetlands "B," "C," and "D." He admitted it was not the optimal time of year to identify wetlands, and further admitted Talasaea made no effort to delineate these alleged wetlands. In contrast, Soundview found no wetlands in these areas during its January 19 and 20, 2011 site visits. Later in 2011 Soundview returned to the areas several times and each time confirmed they did not fit the regulatory definition of wetlands. Soundview even watched Ecology scientist Patrick McGraner perform a chemical test of the soils in the alleged wetlands, which showed the soils lacked the anaerobic processes associated with wetlands. Mr. McGraner's subsequent email leaves no doubt that Ecology agrees with Soundview and disagrees with Talasaea. Robbyn Myers inspected the area for the County in 2005 and detected no wetlands or critical areas violations. Alleged wetlands B through D are not wetlands at all.

In order to issue a properly narrow injunction, the Court must make findings as to which development activities required a permit, which stream and wetland buffers were encroached upon, and where. The Court will not be able to make such findings because the County failed to prove any violation of the site development code. First, the County failed to make the necessary calculations to show that site work exceeded permitting thresholds (e.g., moving 150 cubic yards of earth on a particular day so as to constitute "grading," and thus requiring an SDAP permit). Second, the County failed to show that any single project at the Club exceeded any permitting thresholds (i.e., it failed to rebut the evidence that the improvements at the Club resulted from many small projects over a span of several years, without showing that any of them exceeded permitting thresholds). Finally, the County failed to establish the scope of alleged violations because it failed to prove the exact areas or locations where a permit was necessary and a violation exists. Accordingly, the Court should deny the County's request for relief.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

E. The County's Vague Request to Avoid Continued Violation of the Kitsap County Code is Overly Broad and Provides No Guidance to the Court

In line with the rest of the County's injunctive relief requests, this request is over-broad and vague. The County does not offer any specific provisions with which the Club must comply, instead seeks to "to enjoin all possible breaches of the law." *Kitsap County v. Kev, Inc.*, 106 Wash. 2d 135, 143, 720 P.2d 818, 823 (1986) (noting that injunctions should not be issued so broadly). Accordingly, the Court should deny the County's request for relief.

F. If Any Relief is Granted, it Must be Narrowly Tailored and Limited

Should this Court find in favor of Kitsap County on any of its claims and the circumstances and balancing of the equities justify granting an injunction, the relief granted must be narrowly tailored and limited to what is actually necessary to abate the alleged nuisance activity.

In determining the scope of an injunction to abate a nuisance arising from an otherwise lawful business, the Washington courts have held that an outright permanent injunction of all activities is improper. *Chambers v. City of Mount Vernon*, 11 Wash. App. 357, 361, 522 P.2d 1184, 1187 (1974). In *Chambers* the Court of Appeals held the trial court erred in issuing a complete injunction against "any quarry operation" when the specific alleged nuisance conditions at issue (excess dust, vibrations, and "extraordinary noise") could be remedied without a complete shutdown of the quarry's operations. *Chambers*, 11 Wash. App. at 361.

Courts have also applied this principle in cases involving shooting ranges. For example, the Ohio Court of Appeals reversed the trial court's order enjoining any shooting at

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

a rifle club after neighbors brought a nuisance action alleging excessive noise. *Christensen v. Hilltop Sportsman Club, Inc*., 573 N.E.2d 1183 (Ohio App. 1990). In addition to finding a lack of evidence supporting a claim of nuisance per se, the Court of Appeals also explained that to the extent there may have been a "qualified nuisance," the trial court still erred in completely banning shooting altogether which was "far in excess of what was necessary to protect the appellees' reasonable enjoyment of the property." 573 N.E.2d at 1186. Instead, the trial court should have restricted the activity "no more than is required to eliminate the nuisance." *Id.* (citing 5 POWELL, REAL PROPERTY 64-49 (1985)).

In this case, the Court must similarly avoid granting any relief that would result in a complete shut down of the Club's operations as requested by the County. To the extent the Court finds any significant threats of future harm to warrant an injunction, any relief must be narrowly tailored to what is necessary to abate the particular harmful conditions found.

Finally, even if a narrow injunction is granted, the court must be sensitive to the costs of compliance on the Club. In *Anderson v. Griffen*, the trial court imposed an injunction requiring landowners to obtain wetland permits before performing work to abate nuisance conditions, where the application had been denied and forcing strict compliance would work an extreme hardship on the landowners. 148 Wash. App. 1035, 2009 WL 297444, *2 (2009). In that case, the defendants were found by the trial court to have altered the natural flow of water on their property, thereby causing damage to a neighboring property. *Id*. at *1. The trial court issued an injunction requiring the defendants to restore the natural flow of water, but only after obtaining the necessary permits. *Id.* After the permitting authority denied their permit application, the defendants requested the injunction be vacated, but the trial court

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

denied that request. *Id.* After balancing the equities involved, the Court of Appeals reversed and ordered the injunction lifted. As the Court of Appeals explained:

> "It is manifestly unreasonable to continue the prospective application of an injunction where full compliance is, if not impossible, highly improbable, and the associated costs have become wildly disproportionate to the harm the court seeks to remedy, leading to undue hardship to the party subject to the injunction."

Id. at *2. Accordingly, the Court should deny the County's request for relief.

II. WARRANT OF ABATEMENT

The County seeks a warrant of abatement whereby the Court would authorize it to enter the Club's premises to assess, survey, inspect and remove public nuisance conditions, and restore areas protected by the County' critical areas ordinance. Throughout discovery, the County was allowed to bring multiple employees and surveyors onto the Club's property to inspect alleged nuisance and critical areas ordinance violations. Despite all of this time on the property, the County has failed to prove that the Club is in violation of anything it has refused to correct. Because the County has not concretely proven nuisance or critical area violations, it would be unfounded and duplicative to allow the County onto the property following trial to fix unidentified violations. To further impose the costs onto the Club would be even more unfair, especially considering the equities involved. The Court should deny this request for relief.

III. INSPECTION AND MONITORING

The County further requests an order granting it access to the property to inspect, inventory and investigate the extent of the violations "before, during and after" any permit application, permit review or abatement action has commenced. It is ironic that the County could have worked through the permit issues through an administrative process yet chose to

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

file suit, conduct discovery on alleged violation, then come to Court unprepared to prove its case. The County's attempt to build in an escape hatch into its remedy ignores the judicially created doctrines of issue and claim preclusion. Even more difficult for the Court, the County seeks to have the Court continue to preside over this matter to referee any future issues and play regulator regarding after-the-fact permits. Accordingly, the Court should deny the County's request for relief.

IV. COSTS AND LIENS

Because the County should not be allowed to do the abatement, inspection or monitoring work, it should therefore receive no court awarded costs for that work, and no lien should be placed on the Club's property. Moreover, Kitsap County appears to allege a right to its attorney fees, but the legal support for this allegation is weak. *See Rocky Mountain Fire & Cas. Co. v. Rose*, 62 Wash. 2d 896, 900, 385 P.2d 45 (1963). Kitsap County cites no statute or other rule that expressly provides for "attorney fees." It cites statutes that provide for reimbursement of its "costs" and "expenses" but Washington Courts have long held that the term "costs" in a statute does not include attorney fees and that the term "expenses" is synonymous with "costs." *E.g., Chapin v. Collard*, 29 Wn.2d 788, 795, 189 P.2d 642 (1948). The County's requests for various costs are really a disguised request for litigation costs, and should not be granted especially considering that the County bypassed the administrative approach for solving such disputes (i.e. issuing a notice of violation, seeking permits), and instead decided to go directly to court. Accordingly, the Court should deny the County's request for relief.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

CONSTITUTIONAL COUNTERCLAIMS

The Club has asserted several counterclaims challenging the constitutionality of the County's interpretation of its new non-conforming use ordinance set forth at KCC 17.460.020. The new ordinance was enacted in the midst of this litigation and without the County giving actual notice of the proposed new law to the Club. Importantly, the new law states that an established non-conforming use may continue as long it "remains lawful."

A reasonable interpretation of this new law is that a non-conforming use may continue to enjoy its status so long as the underlying use (e.g. operation of a shooting range, operation of a gambling facility, etc.) remains generally lawful in the County as whole. However, the County has taken the position that, under the new law, an otherwise lawful non-conforming use can lose its status if any violations of any law or ordinance occur at the business or operation at issue. For example, under the County's interpretation, a lawful non-conforming manufacturing facility could lose its non-conforming use status if an emergency exit door was found to be blocked in violation of the fire code. In the case of the Club, the County argues that the alleged violations of the site development activity permit requirements and critical area ordinance, if shown to be true, would cause the entire shooting range to completely lose its non-conforming use status.

The County's interpretation is inherently unreasonable and twists the language of the new law. Moreover, allowing the County to divest the Club of its historical non-conforming use status based on some relatively minor violation would violate the Club's substantive and procedural due process rights and constitute an abuse of the County's police powers.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

A. Using the New Non-Conforming Use Ordinance to Shut Down the Club's Operations for Minor Permit Violations Would Violate the Club's Substantive Due Process Rights.

As discussed above, the County failed to meet its burden of proof because it did not show that the Club operated illegally or unreasonably interfered with other's property rights. However, to the extent the Court finds that the Club has violated some local ordinance, the Court must carefully tailor any relief granted to avoid an unconstitutional and unduly oppressive result. Of particular concern would be any injunctive relief that requires the Club to shut down its operations completely because such relief would violate the Club's constitutional right to substantive due process. Specifically, in its pre-trial submissions, the County suggested that, under its new non-conforming use ordinance, the Club will lose its non-conforming use status should the Court find that it has violated any ordinance. *See* KCC 17.460.020 (non conforming use "may be continued so long as it remains otherwise lawful."). Such a result would be unconstitutional and violate the Club's constitutional guarantees of substantive due process.

An ordinance can violate substantive due process where it is "unduly oppressive on the land owner." *See Presbytery of Seattle v. King County* ("*Presbytery*"), 114 Wash. 2d 320, 330, 787 P.2d 907 (1990). In considering undue oppression, there are several important factors to consider, including "the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owners." *Id.* Courts balance the public interest against the rights of affected landowners by comparing:

> (a) "the seriousness of the public problem [that the ordinance is aimed at], the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions"; against

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

(b) "the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses." *Id.*

At trial, the County presented evidence that the Club created berms, moved an unspecified amount of dirt, and worked on a culvert—all of which the County argues required a site development activity permit or was otherwise done in violation of local law. For its part, the Club presented evidence and testimony that this work was simple maintenance which did not require a permit and was otherwise lawful in all respects. However, even assuming for the sake of argument that any of this relatively limited activity required a permit, the County cannot use its new non-conforming use law to shut down the Club's operations without running afoul of the Club's constitutional guarantees of substantive due process.

First, should the Club lose its non-conforming use status, it will also lose most, if not all, of its property's economic value. The Club subsists on the dues paid by its members and other revenues derived directly from competitions and other shooting activities carried out on the Club's property. Obviously, if the shooting range was shut down, these revenues would quickly disappear. Moreover, the testimony at trial showed there are serious concerns regarding potential environmental cleanup liabilities that would arise should the property cease to be used as an active shooting range.

While the Club would suffer catastrophic financial loss if it lost its non-conforming use status, the harm the County seeks to prevent by stripping the Club of its lawful status is relatively minor. At the very most, the evidence shows the Club moved an unspecified amount of dirt and, if the County's experts are to be believed, may have caused its activities

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

to encroach into a relatively small protected riparian and wetland buffer area. However, even assuming these activities were somehow illegal, there are many less drastic remedies available to address the alleged harm. For example, to the extent the Court finds that the Club in fact disturbed protected natural areas, it could require (with narrowly tailored specificity) that those areas be restored. Similarly, if the Court finds dirt has been moved without a permit, it could require that the necessary permits be obtained or that the offending dirt be removed. Revoking the Club's non-conforming use status outright is simply unnecessary to address the supposed harms.

Moreover, there was ample evidence presented that Club did not and could not anticipate that these relatively minor activities would result in the entire shooting range being shut down. On the contrary, the evidence presented at trial confirmed that the County was well aware of allegations of unpermitted work as far back as 2005 but took no enforcement action to correct the alleged violations until 2010—a year after title to the property was transferred to the Club.

Under these circumstances, allowing the County to use its new ordinance to completely divest the Club of it lawful status, thereby forcing it to shut down, is grossly disproportionate to any alleged public harm and would be "unduly oppressive" in violation of the Club's guarantees of substantive due process. Accordingly, if the Court finds the Club has violated some ordinance or other law, it must invalidate the County's new non-conforming ordinance to the extent the County seeks to use those violations to strip the Club of its historical lawful status.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

B. The County Cannot Use Its Police Power to Use Minor Violations to Strip the Club of it Lawful Non-Conforming Use Status

For similar reasons, the County cannot use its inherent "police power" to shut down the Club's operations completely based on relatively minor alleged violations of the County code. While the Washington Constitution grants counties the general authority to enact health and safety regulations, this power has its limits. Specifically, "courts will not sustain restrictions upon useful, lawful, and non harmful activities of the people or the use of property in pursuance thereof unless it is shown that the restrictions sought to be imposed by means of the police powers are rationally connected to improving or benefiting the public peace, health, safety and welfare." *Ketcham v. King County Med. Serv. Corp*., 81 Wash. 2d 565, 576, 502 P.2d 1197, 1203 (1972). To determine whether the exercise of police power "goes too far," "the court must engage in ad hoc, factual inquiries into the particular economic impact of the regulation on specific property under the case's unique circumstances." *Guimont v. Clarke*, 121 Wash. 2d 586, 594, 596 (1993).

Even if the Court agrees with the County that the Club conducted certain activities without required permits, it is indisputable that such activities only resulted in very limited (and easily corrected) harm. By comparison, completely shutting down the Club's operations on account of such alleged violations would have a catastrophic economic impact on the Club. To the extent the County's new non-conforming use calls for such a result, the new ordinance "goes to far" and the County has not demonstrated how shutting down the Club for minor permit violations is rationally related to improving the public peace, health, and safety.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

C. The County Presented No Evidence That It Gave the Club Notice of the New Non-Conforming Use Ordinance or a Meaningful Opportunity to Be Heard

In addition to being an abuse of police power and violating the Club's substantive due process rights, the new non-conforming use ordinance was enacted without giving the Club the required procedural due process. Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Procedural due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* Instead, it requires consideration of the three factors, including (1) the private interest affected, (2) the risk of an erroneous deprivation of such interests through the procedural safeguards used or not used, and (3) the fiscal and administrative burdens on the government if additional procedural safeguard were used. *Id.*

At trial, the County offered no evidence to refute the Club's position that it did not receive notice of the new non-conforming use law until months after it was enacted. At most, the County presented declarations prior to trial from County workers indicating that they published notice of the meeting at which the ordinance was adopted. However, considering the fact that the ordinance was adopted in the midst of litigation with the Club, appears to be directed specifically at the Club, and completely rewrites the County's rules on non-conforming use, procedural due process demands that the Club be given <u>actual</u> notice of the proposed rule. This is especially true considering the catastrophic economic impact of the new ordinance if the County is successful in attempts to use a strict interpretation of the new law to completely divest the Club of its historic non-conforming use status and shut its doors. By comparison, there would have been only trivial administrative and economic

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

burdens on the County by providing the Club of actual notice of a new law that threatens its very existence. Without any evidence of the County taking even the most basic steps to put the Club on actual notice of the new law, the Club's procedural due process rights have been violated and the Court should invalidate the new non-conforming use ordinance on those grounds.

DATED this 7th day of November, 2011.

CHENOWETH LAW GROUP, P.C.

/s/ Brian D. Chenoweth
Brian D. Chenoweth WASB No. 25877
Of Attorneys for Defendant
510 SW Fifth Ave., Fifth Floor
Portland, Oregon 97204
(503) 221-7958

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com