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,

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,

and

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

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

KITSAP COUNTY'S ANSWER TO AMICUS BRIEF OF NATIONAL RIFLE ASSOCIATION

RUSSELL D. HAUGE
Prosecuting Attorney

NEIL R. WACHTER
Senior Deputy Prosecuting Attorney
614 Division Street, MS 35A
Port Orchard, WA 98366
(360) 337-7174

I. INTRODUCTION

Amicus curiae National Rifle Association, Inc. urges reversal of the trial court's declaratory judgment that the Kitsap Rifle and Revolver Club acted to terminate its nonconforming land use, upon which the court founded its injunction requiring that KRRC acquire a conditional use permit before shooting range operations can resume on the Club's real property. In so doing, NRA introduces the Second Amendment into this case for virtually the first time and advocates for strict scrutiny of the County's case as a regulatory action. The NRA also argues that the trial court misapplied the Kitsap County Code's nonconforming use provisions by contorting what a land "use" means and by crafting a remedy not explicitly provided in the County zoning title.

This Court should reject the Second Amendment argument as not preserved at the trial or appellate levels and not properly applied even if it was not timely. This Court should reject the code interpretation argument as (a) an attempt to analytically split off new, changed and illegal uses from the core use of "shooting range" so as to preserve the nonconforming protections that attached to the core use and (b) further analysis that utterly ignores the trial court's power to render declaratory judgment and make concomitant orders.

II. COUNTERSTATEMENT OF NRA's ISSUES

1. May an amicus curiae raise an issue on appeal that has not been the subject of prior briefing or argument at the trial court or appellate court levels, even where the issue is constitutional in nature?

2. If so, then did the Superior Court deny Second Amendment protections owed to a real property owner by rendering declaratory judgment that the owner's new, changed and illegal uses of its longtime shooting range operation acted to terminate the owner's nonconforming land use status and to apply for a conditional use permit?

3. Did the Superior Court misapply the Kitsap County Code when it rendered its land use declaratory judgment that the real property owner's new, changed and illegal uses of its longtime shooting range operation violated the Code's prohibition upon a nonconforming use that is "not otherwise lawful", and further, did the Court imply a non-existent remedy from the Code when it made its ruling as a matter of declaratory judgment?

III. NRA's STATEMENT OF THE CASE

NRA posits that its challenge is purely to the trial court's conclusions of law.[1] However, NRA's introduction portrays this action as a part of a cookie-cutter "attack" upon ranges across the country,

[1] Brief of Amicus Curiae National Rifle Association, Inc. (NRA Brief), at 3.

prompted by citizens who move to homes built near existing shooting ranges, only to complain about the noise that existed all along.[2] As the court found, the down-range and nearby residential neighborhoods of this case pre-dated the profound changes to KRRC's activities, physical facilities, and days and hours of operation that were subject of this case.[3]

IV. ARGUMENT

NRA asserts the trial court erred by (1) terminating the KRRC's nonconforming use right without considering the Club members' civil rights, and (2) misapplying the Kitsap County Code to authorize the closure of the shooting range. Like that of fellow amicus KAPO, NRA's brief is silent on application of the Uniform Declaratory Judgments Act, chapter 7.24 RCW.

A. NRA MAY NOT NOW RAISE THE SECOND AMENDMENT.

At the last moment, NRA has raised the Second Amendment. The amendment's only other appearance in the case was a footnote in KRRC's reply brief. Reply at 35, n. 66. Prior to the NRA Brief, there has been no argument or briefing on the Second Amendment at the trial court or appellate court levels, whatsoever.

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[2] NRA Brief at 1.

[3] See e.g. Findings of Fact, Conclusions of Law and Orders (CP 4052 – 4092; attached as Appendix 1 to Respondent's Brief), at Findings 80, 81, 82, 83, 84. Hereafter, "FOF", "COL" or "Order" each refers to numbered paragraph(s) of the trial court's judgment.

KRRC's passing mention of the Second Amendment did not preserve the issue for appeal and it is therefore waived. See, e.g., *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) ("This court does not consider issues raised for the first time in a reply brief."); *In re Disciplinary Proceeding Against Kennedy*, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) ("Points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits."). See also *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004), abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (holding that inadequate argument or only passing treatment does not merit review).

Appellate courts generally do not consider issues, even constitutional ones, raised solely by amicus. See, e.g., *State v. Hirschfelder*, 170 Wn.2d 536 552, 242 P.3d 876 (2010) (amicus raised article I, section 7 right to privacy), (citing *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988) (courts need not reach issues raised only by amici)); *State v. Jorden*, 160 Wn.2d 121, 128 n. 5, 156 P.3d 893 (2007) (court is "not bound to consider argument raised only by amici") (citation omitted); *State v. Clarke*, 156 Wn.2d 880, 894, 134 P.3d 188 (2006) (amicus raised article I, section 21 protection of right to jury trial, to which court wrote "this court does not consider arguments raised first

and only by an amicus") (citing *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993)).

NRA provides no authority for why this Court should treat the Second Amendment issue differently from any other issue for which an assignment of error was not made and for which appeal was not otherwise preserved. Nonetheless, the County will address NRA's contentions.

B. THE TRIAL COURT'S LAND USE DECLARATORY JUDGMENT DID NOT DEPRIVE ANY PERSON OR ENTITY OF SECOND AMENDMENT PROTECTIONS.

1. Termination of Nonconforming Use Does Not Violate Second Amendment

The right to bear arms is not unlimited but is subject to reasonable regulation. *District of Columbia v. Heller*, 554 U.S. 570, 626-27, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) ("[l]ike most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."); *City of Seattle v. Montana*, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996) ("[w]e have consistently held that the right to bear arms in art. I, § 24[4] is not absolute,

[4] See NRA Brief at 1, nt. 3 (citing to Wash. Const. art. I, § 24).

but instead is subject to "reasonable regulation" by the State under its police power.").

Courts have adopted a two-pronged test for evaluating a potential Second Amendment violation. *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (7th Cir. 2011). First, courts will determine whether a challenged law imposes a burden on conduct that is protected by the Second Amendment. If the challenged law regulates activity outside the scope of the Second Amendment, then there has been no violation and the inquiry is complete. *Marzzarella,* 614 F.3d at 89 (citing *Heller*, 128 S.Ct. at 2791–92). If the law regulated protected activity, courts will then evaluate the law under some level of means-end scrutiny. Id. The level of scrutiny depends upon how close the law comes to the core of the Second Amendment right and the severity of the law's burden. *Ezell*, 651 F.3d at 707-08.

a. Land Use Regulations Do Not Regulate Conduct Within Scope of Second Amendment

To determine whether conduct is within the scope of a specific constitutional right, courts must look to the scope of that right as the time it was adopted. *Heller*, 128 S.Ct. at 2821. In so doing, the courts have held that regulations prohibiting carrying of firearms near sensitive areas such as schools and churches do not regulate conduct within the scope of

the Second Amendment. *Marzzarella,* 614 F.3d at 91 (citing *Heller,* 128 S.Ct. at 2817). Courts have also held that regulations restricting felons and the mentally ill from possessing guns also do not regulate conduct within the scope of the Second Amendment. See also *State v. Sieyes*, 168 Wn.2d 276, 295-96, 225 P.3d 995 (2010) (Second Amendment likely does not extend to minors).

Furthermore, Courts have recognized that the Second Amendment's scope only extends to the type of weapons possessed by law-abiding citizens. *Marzzarella*, 614 F.3d at 90. See e.g. *United States v. Miller*, 307 U.S. 174, 178 (1939) (no Second Amendment right to possess unregistered, short-barreled shotguns); *U.S. v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1369 (2009) (no Second Amendment right to possess machine guns). These holdings reflect the "historical tradition" of prohibiting "dangerous and unusual weapons." *Heller,* 128 S.Ct. at 2817.

In this case, the local regulations at issue do not regulate protected activity within the scope of the Second Amendment. The permitting regulations require that an entity obtain a permit for land development activities such as installation of culverts and earth-moving activities. The land use regulations prohibit a use unless it is specifically authorized (or permitted) under the relevant zone's land use table or the use pre-dates

zoning and otherwise qualifies as a nonconforming use. The NRA can cite no authority for the proposition that these regulations must be applied differently to real property used as a shooting range, based on the scope of the Second Amendment as understood at the time of its adoption.

b. Termination of Nonconforming Use Survives Scrutiny

(i) Federal Constitution Analysis

When a regulation implicates the right to bear arms under the Second Amendment, the scrutiny to be applied is unclear and depends upon the degree to which the regulation burdens the constitutional right. *State v. Jorgenson*, 179 Wn.2d 145, 159-60, 312 P.3d 960 (2013). In some cases, courts have declined to impose any level of scrutiny and have simply compared the traditional understanding of the right with the burden imposed by the regulation. *Jorgenson*, 179 Wn.2d at 158-59. Some courts, in determining the constitutionality of firearm restrictions imposed upon particular people or particular places, have applied an intermediate level scrutiny (i.e. for time, place and manner regulations). *Jorgenson*, 179 Wn.2d at 160 (citing *United States v. Laurent*, 861 F.Supp.2d 71, 104 (E.D.N.Y. 2011)). On the other hand, regulations resulting in a complete ban or prohibition of firearms within a jurisdiction so as to create a "severe burden on the core Second Amendment right of armed self-

defense" have required a "strong public-interest justification and a close fit between the government's means and its ends." *Ezell*, 651 F.3d at 708.

Here, the trial court's land use declaratory judgment does not approach the impact of the city of Chicago's regulations struck down in *Ezell*. To the degree that the judgment implicates Second Amendment rights, intermediate scrutiny would most likely apply. This judgment, and the necessity for obtaining a conditional use permit, advances important governmental interests in protecting the public's health and safety. See e.g. *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) (under intermediate scrutiny, upholding reasonably tailored prohibition on loaded firearms within a national park due to government's strong interest in protecting public from danger); *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (under any form of scrutiny, upholding ordinance prohibiting firearm possession on county property, thus precluding plaintiff from operating a gun show on county fairgrounds).

The court's land use declaratory judgment is substantially related to the government's police power interests in protecting the public health and safety, and its effect is not overbroad in that it applies only to the nonconforming land owner, KRRC, and is not tantamount to a permanent ban on firearm usage on the subject property. Nor will termination of this

Club's nonconforming use impair the rights of individuals or restrict the operation of any other firing range.

(ii) State Constitution Analysis

Under Washington's firearm protections, a regulation is constitutionally reasonable if it is "'reasonably necessary to protect public safety or welfare, and substantially related to the legitimate ends sought.'" *Jorgenson*, 179 Wn.2d at 156 (quoting *City of Seattle v. Montana*, 129 Wn.2d at 594) (other citations omitted). Using this analysis, Washington courts balance the public benefit from the regulation against the degree to which it imposes upon the constitutional right. Id. While NRA alleges no specific violation of Washington's Constitution, a conditional use permit cannot be said to be an unreasonable requirement to foster compatibility of competing land uses.

The conditional use permit process is "the mechanism by which the county may gather input through an open record hearing and place special conditions on the use or development of land." KCC 17.421.010. For a (hearing examiner) conditional use permit in Kitsap County:

> Approval or approval with conditions may be granted only when all the following criteria are met:
>
> 1. The proposal is consistent with the Comprehensive Plan;
>
> 2. The proposal complies with applicable requirements of this title;

3. The proposal will not be materially detrimental to existing or future uses or property in the immediate vicinity; and

4. The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing character, appearance, quality or development, and physical characteristics of the subject property and the immediate vicinity.

KCC 17.421.030(A). The NRA does not challenge that these criteria serve appropriate government interests in protecting the public's health, safety and quality of life. Moreover, as a conditional use permit applicant, KRRC will surely ask the hearing examiner to account for the rights of its members to "maintain proficiency in firearm use." NRA Brief, at 6 (citing *Ezell*, 651 F.3d at 699).

The conditional use permit requirement advances significant governmental interests while imposing minimal burdens on the right to bear arms. The end of KRRC's nonconforming use does not impact any individual's ability to purchase, own or possess a firearm. It does not restrict an individual from keeping a firearm in the home. It does not impact any individual's ability or right to discharge a firearm in compliance with current land use regulations, which the NRA concedes to be lawful. At most, it requires individuals to travel a little farther to use a shooting range such as the Poulsbo Sportsman's Club, whose members

erected overhead baffles at each rifle and pistol shooting area consistent with the NRA's own Range Source Book.[5]

In short, NRA cannot demonstrate that the trial court's application of the Kitsap County Code's land use provisions unduly restricts shooting ranges or that a conditional use permit requirement is unreasonable under federal or state constitutional analysis.

2. NRA Mistakenly Applies Strict Scrutiny Analysis

NRA argues that First Amendment cases require that local land ordinances be strictly construed against the government if they burden a fundamental, constitutional right and that this standard should apply to Second Amendment cases. NRA Brief at 4. This position neglects that the abrogation of this standard and the critical distinguishing features of the present case.

NRA relies upon *Sumner v. First Baptist Church of Sumner*, 97 Wn.2d 1, 639 P.2 1358 (1982) and *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 995 P.2d 33 (2000) to support its argument. However, the *Open Door* court abrogated and replaced the so-called "compelling interest" requirement set forth in *Sumner* with regard to First Amendment and free exercise of religion in cases involving the exercise of police power. This was necessitated by a United States Supreme Court

[5] RP 1355:12-20, 1356:21-1358:20 (October 13, 2011) (Testimony of Poulsbo Sportsman's Club archivist James Reynolds).

decision holding that requiring a compelling state interest to uphold the application of a neutral, generally applicable law to a religious practice results in "a constitutional right to ignore neutral laws of general applicability." *Open Door*, 140 Wn.2d at 162 (citing *City of Boerne v. Flores*, 521 U.S. 507, 513, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)).

In *Open Door*, the Washington Supreme Court adopted a new standard and held that there is no constitutional violation where the application of a general, neutral zoning regulation results in merely an incidental burden. *Open Door*, 140 Wn.2d at 165-66. Applying this standard, the court held that a zoning regulation requiring a church to apply for a conditional use permit is constitutional. Id., at 166-67.

Applying the holding in *Open Door* to the present case, the declaratory judgment which ended KRRC's nonconforming use does not result in a violation of the Second Amendment. Like churches, gun clubs are not exempt from local government zoning regulations. Furthermore, any burden which may result from the termination of nonconforming use is merely an incidental burden as it does not impact the ultimate right of any individual to keep and bear arms. Finally, KRRC's situation is particularly unique because it has never even applied for conditional use permit approval of any of expanded uses or new activities on its real property.

The present case is also distinguishable from *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991) *cert. denied*, 503 U.S. 986, 118 L.Ed.2d 391 (1992), cited by the NRA. NRA Brief at 7-8. In that case, the plaintiff challenged the city's zoning ordinance limiting adult book and movie stores to heavy industrial zones. The Court held that in regulating written or filmed materials, the ordinance imposed a burden on "pure speech" in that it regulated speech on the basis of its content. As a result, the city was required to demonstrate a narrowly tailored substantial governmental interest, which it was not able to do. *World Wide Video*, 117 Wn.2d at 388 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)).

As the NRA notes, First Amendment cases are instructive because they employ a "scope" analysis that parallels the Second Amendment's own "scope" inquiry. Under Second Amendment and First Amendment cases, the closer a regulation comes to burdening the core of a constitutional right, the more protection it is granted under the constitution. *Ezell*, 651 F.3d at 702-03. In First Amendment cases, content-driven regulations such as those that impede "pure speech" are subject to stronger scrutiny than the mere "expressive conduct." Id; *World Wide Video*, 117 Wn.2d at 388.

In the instant case, zoning regulations which are neutral and which only affect the periphery of rights protected by the Second Amendment are not analogous to the "pure speech" of the *World Wide Video* case. Zoning regulations (and development regulations) that apply to all land owners do not have any implication on an individual's right to keep and bear arms and thus do not attempt to regulate or burden any core Second Amendment right.

The NRA cites to *Ezell* for the proposition that individuals have a right to maintain proficiency in firearm use. In *Ezell*, a firing-range business and Chicago residents sought to challenge a city ordinance which both banned firing ranges within the city and mandated that citizens undergo one hour of firing-range training before being permitted to own a gun. The court held that conditioning gun ownership on firing-range training while banning such training had an effect similar to a complete firearm ban which was a serious encroachment on the Second Amendment. *Ezell*, 651 F.3d at 708-09. As a result, the court applied a strict scrutiny analysis and held the ordinance unconstitutional.

The instant case can be distinguished for several critical reasons. First, unlike the ordinance at issue in *Ezell*, the land use declaratory judgment does not have the effect of a firearm "ban". Neither Title 17 KCC (zoning) nor the trial court's application of its nonconforming use

provisions at chapter 17.460 KCC act to prohibit shooting ranges. Second, Kitsap County does not condition gun ownership on firing-range training, therefore, access to a specific firing range does not impair the ownership and possession of a firearm, which goes to the core of the Second Amendment right. Finally, the alleged dangers posed by the firing ranges in *Ezell* were based purely on speculation and conjecture. There was no evidence that firing ranges posed actual risks of accidental death and injury. *Ezell*, 651 F.3d at 709. In our case, however, there was significant evidence tending to show that KRRC's failure to prevent stray bullets from leaving the firing range posed a serious risk to life and property.

C. THE TRIAL COURT'S LAND USE DECLARATORY JUDGMENT CORRECTLY APPLIED THE COMMON LAW AND COUNTY CODE'S NONCONFORMING USE AUTHORITY TO DECLARE KRRC'S USE TERMINATED

The parties have briefed the subject of the trial court's nonconforming use analysis extensively, and this Answer will not endeavor to re-tread on this subject, except to briefly note that NRA's brief gives short shrift to the Washington common law.

A noncomforming use is by definition a use that is not permitted under the jurisdiction's zoning authority. The use is only permitted to continue so long as it is not a nuisance and does not change or expand.

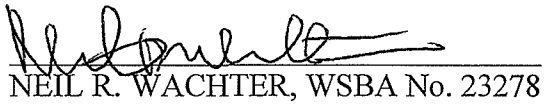
State v. Thomasson, 61 Wn.2d 425, 375 P.2d 441 (1963)(nuisance); *Coleman v. City of Walla Walla*, 44 Wn.2d 296, 266 P.2d 1034 (1954)(extension or change). A nonconforming use does not have special rights and must comply with all regulations that apply to regularly permitted uses. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998) (holding that nonconforming excavating operation was required to obtain excavation permit). When applied in conjunction with (former) KCC 17.455.060[6], the trial court correctly rendered declaratory judgment for the unique circumstances of this case.

V. CONCLUSION

KITSAP COUNTY respectfully requests that this Court deny the reversal sought by Amicus Curiae NRA.

Respectfully submitted this 12th day of June, 2014.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



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

[6] KCC 17.455.060 provides:
"A use or structure not conforming to the zone in which it is located shall not be altered or enlarged in any manner, unless such alteration or enlargement would bring the use or structure into greater conformity with the uses permitted within or requirements of the zone in which it is located."

CERTIFICATE OF SERVICE

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

On the date given below I caused to be served the above document in the manner noted upon the following:

Brian D. Chenoweth Brooks Foster The Chenoweth Law Group 510 SW Fifth Ave., Ste. 500 Portland, OR 97204	[X] [X] [ ]	Via U.S. Mail Via Email: As Agreed by the Parties Via Hand Delivery
David S. Mann Gendler & Mann LLP 936 N. 34th St. Suite 400 Seattle, WA 98103-8869	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery
Matthew A. Lind Sherrard McGonagle Tizzano, PS 19717 Front Street NE, PO Box 400 Poulsbo, WA 98370-0400	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery
Richard B. Sanders Goodstein Law Group 501 S G St Tacoma, WA 98405-4715	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery

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C.D. Michel Michel & Associates, P.C. 180 E. Ocean Blvd, Ste 200 Long Beach, CA 90802	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery

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SIGNED in Port Orchard, Washington this 12 day of June, 2014.

Batrice Fredsti

BATRICE FREDSTI, Legal Assistant
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992

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