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

---

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

KITSAP COUNTY'S ANSWER TO MOTION FOR RECONSIDERATION

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

NEIL R. WACHTER
Special Deputy Prosecuting Attorney
25 W. Main Street
Auburn, WA 98101
(253) 804-5027

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. IDENTITY OF MOVING PARTIES 1

II. RELIEF REQUESTED 1

III. FACTS RELEVANT TO MOTION 1

A. Recent Procedural History 1

B. The Opinion and KRRC's Motion 2

C. Clarifying KRRC's Geographic Expansion: 300-Meter Range 3

IV. GROUND FOR RELIEF AND ARGUMENT 6

A. Washington's Common Law Distinguishes Expanded Uses from Intensified Uses 6

B. Former KCC 17.455.060 Governed the Trial Court's Declaratory Judgments and its Repeal does not Legitimize an Affirmed "Expanded Use" 16

C. Notwithstanding the Repeal, Remand is Appropriate to Enjoin Expanded Uses 18

D. Notwithstanding the Repeal, Remand is Appropriate to Enjoin Nuisances per Se 20

E. Repeal of Former KCC 17.455.060 does not Render Moot the Trial Court's Declaratory Judgment 21

V. CONCLUSION 24

APPENDICES

Appendix 1. Chapter 17.455 Kitsap County Code (chapter in effect at time of trial and judgment).....A-1-1

Appendix 2. Kitsap County Ordinance No. 490 (2012) (ordinance only; attachment omitted) A-2-1

Appendix 3. Trial Exhibit 486 .....A-3-1

TABLE OF AUTHORITIES

Table of Cases

Aetna Life Insur. Co. of Hartford v. Haworth, 300 U.S. 227, 240-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937) 22

Bartz v. Board of Adjustment, 80 Wn.2d 209, 492 P.2d 1374 (1972).....7, 8, 9

Brown County v. Meidinger, 271 N.W.2d 15 (S.Dak. 1978).....15

Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984).....6

City & County of Denver v. Board of Adjustment, 31 Colo.App. 324, 505 P.2d 44 (1972).....15

City of Mercer Island v. Steinmann, 9 Wn. App. 479, 513 P.2d 80 (1973) 20, 21

City of New Orleans v. National Polyfab Corp., 420 So.2d 727 (La.App. 4 Cir. 1982).....16

City of University Place v. McGuire, 144 Wn.12d 640, 30 P.3d 453 (2001).....7, 14

Dovaro 12 Atlantic, LLC v. Town of Hampton, 158 N.H. 222, 965 A.2d 1096 (N.H. 2009) 16

Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).....24

Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 442 P.2d 967 (1968).....22

Hartley v. City of Colorado Springs, 764 P.2d 1216 (Colo. 1988).....15

Hauser v. Arness, 44 Wn.2d 358, 267 P.2d 691 (1954) 15

Hooper v. Delaware Alcoholic Beverage Control Comm'n, 409 A.2d 1046 (Del. Super. Ct.1979) 15

Jahnigen v. Staley, 245 Md. 130, 225 A.2d 277 (1967) 12

Keller v. City of Bellingham, 92 Wn.2d 726, 600 P.2d 1276 (1979) 7, 8, 10, 11, 12, 14

Littlefair v. Schultze, 169 Wn. App. 659, 378 P.3d 218 (2012), *review denied*, 176 Wn.2d 1018 (2013) 14, 15

Marble v. Clein, 55 Wn.2d 315, 347 P.2d 830 (1959) 17

Martin v. Beehan, 689 S.W.2d 29 (Ky.Ct.App.1985) 13

Meridian Minerals Co. v. King County, 61 Wn. App. 195, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991) 9, 10, 11, 12

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) 24

Reeder v. King County, 57 Wn.2d 563, 358 P.2d 810 (1961) 23

Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 959 P.2d 1024 (1998) 3, 7, 12, 13

Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005) 21

State v. Grant, 89 Wn.2d 678, 575 P.2d 210 (1978) 17

State v. Lombardo, 32 Wn. App. 681, 649 P.2d 151 (Div. II 1982) 17

State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970) 17

State ex rel. Evans v. Amusement Association of Washington, Inc., 7 Wn. App. 305, 499 P.2d 906 (1972) 21, 22, 23

State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 273 P.2d 464, (1954) 14

State ex rel. Miller v. Cain, 40 Wn.2d 216, 242 P.2d 505, (1952) 13

State ex rel. Smilanich v. McCollum, 62 Wn.2d 602, 384 P.2d 358 (1963).....7, 8, 9

State ex rel. Standard Mining & Dev. Corp. v. City of Auburn, 82 Wn.2d 321, 510 P.2d 647 (1973).....14, 15

Washington State Communication Access Project v. Regal Cinemas, Inc., 173 Wn. App. 174, 293 P.3d 419, *review denied*, 178 Wn.2d 1010 (2013) 22

Westerman v. Cary, 125 Wn.2d 277, 892 P.2d 1067 (1994).....22

Van Sant v. City of Everett, 69 Wn.App. 641, 849 P.2d 1276 (1993) 13

Court Rules

Rules of Appellate Procedure 2.5(c)(2) 6

Rules of Appellate Procedure 12.4 .....1, 6

Statutory Authorities

Kitsap County Code, Chapter 1.01.040 17

Kitsap County Code, Chapter 1.04.050 18

Kitsap County Code, Title 12 2

Kitsap County Code, Title 17 .....2, 18, 19, 21

Kitsap County Code, Chapter 17.100.030 18

Kitsap County Code, Chapter 17.100.040 19

Kitsap County Code, Chapter 17.110.510 19

Kitsap County Code, Chapter 17.110.515 20

Kitsap County Code, Chapter 17.110.635 19

Kitsap County Code, Chapter 17.110.730 .....19, 20

Kitsap County Code, Chapter 17.381 2

Kitsap County Code, Chapter 17.381.010 19

Kitsap County Code, Chapter 17.381.040 20

Kitsap County Code, Chapter 17.420 3

Kitsap County Code, Chapter 17.420.020 .....6, 16

Kitsap County Code, Chapter 17.455 3

Kitsap County Code, Chapter 17.455.060 .....3, 16, 17, 18, 19, 20, 21, 23

Kitsap County Code, Chapter 17.460 9

Kitsap County Code, Chapter 17.460.020 6

Kitsap County Code, Chapter 17.460.030 .....9, 19

Kitsap County Code, Chapter 17.530.030 20

Kitsap County Code, Title 19 2

Kitsap County Ordinance No. 490 (2012) 3

Revised Code of Washington, Chapter 7.24.010 23

Additional Authorities

3 A. Rathkopf, The Law of Zoning and Planning, Ch. 60-1, § 1 (4th ed. Cum.Supp. 1979) 12

4 Arden H. Rathkopf, The Law of Zoning and Planning § 51A.01 (Edward H. Ziegler ed., 1991) 13

1 Robert M. Anderson, American Law of Zoning § 6.01; Richard L. Settle, Washington Land Use and Environmental Law and Practice § 2.7(d) (1983) 13

1 R. Anderson, American Law of Zoning § 6.35 (3d ed. 1986) 16

1 R. Anderson, American Law of Zoning § 6.47 (2d ed. 1976) 10, 12

8 A. McQuillan, Municipal Corporations § 25.207 (3d ed. 1976) 12

I. IDENTITY OF MOVING PARTIES

The Respondent, KITSAP COUNTY, by and through its attorney, Neil R. Wachter, Special Deputy Prosecuting Attorney, asks this Court for the relief designated in Part II of this Motion.

II. RELIEF REQUESTED

KITSAP COUNTY (the "County") respectfully requests pursuant to RAP 12.4 that this Court deny the Appellant KITSAP RIFLE AND REVOLVER CLUB ("KRRC" or the "Club")'s Motion for Reconsideration ("Motion") and that this Court modify the Opinion to reflect and uphold the trial court's rulings on the 300-meter range project.

III. FACTS RELEVANT TO MOTION

A. Recent Procedural History

On October 28, 2014, this Court issued its published opinion[1] of the trial court's February 9, 2012 judgment.[2] On November 18, 2014, KRRC filed its Motion for Reconsideration. On December 18, 2014, the Court granted KRRC's motion to extend the reconsideration filing deadline and on December 22, 2014, the Court requested an answer to the Motion. Also, on December 1, 2014, KRRC filed its petition for review.

---

[1] *Kitsap County v. Kitsap Rifle and Revolver Club*, __ Wn. App. __, 337 P.3d 328 (Slip. Op., Oct. 28, 2014) (the "Opinion").

[2] Findings of Fact, Conclusions of Law and Orders (Feb. 9, 2012), CP 4052-4092 (the "Judgment"). "FOF" and "COL" refer to findings of fact and conclusions of law therein. The "Property" refers to KRRC's 72-acre parcel of real property.

B. The Opinion and KRRC's Motion

The Court affirmed rulings that commercial/military training uses of the Property and "dramatically increased noise levels" of rapid-fire shooting and other shooting activities that were infrequent or non-existent on the Property as of 1993 each constituted impermissible expansions of nonconforming use ("expanded uses") under the common law and the Kitsap County Code,[3] but reversed judgment that increased hours of operations established an expanded use. Opinion, at 14-16, 47. The Court also reversed the Judgment's land use injunction[4] and remanded for the trial court "to determine the appropriate remedy for the Club's expansion of its nonconforming use and permitting violations". Opinion, at 47.

KRRC's Motion asks the Court to vacate its remand order for entry of a revised judgment governing the affirmed "expanded uses" on the Property. Motion, at 14. KRRC also asks the Court to modify its Opinion to declare that these expanded uses are not prohibited by the common law

---

[3] The Kitsap County Code ("KCC" or the "Code") is published and maintained online at http://www.codepublishing.com/wa/kitsapcounty (last visited 12/29/14).

[4] Judgment, at 34 (CP 4085), providing:

> 6. A permanent, mandatory and prohibitive injunction is hereby issued enjoining use of the Property as a shooting range until violations of Title 17 Kitsap County Code are resolved by application for and issuance of a conditional use permit for use of the Property as a private recreational facility or other use authorized under KCC Chapter 17.381. The County may condition issuance of this permit upon successful application for all after-the-fact permits required pursuant to Kitsap County Code Titles 12 and 19.

and "are no longer prohibited by local code." Id.

KRRC challenges the effect of former KCC 17.455.060,[5] cited by the trial court as prohibiting enlargement or expansion of existing uses:

> KCC 17.455.060 provides that uses existing as of the adoption of Title 17 (Zoning) may be continued, but also prohibits their enlargement or expansion, unless approved by the hearing examiner pursuant to the Administrative Conditional Use Permit procedure of Title 17.420. Washington case law, as in *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998), also holds that uses that lawfully existed before the enactment of zoning ordinances may continue, but the existing use may not be significantly changed, altered, extended, or enlarged.

Judgment (COL 35), at 32 (CP 4081). The Opinion noted that the parties had not briefed the effect of KCC 17.455.060's repeal, and concluded that the code section reflected the state of the common law as to expanded uses. Opinion, at 12, n.5, 13. The ordinance repealing KCC 17.455.060 was effective July 1, 2012, and included no retroactive provisions.[6]

C. Clarifying KRRC's Geographic Expansion: 300-Meter Range.

KRRC seized upon a misunderstanding of development and use outside the Property's historic eight acres, writing:

---

[5] Chapter 17.455 KCC, in effect at the time of trial and judgment, is attached hereto as **Appendix 1**.

[6] Kitsap County Ordinance No. 490 (2012) is attached hereto as **Appendix 2** (without the ordinance's attachment consisting of revised Title 21 KCC "Land Use and Development Procedures")). The full ordinance is available online at http://kcwaimg.co.kitsap.wa.us/recorder/eagleweb/customSearch.jsp?pageId=Ordinances (last visited 12/29/14; accessed by searching for Doc. No. 490-2012).

> The Opinion concludes that the Club did not expand the area of its nonconforming use outside its historical eight acres.

Motion, at 4 (citing Opinion at 14). Kitsap County would respectfully request correction on this point. The Opinion regarded KRRC's development work as confined to its existing nonconforming use area, noting that the Court could not discern "whether the proposed 300 meter range was outside the historic eight acres." Opinion at 12, n. 4.

The County alleged[7] and the trial court implicitly found that KRRC's proposed 300-meter range is located entirely outside the recognized eight-acre historic use area. This geographic fact was not contested.[8] The trial court made findings confirming this fact, including:

---

[7] The complaint for trial alleges this geographic expansion:

> 54. In 2005, Kitsap County began receiving noise complaints regarding shooting and other activities at the Property. In March 2005, DCD began investigating reports by owners of neighboring parcels that heavy equipment was being used and earth-moving operations were occurring on the Property. ***In April 2005, DCD staff discovered extensive work in a long rectangular area on the Property to the east of the existing shooting areas (hereafter the "300-meter range")***: Vegetation removal, grading and other earth work . . . .

Third Amended Complaint for Injunction, Declaratory Judgment and Abatement of Nuisance, at 12 (CP 1706) (emphasis added).

[8] KRRC's Answer for trial responded in pertinent part:

> 34. In Response to Paragraph 54 of the Complaint, Defendant admits that in approximately April 2005 the Club was preparing an area of the property for use as a shooting range. A DCD Representative requested the Club to ***stop work in an area outside the eight acres historically used by the Club for gun club and shooting activities***.

- The 300-meter range area is a 2.85-acre cleared rectangle in the Property's forested eastern portion, which DNR replanted following a 1991 timber harvest. FOF 40, 41 (CP 4063).

- In 2005, KRRC logged, cleared and graded the 300-meter range area prior to stopping work at the County's request. FOF 41, 42 (CP 4063).

- KRRC asserted its abandonment of the 300-meter range project was a "retreat[] to its eight acre area of claimed 'historic use'". FOF 50 (CP 4065).

- The Findings cite to KRRC's own maps of the eight acres of historic use. FOF 8 (CP 4054-55) (citing Trial Exhibits 438, 486).[9]

- In the historic use footprint, the largest shooting area is the existing 200-yard rifle range.[10]

In addition to correcting the geographical error, the County would

---

Defendants' Answer, Affirmative Defenses, and Counterclaims to Third Amended Complaint, at 6 (CP 1776) (emphasis added).

[9] See Trial Exhibit 486 (attached hereto as **Appendix 3**), depicting the approx. eight-acre area of historic use on the Property circa May 2009. The 300-meter range is visible on the right-hand side of the image, i.e. to the east of the historic use area. See also RP 2584:3 – 2586:7 (testimony of Jeremy Downs describing Ex 486's to-scale depiction of the Property's actively used area); FOF 33 (CP 4060) (citing Ex 462, 544, 545, 546, 547 (2005 aerial images, taken after March of that year) as providing "clearest evidence of the state of development at the Property . . . which included clearing and grading work performed in the eastern portion of the Property . . .".); FOF 33 (CP 4061) (citing Ex 14 (2007 aerial image) as revealing extension of the existing rifle range).

[10] See FOF 29 (CP 4059) (describing the rifle range c. 1993, "with a series of backstops going out as far as 150 yards to the northeast" of the shooting shed). After extension, the rifle range accommodates target lines up to 200 yards (600 feet) from the shooting shed. Ex 64, 65, 66 (AHBL survey, Jan. 2011); Ex 491 (CD of the AHBL survey drawings – sheets 1, 2, 3). By comparison, the proposed 300-meter range would be at least 984 feet in length. (Meters-to-feet conversion from http://www.metric-conversions.org/length/meters-to-feet.htm (last visited 12/26/14)).

ask the Court to recognize KCC 17.460.020(C)'s applicability to the 300-meter range.[11] Otherwise, the Opinion may perpetuate a false understanding of uses of the Property outside the historic eight acres, one of which continues today notwithstanding KRRC's abandonment of the 300-meter range project. FOF 48, 49 (CP 4064-65).

IV. GROUND FOR RELIEF AND ARGUMENT

On reconsideration, the Court of Appeals may correct a decision terminating review based upon points of law or fact that the movant "contends the court has overlooked or misapprehended." RAP 12.4(c).[12]

A. Washington's Common Law Distinguishes Expanded Uses from Intensified Uses

KRRC argues "[t]here is no common law prohibition on expansion" of nonconforming uses of real property, suggesting that the common law "right to freely use and develop one's property for its highest and best use" is unbounded *unless* the local zoning jurisdiction has explicitly outlawed expanded uses in its zoning code. Motion, at 8. This

---

[11] See Opinion, at 11 (citing KCC 17.420.020(C)'s prohibition on expanding the area of an existing nonconforming use and moving of "the use or any part thereof" . . . "to any other portion of the property not historically used or occupied for such use.")).

[12] In its Motion at 2, KRRC cites reconsideration cases including *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 691 P.2d 524 (1984), in which our Supreme Court reconsidered its earlier opinion pursuant to RAP 2.5(c)(2) upon balancing "the principles of finality embodied in the Rules of Appellate Procedure" against "the complexity of the statutory authority issue and the importance of this litigation to thousands of individuals". Id, at 885-86.

stance ignores the common law's distinction between uses that are said to be "intensified" as opposed to "expanded" or "new".

KRRC claims that this Court mistook our Supreme Court's holdings for dicta when it cited *Keller v. City of Bellingham*, 92 Wn.2d 726, 600 P.2d 1276 (1979); *Rhod-A-Zalea & 35th, Inc. v. Snohomish County ("Rhod-Z-Zalea")*, 136 Wn.2d 1, 959 P.2d 1024 (1998); and *City of University Place v. McGuire ("McGuire")*, 144 Wn.12d 640, 30 P.3d 453 (2001). Motion, at 7.

To support its "dicta" theme, KRRC cites to *Bartz v. Board of Adjustment*, 80 Wn.2d 209, 217, 492 P.2d 1374 (1972) and *State ex rel. Smilanich v. McCollum ("Smilanich")*, 62 Wn.2d 602, 607, 384 P.2d 358 (1963). Motion, at 7-8. In *Bartz*, the Spokane County Board of Adjustment granted a permit to construct a building to house operations of a property owner's established wrecking yard business, a use which pre-dated zoning of the property as "agricultural" and was therefore nonconforming. *Bartz*, 80 Wn.2d at 210-11. The Board made findings, including that the structure would improve the wrecking yard's efficiency and appearance and that the building would have no detrimental effects upon surrounding properties. Id, at 213. On a neighbor's appeal, the trial court affirmed the Board but the Court of Appeals reversed. Id, at 211.

The Supreme Court reversed, focusing on whether this permit

could be issued in light of the "desirable policy of zoning legislation" to phase out nonconforming use. Id, at 217. In so doing, the Court quoted the *Smilanich* opinion:

> "The general rule of law is that the purposes of zoning ordinances are served by phasing out nonconforming uses and that resolutions of boards of county commissioners and rules of planning commissions which refuse to enlarge nonconforming uses will be sustained by the courts . . . . But there is nothing in this zoning code which prohibits the enlarging of a nonconforming uses in which there is no building involved, except such as provided in s 8(b), paragraph one, of the code, . . ."

Bartz, 80 Wn.2d at 217 (quoting *Smilanich*, 62 Wn.2d at 602).

The *Bartz* court noted that Spokane County's zoning code spoke in terms of "extension" and "expansion" of a nonconforming use but made no distinction between the terms' meanings. Id, at 217. The Court found the county zoning ordinance contained "no prohibition" against "the extension or expansion of a nonconforming use" and that this permit "was within the Board's discretion, subject to the guidelines [of the County Zoning Ordinance]". Id, at 217. The local legislature's decision to not "prohibit expansion of a nonconforming use", writes KRRC, compels "courts to defer to that decision." Motion, at 9.

Bartz pre-dated the expansion vs. intensification discussion in *Keller*. Perhaps more importantly, *Bartz* embraced a process in which the jurisdiction considered a permit to erect a structure in potential violation

of the property's nonconforming use. In Kitsap County, under chapter 17.460 KCC, a nonconforming land user may similarly present a proposed new use for approval by the Department of Community Development ("DCD") Director who determines whether "the proposed use will not more adversely affect the character of the zone in which it is proposed to be located than the existing or preexisting use". KCC 17.460.030. Unlike in *Bartz*, no application was ever made for County approval of new or expanded uses at the Property.[13]

KRRC cites *Meridian Minerals Co. v. King County ("Meridian")*, 61 Wn. App. 195, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991), in support of its reading of *Bartz* and *Smilanich*. Motion, at 9. *Meridian* concerned a rock quarry operation on King County's Enumclaw Plateau which dated from 1905 and was a nonconforming use following that county's zoning of the area as agricultural in 1958. *Meridian*, 61 Wn. App. at 198-99. The county had refused the owners' previous applications for a "re-zone" or an "unclassified use permit" (a/k/a CUP) to operate a commercial quarry. The case's issue was whether the county "erred in refusing to issue a grading permit allowing Meridian to intensify, enlarge,

[13] See FOF 32 (CP 4060) (finding no evidence of application for any County permit, with noted exceptions); FOF 51 (CP 4065) (finding KRRC never applied for a conditional use permit for use of property as a shooting range or as a private recreational facility); FOF 77 (CP 4072) (finding no evidence that application was ever made to Kitsap County to approve commercial use of the Property).

and expand its nonconforming land use." Id, at 204-05.

The *Meridian* court considered the King County Code's treatments of nonconforming use of land and nonconforming buildings:

> The code contains "'nonconforming use'" exceptions as to buildings. There is no express provision relating to nonconforming uses as to land and hence no provision regarding variations in use (e.g., expansion, enlargement, or intensification). A literal interpretation of the Code would disallow any nonconforming land use. However, ***[the county] has interpreted the Code to allow nonconforming land uses as provided under the common law, i.e., uses as they existed at the time of zoning.*** Meridian contends [the county] must apply the Code's definitions and classifications of the type of use in question when determining nonconforming use rights.

Meridian, 61 Wn. App. at 204-05 (emphasis added). Notwithstanding the lack of a provision regarding variations in use, the Court found that the county properly rejected the proposed grading permit on the basis of the extent of the change the permit would have allowed in the property's established quarry use. Id, at 208. The Court wrote:

> As acknowledged in *Keller*, nonconforming uses do not always remain static. *Keller*, at 731, 600 P.2d 1276 (citing 1 R. Anderson, Zoning § 6.47 (2d ed. 1976)). The issue thus arises as to the extent changes in a nonconforming use are tolerated without requiring a rezone or conditional use permit.

Meridian, 61 Wn. App. at 208. The Court recognized that the proposed grading permit would not transform the "type of activity", but found the resulting tremendous increase in quarrying activity would cross over from

an intensification into a prohibited enlargement:

> Meridian's proposed intensification is different in kind from that which existed in 1958 and would constitute a prohibited enlargement of the nonconforming use. The nature and purpose of the original use would change with the proposal and would have a substantially different impact and effect on the surrounding area.

Meridian, 61 Wn. App. at 210. In so ruling, the Court cited to *Keller*'s intensification analysis. Id, at 208-209 (citing *Keller*, 92 Wn.2d at 731).

In *Keller*, the Court applied the City of Bellingham's zoning ordinance providing that "[a] nonconforming use shall not be enlarged, relocated or rearranged after the effective date of the ordinance which made the use nonconforming", to the proposed enlargement of a chlorine manufacturing plant. *Keller*, 92 Wn.2d at 727-28. The trial court found that proposed improvements constituted a "permitted intensification" and not a "prohibited enlargement" of the use. Id, at 729. As contrasted with the instant case, the *Keller* trial court made factual findings "that intensification wrought no change in the nature or character of the nonconforming use" and "that the intensified use '(has) no significant effect on the neighborhood or surrounding environment.'" Id, at 732. Thus, the case came down to the city's lack of prohibition on intensification of uses. Id, at 731. On this point, the Court discussed the common law regarding intensified vs. expanded uses:

> When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. 1 R. Anderson, Supra at s 6.47; 8 A. McQuillan, Municipal Corporations s 25.207 (3rd ed. 1976). Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. *Jahnigen v. Staley*, 245 Md. 130, 137, 225 A.2d 277 (1967). The test is whether the intensified use is "different in kind" from the nonconforming use in existence when the zoning ordinance was adopted. 3 A. Rathkopf, The Law of Zoning and Planning, ch. 60-1, s 1 (4th ed. Cum.Supp.1979).

Keller, 92 Wn.2d at 731. This, is the "different in kind" analysis applied by the *Meridian* court to the quarry grading permit application without citation to a code provision prohibiting expansion or enlargement. *Meridian*, 61 Wn. App. at 210.

Rhod-A-Zalea concerned a nonconforming peat mining operation that Snohomish County had cited for failure to obtain (a) a conditional use permit ("CUP") and (b) a grading permit required under the building code. *Rhod-A-Zalea*, 136 Wn.2d at 3-4. A hearing examiner found that the use was nonconforming requiring no CUP, but that a grading permit was required for excavating and filling. Id, at 4. The trial court found that the owner had a

> vested right to continue the peat mining operation, and since the operation by its nature involved grading, excavating, and filling, it was not subject to the County's grading regulations, which were enacted after the mining began.

Id, at 5. The Court of Appeals affirmed, and the Supreme Court considered what was the vesting impact of the nonconforming status, writing:

> The right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a "protected" or "vested" right. See *Van Sant v. City of Everett*, 69 Wn.App. 641, 649, 849 P.2d 1276 (1993); Martin v. Beehan, 689 S.W.2d 29, 31 (Ky.Ct.App.1985); 4 Arden H. Rathkopf, The Law of Zoning and Planning § 51A.01 (Edward H. Ziegler ed., 1991). **This right, however, *only* refers to the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use**. See 1 Robert M. Anderson, American Law of Zoning § 6.01; Richard L. Settle, Washington Land Use and Environmental Law and Practice § 2.7(d) (1983).

Rhod-Z-Zalea, 136 Wn.2d at 6 (italicized emphasis provided; bold emphasis added). Apart from any ordinance, the Court discussed the scope of nonconforming use:

> A protected nonconforming status generally grants the right to continue the existing use ***but will not grant the right to significantly change, alter, extend, or enlarge the existing use***.

Rhod-A-Zalea, 136 Wn.2d at 7 (citing *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 218, 242 P.2d 505 (1952) (emphasis added). The Court reversed, holding that the County's grading permit requirement was a reasonable exercise of its police powers, and rejected the owner's claim that the county's later-enacted regulation could not apply to the peat operation because it was a nonconforming use. *Rhod-A-Zalea*, 136 Wn.2d

at 15.

The 2001 *McGuire* opinion articulates the common law rule on expansion of nonconforming uses, holding:

> Under Washington common law, nonconforming uses may be intensified, but not expanded.

McGuire, 144 Wn.12d at 649 (citing *Keller*, 92 Wn.2d at 731-32). KRRC dismisses this statement as dicta, noting that the *McGuire* Court ruled on other bases. Motion, at 11. The "dicta" label simply means the Court's ultimate decision did not rely upon this pronouncement of law. See *State ex rel Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954) (citing Black's Law Dictionary's definition of "dictum", meaning "an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination"). *McGuire*'s pronouncement was dicta in terms of the Court's resolution of that case.

KRRC cites a general rule of construction that land use ordinances are in "derogation of 'the common-law right to use property so as to realize its highest utility[.]'" Motion, at 8 (citing *Littlefair v. Schultze*, 169 Wn. App. 659, 669-70, 378 P.3d 218 (2012), *review denied*, 176 Wn.2d 1018 (2013); and *State ex rel. Standard Mining & Dev. Corp. v. City of*

Auburn, 82 Wn.2d 321, 326, 510 P.2d 647 (1973)). Neither cited case addresses nonconforming use.[14] KRRC's "derogation" quote is derived from the general rule announced in the cited *City of Auburn* case:

> It is the general rule, recognized and adopted by this court, that zoning ordinances should be liberally construed to accomplish their plain purpose and intent. At the same time the court bears in mind that they are in derogation of the common-law right to use property so as to realize its highest utility and should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.

City of Auburn, 82 Wn.2d at 326 (citing *Hauser v. Arness*, 44 Wn.2d 358, 267 P.2d 691 (1954)).

Because the common law disfavors nonconforming uses, zoning provisions allowing continuance of non-conforming uses "should be strictly construed, and zoning provisions restricting nonconforming uses should be liberally construed." *Hartley v. City of Colorado Springs*, 764 P.2d 1216, 1224 (Colo. 1988) *(*citing *City & County of Denver v. Board of Adjustment,* 31 Colo.App. 324, 331, 505 P.2d 44, 47 (1972); *Hooper v. Delaware Alcoholic Beverage Control Comm'n,* 409 A.2d 1046, 1050 (Del.Super.Ct.1979); *Brown County v. Meidinger,* 271 N.W.2d 15, 18–19

---

[14] *Littlefair*, 169 Wn. App. at 669-670 (reversing trial court's ruling for property owner who constructed fence in an easement contrary to unambiguous zoning code); *City of Auburn*, 82 Wn.2d at 326-27 (discussing gravel mining permit required by zoning code).

(S.Dak. 1978) (citations omitted); 1 R. Anderson, American Law of Zoning § 6.35, at 557–58 (3d ed. 1986)).

New Hampshire's Supreme Court has written that "[w]e strictly construe [code] provisions that permit the continuance of preexisting nonconforming uses, and the party asserting that a proposed use is not new or impermissible bears the burden of proof." *Dovaro 12 Atlantic, LLC v. Town of Hampton*, 158 N.H. 222, 965 A.2d 1096, 1102 (N.H. 2009) (citation omitted). See also *City of New Orleans v. National Polyfab Corp.*, 420 So.2d 727, 729 (La.App. 4 Cir. 1982) (injunction of extension of nonconforming use is "elementary" right of municipality to enjoin violations of zoning ordinance) (citation omitted).

B. Former KCC 17.455.060 Governed the Trial Court's Declaratory Judgments and its Repeal does not Legitimize an Affirmed "Expanded Use".

For the first time in this appeal, KRRC challenges the effect of former KCC 17.455.060, which provided in pertinent part:

> A. 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.
>
> The hearing examiner shall review and approve requests for alteration or enlargement of the use or structure through the conditional permit review procedures as set forth in Chapter 17.420. In no case shall the enlargement of these uses be allowed beyond the limits of existing contiguously

> owned parcels at the time of the passage of the amended ordinance.

KRRC's challenge to KCC 17.455.060 must fail for at least two reasons: The common law applies the law in effect at the time of judgment, and the Kitsap County Code includes a "savings ordinance"

"At common law, where a statute is repealed, all pending litigation must be decided according to the state of the law at the time of the decision." *State v. Lombardo*, 32 Wn. App. 681, 683, 649 P.2d 151 (Div. II 1982). The court will construe any saving statute strictly as being in derogation of this common law rule. *Lombardo*, 32 Wn. App. at 683 (citing *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970); *Marble v. Clein*, 55 Wn.2d 315, 347 P.2d 830 (1959)). Thus, a repealing statute "need not state in express terms an intention to affect pending litigation; rather, the statute must reasonably and fairly convey such intention." *Lombardo*, 32 Wn. App. at 684 (citing *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978); *State v. Zornes*, supra).

In the instant case, Kitsap County's Code includes a "savings ordinance", KCC 1.01.040, which provides in pertinent part that "[t]he adoption and the repeal of ordinances by this code shall not affect . . . [a]ctions and proceedings which began before the effective date of this code." KCC 1.01.040(A). Thus, when Judge Serko applied KCC

17.455.060, she applied the law in effect at the time of the court's judgment.[15] Given the Code's savings provision and the lack of any retroactive verbiage in the repealing ordinance, the trial court properly applied former KCC 17.455.060.

C. Notwithstanding the Repeal, Remand is Appropriate to Enjoin Expanded Uses

If KCC 17.455.060 and the common law on expanded uses had no application to this case, the question would turn to what provisions of the Kitsap County Code act to restrict or prohibit an "expanded use".

One answer lies in the Code's general provision on compliance, providing in pertinent part:

> It shall be unlawful for any person, firm, or corporation to erect, construct, establish, move into, ***alter, enlarge***, use or cause to be used, any buildings, structures, improvements, or ***use of premises*** contrary to the provisions of this title, provided, however, conditions of approval as referred to in the changes to zones, amendments and alterations section, and the existing uses referred to in the interpretations and exceptions section, shall be allowed to continue in the manner and extent provided for therein.

KCC 17.100.030 (emphasis added). Uses are allowed under Title 17 KCC when the uses are either specifically listed in the title as permitted outright or listed as permitted subject to the conditions of a conditional use permit,

---

[15] See also KCC 1.04.050, providing "[w]henever a reference is made to this code, or to any portion of it, or to any ordinance of Kitsap County, the reference shall apply to all amendments, corrections, and additions thereto, whenever made."

or, if unspecified, where the DCD Director determines that the use is "similar" to a listed, permitted use. KCC 17.100.040; KCC 17.381.010. Under Title 17 KCC, a use is "prohibited" if it is not expressly allowed and does not receive the Director's approval that it is similar to a listed, permitted use. KCC 17.110.635. For a proposed use to be "similar" to an existing permitted use, the Director must make findings, including that

> The proposed use shall share characteristics in common with, and not be of greater intensity, density or generate more environmental impact than, those uses listed in the land use zone in which it is to be located.

KCC 17.100.040(D). The Code creates no exception for a nonconforming land user to embark upon a new use – the County's review is still required.

The nonconforming use chapter continues to provide that the DCD Director may grant an application for a change of use under certain conditions. By its terms, the repealed KCC 17.455.060 provided an avenue for hearing examiner review of alteration or enlargement of changes to nonconforming uses. Thus, KCC 17.455.060's repeal creates no substantive change in a code that already allows Director's approval of a "change in use" per KCC 17.460.030.[16]

---

[16] A "nonconforming use" of land is "a use of land . . . which was lawfully established or built or which has been lawfully continued but does not conform to the regulations established by this title or the amendments thereto." KCC 17.110.510. A "use" means the "nature of occupancy, type of activity or character and form of improvements to which land is devoted." KCC 17.110.730.

Additionally, the Opinion upheld judgment that KRRC engaged in "expanded uses" of its Property, and KRRC does not challenge the ruling that the expanded uses constitute a public nuisance. Opinion, at 28. Separate and apart from the nonconforming use analysis, the Opinion did not disturb Judgment that the Code's "Rural Wooded" zoning table disallows the commercial and military training uses of the Property. Judgment, at 28-29 (CP, at 4079-4080)(citing KCC 17.381.040 (Table E)).

D. Notwithstanding the Repeal, Remand is Appropriate to Enjoin Nuisances per Se

In its conclusion, KRRC asks this court to vacate its instruction for the trial court to fashion an injunction for past expansion. Motion, at 14. Notwithstanding expanded use issues raised by KRRC, a remand would properly address nuisances per se. The trial court found, and the Opinion either affirmed or did not disturb, multiple uses of the Property adjudged to be nuisances per se under KCC 17.530.030 and KCC 17.110.515.[17] Opinion, at 18. This will necessarily include uses not within the scope of an intensified nonconforming use, because such uses are contrary to the Code's zoning tables. Injunctive relief is available against violations of zoning ordinances which are declared by ordinance to be nuisances. *City*

---

[17] KCC 17.530.030 provides that "[a]ny use ... in violation of this title is unlawful, and a public nuisance" and KCC 17.110.515 provides that "any violation of this title [zoning] shall constitute a nuisance per se."

of Mercer Island v. Steinmann, 9 Wn. App. 479, 513 P.2d 80 (1973). Thus, notwithstanding the issue of former KCC 17.455.060, the trial court will properly consider injunctive orders against each of the uses of or activities upon the Property that violate Title 17 KCC, as well as against each of the non-permitted development activities upon the Property.

E. Repeal of Former KCC 17.455.060 does not Render Moot the Trial Court's Declaratory Judgment

KRRC claims mootness of "all issues related to expansion", based on KCC 17.055.060's repeal and the common law's purported non-prohibition on expanded uses, which are said to leave "no basis for the trial court to fashion an injunction or any other remedy for expansion on remand". Motion, at 12.

KRRC's restatement of mootness is that "when legislation is repealed after a trial court makes its decision, any issues that relate to that legislation become moot". Motion, at 12 (citing *State ex rel. Evans v. Amusement Association of Washington, Inc. ("Evans")*, 7 Wn. App. 305, 307, 499 P.2d 906, 907 (1972). Hence, KRRC suggests the Court "could vacate all portions of the Opinion" analyzing expansion. Motion, at 13.

A case is moot where "it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief." *Spokane Research &*

Defense Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) (citing *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994)). Or, stated conversely:

> The controversy at issue in the litigation must be "definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Washington State Communication Access Project v. Regal Cinemas, Inc., 173 Wn. App. 174, 203-04, 293 P.3d 419, *review denied*, 178 Wn.2d 1010 (2013) (quoting *Aetna Life Insur. Co. of Hartford v. Haworth*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937)(citations omitted)).

The cited *Evans* case concerned declaratory judgment and injunction entered against certain pinball machines based upon a state gambling statute. During appeal, the legislature repealed that statute and replaced it with a different statutory scheme. The case's issues "became moot when the legislature repealed or substantially amended all of the statutes upon which the declaratory judgment and injunction were based." *Evans*, 7 Wn. App. at 307. The Court noted that in rare cases, an appellate court will retain and decide an otherwise moot case that presents "matters of continuing and substantial public interest". Id, at 307 (citing *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 442 P.2d 967

(1968)). The Court declined to apply this exception, finding "the relevant statutes have been superseded by a new and comprehensive plan which will answer the questions raised in this appeal and clearly grant the relief sought by the state". *Evans*, 7 Wn. App. at 308.

Under Washington's Uniform Declaratory Judgment Act ("UDJA"), "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other relations ***whether or not further relief is or could be claimed***." RCW 7.24.010 (emphasis added); see also *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961) ("the declaratory judgment act should be liberally construed in order to facilitate its socially desirable objective of providing remedies not previously countenanced by our law.") Thus, notwithstanding application of former KCC 17.455.060, KRRC's uses and activities that go beyond intensification of its core "shooting range" use are subject to injunction under the UDJA.

KRRC may claim that it ceased renting its Property to commercial providers of military training such as Surgical Shooters, Inc. and Firearms Academy of Hawaii (FOF 74, 75 (CP 4071-72)) but cessation does not make the trial court's rulings moot. "Voluntary cessation does not moot a case or controversy unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

recur.'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (alteration in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). In light of KRRC's ongoing relationship with the for-profit entity "National Firearms Institute", which provides firearm training at the Property and is owned by the family of KRRC's longtime Executive Officer Marcus Carter, future commercial use of the Property is likely. See FOF 73 (CP 4071). The trial court's judgment on commercial / military training uses of the Property is not an academic, moot judgment.

V. CONCLUSION

KITSAP COUNTY respectfully requests that this Court grant the relief identified in Part II of this Motion.

Respectfully submitted this 30th day of December, 2014.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

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

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

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

SIGNED in Port Orchard, Washington this 31st day of December, 2014.

Batrice Fredsti

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

Appendix 1

Chapter 17.455 Kitsap County Code
(chapter in effect at time of trial and judgment)

Chapter 17.455
INTERPRETATIONS AND EXCEPTIONS

Sections:

17.455.010 Director authority to interpret code provisions and issue administrative decisions.
17.455.060 Existing uses.
17.455.080 Pending long or short subdivisions.
17.455.090 Temporary permits.
17.455.100 Number of dwellings per lot.
17.455.110 Obnoxious things.
17.455.120 Existing lot aggregation for tax purposes.

17.455.010 Director authority to interpret code provisions and issue administrative decisions.

It shall be the responsibility of the director himself/herself to interpret ambiguous and/or conflicting code and apply the provisions of this title, Kitsap County Countywide Planning Policies, Kitsap County Comprehensive Plan and applicable sub-area plans.

A. The director may initiate an administrative code interpretation without an applicant request at any time, and the interpretation will be made available pursuant to Title 21 by the department with the development code to which it applies.

B. Any person(s) may submit an application for code interpretations from the director and the interpretation will be made available by the department pursuant to Title 21 with the development code to which it applies.

C. At the request of the applicant, in writing, the director may also authorize a variation of up to ten percent of any numerical standard, except density, when unusual circumstances cause undue hardship in the strict application of this title; provided, such a variance shall be approved only when all of the following conditions and facts exist:

1. There are special circumstances applicable to the subject property, including size, shape, topography, location or surroundings, that were not created by the applicant and do not apply to other property in the same vicinity or zone;

2. Such variance is necessary for the preservation and enjoyment of a substantial property right or use of the applicant possessed by the owners of other properties in the same vicinity or zone;

3. The authorization of such variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or zone in which the property is located; and

4. The variance is the minimum necessary to grant relief to the applicant.

5. An approved variance shall become void in three years if a complete application has not been received. The director's response, including findings for granting the variation, shall be in writing and kept in the department files.

D. All code interpretations are binding and may be appealed by any party through the process pursuant to Title 21.

E. All code interpretations, hearings examiner decisions on such interpretations and board reviews shall be a permanent record of the department of community development and included in the Kitsap County Department of Community Development Policy Manual. Code interpretations shall be made available to the public and posted on the county website.

(Ord. 415 (2008) § 213, 2008: Ord. 256 (2001) § 2, 2001: Ord. 234 (1999) § 2 (part), 1999: Ord. 216 (1998) § 4 (part), 1998)

17.455.060 Existing uses.

A. Except as hereinafter specified, any use, building, or structure lawfully existing at the time of the enactment of this title may be continued, even though such use, building, or structure may not conform to the provisions of this title for the zone in which it is located. 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.

The hearing examiner shall review and approve requests for alteration or enlargement of the use or structure through the conditional permit review procedures as set forth in Chapter 17.420. In no case shall the enlargement of these uses be allowed beyond the limits of existing contiguously owned parcels at the time of the passage of the amended ordinance.

B. This section does not apply to any use, building, or structure established in violation of any zoning ordinance previously in effect.

All uses in existence occurring on a specific parcel of land which legally qualified as a permitted unclassified use under the provisions of any former Kitsap County zoning ordinance, shall continue as conforming uses after the effective date of this title, provided, however, in no case shall any use be allowed to expand into

adjoining or contiguous property without an approved zone change or conditional use permit, and further, any expansion on the original parcel shall comply with the standards contained in the zone within which the use is permitted.

(Ord. 415 (2008) § 214, 2008: Ord. 234 (1999) § 2 (part), 1999: Ord. 216 (1998) § 4 (part), 1998)

17.455.080 Pending long or short subdivisions.

Nothing herein shall require any change in the location, plans, construction, size or designated use of any residential plat, for which preliminary official approval has been granted prior to the adoption of this title.

(Ord. 234 (1999) § 2 (part), 1999: Ord. 216 (1998) § 4 (part), 1998)

17.455.090 Temporary permits.

The director may approve temporary permits, with conditions to mitigate negative impacts, valid for a period of not more than one year after issuance, for temporary structures or uses which do not conform to this title.

Upon the expiration of the temporary permit, the applicant shall have thirty days within which to remove and/or discontinue such temporary use structure.

Upon approval, temporary permits may be issued for the following uses or structures:

A. Storage of equipment and materials during the building of roads or other developments;

B. Temporary storage of structures for the housing of tools and supplies used in conjunction with the building of roads or other developments;

C. Temporary office structures;

D. Temporary housing/construction living quarters for personnel such as watchmen, labor crews, engineering, and management; provided:

1. The building permit for the primary structure must have been issued;

2. The temporary dwelling must not be permanently placed on the site;

3. The temporary dwelling must meet the setback requirements of the zone in which it is located; and

4. For the purpose of constructing a single-family dwelling, temporary living quarters (for example, a recreational vehicle) may be permitted only

in conjunction with a stick frame structure. This permit will remain active as long as the building permit for the single-family dwelling remains active.

E. Use of equipment essential to and only in conjunction with the construction or building of a road, bridge, ramp, dock, and/or jetty located in proximity to the temporary site; provided, that the applicant shall provide a construction contract or other evidence of the time period required to complete the project; and provided further, that the following equipment shall be considered essential to and in conjunction with such construction projects:

1. Portable asphaltic concrete-mixing plants.

2. Portable concrete-batching plants.

3. Portable rock-crushing plants.

4. Accessory equipment essential to the use of the aforementioned plants.

F. Temporary uses and structures otherwise permitted within the zone which will remain up to one hundred eighty days on an existing lot or parcel where compliance with an administrative conditional use permit and landscaping requirements are impractical.

G. Temporary uses and structures not specified in any zone classification subject to applicable provisions of the Kitsap County Code; provided, that such uses and structures may not be approved by the director for a period greater than ninety days.

H. The occupancy of a recreational vehicle (RV) for a period not to exceed three months subject to the following conditions:

1. The subject property must be located in the Rural Wooded (RW), Rural Protection (RP), or Rural Residential (RR) zones;

2. The RV must be occupied by the property owner or family member;

3. The RV must be provided with approved utilities including septic or sewer (health district approval), water, and electrical power;

4. The location of the RV must meet all setbacks required by the underlying zone;

5. The director may impose additional conditions as appropriate to ensure that the RV use is compatible with the surrounding properties;

6. The minimum RV size shall be two hundred square feet; and

7. A permit will be required each time the RV is placed on a parcel. If the RV is placed on the same parcel each year the application fee will be half of the initial fee.

I. Placement of a storage container on a property developed with single-family dwelling or properties with an active building permit for construction of a residential or commercial building is subject to the following conditions:

1. The container must meet all applicable setbacks for the zone; and

2. The storage container may not be placed on site for more than ninety days; however, in instances where a building permit for a single-family dwelling or commercial development is active, the container may remain on site until thirty days after the permit expires or receives final inspection/certificate of occupancy.

(Ord. 415 (2008) § 215, 2008: Ord. 234 (1999) § 2 (part), 1999: Ord. 216 (1998) § 4 (part), 1998)

17.455.100 Number of dwellings per lot.
Except as provided for elsewhere in this title, there shall be no more than one dwelling unit per lot.

(Ord. 415 (2008) § 216, 2008: Ord. 234 (1999) § 2 (part), 1999: Ord. 216 (1998) § 4 (part), 1998)

17.455.110 Obnoxious things.
In all zones, except as provided for elsewhere in this title, no use shall produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses. Lighting is to be directed away from adjoining properties. Not more than one foot candle of illumination may leave the property boundaries.

(Ord. 234 (1999) § 2 (part), 1999: Ord. 216 (1998) § 4 (part), 1998)

17.455.120 Existing lot aggregation for tax purposes.
For the purposes of this title, parcels which have been aggregated by the county for tax purposes shall be considered separate legally existing lots of record.

(Ord. 415 (2008) § 217, 2008: Ord. 234 (1999) § 2 (part), 1999: Ord. 216 (1998) § 4 (part), 1998)

Appendix 2

Kitsap County Ordinance No. 490 (2012) (ordinance only; attachment omitted)

ORDINANCE NO. 490- 2012

ORDINANCE ADOPTING KITSAP COUNTY CODE TITLE 21 'LAND USE AND DEVELOPMENT PROCEDURES,' REPEALING AND REPLACING FORMER KITSAP COUNTY CODE TITLE 21 'LAND USE AND DEVELOPMENT PROCEDURES' IN ITS ENTIRETY, AND MAKING CORRESPONDING AMENDMENTS TO TITLE 17 'ZONING' AND TITLE 18 'ENVIRONMENT'

BE IT ORDAINED:

Section 1. General Findings. The Kitsap County Board of Commissioners (Board) makes the following findings:

1) Kitsap County Code (KCC) Chapter 21.08 provides guidance on the process and procedures for amending Kitsap County's development code.

2) In 2011, the Department of Community Development (DCD) began a review of development code and determined that KCC Title 21 'Land Use and Development Procedures' was in need of comprehensive review and rewrite.

3) The process for the proposed amendments to KCC Title 21 included advance solicitation of comments, open-invite meetings, presentations to three DCD stakeholder groups, meetings with a comprehensive plan amendment stakeholder group, individual meetings with the public, publication and posting on the County website, and Board and Planning Commission work studies, public hearings and deliberation. The DCD Advisory Group, West Sound Conservation Council, and the Home Builders' Association held meetings on the proposed amendments Title 21.

Section 2. General Procedural Findings. The Board makes the following findings regarding the process and public participation aspects in revising Title 21 KCC.

1) In December 2010, following timely and effective public notice, the Board adopted Ordinance 467-2010, which directed the DCD to update Title 21, "Land Use and Development Procedures (Title 21)." The purpose of the update was to address a variety of inconsistencies and errors, provide for process improvements, and consolidate definitions.

2) Chapter 21.02 KCC "Definitions" Procedural Findings.

A-2-2

a. On February 13, 2012, Kitsap County submitted a 60-day Notice of Intent to Adopt this ordinance to the Washington State Department of Commerce, pursuant to RCW 36.70A.106.

b. On March 19, 2012, pursuant to the State Environmental Policy Act (SEPA), Kitsap County issued a Determination of Nonsignificance and Adoption of Existing Environmental Documents for the proposed amendment; the DNS comment period expired April 3, 2012, and no SEPA appeals were filed.

c. Following timely and effective public notice, the Planning Commission conducted a work-study on April 3, 2012, to consider proposed Chapter 21.02 KCC.

d. Following timely and effective public notice, the Planning Commission conducted a public hearing on Chapter 21.02 KCC. The Planning Commission voted 8-1 **to recommend** the proposed amendments with three modifications outlined in the Findings of Fact.

e. On April 17, 2012, the Planning Commission held a meeting to deliberate upon and finalize the *Findings of Fact, Conclusions, and Recommendations of the Kitsap County Planning Commission to the Kitsap County Board of County Commissioner of Kitsap County.*

3) Chapter 21.01 KCC, "Introduction" and Chapter 21.04 KCC, "Land Use and Development Procedures' Procedural Findings.

a. On March 19, 2012, pursuant to the SEPA, Kitsap County issued a Determination of Nonsignificance and Adoption of Existing Environmental Documents for the proposed amendment; the DNS comment period expired April 3, 2012, and no SEPA appeals were filed.

b. Meetings with stakeholders. Staff met with the Home Builders' Association, West Sound Conservation Council and the DCD Advisory Group to discuss changes to Chapters 21.01 and 21.04.

c. On April 3, 2012, the Planning Commission held an informational session regarding Chapter 21.04.

4) Chapter 21.08 KCC, "Annual Comprehensive Plan Amendment Procedures" Procedural Findings.

A-2-3

a. Project website. A key component in communication and distribution of information to the public was the use of a project website. This website included project schedule information, draft documents for public review, mapping information, and opportunities for public input.

b. Meetings with stakeholders. Staff met with the Home Builders' Association and the DCD Advisory Group to discuss changes to Chapter 21.08. In addition, a DCD Title 21.08 Stakeholders Group was formed to review in depth the changes being proposed. Input has been gathered from these various meetings to comprise a draft document. Provided in an attached exhibit, are comments received to-date from stakeholders.

c. On February 13, 2012, Kitsap County submitted a 60-day Notice of Intent to Adopt this ordinance to the Washington State Department of Commerce, pursuant to RCW 36.70A.106.

d. On March 19, 2012, pursuant to the SEPA, Kitsap County issued a Determination of Nonsignificance and Adoption of Existing Environmental Documents for the proposed amendment; the DNS comment period expired April 3, 2012, and no SEPA appeals were filed.

e. Following timely and effective public notice, the Planning Commission conducted a work-study session on March 6, 2012, to consider amendments to Chapter 21.08 KCC.

f. Following timely and effective public notice, the Planning Commission conducted a work-study session on March 20, 2012, to consider amendments to Chapter 21.08 KCC.

g. Following timely and effective public notice, the Planning Commission conducted a public hearing on March 20, 2012, on Chapter 21.08 KCC. They voted 5-2 **to recommend** the proposed amendments with three modifications outlined in the Findings of Fact.

h. On April 3, 2012, the Planning Commission held a meeting to deliberate upon and finalize the *Findings of Fact, Conclusions, and Recommendations of the Kitsap County Planning Commission to the Kitsap County Board of County Commissioner of Kitsap County.*

5) On April 18, 2012, following timely and effective public notice, the Board of County Commissioners held a work-study session to review all proposed amendments to Title 21.

A-2-4

6) On May 14, 2012, following timely and effective public notice, the Board of County Commissioners conducted a public hearing to accept oral and written comments regarding all proposed amendments to Title 21. The Board established May 29, 2012 as the closure date for additional written comments.

7) On June 6, 2012, following timely and effective public notice, the Board of County Commissioners conducted a Work Study to review oral and written comments received at the hearing and submitted prior to May 29, 2012. The Board provided direction to prepare amendments as noted in the June 6, 2012 Executive Summary.

8) On June 19, 2012, DCD prepared a memo to the Board which outlined the amendments consistent with the June 6, 2012 Executive Summary. An additional minor amendment (amendment 19) is noted in the memo, based on discussion with the public and the DCD.

9) On June 25, 2012, following timely and effective public notice, the Board of County Commissioners deliberated on Kitsap County Code Title 21, related code and the Planning Commission recommendation.

10) The opportunities provided for citizen participation used in the preparation of the draft amendments are consistent with the requirements of the Growth Management Act and the State Environmental Policy Act.

11) The Board has considered the following criteria consistent with Kitsap County Code Chapter 21.08 KCC and makes the following findings:

a) The proposed amendments are consistent with or support other plan elements and/or development regulations; and
b) The proposed amendments reflect the goals, objectives and policies of the Comprehensive Plan; and
c) The proposed amendments are consistent or not inconsistent with the Countywide Planning Policies; and
d) The proposed amendments are compliant with the requirements of the Growth Management Act; and
e) Elements of the proposed amendments will correct procedural deficiencies identified by the Department of Community Development and insert desirable changes to development regulations.

12) The Board finds that it is in the best interest of the public health, welfare and safety to enact this new and updated code.

A-2-5

Section 3. **Kitsap County Code.** Kitsap County Code Title 21 'Land Use and Development Procedures' last amended by Ordinance 452-2010 is repealed in its entirety. Kitsap County Code Title 21, as set forth in Attachment 1 and incorporated herein by this reference, is hereby adopted.

Section 4. Kitsap County Code Section 18.04.210, last amended by Ordinance No. 416-2008, is hereby amended as follows:

~~A. In addition to the procedures set forth in Title 21 of this code, the county establishes the following administrative appeal procedures under RCW 43.21C.075 and WAC 197-11-680:~~

~~1. An administrative appeal relating to a FEIS or threshold determination for a nonexempt action that does not require a public hearing shall be heard by the hearing examiner.~~

~~2. An administrative appeal relating to a FEIS or threshold determination for a nonexempt action that requires a public hearing shall be combined with and heard by the reviewing body for the underlying action.~~

~~3. Administrative appeals relating to a threshold determination shall be heard by the Hearing Examiner.~~

~~4. For any appeal under this subsection, the county shall provide for a record that shall consist of the following:~~

~~a. Findings and conclusions;~~

~~b. Testimony under oath; and~~

~~c. A taped or written transcript, the cost of which may be borne by the appellant.~~

~~5. The county may require the appellant to provide an electronic transcript.~~

~~6. The procedural determination by the county's responsible official shall carry substantial weight in any appeal proceeding.~~

~~B. Any appeal of the county's final administrative appeal under subsection (A) of this section shall be to the applicable reviewing court or administrative agency as provided under Washington State law.~~

~~C. The county shall give official notice under WAC 197-11-680(5) whenever it issues a permit or approval for which a statute or ordinance establishes a time limit for commencing judicial appeal.~~

A-2-6

Appeals of SEPA decisions shall be in accordance with Title 21 KCC.

Section 5. Repealers. The following sections of the Kitsap County Code are hereby repealed:

a. Chapter 17.405 Kitsap County Code (Pre-Application Review), adopted by Ordinance No. 216-1998, is hereby repealed.

b. Kitsap County Code Section 17.420.060 (Vacation of administrative conditional use permit), last amended by Ordinance No. 415-2008, is hereby repealed.

c. Kitsap County Code Section 17.420.070 (Revocation of permit), last amended by Ordinance No. 415-2008, is hereby repealed.

d. Subsections A, B, D and E of Kitsap County Code Section 17.455.010 (Director Authority to interpret code provisions and issue administrative decisions), last amended by Ordinance No. 415-2008, are hereby repealed. Kitsap County Code Section 17.455.010 shall be re-titled "Director authority to issue administrative decisions" and the subsection numbering shall be revised accordingly.

e. Kitsap County Code Section 17.455.060 (Existing Uses), last amended by Ordinance No. 415-2008, is hereby repealed.

f. Chapter 17.510 Kitsap County Code (Changes to zones, rezones, amendments, alterations), last amended by Ordinance No. 416-2008, is hereby repealed.

Section 6. Explicit Action. Should any amendment to Kitsap County Code Title 21 that was passed by the Board during its deliberations be inadvertently left out upon publication, the explicit action of the Board as discussed and passed shall prevail upon subsequent review and verification by the Board.

Section 7. Effective Date. This ordinance is effective July 1, 2012.

Section 8. Severability. If any provision of this ordinance, or its application to any person, entity or circumstance is for any reason held invalid, the remainder of the ordinance, or the application of the provision to other persons, entities or circumstances, is not affected.

A-2-7

DATED this 25th day of June, 2012.

BOARD OF COUNTY COMMISSIONERS
KITSAP COUNTY, WASHINGTON

ATTEST:

BOARD OF COMMISSIONERS STATE OF WASHINGTON KITSAP COUNTY

ROBERT GELDER, Chair

JOSH BROWN, Commissioner

Dana Daniels
Clerk of the Board

ABSTAINED
CHARLOTTE GARRIDO, Commissioner

Approved as to form:

Deputy Prosecuting Attorney

A-2-8

Appendix 3

Trial Exhibit 486

KRRC - EIGHT ACRE CLUB FACILITY AS OF 2009

0 150 300 600

SCALE = 1:300

SOURCE:

GOOGLE EARTH MAY 1, 2009

Soundview Consulta
Environmental, Natural Resource, and Land e Consultants
2907 Harborview Drive
Gig Harbor, WA 98335
Office 253.514.8952
253.514.8954

KITSAP RIFLE & REVOLVER CLUB
4900 SEABECK HIGHWAY NORTHWEST
BREMERTON, WA 98312

SECTIONS 10 & 15, TWP. 18N, RGE. 12 W, W.M.

DATE: 08/24/11
JOB: 1061.0001
BY: JD & KM
SCALE: 1"=300'
SHEET 1 OF 1

A-3-2