NO. 43076-2-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Appellants,

and

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

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APPELLANT'S ANSWER TO RESPONDENT'S MOTION TO STRIKE

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I. INTRODUCTION

In its motion to strike, respondent Kitsap County objects to four references to the record that appear in the *Amended Reply Brief of Appellant* filed by Kitsap Rifle and Revolver Club. The motion attempts to create some advantage for the County, but the four issues raised in the motion are easily resolved in the Club's favor, and the motion to strike would not change the outcome of this appeal even if it were granted.

First, the County alleges the Club improperly referenced a witness declaration that was part of the pre-trial preliminary injunction hearing. The reference was proper because the declaration became part of the record pursuant to CR 69(a)(2). The trial transcript also shows the declaration was considered by the trial judge and the County did not object to that or move to exclude it.

The County's second complaint is that the Club referenced portions of a deposition transcript that supposedly did not become part of the trial record. This argument is erroneous because the record plainly shows the audio recording of the referenced portion of the deposition transcript was played at trial. It makes no difference that it was used to impeach a County witness, as opposed to being introduced during the Club's case in chief. Moreover, the Club cited that portion of the deposition testimony to disprove the County's arguments in this appeal

and establish the trial court's error. Those purposes are consistent with the Club's use of the evidence for impeachment at trial.

Third, the County accuses the Club of attempting to circumvent the page limit of its reply brief by referencing trial briefing regarding the Club's accord and satisfaction defense. The Club did this in response to the County's counterstatement of issues, which suggested the Club had somehow waived its appeal of the accord and satisfaction defense. The Club cited the trial briefing to show the issue was preserved. The trial briefing also shows that the manner in which accord and satisfaction was presented in the Club's opening brief was not prejudicial to the County because it had been informed of the legal standards and elements of accord and satisfaction, but the only substantive issue raised is whether the 2009 Deed supports the defense. The trial briefs were cited to prove relevant procedural facts in response to a procedural argument, not to circumvent page limits.

Finally, the County objects to the Club's references to two exhibits admitted at trial for purposes other than the truth of the assertions in them. The Club's reply brief cites these exhibits for the same non-truth purposes. There is nothing objectionable about these citations.

In sum, the County fails to provide legitimate grounds to strike any material from the Club's reply brief. It repeatedly errs by

mischaracterizing the record on review or the Club's references to it. The County's motion to strike should be denied in its entirety.

II. ARGUMENT

A. The Club's Citation to the Declaration of Marcus Carter Is Proper and Must Not Be Stricken.

The County moves to strike the Club's references in its reply brief to the *Declaration of Marcus Carter in Opposition to Preliminary Injunction*, dated October 6, 2012, and its attached declaration Exhibits 1 through 11.[12] The County does not dispute that the declaration was properly received into evidence during the preliminary injunction proceeding. The County does not dispute that the trial judge properly considered it at that time, or that it supported the trial court's denial of a preliminary injunction.

Instead, the County argues the declaration cannot be considered in this appeal because the Club supposedly:

> "can point to no point in the record where the trial court specifically cited this declaration or evaluated whether this declaration was 'admissible.' Nor was the declaration marked as a trial exhibit."

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[12] *Respondent Kitsap County's Motion to Strike Portions of Reply Brief* ("Mot.") at 1, 13; *Amended Reply Brief of Appellant* ("Club's Reply") Appx. 28 (*Declaration of Marcus Carter in Opposition to Preliminary Injunction*, dated October 6, 2012).

Mot. at 14. This argument is contradicted by CR 69(a)(2) and by the trial transcript itself.

Under CR 69(a)(2),

> "Any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record and need not be repeated upon the trial."

CR 69(a)(2). This rule plainly states that evidence admitted during a preliminary injunction proceeding need not be "repeated" at trial to become part of the trial record. The only question is whether the evidence "would be admissible" at trial, i.e., whether it "would have been admitted if presented at trial." The cited declaration testimony of Marcus Carter satisfies this rule because Mr. Carter testified at trial and the County has failed to show that the cited declaration testimony would not have been admitted if repeated at that time.

As the County correctly acknowledges, the declaration of Marcus Carter shows the Club's executive officer is well qualified to manage a shooting range, the Club offers numerous firearm training programs that benefit the community, and the Club supports the firearm training and practice of military personnel prior to deployment.[13] The County objects that this evidence was not repeated at trial, but fails to identify any

[13] Mot. at 5–6; Club's Reply at 66; Club's Reply Appx. 28 at CP 839–40 (listing qualifications of Marcus Carter); *id.* at CP 826–827, 837 (describing Club's training programs and supplemental pre-deployment training).

possible objection it could have made to its admissibility if it had been. The cited testimony and exhibits are of the type that "would be admissible" at trial so there was no need for any of it to be repeated. The Club properly cited it as part of the record on appeal pursuant to CR 69(a)(2).

Furthermore, the trial transcript shows the trial court informed the parties it would be considering all of the preliminary injunction materials and gave them an opportunity to object.[14] The County's only objection was to the declaration of Michael Crouch.[15] Not once did the County object to the trial court's consideration of Mr. Carter's declaration or argue it was inadmissible.[16] If it had done so, the Club could have addressed that argument or called Mr. Carter to the stand to repeat his declaration testimony. Instead, the County saved its objection for this appeal, after the trial court had already considered the declaration, and after it was too late for the Club to repeat the testimony on the record.

The case cited by the County, *In re Adoption of R.L.M.*,[17] is fundamentally distinguishable because it did not involve an injunction

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[14] *See* VT 2588:21–2589:23 (discussing admissibility of declarations).
[15] VT 2589:1–4.
[16] VT 2588:21–2589:23. When asked about the admissibility of preliminary injunction declarations, the trial judge stated she intended to "[go] back through the entire files, starting from the beginning and reading everything." VT 2589:10–16.
[17] 138 Wn. App. 276, 282, 156 P.3d 940 (2007).

proceeding or proof that the trial court considered evidence from the earlier proceeding in making its final decision. Regardless of whether CR 69(a)(2) applies, the declaration of Marcus Carter was considered by the trial court with no objection from the County and cannot be stricken from this appeal.

B. An Audio Recording of the Disputed Portion of the Deposition of Stephen Mount was Played Back at Trial and the Testimony Was Used to Disprove the County's Position at Trial and on Appeal.

The County's second issue is with the Club's reference to the deposition of the County's chief code enforcement officer, Stephen Mount.[27] There, Mount agreed that "if the [Club] didn't want to proceed, they wouldn't need the Conditional Use Permit."[28] The County acknowledges Mount's deposition was filed and unsealed for impeachment during Mount's cross-examination.[29] The County further acknowledges that the Club used the deposition:

> "as allowed by CR 32(a)(1) 'for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence.'"

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[27] Mot. at 1, 6, 14–16; Club's Reply at 39 (citing deposition of Mount); CP 2372:1–4 (relevant portion of Mount's deposition).
[28] CP 2372:1–9.
[29] Mot. at 6. VT 565:21–566:12, 604:1–4 (publishing and filing deposition).

Mot. at 14–15. The County then argues the Club cannot cite in this appeal to any portion of Mount's deposition transcript because that would be "inconsistent with" CR 32(a)(1), it would "strain credulity," and the transcript was not "admitted" into evidence at trial. Mot. at 15.

The County is mistaken because the relevant portion of Mount's deposition cited in the Club's reply was played back from audio sync at trial.[30] It was therefore considered by the trial court and is properly cited as part of the record on appeal.

Moreover, Mount's deposition testimony is supporting evidence for facts and findings the County does not dispute, which means striking it would not change the outcome of this appeal. These undisputed facts and findings show the trial court erred in treating the Club's former plan for a 300-meter range outside its historical eight acres as an expansion of its nonconforming use because the Club abandoned that project years ago and never used that part of its property as a shooting range.

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[30] *See* VT 604:1–4 (publishing and audiosyncing "Page 196, Lines 1 through 4" [CP 2372:1–4]); Club's Reply at 39, n. 76 (citing CP 2371–74). The Club's reply also cites to the deposition's cover page (CP 2336), the oath Mount took at the deposition (CP 2345), the surrounding testimony for context (CP 2371–2374), and the final page of the deposition (CP 2480–2481). Those citations were included not for relevant testimony but for the convenience of the Court and to prove the testimony was Mount's.

There is no dispute that the Club decided to abandon its former plans to develop a 300-meter range outside its historical eight acres.[31] There is also no dispute the County sent two letters to the Club in September 2007 and April 2008 saying it was closing its file on the proposed project.[32] Still further, the County has not assigned error to the trial court's finding that the Club's shooting activities are confined within its historical eight acres, while the remaining acreage—including the area formerly planned for the 300-meter range—is utilized only "passively."[33]

Considering all this, it was error for the trial court to conclude the abandoned 300-meter range project constituted an unlawful expansion of the nonconforming use.[34] The trial court then compounded its error by terminating the Club's nonconforming use right without allowing the Club to retract any such expansion or remedy any specific code violation related to the preliminary work it had done on the project years ago.[35]

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[31] CP 4064 (FOF 46) ("[i]n the summer of 2006, KRRC abandoned its plans to develop the 300 meter range and re-directed its efforts and the grant money toward improvements of infrastructure in its existing range"); *see also, Brief of Respondent Kitsap County* ("County's Resp.") at 25–26 (failing to dispute trial court's finding of abandonment).

[32] *See* Club's Reply at 39 (citing Exs. 143, 144 (Appx. 24, 25)). The County has never disputed the authenticity or admissibility of these letters.

[33] CP 4054–55 (FOF 8); Exs. 438, 486 (maps delineating eight acres) (Appcs. 20, 21).

[34] *See* Club's Opening Br. at 34 (citing *Rosema v. City of Seattle*, 166 Wn. App. 293, 301, 269 P.3d 393 (2012) (affirming nonconforming use of residential duplex where former unlawfully expanded use as triplex had ceased)).

[35] *See* Club's Opening Br. at 37 (citing *Richland Township v. Prodex, Inc.*, 634

The County has made one attempt to show an alternative ground to affirm the trial court's erroneous conclusion that the abandoned 300-meter range project constitutes an expansion. Its argument is that the Club has been storing some shooting range materials in the area, which is outside its historical eight acres.[36] That argument equates passive storage with an active shooting range. The trial court did not adopt that view, and neither should this Court. Moreover, if storage of materials were an expansion, the remedy would be as simple as removing them.

In sum, the Club correctly cited in its reply brief to a relevant portion of Mount's deposition that was played back from audio sync at trial to impeach him during cross examination. The testimony supports the Club's position that the abandoned 300-meter range project does not constitute an expansion of its nonconforming use. Yet, even if Mount's deposition testimony were stricken from the record, there would be ample undisputed evidence to support the Club's position. That position is also supported by the trial court's unchallenged finding that the Club's shooting activities are confined within its historical eight acres, while the remainder of the property is utilized passively. It was error for the trial

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A.2d 756 (Pa. Com. 1993) (affirming trial court's finding of scope of lawful nonconforming use and retraction remedy)); Club's Opening Br. at 38 (citing VT 278:17–279:15 (testimony of county chief building official Jeff Rowe agreeing no CUP would be required if "the Club were to withdraw and retract this alleged expansion[.]").

[36] *See* County's Resp. at 25.

court to conclude that the abandoned 300-meter range project constitutes an expansion, and it was error for the trial court to fail to give the Club an opportunity to retract or remedy any specific code violation associated with that former project. Nothing in the County's motion to strike changes these conclusions.

C. The Club Referenced Its Trial Briefing to Prove Relevant Procedural Facts, Not to Circumvent Page Limits.

The County moves to strike references to the Club's trial briefing in its reply brief, which the County believes were intended to circumvent page limits by incorporating additional substantive briefing by reference.[37] These accusations overlook the fact that the Club cited the trial briefing to rebut allegations of procedural waiver in the County's response.[38]

The County vaguely identified the issue of waiver in its counterstatement of the issues: "For the Superior Court's implicit denial of [the Club's] accord and satisfaction defense, did [the Club] waive challenge by not briefing it?"[39] The County did not brief this waiver issue anywhere in the body of its response brief. Nevertheless, the Club cautiously addressed it in its reply. In doing so, the Club cited the trial

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[37] Mot. at 16–18.

[38] *See* County's Resp. at 2 (asking whether Club waived accord and satisfaction assignment of error by supposedly failing to brief the issue in its opening brief); Club's Reply at 8 (showing accord and satisfaction was preserved and not waived).

[39] *Id.*

briefing to show its accord and satisfaction defense was briefed and squarely presented to the trial court, the issue was preserved for appeal, and there was no waiver.[40]

The trial briefing was also used to show that the County was not prejudiced by the Club's presentation of the issue in its opening brief, in which the Club correctly treated the trial court's failure to grant accord and satisfaction as resulting from the trial court's misinterpretation of the 2009 Deed.[41] The existence of a contract precluding a claim is the core element of an accord and satisfaction defense.[42] By every indication, the trial court would have granted the defense if it had correctly interpreted the Deed to have resolved any potential land use or code enforcement issues that existed when it was executed. The trial briefing shows the County was well aware of the basic elements of accord and satisfaction. Yet, it has never argued that the trial court's denial of accord and

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[40] *See* Club's Reply at 8 ("the Club filed extensive briefing to show the effect of the Deed was to resolve actual or potential disputes between the Club and County regarding the Club's then existing facilities and operations and its land use status . . . the trial record contains briefing on the defense, and the opening brief states the trial court erred in denying it") (citing CP 1958, 1966–73, 1998 (Appx. 30) (*Trial Memorandum of Defendant and Counterclaimant Kitsap Rifle and Revolver Club*); CP 1558, 1565–73 (Appx. 31) (*Defendant Kitsap Rifle & Revolver Club's Response to Kitsap County's Motion to Strike Affirmative Defenses of Settlement, Equitable Estoppel and Laches*)).

[41] *See* Club's Opening Br. at 40–55 (identifying at least four errors committed by the trial court in denying the Club's accord and satisfaction defense and misinterpreting the 2009 Deed).

[42] *See* Club's Reply at 8 (citing *Perez v. Pappas*, 98 Wn.2d 835, 843, 659 P.2d 475 (1983) ("an accord and satisfaction consists of a bona fide dispute, an agreement to settle that dispute, and performance of that agreement")).

satisfaction can be affirmed on any grounds other than the Deed itself. The County's own approach to this appeal confirms the Club presented the issue correctly by focusing on the issue of contract interpretation.

The County's attempt to compare this case to *US West Communications, Inc. vs. Washington Utility and Transportation Commission* ("*US West*")[43] is not persuasive because the Club's reply makes it clear that the trial briefs were not cited for the purpose of incorporating additional substantive briefing into this appeal. In *US West*, the appellant admitted it ran out of space in its brief on the merits and cited trial briefing for additional substantive argument.[44] In contrast, the Club's reply cited trial briefing for procedural facts to rebut the County's procedural waiver argument.[45] If the County had not raised that argument, the Club would have had no reason to cite the trial briefing because it had thoroughly briefed the substantive issues surrounding the trial court's misinterpretation of the 2009 Deed, which are the only issues raised by the accord and satisfaction defense *See* Club's Opening Br. at 40–55.

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[43] 134 Wn.2d 74, 949 P.2d 1337 (1997). The County cites several other distinguishable cases. Mot. at 16–17. The distinguishing factor in these cases is that each appellant attempted to raise new issues solely by incorporating portions of their trial briefs. *See* Mot. at 16–17 (citing *US West*, 134 Wn.2d at 74; *In re Guardianship of Lamb*, 173 Wn.2d 173, 183, n. 8, 265, 265 P.3d 876 (2011); *Multicare Health Sys. V. Dept. of Soc. & Health Servs.*, 173 Wn. App. 289, 299, 294 P.3d 768) (Div. 2 2013)). The Club did not do that here.

[44] *Id.* at 111 (appellant stated in a footnote that it fully briefed the issues to the trial court and "does not have adequate space to brief them [on] appeal").

[45] *See* Club's Reply at 8 (citing trial briefing to show there was no waiver).

It is ironic the County accuses the Club of evading page limits and presenting new argument when it appears the County is using its motion to present additional substantive briefing on the issue of waiver, which it already presented in its response on the merits. The Court should disregard the further discussion of waiver in the County's motion to strike because it is a motion to strike, not a motion to allow a supplemental brief on issues already raised by the County.[46]

The Club's citations to the trial briefing were used to prove preservation of accord and satisfaction for appeal, lack of waiver, and lack of prejudice associated with the Club's accord and satisfaction assignment of error in its opening brief. The citations prove procedural facts in response to the County's procedural waiver argument. The references are proper and should not be stricken.

D. The Club's Reply Brief Cites Trial Exhibits 550 and 359 for Non-Truth Purposes.

The County next moves to strike the Club's references to trial exhibits 550 and 359.[47] According to the County, the Club cited these exhibits on appeal for the truth of matters asserted in them, which is

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[46] *See Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 218, 969 P.2d 486 (1998).

[47] Mot. at 18–20; *see* Club's Reply Appx. 12 (Ex. 550), Appx. 23 (Ex. 359); Club's Reply at 50–51 (citing Ex. 550); *id.* at 56–57 (citing Ex. 359).

inconsistent with the purposes for which they were admitted at trial.[48] The County is incorrect. Exhibit 550 was admitted at trial and cited in the Club's reply to show the statements in the exhibit were made, which is relevant regardless of whether they are true. Similarly, Exhibit 359 was admitted at trial and cited in the Club's reply to show DNR's intentions for the land swap. Again, this is a "non-truth" purpose. There is no basis to strike either exhibit.

1. Exhibit 550

Exhibit 550 is an April 10, 2009 email from the Club's volunteer attorney, Regina Taylor, to County officials early on in the negotiations that led to the 2009 Deed.[49] The exhibit also includes some draft lease proposals that were attached to the email.[50] The Club cites Exhibit 550 in its reply to prove the parties were not negotiating in an overtly adversarial posture, as follows:

> "a release and settlement was not discussed because there were no pending adversarial allegations by the County that would have caused the Club to negotiate such a provision with its 'win-win' 'partner.'"[51]

Exhibit 550 is one of several pieces of evidence cited in the Club's briefs that show the parties were not negotiating as adversaries and the County

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[48] *See* Mot. at 18–20.
[49] Club's Reply Appx. 28.
[50] *Id.*
[51] Club's Reply at 50–51.

was making no public allegations against the Club that would have led it to negotiate an express release.[52] This evidence is relevant to show the intentions of the parties in negotiating and entering into the 2009 Deed and the trial court's error in misconstruing that contract. The Club's reference to Exhibit 550 in this appeal is consistent with its admission into evidence at trial.

Exhibit 550 shows the Club's attorney sent the following email to County officials:

> "This is [*sic*] email is to follow-up on meeting today. We were very encouraged by the direction that you informed us are the County's goals regarding the KRRC Lease and the Land Exchange.
>
> It is my understanding that the following points were made:
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> 1. Kitsap County would like to 'partner' with KRRC to provide a Regional Shooting Facility. Kitsap County

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[52] *See* Club's Opening Br. at 48 (citing testimony of Taylor and discussing County's resolution that approved the Deed). This evidence includes the testimony of Taylor regarding the Deed's "improvement clause. VT 2881:25–2882:2; Ex. 400 at 1–2. It includes the County resolution approving the Deed, which states "[the Club should] continue to operate with full control over the property." Ex. 477. It includes the testimony of County negotiator Matt Keough, who testified that he knew the Club intended the Deed to resolve its land use status. Club's Opening Br. at 51 (citing VT 2078:6–2079:8, 2827:3–9, 2828:19–23, 2833:8–13, 2844:21–24, 2845:22–2846:13, 2851:2–2852:14). It includes letters sent from County officials to members of the community that voiced support for the sale and Club's continued operations. Club's Opening Br. at 52–53 (citing Exs. 330, 332, 336, 293, 405). It includes Taylor's testimony that the reason she did not draft an express release into the improvement clause was because the Club was not aware of any adversarial allegations by the County. Club's Opening Br. at 53–54 (citing VT 2869:5–15, 2872:24–2873:24, 2886:16–2888:4, 2890:6–2893:2, 2893:13–2894:4). The Club's reply summarized all of this extrinsic evidence of the Deed's intent. *See* Club's Reply at 46–51.

> agrees with KRRC that working together would be a win-win.
>
> * * *
>
> If I have misunderstood the points made or if there are any additional points you would like to add to the foregoing, please do not hesitate to contact me."[53]

This exhibit shows the Club's attorney thought the County wanted to "partner" with the Club and enter into a "win-win" transaction when the parties began the negotiations that eventually led to the Deed. It also shows the Club's attorney communicated this understanding to the County. There is no evidence any County official ever responded that the Club's attorney was mistaken.

As discussed in the Club's briefs, extrinsic evidence of the intentions of the parties to a contract is admissible to resolve a dispute over the intended meaning of the contract.[54] Thus, Exhibit 550 was properly admitted at trial "to show that communication [in the exhibit] was made" and to show the "start of negotiations, not necessarily the truth

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[53] Club's Reply Appx. 28 (Ex. 550 at 1).

[54] *See* Club's Opening Br. at 47 (citing authority regarding extrinsic evidence). *Hearst Commc'ns, Inc. v. Seattle Times Co.* ("*Hearst*"), 154 Wn.2d 493, 502, 115 P.3d 262 (2005) (adopting the "context" rule and approving of extrinsic evidence); *Chevalier v. Woempner*, 172 Wn. App. 467, 477, 290 P.3d 1031 (2012) (reversing trial court's erroneous interpretation because it was contrary to the contract terms and the extrinsic evidence of their intended meaning); Club's Reply at 48–49 (discussing consideration of extrinsic evidence and authority showing the extrinsic evidence offered by the Club is proper); *Thompson v. Schlittenhart*, 47 Wn. App. 209, 211–12, 734 P.2d 48 (1987) (determining intent of a deed based on monuments on extrinsic evidence).

of what she wrote[.]"[55] The Club is referencing Exhibit 550 in this appeal for the same purpose.

As a communication made between the parties to the Deed, Exhibit 550 is an outward manifestation of intent that explains why the Deed contains no express release of potential claims by the County against the Club. It is the fact that the communication was made that makes it relevant. Even if the County did not genuinely intend to treat the Club as "partner" or negotiate a "win-win" transaction, such subjective intent would be irrelevant in construing the contract.[56] The exhibit was admitted at trial to show the statements in it were made. These statements are relevant in this appeal for the same reason, regardless of whether any of them are truth. There is no basis to strike Exhibit 550.

It should also be noted that Ms. Taylor testified at trial regarding her meeting with the County officials that she commemorated with Exhibit 550.[57] She testified, to the best of her recollection, the words "win/win" and "partnering" or "partnership" were used at the meeting.[58] The County did not object to this testimony. The County evidently understood the testimony was relevant regardless of whether it genuinely wanted to enter into a win-win partnership with the Club when it was negotiating the

[55] VT 2872:16–20.
[56] *See* Club's Opening Br. at 47 (citing *Hearst*, 154 Wn.2d at 502).
[57] VT 2872:24–2873:24.
[58] *Id.*

Deed. The County appears to have forgotten this in its motion to strike Exhibit 550, which should be denied.

2. Exhibit 359

The County moves to strike all references to Exhibit 359 from the Club's reply.[59] Before addressing the exhibit itself, it is helpful to consider the context in which it was referenced.

The Club cites Exhibit 359 in its reply brief regarding its estoppel defense. One of the County's response arguments against that defense was that the Club would have purchased its "long-time range property" even if it had known "the County would one day sue[.]"[60] This argument attacks the element of materiality. In essence, the County argues the trial court's denial of the estoppel defense was correct because the words, acts, and omissions of the County that it seeks to repudiate in this lawsuit were not material to the Club, as the Club would have purchased the Property even if it knew the County was planning this lawsuit.

The Club rebutted this argument in its reply, as follows:

> "The evidence, however, shows the Club would have negotiated differently, not that it would have lost all interest in the property.[61] For example, one option, which the

[59] Mot. at 20.
[60] Resp. at 75.
[61] Club's Reply at 55–56 (discussing testimony of Regina Taylor and Marcus Carter regarding indemnity and public access provisions and Club's desire to secure its facility and operations). The Club's attorney testified she would have

> County has not foreclosed, is that the Club could have prevented the sale so DNR could keep the property and ensure the Club's continued existence.[62] Moreover, the County does not dispute that its present claims adversely affect the value of the transaction or impair the Club's purpose in entering into it, which makes its prior inducements and concealment material.[63] The County's words and actions were material and the Club relied on them."[64]

In other words, the Club need not show it would have lost all interest in taking title to the Property in order to show the County's inducements were material. The Club must only show it would have negotiated differently if it had known the County would be bringing this lawsuit to shut the Club down and repudiating so many of the words, actions, and omissions the Club relied on in negotiating and executing the Deed. Alternatively, materiality is proven because the County's lawsuit has adversely affected the value of the property or materially impaired or

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advised the Club not to sign the Deed if she knew the County was reserving the right to shut the Club down due to existing conditions. VT 2893:13–2894:4. The Club's Executive Officer explained that the indemnity provision was acceptable because of the County's assurances that the Club would continue. VT 2097:8–2098:19. The Club had significant bargaining power given the County's undisputed desire to complete the land swap with DNR, DNR's refusal to complete the swap if it did not include the Club property, and the County's determination not to remain the property's owner. CP 4056–57 (FOF 16–19).

[62] DNR wanted to structure the deal so the Club would continue. *See* Ex. 359 at 3 (App. 23).

[63] *See* RCW 18.86.010(9) (defining as material any "information that substantially adversely affects the value of the property . . . or operates to materially impair or defeat the purpose of the transaction").

[64] Club's Reply at 55–56 (footnotes in original).

defeated the Club's very purpose in taking title to it. The County's argument against materiality provides no grounds to affirm the trial court's error in failing to grant the Club's estoppel defense. This would be true even if Exhibit 359 were stricken from the record.

Moreover, Exhibit 359 should not be stricken because it was cited in the Club's reply for non-truth purposes consistent with its stipulated admission at trial. Exhibit 359 was admitted at trial by stipulation, along with some other exhibits, "for purposes other than the truth of the matters asserted, pursuant to ER 801, such as effect on the hearer, intent, notice, state of mind, context, and contract formation."[65] Exhibit 359 was admitted for these purposes because it shows the intentions of DNR in entering into the land swap with the County that resulted in the Deed. Those intentions were for the land swap to secure the Club's ongoing existence at the Property.

Like the Club, if DNR or the Club had known the County did not share that intent, it would have negotiated differently in the land swap. This would have increased the Club's negotiating leverage because the County needed both DNR and the Club to make the land swap possible. Therefore, DNR's intentions are relevant to prove the materiality of the County's inducements because they show the Club could have negotiated

[65] CP 3926, 3928; Mot. at 8, n. 10, App. A.

different terms if it had known the County would soon repudiate them and sue. Exhibit 359 was admitted at trial to prove DNR's intent and properly cited in this appeal to prove that intent. The Exhibit should not be stricken.

The County accurately describes Exhibit 359 as consisting of

> "an internal email between county staff members involved in the negotiation [that led to the 2009 Deed], along with letters exchanged between state Commissioner of Public Lands Goldmark (DNR) and a constituent. The email is dated April 21, 2009 and the Commissioner's letter to the constituent is dated April 17, 2009."[66]

To expand, the letter from constituent Richard Fife in Exhibit 359 advocates for the land swap to "protect the culture, heritage, interests and infrastructure investment of the [Club][.]"[67] DNR responded by reassuring Fife, "DNR and Kitsap County are working on outcomes that provide the best options for the state, county, *and the gun club*."[68] DNR also relayed its understanding that "Kitsap County Commissioners have expressed publicly that the [Club] use is compatible with long term plans at the Kitsap County Heritage Park."[69] Still further, DNR explained the idea of selling the property to the Club was intended to be a "long term

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[66] Mot. at 8 (citation omitted).
[67] Club's Reply Appx. 23 at 5–6 (trial exhibit 359).
[68] *Id.* at 4.
[69] *Id.*

option" that, if approved would be documented with "a resolution committing the county to a long term arrangement with the [Club]."[70]

The statements in Exhibit 359 are relevant to show DNR's intentions for the land swap. They are relevant for this purpose regardless of whether any of the statements are true. They show the Club had bargaining power in its negotiations that led to the Deed and would have negotiated differently if it had known the County's inducements were false. Exhibit 359 supports this, and is admissible for this purpose, as a statement of DNR's intent for the land swap to secure the Club's future at the property. There is no ground to strike Exhibit 359 presented, but even if it were stricken, there is no merit to the County's argument that the Club would have executed the Deed as drafted if it had known the County would soon file this lawsuit.

E. The Court Should Disregard All Extraneous Argument Presented in the County's Motion to Strike.

The Court should disregard all extraneous argument stated in the County's motion to strike that does not relate to the four references to the record the County contests discussed above.[71] It is improper for a respondent to use a motion to strike to present additional briefing that

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[70] *Id.*

[71] Mot. at 1–2 (stating the County's relief requested, which includes only the four references analyzed above).

expounds upon the arguments in its response on the merits.[72] The County violates this rule by devoting a part of its motion to strike to legal argument suggesting the Club did not adequately assign error to the findings of fact challenged in its opening brief.[73] The County already raised this argument in its response, and the Club answered it in its reply.[74] Most importantly, the County's attempt to re-litigate the issue is unavailing because the Club's opening brief cites the evidence in the record that proves the challenged findings of fact were in error.[75]

To the extent the Club's reply brief cites any additional evidence that supports reversal of the erroneous findings, it did so in reply to the

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[72] *See* RAP 10.7; *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 218, 969 P.2d 486, 494 (1998) (holding that respondent's motion to strike was an inappropriate attempt to respond to appellant's reply brief and "striking" the motion itself).

[73] Mot. at 11 ("[the Club's] opening brief did not comply with [RAP 10.3] . . . [the Club] has filed a reply brief that attempts to correct the deficiencies through belated identification of the findings it disputes and the evidence it claims undermines the findings").

[74] *See* County's Resp. at 3, 39–42, 44; Club's Reply at 6.

[75] *See* Club's Opening Br. at 52–53 (assigning error to FOFs 23, 25, and 26 and explaining errors). These findings are erroneous because ample documentary evidence that plainly shows the County negotiated and intended the Deed to resolve the Club's land use status. *See* Ex. 477 (resolution approving the Deed); Ex. 552 (adopting resolution); Ex. 555 (audio recording of May 9, 2009 BOCC meeting); Exs. 330, 332, 336, 293, 405 (letters drafted by County officials regarding intent of Deed). *See also*, Club's Opening Br. at 52 (assigning error to FOF 57 and explaining error). This finding is erroneous because an August 2006 email to a County official proves the County was given notice of the Club's intent to replace "culvert pipes" at its facility. *Id.* (citing Ex. 416 at 2–3).

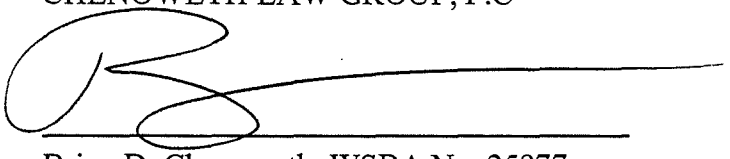
County's specific arguments stated in its response which is one of the purposes of a reply brief.[76]

III. CONCLUSION

For the foregoing reasons, the County's motion to strike should be denied in its entirety.

DATED: April 3, 2014

CHENOWETH LAW GROUP, P.C



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[76] *See* RAP 10.3(c); *Rafel Law Grp. PLLC v. Defoor*, 176 Wn. App. 210, 218, n. 15, 308 P.3d 767 (2013) *review denied,* 179 Wn.2d 1011, 316 P.3d 495 (2014) (denying respondent's motion to strike when appellant's reply brief substantially comport[ed] with RAP 10.3(c) insofar as it responds to issues raised in RLG's respondent's brief"). The County cites several cases illustrating the scope of a reply brief but all are highly distinguishable from this case. Mot. at 10–11. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding that appellant's reply brief violated RAP 10.3(c) when it failed to include "any argument" in support of a challenged finding of fact); *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967) (same); *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994) (holding that appellant could not present an entirely new issue on appeal to Washington Supreme Court in a "supplemental brief"); *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (denying request for attorney's fees stated for the first time in a reply brief). Unlike those cases, the Club's opening brief expressly identifies the challenged findings and explains the errors, and the reply brief properly rebuts the County's response.

CERTIFICATE OF SERVICE

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

On the date stated below, I caused to be served a copy of *Appellant's Answer to Respondent's Motion to Strike* on the following individuals by U.S. Mail, postage prepaid:

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SIGNED in Portland, Oregon this 3rd day of April, 2014.

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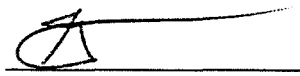

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