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

NO. 43076-2-II

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

Respondent/Cross-Appellant,

vs.

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

Appellants/Cross Respondents,

and

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

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BRIEF OF *AMICUS CURIAE* CK SAFE & QUIET IN RESPONSE TO *AMICUS CURIAE* BRIEF OF KITSAP COUNTY ALLIANCE FOR PROPERTY OWNERS

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I. INTRODUCTION

Amicus Curiae CK Safe & Quiet, LLC, offers the following response to the Brief of *Amicus Curiae* Kitsap County Alliance of Property Owners ("KAPO"). As explained in CK Safe & Quiet's *Amicus*, the trial court's extensive findings and conclusions fully supported its order permanently enjoining Kitsap Rifle and Revolver Club ("KRRC") from operation until it obtained a CUP permit and permanently enjoining the use of automatic firearms, rifles greater than .30 caliber, exploding targets and cannons, and use of the property outside the hours of 9 a.m. to 7 p.m.

KAPO entirely ignores the trial court's determination that KRRC's operation is a public nuisance, as well as the trial court's description of the significant noise and safety impact that the facility has on the surrounding neighborhood. KAPO instead focuses only on the trial court's termination of KRRC's nonconforming use, asserting that the termination is unconstitutional. CK Safe & Quiet offers this response in order to clarify three points: (1) the trial court's injunctions were based independently on the determination that KRRC's operation is a public nuisance; (2) that the "unduly oppressive" test set out in *Presbytery of Seattle v. King County,* is not applicable where the government action or regulation "only regulates

the activity which is directly responsible for the harm; " and (3) that even if the unduly oppressive test were applicable, the analysis begins with an understanding of the impacts to the public.

II. ARGUMENT

A. The Trial Court's Injunctions Were Independently Based on its Determination that a Public Nuisance Exists

At the outset, KAPO's argument appears premised on the assumption that the trial court's grant of permanent injunctive relief was based on the court's KRRC's nonconforming use right and that, but for the termination, KRRC would be allowed to continue its operations. While it is correct that the trial court enter a declaratory judgment finding that KRRC's nonconforming use status was terminated, CP 5075-76 (COL 5-10); CP 4084 (Order, ¶ 1),[1] the trial court's injunctions were independently based on the trial court's extensive findings and conclusions that KRRC's facility was a public nuisance. *See* CP 4084 (Order ¶¶ 3-4) (judgment declaring KRRC's use a public nuisance); ¶¶ 6-7 (injunctions). *See also*, CP 4075 (COL 3); CP 4076-4078 (COL 11-21).

As explained in the Brief of Respondent Kitsap County, pp. 29-32, the trial court entered extensive findings of fact, unchallenged here, that

[1] The trial court found that KRRC's use of its property had "changed, expanded and intensified" and was therefore no longer a valid nonconforming use.

KCCR's operation constituted a public noise nuisance due to its extended hours of operation, the use of high caliber rapid fire and automatic fire weapons, and the use of exploding targets and cannons. Indeed, the trial court found persuasive testimony from witnesses that described "their everyday lives as being exposed to the 'sounds of war ... .'" CP 4073-4074 (Findings 81-86). The trial court also entered unchallenged findings supporting its conclusion that KCCR's use constituted a public safety nuisance based on evidence of bullets escaping the range and affecting nearby residential properties. CP 4070 (Findings 67-69).

Even a lawful operation may be a nuisance if "the operation interferes unreasonably with other persons' use and enjoyment of their property." *Tiegs v. Watts*, 135 Wn.2d 1, 13-14, 954 P.2d 877 (1998). Thus, even if, *arguendo*, the trial court had *not* terminated KRRC's nonconforming use, the trial court was still well within its discretion to permanently enjoin all operations pending KRRC obtaining a CUP and permanently enjoin KRRC from use of automatic firearms, rifles greater than .30 caliber, exploding targets and cannons, and use of the property outside the hours of 9 a.m. to 7 p.m.[2]

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[2] RCW 7.48.220 provides that "a public nuisance may be abated by any public body or officer authorized thereto by law." *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 354, 75 P.3d 1003 (2003). RCW 7.48.200 grants trial courts "broad remedial

B. The "Unduly Oppressive" Test is Not Applicable Where the Regulated Entity is the Source of the Harm

KAPO's argument that termination of KRRC's nonconforming use violates KRRC's right to substantive due process is based on a misunderstanding of the law. Relying principally on *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990), KAPO argues that termination of KRRC's nonconforming use would be "unduly oppressive" and therefore unconstitutional. KAPO Brief, pp 6-13.

The purpose of the *Presbytery* "unduly oppressive" analysis "is to prevent excessive police power regulations that would require an individual 'to shoulder an economic burden, which in justice and fairness the public should rightfully bear.'" *Weden v. San Juan Cnty.*, 135 Wn.2d 678, 706-07, 958 P.2d 273 (1998) *quoting Orion Corp. v. State,* 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987). But where, as here, the entity or activity being regulated is directly responsible for the harm the regulation seeks to remediate, the "unduly oppressive" test is not applicable. *Weden,* 135 Wn.2d at 707.

Weden concerned a challenge by personal water craft ("PWC") owners of San Juan County's adoption of a ban on their use of the waters

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powers, including the power to unconditionally abate a nuisance." *City of Bremerton v. Sesko*, 100 Wn. App. 158, 164, 995 P.2d 1257 (2000).

adjacent to county shorelines. The PWC owners argued that the ban was unduly oppressive and therefore violated substantive due process. *Id.* at 689. The court rejected the owners' substantive due process claim, explaining:

> Applying [the *Prebytery* factors] to the Ordinance at issue here, we conclude the PWC ban is not unduly oppressive. The test simply does not apply to the present case. In *Sintra,* the housing preservation ordinance required developers who demolished or changed the use of low income housing to pay large fees to a city fund used to construct low income housing. The ordinance was found to be unduly oppressive because it placed upon a discrete group of individuals and developers the responsibility of solving the society-wide problem of homelessness. This was accomplished by levying exorbitant fees, even though the developers were not responsible for the problem. *Sintra,* 119 Wash.2d at 22, 829 P.2d 765. The PWC owners are not being forced to bear a financial burden or solve a societal problem not created by PWC. To the contrary, unlike the developers in *Sintra*, the PWC owners are directly responsible for the problems created by the use of their machines. *It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm.*

Weden, 135 Wn.2d at 707, *citing Sintra, Inc. v. City of Seattle,* 119 Wash.2d 1, 22, 829 P.2d 765 (1992)(emphasis added).

The additional authorities cited by KAPO in support of its substantive due process argument are in accord with the conclusion in *Weden*. In each case where the "unduly oppressive" factor were applied resulting the invalidity of a regulation the harm that the regulation sought to remedy was a societal problem not caused by the regulated entity.

For example, in *City of Seattle v. McCoy*, 101 Wn. App. 815, 4 P.3d 159 (2000), Division I addressed the constitutionality of the drug nuisance statute, RCW 7.43.080. The statute required abatement of any building where manufacturing, delivering, selling, storing or giving away a controlled substance occurred. In finding the statute "unduly oppressive," the court explained that the harm the statute sought to prevent was a "serious societal problem" and there was no evidence that the restaurant at issue contributed to the problem. *Id.* at 840-842. And because the restaurant was not source of the societal problem the statute sought to prevent, temporary abatement was unduly oppressive. *Id.*

In *Rivett v. City of Tacoma*, 123 Wn.2d 573, 581-583, 870 P.2d 299 (1994), the court found a city ordinance requiring a landowner to indemnify the city against any tort claim caused by a defective public sidewalk if the landowner failed to notify the City of the defect. The owner was required to indemnify the City regardless of whether the

landowner know of the defect or caused it. Again, because the problem the city ordinance sought to protect – safe sidewalks – was a societal problem, it was unduly oppressive to force a neighboring landowner, without fault, to shoulder the burden. *Id.*

Finally, in *Guimont v. Clark*, 121 Wn.2d 586, 854 P.2d 1 (1993), the court struck down as "unduly oppressive" an ordinance requiring a landowner to pay a tenant relocation fee of $7,500 before closing a mobile home park. As quoted by KAPO in its Brief at 15-16:

> While the closing of a mobile home park is the immediate cause of the need for relocation assistance, it is the general unavailability of low income housing and the low income status of many of the mobile home owners that is the more fundamental reason why the relocation assistance is necessary. *An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.*

Id. at 611 (emphasis added).

Here, unlike *Sintra*, *McCoy, Rivett,* and *Guimont,* KRRC is not being forced to bear a financial burden or solve societal problems not of its own making. To the contrary, like *Weden*, KRRC is directly

responsible for the problems associated with its public nuisance. It defies logic to suggest that the trial court's decision terminating the nonconforming use and permanently enjoining and abating the harm caused by KRRC's public nuisance is "unduly oppressive." *Id.,* 135 Wn.2d at 707.

C. KAPO Ignores KRRC's Significant Impact on the Surrounding Commity

Even if, *arguendo,* it was appropriate to apply the "unduly oppressive" test in this situation, KAPO's analysis focuses solely on the impact to KRRC and ignores completely KRRC's impact on the surrounding residential community. As the *Presbytery* Court made clear, the beginning point of the analysis is an understanding of "the nature of the harm to be avoided." 114 Wn.2d at 331. Factors include also "the seriousness of the public problem" and "the extent to which the owner's land contributes to it." *Id.*

As discussed above, *supra* at 2-3, and in Kitsap County's Brief in Response, the trial court entered extensive findings of fact confirming that KRRC's operation was both a public nuisance due to incessant noise like the "sounds of war," as well as a public safety nuisance because of its inability to protect against bullets escaping and impacting the nearby residential properties. These significant public nuisance impacts are

attributable to one source and one source only – KRRC's operations. Based on the trial court's extensive findings of fact, the trial court's order terminating the nonconforming use and enjoining and abating the public nuisance is not "unduly oppressive."

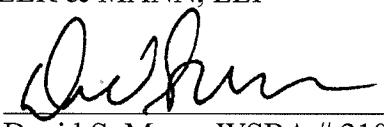
III. CONCLUSION

Amicus Curiae CK Safe & Quiet respectfully requests this Court deny the appeal and affirm the trial court's decision, including its grant of permanent injunctive relief.

DATED this 9th Day of June, 2014.

Respectfully submitted,

GENDLER & MANN, LLP

By: 

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on the date and in the manner indicated below, I caused this document to be served on:

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