No. 43076-2-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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

v.

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

and

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

AMENDED REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In this case, respondent Kitsap County asks this Court to shut down appellant Kitsap Rifle and Revolver Club (the "Club") and trust the County with the power to impose virtually any condition on the Club through a Conditional Use Permit ("CUP") before the Club can reopen. Yet undisputed evidence shows the County betrayed the Club's trust, and the law, to put itself in this position. The County has never explained why it withheld its chief enforcement officer's allegations that the Club was an unlawful nuisance until after the County had obtained what it wanted from the Club—facilitation of the County's land swap with the State Department of Natural Resources (DNR)—and after the Club had given up its bargaining power in exchange for what it thought were clear, final, and enforceable contractual commitments from the County to allow the Club to continue as it then existed.

Against that backdrop, the County convinced the trial court to deem the Club a public nuisance and illegal land use entitled to none of the benefits the County promised the Club when it sold the Club its property. The County convinced the trial court to terminate the Club's vested right to operate at the property, where it has operated continuously since 1926. It convinced the trial court to issue an injunction shutting the Club down unless the Club could obtain a CUP, which might never

happen, under conditions the County has never disclosed. It convinced the trial court the Club has illegally changed the fundamental nature of its land use, even though the County Commissioners confirmed in 1993 that the Club is a grandfathered nonconforming shooting range, even though every activity at the Club today is consistent with the very nature of a gun club and shooting range, and even though it has always been a place for shooting with safety infrastructure and supervision.

The County convinced the trial court sound from the Club is a public nuisance based on purely subjective testimony about aesthetic offenses to a few complainants, even though other members of the same community testified the sound does not bother them. It prosecuted its case without ever taking any decibel readings or objective studies of sound, against a regulatory framework that expressly allows the Club to create sound without limit during its operating hours from 7 am to 10 pm.

The trial court deemed the Club a public safety nuisance based on a finding of a mere possibility of harm, even though the Club—in all its years—has never been proven or found to have harmed any person or property, and the Navy inspected the Club and found it safe. The County's speculative, vague safety concerns about the Club are ironic considering the County's loose regulation of firearms, which allows shooting on five acre parcels without the robust safety rules, infrastructure,

and supervision fostered at the Club.

The trial court denied the Club's accord and satisfaction defense and breach of contract counterclaim based on the erroneous finding that there was no evidence of the manifest intent of the 2009 Deed other than the Deed itself, even though overwhelming extrinsic evidence supports the Club's interpretation—evidence that includes the County's own Resolution stating the Deed was intended: "to provide that [the Club] continue to operate with full control over the property." Ex. 477 (App. 15) (emphasis added). The trial court construed the Deed to give the Club no benefits other than title to the property itself, even though the Club's attorney negotiated into the Deed a detailed "improvement" clause that says the Club can improve and modernize its facility within the historical eight acres as long as it does so consistent with management standards for a modern shooting range; and even though the necessary implication of the Deed's confinement and public access clauses is that the County would allow the Club to continue as it then existed.

The trial court implicitly denied the Club's estoppel defense without a single written finding or conclusion of law, even though the evidence proves beyond a shadow of a doubt that the Club reasonably relied on the supportive assurances, representations, actions, and silence of the County Commissioners acting within their authority while conducting

official County business. The trial court's decision allows the County to repudiate its solemn words and commitments, enshrines the County's deceptive acts as legally permissible, and results in the unjust enrichment of the County. The trial court denied estoppel even though granting the claim would improve the way the County functions by requiring it to act openly, honestly, and with integrity in conducting land transactions and other proprietary transactions with the public, which it did not do here.

The Club's opening brief explains how the trial court incorrectly applied legal standards regarding nonconforming use rights, public nuisances, contract interpretation, estoppel, and injunction, while making several findings of fact unsupported by substantial evidence. The trial court's errors spawned two excessive and arbitrary injunctions that threaten the future existence of the Club and cast a dubious shadow over other shooting ranges in the Pacific Northwest. These injunctions cannot stand because there is no lawful basis to terminate the Club's nonconforming use. Even if one or more of the trial court's other decisions is affirmed, the injunctions will be excessive and arbitrary because they are not tailored to remedy any specific harm.

In its response, the County attempts to defend and excuse the trial court's errors through an oblique approach that addresses few of the Club's arguments directly and frequently leaves the Court and Club to

guess at what the exactly the County is attempting to argue. The overall thrust of the response is that there are many facts in the record and the trial court has discretion in granting declaratory judgment and injunctive relief. Such erroneous reasoning would insulate virtually every declaratory judgment and injunction against meaningful appellate review. The County also attempts to escape substantive review by raising hyper-technical procedural arguments, even while admitting the Club's assignments of error, issues on appeal, and positions taken in the opening brief are perfectly clear.

In this reply, the Club addresses each of the County's apparent and implied arguments, identifies the correct legal standards and how they should apply, and shows the law and evidence require reversal of the trial court's decisions.

II. ARGUMENT

A. The County Cannot Escape Substantive Review on Procedural Grounds.

The County argues the Court should "truncate" the Club's appeal on procedural grounds because the Club assigned error to certain findings of fact in the body of its brief, rather than in the assignments of error section. Resp. at 3, 39–44. Yet, as discussed below, the County seemingly admits this is a non-issue, as it cites to and acknowledges each of the Club's challenges to findings of fact. The Court should disregard

the County's procedural arguments.

The County argues the Club waived any challenge to the trial court's findings of fact because it did not identify specific findings of fact among its assignments of error. Resp. at 3, 39–42, 44. At the same time, the County acknowledges this should not be an issue if "briefing makes the nature of the challenge [to a finding of fact] perfectly clear, particularly where the challenged finding can be found in the text of the brief."[1] The County later acknowledges that the Club's opening brief challenges findings of fact 23, 25, 26, and 57. Resp. at 44 (citing Brief at 52–53). The opening brief makes the nature of the challenge to these findings of fact perfectly clear and the findings are identified in the brief. The Club did not waive its challenge to these findings.

A related issue relates to "Finding of Fact" 28, which the County treats as unchallenged in this appeal. *See* Resp. at 12–13. It provides:

> "By virtue of the deed, the County did not release the Club from current or future actions brought under public nuisance or violation of County codes or violation of its historical and legal nonconforming uses."

CP 4059 (FOF 28) (App. 1). This so-called "finding" declares the effect of the Deed,[2] which is a legal conclusion.[3] As the County recognizes,

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[1] Resp. at 40 fn. 79 (citing *In re Disciplinary Proceeding Against Conteh* ("*Conteh*"), 175 Wn.2d 134, 144, 294 P.3d 724 (2012); *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709–10, 592 P.2d 631 (1979); RAP 1.2(a)).

[2] CP 4087–92 (2009 Bargain and Sale Deed) (App. 1).

when a trial court misidentifies a conclusion of law as a finding of fact, it is reviewed as a conclusion of law.[4] The Club assigned error to the trial court's denial of its accord and satisfaction defense and breach of contract counterclaim based on the trial court's misinterpretation of the Deed. Brief at 2, 40–41. That issue was preserved and must be decided, regardless of the trial court's mis-labeling of Finding of Fact 28.[5]

The County argues several of the Club's assignments of error "identify questions of *law*," and cites the rule that an appellant need not assign error to "conclusions of law."[6] The Club's appeal properly assigns error to the trial court's remedies and conclusions of law that involve application of law to facts.[7] The Club's briefing explains these errors. There is nothing unusual about this.

The County complains the Club did not assign error to the trial court's failure to adopt one or more of the Club's proposed findings of fact. Resp. at 3, 39, 42–43, 70. Yet the County does not identify any particular finding that was proposed by the Club and rejected by the trial

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[3] *Eder v. Nelson*, 41 Wn.2d 58, 62, 247 P.2d 230 (1952) (holding the effect of a contract is a legal conclusion).

[4] Resp. at 43 (citing *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986)).

[5] At worst, the lack of citation to "finding" 28 is an excusable technical omission. *Conteh*, 175 Wn.2d at 144.

[6] Resp. at 40 (emphasis in original) (citing *In re Estate of Krappes*, 121 Wn. App. 653, 660 n. 11, 91 P.3d 96, *review den.*, 152 Wn.2d 1033 (2004)).

[7] Brief at 2–3 (assignments of error); *id.* at 8–9 (termination of Club's nonconforming use right); *id.* at 20, 22 (noise nuisance determination); *id.* at 23, 26 (safety nuisnace determination); *id.* at 26–27 (unlawful expansion and change of use determination); *id.* at 40–41 (denial of Club's breach of contract counterclaim and accord and satisfaction defense); *id.* at 56–57 (denial of Club's estoppel defense); *id.* at 71–72 (injunctions).

court, or explain how it might be significant. The County also fails to cite any authority that would have required the Club to make such an assignment of error. Case law shows it is not required.[8]

The County argues the Club waived its assignment of error regarding the trial court's denial of its accord and satisfaction defense by "not briefing" the defense. Resp. at 2. Yet, the Club filed extensive briefing to show the effect of the Deed was to resolve actual or potential disputes between the Club and County regarding the Club's then existing facilities and operations and its land use status.[9] It is black letter law that "an accord and satisfaction consists of a bona fide dispute, an agreement to settle that dispute, and performance of that agreement."[10] The trial record contains briefing on the defense, and the opening brief states the trial court erred in denying it. Brief at 2, 40–41. The County does not pretend to be ignorant to the nature of the defense, nor does it argue accord and satisfaction should be denied even if the Club is right about the Deed. There was no waiver of the accord and satisfaction defense.

The County's response mentions that the parties filed no motion to reconsider or clarify the trial court's judgment. Resp. at 8. Yet the

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[8] *State v. Armenta* ("*Armenta*"), 134 Wn.2d 1, 14 n.9, 948 P.2d 1280 (1997) (reviewing trial court's failure to make a particular finding of fact even though appellant did not assign error to it in opening brief). Unlike *Armenta*, this appeal does not depend on a finding that a specific, disputed verbal communication occurred, nor does it involve a verbal communication contradicted by substantial documentary evidence.

[9] *See* CP 1958, 1966–73, 1998 (App. 30); CP 1558, 1565–73 (App. 31).

[10] *Perez v. Pappas*, 98 Wn.2d 835, 843, 659 P.2d 475 (1983).

County cites no authority assigning any significance to the lack of such a motion, and the Club's counsel is not aware of any.

B. The Only Significance of "Credibility" Is to Reduce Deference to the Trial Court Because Credibility Was Not a Factor in Its Decision.

The County attempts to skew the standard of review by arguing the Club cannot "overcome the deference to the trial court's evaluation of credibility." Resp. at 39. Credibility, however, was not a factor in the trial court's decision. Therefore, the only effect "credibility" has in this appeal is to reduce any deference to the trial court.

The trial court's decision includes no credibility finding regarding any witness, and the County points to no such finding in the record. The rule is that the Court of Appeals "will not review credibility determinations made by the trier of fact."[11] The County cites no authority that would presume a credibility determination where none was made.

The trial court evidently concluded credibility is not important to the outcome of this case because it made no such finding. Neither party requested a credibility determination.[12] The lack of importance placed on

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[11] *Recreational Equip., Inc. v. World Wrapps Northwest, Inc.*, 165 Wn. App. 553, 567-68, 266 P.3d 924 (2011) (deferring to written credibility finding) (emphasis added); *see also*, *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 275 P.3d 339 (2012) *review denied*, 175 Wn.2d 1008 (2012) (similar).

[12] *See generally*, CP 4026–49 (Club's proposed findings) (App. 26); CP 3987–4025 (County's proposed findings) (App. 27).

credibility reduces any deference the trial court might receive.[13] It also means the County cannot use credibility arguments to resolve a disputed fact in its favor where it had the burden of proof.[14]

The substantial evidence standard asks whether the evidence cited in the County's response is "sufficient to persuade a rational fair-minded person the premise is true."[15] Because credibility was not a factor in the trial court's decision, any deference is reduced. Where the County attempts to show a decision of the trial court can be affirmed on alternative factual grounds, it must provide substantial evidence.[16] Where there is a dispute over a pure question of law, such as which legal standard should apply, the trial court receives no deference.[17] There is also no deference to the trial court in deciding whether a legal conclusion was properly formed from a fact or finding.[18] The Court should apply these standards without assuming the credibility—or lack of credibility—of any party or witness.

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[13] *See Dolan v. King County*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011) (holding "the less the outcome depends on credibility, the less deference is given to the trial court").

[14] *In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010) ("lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof") (emphasis added); *Pilling v. Eastern and Pac. Enterprises Trust*, 41 Wn. App. 158, 165, 702 P.2d 1232 (1985).

[15] *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 269 (2003); *Raven v. Dept. of Social and Health Svcs.*, 177 Wn.2d 804, 809, 829, 306 P.3d 920 (2013) (reversing finding of neglect for lack of substantial evidence).

[16] *Teter v. Deck*, 174 Wn.2d 207, 216, 274 P.3d 336 (2012).

[17] *State v. Corona*, 164 Wn. App. 76, 79, 261 P.3d 680 (2011) ("[w]hen we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case").

[18] *See In re Marriage of Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000).

C. Termination Is Contrary to Law.

The Club's opening brief shows there is no ordinance, statute, or common law authority permitting termination of the Club's nonconforming use right. Brief at 8–12. The grounds for termination cited by the trial court are: (1) change in the use; (2) expansion of the use; (3) unpermitted site development; (4) nuisance conditions; and (5) increased use. CP 4076–83. The ordinances and case law cited by the trial court do not support termination, and the decision should trouble every owner of a property with a nonconforming use.[19]

The County's response consumes approximately ten pages discussing the termination remedy. Resp. at 48–59. For legal support, it invokes the Uniform Declaratory Judgment Act (UDJA), local ordinances, and case law. Yet the County never identifies a single legal authority that expressly authorizes termination on these or any alternative grounds.

Under Washington law, regulation of nonconforming uses is a matter of local governance. *Rhod-A-Zalea*, 136 Wn.2d at 8. At the same time, a nonconforming use right is a "vested" and "protected" property right that "cannot be lost or voided easily." *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993). The Washington Supreme Court explains the "reason for their continuance" as follows:

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[19] CP 4080 (COL 26) (citing KCC Title 17); CP 4081 (COL 27, 35) (citing *Rhod-A-Zalea & 35th, Inc. v. Snohomish Cnty.* ("*Rhod-A-Zalea*"), 136 Wn.2d 1, 959 P.2d 1024 (1998)).

> "An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained."

State ex rel. Miller v. Cain, 40 Wn.2d 216, 218, 242 P.2d 505 (1952). Consistent with this, a zoning ordinance "may not require a property owner immediately to cease a nonconforming use." *Skamania County v. Woodall*, 104 Wn. App. 525, 537, 16 P.3d 701 (2001) (emphasis added). The only grounds recognized in Washington upon which to terminate a nonconforming use right are "abandonment or reasonable amortization." *Rhod-A-Zalea*, 136 Wn.2d at 7.

The trial court correctly found that by 1993 the Club possessed a vested nonconforming use right.[20] The County does not dispute this. The trial court and County have not attempted to base termination upon amortization or abandonment. The only question is whether the law supports termination on any of the trial court's factual grounds.

The County first argues the trial court was authorized by the UDJA to terminate the nonconforming use right in order to resolve a controversy between the parties. Resp. at 48–51. The UDJA, however, is not a source of legal rights. It is merely a mechanism for resolving a controversy by applying legal rights to facts. The UDJA provides that courts "shall have power to declare rights, status and other legal relations[.]" RCW 7.24.010.

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[20] *See* CP 4055 (FOF 10) (App. 1); CP 4075 (COL 6).

It gives courts the power to declare a right or obligation that exists under a statute or ordinance.[21] It does not create rights or imply remedies.[22] The UDJA, on its own, does not authorize termination.

The County's next suggestion is that the requisite authority can be found, by implication, in Kitsap County zoning ordinances. Resp. at 54–58. Washington courts generally construe an unambiguous ordinance by its plain language. *Littlefair v. Schulze*, 169 Wn. App. 659, 669—70, 378 P.3d 218 (2012). They also hold that zoning ordinances:

> "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 . . . manifest in their language."

Id. (emphasis added).[23] It is error for a court to amend a zoning ordinance through judicial construction,[24] or to interpret an ordinance in a way that produces absurd results.[25]

No Kitsap County ordinance plainly and unambiguously provides for termination of a vested nonconforming use. The Code itself declares

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[21] RCW 7.24.010; *United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 640, 669 P.2d 476 (1983) (affirming declaration of rights of person "affected by a statute").

[22] *See, e.g., Chevron Corp. v. Naranjo*, 667 F.3d 232, 244-45 (2d Cir. 2012) *cert. denied*, 133 S.Ct. 423 (U.S. 2012) ("[when substantive law] does not provide that legal predicate, the [UDJA] cannot expand the [statutory] authority by doing so"); *Hanson v. Wyatt*, 552 F.3d 1148, 1157 (10th Cir. 2008) (holding the UDJA "does not create substantive rights"); 26 C.J.S. Declaratory Judgments § 7 at 59–60 ("[t]he declaratory judgment acts do not create or change any substantive rights, or bring into being or modify any relationships, or alter the character of controversies").

[23] *State ex rel. Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 326, 510 P.2d 647 (1973).

[24] *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998).

[25] *City of Tacoma v. Price*, 137 Wn. App. 187, 197–98, 152 P.3d 357 (2007).

nonconforming uses are intended "to continue until they are removed or discontinued." KCC 17.460.010 (App. 2). There are County ordinances that specifically provide for abandonment and amortization of a nonconforming use right.[26] Other ordinances authorize the County to seek general remedies such as civil penalties or an injunction.[27] Implying additional grounds for termination besides what is stated in the Code would violate its plain language and structure, and Washington law.

Even if the Code were ambiguous, it would not authorize termination because ambiguity must be interpreted in favor of the Club, as landowner. *Littlefair*, 169 Wn. App. at 670. The only possible exception is if Kitsap County could prove an "established practice of enforcement" to substantiate its interpretation of an ambiguity in the Code.[28] The County does not make this argument, and there is no such evidence here. In fact, the evidence shows the opposite. Jeff Rowe, the County's chief building official and planning director, testified an expansion can be rolled back as an alternative to requiring a CUP. VT 278:17–279:15.

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[26] KCC 17.460.020(A)–(C) (App. 2).

[27] *See* KCC 17.530.030 (authorizing a mandatory injunction as the remedy to abate a public nuisance) (App. 3); KCC 17.530.020 (authorizing civil penalties for violations of Title 17). The difference between an injunction and termination of a vested property right is profound. The trial court and County intended to permanently strip the Club of its nonconforming use right. In contrast, a party subject to an injunction can always return to court to petition for it to be modified or lifted. *See* CR 60(b)(6); 15A Wash. Prac., Handbook Civil Procedure § 73.13 (2012–2013 ed.) ("[CR 60(b)(6)] is generally taken to mean that the court retains authority to modify or vacate any injunction, temporary or permanent, if conditions have changed").

[28] *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007).

Interpreting the Code to allow termination based on a single illegality, as the County does, is of doubtful constitutionality and would produce absurd results. If that were the law, a single code violation would cause a nonconforming use to permanently lose its right to operate. A nonconforming restaurant could be shut down for having an unpermitted electrical socket. The County's position is unreasonable.

The County's position is also in direct conflict with Washington case law, which provides for termination only upon abandonment or amortization. *Rhod-A-Zalea*, 136 Wn.2d at 8. The County fails to cite a single case where a nonconforming use right was properly terminated due to a code violation or nuisance condition.

The trial court issued a declaratory judgment terminating the Club's vested nonconforming use right "by operation of law," yet failed to identify any legal authority for that remedy.[29] The County attempts to defend the decision as authorized by the UDJA, County ordinances, and case law, but its arguments do not withstand scrutiny. It is undisputed that the Club's vested nonconforming use right was not amortized or abandoned. Termination on other grounds was in error. Judgment should be entered declaring that the Club retains its nonconforming use right.

[29] CP 4084 ¶ 1 (App. 1); CP 4079 (COL 23).

D. Sound from the Club Is Not a Public Nuisance.

The trial court concluded that at some undesignated point in time sound from the Club went from being historically acceptable to being a public nuisance warranting closure and termination of its nonconforming use right.[30] The court did this based on the subjective testimony of a few objectors who live within two miles of the Club.

The trial court erred because: (1) sound from the Club does not impact the rights of the entire "two-mile" neighborhood or community equally because many witnesses from that community confirmed it does not bother them at all; (2) sound from the Club between 7 am and 10 pm cannot be deemed a nuisance because such sounds are expressly authorized, without limit, by statute and regulation; and (3) there is no objective decibel evidence from which to conclude the Club ever exceeded the reasonable sound levels authorized and tolerated in its community. Brief at 16–20. The County's response does not rebut these arguments.

1. Sound From the Club Does Not Affect Equally the Rights of the Entire "Two-Mile" Community.

A public nuisance "is one that affects equally the rights of an entire community or neighborhood."[31] The trial court erred because there is no evidence that sound from the Club affects equally the rights of the entire

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[30] CP 4073 (FOF 84); 4076 (COL 11–13).

[31] Resp. at 62; Brief at 21 (citing RCW 7.48.130; *State v. Hayes Investment Corp.*, 13 Wn.2d 306, 125 P.2d 262 (1942); *Crawford v. Central Steam Laundry*, 78 Wash. 355, 139 P. 56 (1914)).

community in the vicinity of the Club. Brief at 20–22. The County failed to address this argument in its response. The County does not dispute that many witnesses confirmed the sound from the Club is no problem at all. *See id.* at 13–15 (relevant testimony). The County does not dispute that the sound is lawful if it does not affect equally the rights of the entire community. The record shows it does not.

This is not a case where the rights of the entire community are equally affected. To many witnesses living within two miles from the Club, the sound was not objectionable and therefore did not affect their rights in any way. The requirement that a public nuisance "affect equally" the entire two-mile community asserted by the County and found by the trial court is not satisfied here. The decision must be reversed.

2. *Sound from the Club Between 7 am and 10 pm Is Authorized by Law, Without Limit.*

Washington law requires an act to be done "unlawfully" in order to constitute a nuisance.[32] "Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance." RCW 7.48.160. A court may not usurp legislative or administrative power by deeming an expressly authorized activity a nuisance. *Judd v. Bernard*, 49 Wn.2d 619, 622, 304 P.2d 1046 (1956). In *Judd*, the court dismissed a nuisance claim

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[32] RCW 7.48.120 (defining "nuisance"); KCC 17.110.515 (App. 4) (incorporating statutory definition of "nuisance"); *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 P. 976 (1922) (defining "nuisance" as "the unlawful doing of an act").

to enjoin the state game commission from poisoning fish in a lake because the action was undertaken pursuant to statutory authority. *Id.* at 620–21. The County does not distinguish *Judd*.

State and local law regulates sound based on decibel levels.[33] State and County regulations expressly exempt authorized shooting ranges from sound limitations between 7 am and 10 pm. WAC 173-60-050(1)(b); KCC 10.28.050(2) (App. 7). This exemption is the product of the Noise Control Act of 1974, which directs the Department of Ecology to "provide exemptions or specially limited regulations relating to recreational shooting[.]" RCW 70.107.080.

The County does not dispute that the Club was an authorized shooting range, or that sound created at the Club from 7 am to 10 pm is expressly authorized pursuant to State and local sound exemptions. The County does not attempt to explain how judging sound from the Club between 7 am and 10 pm to be a nuisance was not a usurpation of state and local legislative and administrative authority.

Instead, the County argues the trial court acted within its broad equitable discretion when it ignored all of the above. Resp. at 60—62. The County cites numerous federal cases, none of which involve a sound nuisance, public nuisance, or Washington law.[34] The County implies

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[33] WAC 173-60-040, WAC 173-60-050; KCC 10.28.040 (App. 7); KCC 10.28.050(2).
[34] *See* Resp. at 60–61, fns. 142–148.

these cases allow courts to disregard other laws when exercising equitable powers.[35] The County's own case law, however, holds the equity power cannot contradict the plain terms of a statute, as the trial court did here.[36]

The County further argues a savings clause in RCW 70.107.060 means the Club's sound exemption does not prevent a public nuisance action. Resp. at 65. The savings clause provides:

> "Nothing in this chapter shall be construed to deny, abridge or alter alternative rights of action or remedies in equity or under common law or statutory law, criminal or civil."

RCW 70.107.060(1) (emphasis added). By its own terms, this savings clause applies only to statutes found in RCW Title 70, Chapter 107. It does not apply to the regulatory exemption for sound from the Club between 7 am and 10 pm. The trial court unlawfully usurped legislative and administrative authority by deeming sound from the Club a nuisance.

3. The County Fails to Show Sound from the Club Was Ever Objectively Unreasonable.

The trial court also erred in concluding sound from the Club was a nuisance where there was no evidence showing it is objectively unreasonable or that it has caused anything other than a subjective, aesthetic offense. Brief at 18–20. The record contains no decibel evidence regarding sound from the Club, and no evidence that it ever

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[35] Resp. at 61 (citing dissenting opinion in *Miller v. French*, 530 U.S. 327, 338, 120 S.Ct. 2246, 2253, 147 L.Ed.2d 326 (2000)).

[36] *Miller*, 530 U.S. at 338–39 (holding district court erred in granting an injunction contrary to a federal statute).

exceeded Kitsap County's regulatory decibel limitations. *Id.* at 13–14, 18–20; VT 597:7–598:9; 626:5–10. The County does not dispute this.

As noted in the Club's opening brief, "[t]hat a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance." *Mathewson v. Primeau*, 64 Wn.2d 929, 938, 395 P.2d 183 (1964). The County does not challenge this rule, distinguish this case, or show that its witnesses' entirely subjective complaints about sound from the Club prove anything other than aesthetic offenses. No more was proven, especially considering the numerous witnesses who testified that the Club's sound is acceptable. Brief at 14.

The trial court found the sound of the Club is akin to the "sound of war." CP 4073 (FOF 84). This finding pertains to the aesthetic *quality* of the sound, not its volume. One can hear the "sound of war" coming from a television even if the volume is barcly audible. This subjective finding cannot prove a public nuisance.

Cases cited in the County's response show that "unreasonableness" is an element of its public nuisance claim.[37] That element was the subject

[37] Resp. at 64 n. 159 (citing *Lakey v. Puget Sound Energy, Inc.* 176 Wn.2d 909, 923, 296 P.3d 860 (2013); *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005)). In *Lakey*, the court dismissed public and private nuisance claims against a power station whose use had increased because the plaintiffs could not prove it was unreasonable. 176 Wn.2d at 923. In *Grundy*, the court required that harm be "substantial and unreasonable" in order to prove a nuisance. 155 Wn.2d at 6.

of *Lehman*, cited in the opening brief.[38] There, the court dismissed a noise nuisance claim against a rifle range based on the "general rule" that "no one is entitled to absolute quiet in the enjoyment of his property; but one may insist on a degree of quietness consistent with the standard prevailing in the locality in which one lives." *Id.* (emphasis added). This case is consistent with *Mathewson* because a "degree of quietness" is an objective measure of the volume of sound in an environment, not some immeasurable aesthetic quality. 64 Wn.2d at 938. It also shows a sound is not a nuisance unless it is proven to exceed standards by which other sounds are permitted in a locality.

That was also the rule in another case cited in the opening brief, *Woodchuck*.[39] There, the court affirmed summary judgment dismissing a noise nuisance claim against a gun club because there was no evidence of a violation of the local noise control ordinance. The County does not attempt to distinguish this case.

The County's response cites no case law involving a sound nuisance, whatsoever. Thus, there is no precedent that might call *Lehman* or *Woodchuck* into question. These cases are consistent with the only Washington case cited by either party on the subject of a sound nuisance,

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[38] *Lehman v. Windler Rifle & Pistol Club*, 44 Pa. D. & C.3d 243, 246, 1986 WL 20804 (Pa. Com. Pl. 1986); Brief at 19–20.

[39] *Concerned Citizens of Cedar Heights—Woodchuck Hill Road v. DeWitt Fish & Game Club* ("*Woodchuck*"), 302 A.D.2d 938 (N.Y. App. 2003); Brief at 19.

Gill v. LDI, 19 F.Supp.2d 1188 (W.D. Wash. 1998). Brief at 19. There, the Western District of Washington denied summary judgment against a plaintiff claiming nuisance where the plaintiff presented expert evidence of sound in excess of decibel regulations. There is no precedent to support the trial court's decision that a historical sound source exempt from sound regulations is a public noise nuisance solely because of the subjective testimony of a few lay witnesses who found it annoying.

The County does not dispute that Kitsap County sound regulations define the reasonable maximum level of sound permitted in the community around the Club. The County does not show—and the trial court did not find—that some lower level of sound is a more appropriate standard. The only objective community standard is Kitsap County's own sound regulation, which the Club was never shown to have exceeded. The sound nuisance decision must be reversed.

E. The Club Is Not a Public Safety Nuisance.

The trial court made three findings of fact regarding the safety of the Club's range. CP 4070 (FOF 67–69). There is no finding that any bullet from the Club ever left the Club property, struck a person or nearby property, or is likely to leave the Club and cause substantial harm. The trial court only concluded that bullets from the Club will "*possibly* strike persons or damage property in the future." CP 4070 (FOF 68) (emphasis

added). This does not prove a public safety nuisance.

We live in a world of risk. Washington recognizes a mere possibility of harm does not constitute a safety nuisance.[40] If it were, the highways, roads, and airports would be closed by injunction. The County does not dispute that a risk of harm must be, at a minimum, "reasonable and probable" in order to prove a public safety nuisance.[41] The County does not dispute that the trial court did not find a reasonable and probable likelihood of future harm.[42] The County's response does not present substantial evidence of a reasonable and probable likelihood of harm. The trial court erred in holding the Club to be a public safety nuisance.

Faced with the inadequacy of the trial court's findings and conclusions, the County scours the record for evidence of a reasonable and probable likelihood of harm. Resp. at 31–38. Yet the evidence that failed to persuade the trial court also fails the substantial evidence test. It cannot persuade a fair and reasonable person that the Club is reasonably and probably likely to cause substantial harm.

First, the County cites the testimony of Gary Koon, a disgruntled

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[40] *See* Brief at 24; *Hite v. Cashmere Cemetery Assn.*, 158 Wash. 421, 424, 290 P. 1008 (1930) (finding contamination of drinking water was not "reasonable and probable" and therefore cemetery was not a nuisance).

[41] Resp. at 68 (discussing *Hite*, 158 Wash. at 424).

[42] The County opines that COL 21 contains an "embedded" safety finding that was "mislabeled as a conclusion." Resp. at 31; CP 4072 (COL 21). This conclusion refers only to a "risk." *Id.* It says nothing about the degree of risk, and does not contradict the trial court's finding of a mere possibility of harm. The trial court did not find a reasonable and probable likelihood of harm.

neighbor.[43] He testified about military surface danger zone maps ("SDZs") that he obtained for various firing locations at the Club. Resp. at 32–34. The County cites no precedent stating that the existence of a person or property within an SDZ is sufficient to conclude that shooting within that area is a safety nuisance, much less an enjoinable one. The County seeks to create that precedent here by asserting SDZs depict "the area into which bullets will fall, based upon the weapon system and direction and origin of fire." Resp. at 32. Even if this were correct, it would not establish a reasonable and probable likelihood of harm because each SDZ for the Club includes portions of the Club's property.[44] The County cites no evidence showing the probability that a bullet fired at the Club will leave the Club property as opposed to landing within the Club's part of the SDZ. Thus, the SDZs do not show a reasonable and probable likelihood of harm.[45]

The County emphasizes Koon's testimony that the military does not allow shooting unless it owns all of "the property within the SDZ" or there are "engineered solutions to keep bullets from escaping." Resp. at 32–33. This is not evidence of a likelihood of harm. Moreover, Koon

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[43] VT 1194:8–1195:20 (background); 1267:17–1268:3 (noise); 1269:11-23 (testifying his wife signed petition complaining about sounds from the Club).

[44] *See* Exs. 207, 208, 209, 210, 211 (SDZ maps) (App. 35, 36, 37, 38, 39).

[45] Koon testified there is a one in one million chance of a bullet landing outside an SDZ. VT 1279:13–1280:1. He also testified the SDZs take into account "all possibilities for the impact of a bullet." VT 1281:13–22. If the SDZs showed the probability of a bullet landing outside the Club property as opposed to within it, Koon would have said so.

testified the military issues "waivers" from SDZs based on the opinions of "engineers and range safety officials," after considering topography and other site specific factors, which is an area Koon is "not familiar with." VT 1228:1–19. The trial court found the military inspected and approved the Club as a training facility. CP 4072 (FOF 75–76). The implication is that the military determined the Club—with its berms, backstops, bays, safety rules, and range officer supervision—is adequately engineered and operated to keep bullets from escaping its property. Koon's testimony and the County's SDZs do not prove a likelihood of substantial harm or establish a safety nuisance.[46]

Next, the County cites the testimony of the Club's range safety expert, Scott Kranz. Resp. at 34–35. Kranz confirmed the Club does not have overhead "baffles" at its firing lines. *Id.* at 35.[47] Yet the County

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[46] Koon also made numerous admissions that may further explain why the trial court found his testimony and SDZ analysis prove only a possibility of harm. Koon did not prepare the SDZ maps on behalf of the County. VT 1221:18–1223:18. A Fort Lewis employee created them using the U.S. Marine Corps' "Range Managers Toolkit" program. *Id.* Koon has no engineering background or college education in advanced mathematics. VT 1262:19–1263:9. He never received training on how SDZs are developed. VT 1204:20–1205:1. He testified the SDZs assume shooters will fire blindly into the air at 45 and 60 degree angles, instead of aiming at their targets downrange. VT 1295:8–1296:11. The County's SDZ maps do not consider the Club's unique topography or analyze how the Club's berms reduce the possibility of errant bullets. VT 1228:1–1229:1; 1275:10:22; 1286:2–18. In short, the maps have little or no application to actual site conditions. They assume range users ignore criminal recklessness laws and the Club's safety rules. The trial court allowed Koon's testimony and SDZs over the Club's objections. VT 1236:13–1239:11; *see also* VT 1205:2–1207:6, 1220:24–1221:15, 1226:9–18, 1228:20–1229:13. Yet the trial court's finding of a mere possibility of harm suggests it understood the limitations of that evidence.

[47] What the County fails to mention is that baffles have open spaces and cannot prevent a person from firing into the blue sky. VT 1520:20–1521:9. Therefore, the distinction is

omits Kranz's conclusion that the Club's engineering and institutional controls are adequate to prevent bullets from escaping its property.[48] He testified the Club's berms are of a sufficient height to prevent bullets from escaping downrange. VT 333:20–335:24. He commended the Club's institutional safety controls, including its mandatory safety-training program for new members and its range safety officer program.[49] He testified the Club's safety measures are at or above industry standards for shooting ranges in the Pacific Northwest. VT 343:16–20. He testified the Club's range is "very similar . . . except the [Club] has slightly higher impact berms" to the blue sky range where the County's sheriff's department and Bremerton police department conduct firearm training.[50]

The County then cites the testimony of its range safety expert, Roy Ruel. Resp. at 35–37. Ruel testified it is "extremely likely" that bullets will escape the Club property and strike downrange areas, and that this "has happened at some point" in the past.[51] Yet Ruel candidly explained in cross-examination that his opinion about future harm is based solely on his opinion "that it's possible for bullets to exit the range," combined with

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not as clear as the County would have the Court believe. Most importantly, there is no precedent, nor substantial evidence here, upon which to conclude that a range without baffles is reasonably and probably likely to cause substantial harm to person or property.

[48] VT 337:25–338:10, 348:24–349:10, 360:2–360:11.

[49] VT 331:16–332:11 (testifying new members are specifically instructed not to shoot above berms); VT 336:13–337:13 (describing range safety officer program).

[50] VT 359:7–360:11, 352:20–354:6, 356:7–9.

[51] Resp. at 37 (citing VT 1498:12–19).

the fact that bullets are fired there. VT 1518:1–22 (emphasis added); VT 1541:8–1542:4.[52] To Ruel, there is no difference between a possibility and a likelihood.

Ruel committed the same logical fallacy in reaching his opinion about bullets leaving the range after studying only one alleged bullet strike (found at the Slaton residence). VT 1498:8–19. He explained:

> "My opinion was that it was possible that it originated from the [Club's] shooting shed, and since we know that shooting does take place from that point, it was probable that that was the origination of that bullet."

VT 1497:4–16. Ruel also admitted there was no certainty that the bullet discovered at the Slaton residence came from the Club, and that it could have come from an area outside the Club. VT 1526:22–1527:17. Again, Ruel equates a possibility with a probability—but only when it is associated with the Club. His incoherent reasoning did not persuade the trial court, and it does not prove a likelihood of harm.

Ruel's testimony about the Slaton bullet is also contradicted by the County's own ballistics expert, Kathy Geil. Resp. at 38–39. The County asserts her determination was that the "potential origin" of two residential

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[52] Ruel further admitted he made no engineering calculations to determine whether bullets are leaving the range, although he is a retired engineer. VT 1517:11–18. He testified it was "not possible" to calculate what percentage of bullets fired at the range are "actually leaving the range." VT 1517:19–23. He believes "as long as shooters can see the blue sky that there will be bullets leaving the range." VT 1511:3–5. According to this extreme view, shooting a firearm anywhere outdoors within the range of a residence would be a safety nuisance regardless of where a shot is aimed, whether there are berms and other safety features, and the actual likelihood of harm.

bullet strikes she studied "included the area of the Property." Resp. at 39. The County omits her testimony that the bullets could have come from areas outside the Club property. VT 1623:13–1624:11, 1626:7—19. The County also omits Geil's testimony that, in her analysis, the Club is further from the Linton residence than the maximum range of the type of bullet found there. VT 1626:23–1627:25. Geil admitted she was not able to determine where any of the bullets she studied originated. VT 1630:13-25. She could not say any came from the Club.

Like the County's other experts, and consistent with the trial court's decision, Geil identified only a possibility of harm from the Club. Her "pie shaped area[s] for each shot's potential origin" (Resp. at 39) include large areas outside the Club, where other evidence confirms uncontrolled shooting can and does take place.[53] Her analysis of the Linton bullet was that it could not have come from the Club.[54] This is not substantial evidence of a reasonable and probable likelihood of harm.

The County reasons that even a low probability of a bullet escaping the Property is a "substantial risk demanding enjoinment" because "the outcome of bullet escapement will be death or injury." Resp.

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[53] *See* Exs. 214, 215, 216 (App. 32, 33, 34) (Geil's bullet origin diagrams); VT 1697:13-1700:24 (testimony of Club Executive Marcus Carter regarding uncontrolled shooting that occurs near the Club); VT 2437:18–2439:17, 2606:7–2607:23 (testimony of Club expert witness Jeremy Downs regarding areas where uncontrolled shooting may occur); Ex. 539 aerial photo of cleared areas where uncontrolled shooting may take place) (App. 22).

[54] VT 1646:17–25; VT 1630:13–25.

at 67. According to this logic, if a bullet were to ever leave the Club property, it would be certain to strike and injure or kill a person. Yet the trial court made no such finding, and the County fails to appreciate that the absence of such an injury means the Club is not a substantial risk. The area outside the Club's 72 acres includes substantial open and undeveloped space. It is not a densely populated urban area.[55] A likelihood of *insubstantial* harm would not prove a nuisance. *Grundy*, 155 Wn.2d at 6 (requiring substantial harm). Therefore, even if there were a likelihood that a bullet would leave the Club in the future (which the evidence does not show), that risk would not prove a nuisance.

This case is similar to *Hite*, where the risk of a cemetary contaminating a nearby drinking water well was not shown to be reasonable and probable. 158 Wash. at 421. According to the County, *Hite* is distinguishable because there the risk of harm was "highly improbable." Resp. at 68. That finding, however, is equivalent to the trial court's finding of a mere possibility of harm from the Club. Moreover, the County cites no precedent holding the source of a mere possibility of harm is a safety nuisance. Still further, no bullet from the Club, operating since 1926, has ever been proven to have left the property, let alone harmed any person or property. Therefore, harm from the Club is highly

[55] *See e.g.*, Ex. 16 (aerial photo of the Club and nearby rural land) (App. 8); Ex. 133 (aerial photo of the Club) (App. 14); Ex. 3 (map of areas nearby the Club) (App. 9).

improbable, just as in *Hite*. The County might as well be trying to lock up a dog that has never bitten a person, simply because it has teeth.

The irony is that the Club is one of the safest places to shoot in Kitsap County because the County authorizes uncontrolled shooting on properties larger than five acres. Brief at 25–26; KCC 10.24.090 (App. 40). As County witness Gary Koon confirmed, it is safer for community members to shoot at a range with berms, backstops, and safety rules. VT 1299:1–10. The County even partnered with the Club to hand out coupons for a free trip to the Club to any person found shooting in the woods. VT 1701:19–1702:14.

The County and its range safety expert imply blue-sky ranges are public nuisances because bullets can possibly escape. VT 1509:12–1511:5. Yet this is the same expert who testified he shoots at a blue sky range in Hawaii. VT 1510:25–1511:5, 1530:12–23. The U.S. Navy approved the Club for firearms training. CP 4072 (FOF 76). Local law enforcement personnel shoot at the Club and at their own blue sky range.[56]

There are at least eight other blue sky shooting ranges in the Pacific Northwest that are similar to the Club and are used by at least

[56] Ex. 440 at 4–5 (describing the City of Bremerton's shooting range, also used by County Sherriff's Department); Ex. 273 (App. 11), VT 1973:11-1975:4 (testimony of Club Executive Officer Marcus Carter regarding use of the Club by law enforcement); VT 1867:16-1868:4, 1877:12-1879:4, 1882:151-1884:12 (testimony of Ken Roberts regarding use of the Club by the County sheriff's department).

10,000 people annually.[57] If this Court affirms the trial court's safety nuisance conclusion, blue sky ranges across the Pacific Northwest could be closed due to the same speculative, theoretical risk of harm. Individuals across Washington would be unable to shoot at the Club and other blue sky ranges because they would cease to exist. Kitsap County shooters would increasingly take advantage of the County's liberal shooting ordinances to practice their marksmanship on unsupervised properties, where they could shoot into the "blue sky" with no person or security camera there to stop them.

The County had every opportunity to prove a high probability of substantial harm from the Club, but failed to do so. The fact that the Club has operated safely since 1926 strongly supports allowing the Club to continue. The safety nuisance conclusion must be reversed.

F. The Club Is Not a Public "Fear" Nuisance.

The County's response argues the Club can be held a public nuisance on the alternative ground, not adopted by the trial court, that the Club strikes fear into the community.[58] The County's argument is not surprising since the County's case centered on fear, not science. The

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[57] *See* Ex. 440 at 5–6 (listing ranges similar to the Club) (App. 10); VT 327:25–328:20 (admitting Ex. 440); VT 363:21–364:2 (Club's range safety expert's testimony comparing the Club to other blue sky ranges); VT 1508:13–1510:8 (County range safety expert's testimony regarding blue sky ranges in the Pacific Northwest).

[58] Resp. at 63–64 (citing *Everett v. Paschall* ("*Everett*"), 61 Wash. 47, 50–51, 111 P. 879 (1910) and *Ferry v. City of Seattle* ("*Ferry*"), 116 Wash. 648, 203 P.40 (1922)).

County argues "a neighbor's reasonable fear of harm can be the sole basis for a nuisance since comfortable enjoyment includes mental quiet." Response at 63. The trial court made no finding that the Club frightens nearby residents.[59]

Like its noise nuisance argument, the County's fear argument fails because the evidence shows all members of the community are not afflicted with fear of the Club.[60] Of the sixteen witnesses who live within two miles of the Club, three testified they are not afraid of the Club, and three did not testify about any fear of the Club.[61] Fear does not equally affect all members of the community.

The County's fear argument also fails because there is no evidence of depreciated property values. In *Ferry*, the court rule that fear can prove a nuisance only if it is "support[ed by] a reasonable expectation that disaster may happen, and such expectation leads to a depreciation in the value of adjoining properties." 116 Wash. at 648 (1922).[62]

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[59] *See* CP 4077 (COL 19–21) (conclusions regarding nuisance).

[60] *See* Brief at 21–22 (discussing "equally affect" element of public nuisance); RCW 7.48.130; *Hayes*, 13 Wn.2d at 311; *Crawford*, 78 Wash. at 357–58; *Clark*, 45 Wn.2d at 192 (affirming no fear nuisance where plaintiffs "failed to show that the public generally fears" the conditions complained of).

[61] Lee Linton believes a bullet struck his deck, but is not afraid and allows his kids to play outside. VT 1168:24–1170:25, 1176:2–1177:16. Frank Jacobson and Kenneth Barnes do not consider the Club a nuisance and are not afraid of it. VT 1942:1–1943:25, 2295:18–2297:24. Robert Kermath, Donna Hubert, and Steve Coleman complained about sounds from the Club, but never testified the Club frightened them. VT 318:1–319:21, 876:18–25, 934:20–935:2.

[62] *See also Everett*, 116 Wash. at 48–50 (declaring tuberculosis sanitarium a public nuisance where it created "general public dread" that reduced property values up to

Here, there is no finding of diminished property values, and the County does not find any such evidence in the record. Two witnesses testified they bought or sold property near the Club at fair market value, confirming the Club caused no diminution in property value.[63] Two other witnesses alleged the Club was reducing their property value, but neither testified they had listed their property for sale, received any below-market-value offers, or obtained an appraisal; and neither testified as to how much their property value had supposedly diminished.[64] The County called no appraiser to testify. The lack of substantial evidence of diminished

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50%); *Goodrich v. Starrett*, 108 Wash. 437, 439, 184 P. 220 (1919) (finding a nuisance where there was evidence that construction of an undertaking facility would decrease property values); *Turtle v. Fitchett*, 156 Wash. 328, 287 P. 7 (1930) (finding a nuisance upon a showing of a ten-percent decrease in property values); *Hann v. Hann*, 161 Wash. 128, 296 P. 816 (1931) (finding a nuisance upon a showing of depreciated property values); *Park v. Stolzheise*, 24 Wn.2d 781, 167 P.2d 412 (1946) (finding a nuisance where sanitarium would "at once and continuously depreciate" property values); *Shields v. Spokane School Dist. No.* 81, 31 Wn.2d 247, 196 P.2d 352 (1948) (finding a nuisance where testimony showed property values had decreased); *Morin v. Johnson*, 48 Wn.2d 275, 293 P.2d 404 (1956) (discussing evidence of depreciated property values related to tire plant's operations); *Champa v. Wash. Compressed Gas Co.*, 146 Wash. 190, 192, 262 P. 228 (1927) (affirming nuisance where plaintiff alleged $4,000 in permanent depreciation related to gas manufacturing and storage facilities' operations); *Steele v. Queen City Broadcasting Co.*, 54 Wn.2d 402, 341 P.2d 499 (1959) (discussing testimony of $5,625 in depreciated property value related to construction of television broadcasting tower); *Pierce v. Northeast Lake Wash. Sewer & Water Dist.*, 69 Wn. App. 76, 847 P.2d 932 (1993) (discussing unrebutted evidence that construction of water storage tank would decrease property values by $30,000).

[63] Steve Coleman sold his home in 2006 "at the price that the market was bearing" and neither "gained or lost value" from the sale. VT 934:20–935:2. Kenneth Barnes paid "fair market value" for his home in 2001, which is located 150 feet from the Club's entrance. VT 2323:23–2324:18.

[64] Jeremy Bennett has never listed his home or retained a broker, but speculates he could "stand to lose quite a bit" if he were to disclose the Club to a buyer and might "potentially not be able to sell" his property. VT 895:7–21. Eva Crim testified her broker told her that disclosing the Club's operations to a buyer would "negatively impact [her] property value." VT 969:10–23.

property values disproves the fear nuisance theory.

A nuisance cannot be proven by fears that are unreasonable. *Clark*, 45 Wn.2d at 191–92. In *Clark*, fourteen property owners alleged a memorial park was a nuisance because they were frightened by the possibility it might contaminate their groundwater. *Id.* at 190—91. The court affirmed the fears were "wholly unfounded" based on expert testimony regarding the risk of harm. *Id.* at 192 (affirming trial court).[65]

Here, the trial court did not find any fears, let alone reasonable ones. As discussed above (in the safety nuisance section), the findings and evidence prove the Club is not likely to cause substantial harm. There is also no finding or proof that any bullet from the Club has ever left the Club property or harmed any person or property. There is no substantial evidence that any fear of the Club is reasonable or well founded.

Based on the County's cases, the last time a Washington court of appeals affirmed a nuisance arising from fear was in 1922. *See Ferry*, 116 Wash. at 648 (1922). Most of the County's "fear" cases are over 90 years old. *See* Resp. at 63. Considering the advances of modern science, their persuasiveness is severely limited. The only risk identified in this case is that someone might recklessly endanger the community by firing up into the air over the Club's berms and buffering acreage. This type of risk,

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[65] *See also, Rea v. Tacoma Mausoleum Assn.*, 103 Wash. 429, 430, 174 P. 961 (1918) (rejecting fear nuisance claim when there was no evidence that fumes and liquids from a crematorium had ever migrated onto plaintiffs' properties).

however, exists throughout the United States, where the right to bear arms is constitutionally protected.[66] Unlike the uncontrolled areas of Kitsap County where shooting is allowed, the Club has safeguards to prevent this from happening. In addition, that conduct would have to be attributed to the individual who breaches the Club's safety rules, not the Club.[67] There is no doubt people have generalized fears and concerns about firearms in their community. Shutting down one of the longest standing firearm safety organizations in Kitsap County is no way to alleviate them.

G. There Was No Expansion, Change of Use, or Enlargement, But Even If There Were, the Trial Court Erred in Failing to Identify the Extent of Lawful Intensification.

The trial court concluded the Club unlawfully expanded, changed, and enlarged its use, in violation of Kitsap County Code and common law governing nonconforming uses.[68] The Club's opening brief argues the Club did none of those things, and that any change in the Club over the years was part of the natural intensification of the use, the result of the County's own policies, and permitted as a matter of substantive due process. Brief at 26–40. The Club further argued that even if the trial court were correct, it still erred in failing to identify the extent to which

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[66] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II.

[67] Brief at 25; *State v. Hayes Inv. Corp.*, 13 Wn.2d 306, 312, 125 P.2d 262 (1942) (finding public beach was not a nuisance where operator policed rules prohibiting profanity, drinking, and other misbehavior).

[68] CP 4075–76, 82 (COL 8–10, 33) (citing *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979)).

the Club had lawfully intensified, which is required to determine the remedy for any over-intensification. *Id.* at 28, 39–40. The County's response attempts to show the trial court's conclusions regarding expansion, enlargement, and change of use were correct, but incorrectly applies the controlling legal standards. The County does not attempt to explain how the trial court could properly remedy any over-intensification without first identifying the extent of lawful intensification.

The parties agree nonconforming use rights are matters of "local government" regulation, and such regulation is subject to the "broad limits" of the Washington constitution. *Rhod-A-Zalea*, 136 Wn.2d at 7 (emphasis added).[69] The parties further agree one of those constitutional limits is that a nonconforming use must be allowed to intensify as a matter of substantive due process. The parties agree the following test determines lawful intensification, but disagree on how it applies:

> "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 [zoning] ordinance. Intensification is permissible, however, where the *nature and character* of the use is unchanged and *substantially the same facilities are used.* The test is whether the intensified use is 'different in kind' from the nonconforming use in existence when the zoning ordinance was adopted."

Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979)

[69] Brief at 28; Resp. at 53–54.

(citations omitted) (emphasis added). *Keller* correctly applied this standard to hold the addition of six manufacturing cells to a chemical plant was a lawful intensification. *Id.* at 729, 732. In contrast, the County and trial court incorrectly rely on the first sentence while misapplying the next two. Any increase in the volume or intensity of the use has not made the Club's use "different in kind" from what it was in 1993.

Since 1926, the Club's land use has always been that of a gun club and shooting range for "sport and national defense." Brief at 29–30; CP 4054 (FOF 6). The County does not dispute this. Instead, the County presents five erroneous reasons why the current use should be considered fundamentally different: (1) the Club constructed berms and bays that did not exist prior to 1993; (2) the Club engages in "practical shooting" activities that did not exist prior to 1993; (3) the Club hosted small arms navy training classes between 2003 and 2010, which did not occur prior to 1993; (4) the Club has allegedly expanded its hours of operation beyond what they were in 1993; and (5) the Club allows the use of fully automatic firearms, large caliber rifles, and explosives. Resp. at 57–58. There is no dispute these activities occurred only within the historical eight acres.

The Club addressed the County's arguments in its opening brief.[70]

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[70] *See* Brief at 33 (discussing Club's use of berms, backstops, and shooting bays); *id.* at 32–33 (discussing Club's practical shooting activities); *id.* at 34–36 (discussing Club's firearm training activities); *id.* at 36 (discussing Club's shooting hours); *id.* at 32 (discussing Club's use of fully automatic firearms, cannons, and explosives). Club

As noted, the Club's historical activities included construction of earthen berms to trap bullets—like the berms and bays constructed after 1993.[71] They included rapid fire shooting, shooting in multiple directions, and competitions involving dozens of shooters—like the practical shooting activities that occur at the Club today.[72] They included small arms firearm training, including training of law enforcement and Navy qualification exercises—like the Navy training between 2003 and 2010.[73] They included shooting from at least 6 am to 10 pm.[74] They included use of fully automatic firearms, cannons, large caliber rifles, and explosives.[75]

The County fails to dispute any of this historical evidence. Instead, the County mischaracterizes as a different kind of use the very types of activities that have defined the Club as a gun club or shooting range since its charter in 1926. Resp. at 48, 54, 57. This is a case about a gun club being a gun club. This is not a case where a shooting range added a motorcycle track and argued it was all recreational activity. This

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witnesses Andrew Casella and Marcus Carter both testified regarding historical use of large caliber rifles. VT 1854:13–1855:2, 1720:1–1721:13, 1782:21–1784:24.

[71] CP 4059 (FOF 29), 4082–84 (FOF 33, 37).

[72] Brief at 32–33. *See* VT 1782:21–1784:12 (testimony of Andrew Cascella); 1873:10–1874:13; 1907:3–23 (testimony of Ken Roberts, County Deputy Sheriff)).

[73] Brief at 34–36 (discussing the history of Club's firearm training programs); CP 4071 (FOF 72) (describing Navy's qualification exercises). *See also* VT 1973:11–1974:13 (testimony of Club Executive Officer Marcus Carter regarding law enforcement training).

[74] Brief at 36 (discussing Club's historical hours of operation); *see also*, VT 1027:24–1028:14, 1096:10–18, 1068:18–1069:9 (testimony of County witness Terry Allison regarding Club's historical hours); VT 1872:14–19, 1895:6–8 (testimony of Club witness Ken Roberts regarding Club's historical hours).

[75] *See supra*, note 70.

case is more like *Keller*, where the addition of six manufacturing cells to a chlorine plant was a lawful intensification of the use and not an enlargement or change in the kind of use. 92 Wn.2d at 732.

The County emphasizes that the Club previously planned an expansion in the 300 meter range area, outside its historical eight acres. Resp. at 25. The Club abandoned the plan and the County was satisfied for many years with that decision—it even sent the Club two letters stating it was closing its file.[76] The County does not dispute this, but responds that the Club has been storing some shooting range materials in that area. Resp. at 25 n. 45. The Club has long used this area for storage,[77] and the County cites no contrary evidence. The trial court correctly found the Club's shooting activities are confined within its historical eight acres, while the Club's remaining acreage is "passively utilized."[78] The trial court correctly omitted passive materials storage from its reasons to conclude the Club had expanded.[79] Even if that were in error, the remedy would be as simple as removing the materials.

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[76] Brief at 37–39; *see also,* Exs. 143, 144 (App. 24, 25); VT 2070:1–2072:1 (testimony of Club Executive Officer Marcus Carter regarding County's enforcement position); CP 2336, 2345, 2371–74, 2480–81 (deposition of County Code Compliance Supervisor Steve Mount regarding County's enforcement position); VT 415:15–25, 565:21–566:16 (admitting Mount's deposition).

[77] *See* VT 2204:6–2205:12 (testimony of Club Executive Officer regarding Club's previous uses of 300 meter range area for storage).

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

[79] CP 4080–82 (COL 26–28, 30). If storing materials outside the historical eight acres were an expansion, it could be remedied easily by removing the materials, an activity that would require no County permit.

The County spends several pages discussing a landowner's burden of proof when seeking to establish a nonconforming use right. Resp. at 51–53.[80] The entire discussion is irrelevant to this case because there is no question that the Club's nonconforming use right was previously recognized by the County Commissioners in 1993.[81]

The County mentions that Kitsap County Code prohibits expansion of "the area of use,"[82] and that the Club installed a culvert across the rifle range after 1993 to prevent metals from entering surface water.[83] Yet the County does not argue that this expanded the Club's shooting area or established a different kind of use. The trial court correctly found the Club's shooting activities are confined within its historical eight acres, while the Club's remaining acreage is "passively utilized."[84] Therefore, there has been no expansion.

The County asserts the Club "raises no challenge to Kitsap

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[80] The discussion touches on the rule that a landowner cannot use "unlawful methods to establish a nonconforming use," as well as the rule that the use must have been "continuous, not occasional or intermittent." Resp. at 53. There is no evidence that the Club used unlawful methods to establish its nonconforming use right in 1993 or that it did not continuously maintain its use of the property as a shooting range.

[81] *See Van Sant v. City of Everett*, 69 Wn. App. 641, 648, 849 P.2d 1276 (1993) ("once a non-conforming use is established, the burden shifts to the party claiming abandonment or discontinuance of the non-conforming use to prove such"). In *Van Sant*, the court correctly reversed a hearing examiner's mis-allocation of the burden of proof to the landowner where the city had "previously recognized" the nonconforming use right existed. *Id.* at 648–50.

[82] Resp. at 56; KCC 17.460.020.C (App. 2) ("[i]f an existing nonconforming use or portion thereof, not enclosed within a structure, occupies a portion of a lot or parcel of land on the effective date hereof, the area of such use may not be expanded").

[83] Resp. at 20 (citing CP 4065–4066 (FOF 53–54)).

[84] Brief at 30 (citing CP 4065–66 (FOF 8)).

County's nonconforming use chapter," while citing an ordinance that provides a nonconforming use "shall not be altered or enlarged in any manner." Resp. at 54; KCC 17.455.060 (App. 5). Yet the County does not argue this provision should be strictly enforced, and doing so would violate the Club's constitutional right to intensify. An alteration or enlargement is only prohibited if it results in a different "kind" of use pursuant to *Keller*.

The County cites KCC 17.460.020, which states a nonconforming use "may be continued so long as it remains otherwise lawful." Resp. at 57; App. 2. This provision ensures the Club may continue if there are no code violations, or if any such violation is remedied. It does not say what happens if there is a violation, or how it must be cured. As County chief building official Jeff Rowe testified, the Code allows a landowner to retract a prohibited expansion, enlargement, or change of use, and return "back into nonconformity."[85] The County's response does not attempt to discredit Mr. Rowe, nor does the County dispute that the Club must know the extent to which it has lawfully intensified in order to retract. Even if there were over-intensification, the trial court's failure to determine the extent of lawful intensification was in error.

The County cites the trial court's numerous conclusions of law

[85] VT 278:17–279:15, 187:1–18.

regarding expansion, enlargement, and change of use, and mistakenly refers to one of them as a "finding." Resp. at 57 (citing COL 33). These conclusions must be reviewed *de novo*.[86]

The County complains that the Club never tendered written assurance of cessation of all military training and that the evidence does not show NFI has ceased "doing business" at the property. Resp. at 58. As noted above, the small arms navy training at the Club between 2003 and 2010 is consistent with the Club's historical activities and chartered purpose. The County also fails to distinguish the Club's case law that shows renting a property is permitted if the type of activity is within the scope of the nonconforming use right.[87] There is no evidence of any plans for future military training.[88]

The County mentions that the trial court found the Club's activities are not encompassed by the current zoning definition of a "private recreational facility." Resp. at 58. Yet the County identifies no error in the Club's argument and case law showing it is the nature of the historical use that defines a nonconforming use right, and not a code definition.[89]

In sum, the County and trial court erroneously equate an increase

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[86] *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).
[87] Brief at 35 (citing *Hendgen v. Clackamas County*, 836 P.2d 1369 (Or. App. 1992)).
[88] *See* VT 1318:24–1319:18, 1320:5–15, 1329:10–15 (testimony of County witness Arnold Teves regarding cessation of Navy training at the Club in 2010).
[89] Brief at 27 (citing *Keller*, 92 Wn.2d at 727–28; *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002)).

in the number of bullets fired or berms constructed at the Club to increase its safety with an enlargement or change of use. This argument would eviscerate the constitutional guarantee that a nonconforming use may intensify its activity as long as the kind of use does not change. Intensification always entails some change in the level of activity at a property. As in *Keller*, it can also involve improvements to the facilities. An increase in the number of bullets fired or berms constructed within a nonconforming gun club's historical shooting area is no more a change or enlargement of the use than an increase in the number of pizzas sold or ovens installed at a nonconforming pizza parlor. Finally, even if there were some prohibited over-intensification, the trial court still erred by failing to identify what is allowed as lawful intensification.

H. The Trial Court Misconstrued the Deed and Erred By Denying the Club's Accord and Satisfaction Defense and Breach of Contract Counterclaim.

The trial court erred when it denied the Club's affirmative defense of accord and satisfaction and its closely related counterclaim for breach of contract, both based on the 2009 Deed.[90] The trial court disregarded the specific, plain language of the Deed's "improvement" clause, which allows the Club to upgrade and improve its facilities consistent with

[90] *See* CP 4083–84 (COL 37–38) ("the [Deed] cannot be read as more than a contract transferring Property, . . . with restrictive covenants binding only upon [the Club]"); CP 4087–92 (Deed) (App. 1).

management practices for a modern shooting range. Brief at 42–43 (citing CP 4088 ¶ 3). It also failed to effectuate the County's implied duties to allow the Club to continue pursuant to the Deed's "public access" and "confinement" clauses. *Id.* at 44–46 (citing CP 4089 ¶ 4). The trial court's decision should be reversed. The Club's accord and satisfaction defense and breach of contract counterclaim should be granted.

The County argues two general statements in the Deed trump the Club's more specific clauses. Resp. at 69, 72. The first is the title, "Bargain and Sale Deed with Restrictive Covenants." CP 4087. The second is from the preamble on page one: "This conveyance shall be made subject to the following covenants and conditions, the benefits of which shall inure to the benefit of the public and the burdens of which shall bind the [the Club]." CP 4087. Based on these general statements, the County argues the Deed imposes no duties on the County and no benefits on the Club other than the conveyance of title. Resp. at 71–72. The County's position is contrary to the Deed's language and implication, contrary to the evidence of its intent, and contrary to Washington law.

Washington courts "apply basic rules of contract interpretation" to construe provisions of a document, including restrictive covenants. *Wimberly v. Caravello*, 136 Wn. App. 327, 336–37, 149 P.3d 402 (2006). One well-accepted rule is that a specific provision qualifies the meaning of

a more general provision when the two conflict. *McGary v. Westlake Investors*, 99 Wn.2d 280, 286, 661 P.2d 971 (1983). Another is the "context" rule, which determines the intent of the contracting parties by viewing the contract as a whole, its subject matter and objective, the circumstances surrounding its making, the subsequent acts and conduct of the parties, and the reasonableness of the interpretations advocated by the parties. *Wimberly*, 136 Wn. App. at 336–37.[91] There is a rule cited by the County that gives effect to the intent of the drafter,[92] and another that gives weight to the intent of the grantor.[93] Another effectuates the implied duties of a contract.[94] These rules support the Club's interpretation.

The improvement, public access, and confinement clauses are more specific than the general statements on which the County relies. Therefore, they qualify those general statements, and take priority. *McGary*, 99 Wn.2d at 286. The "improvement" clause expressly states that the Club may improve its historical eight acres in a manner consistent

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[91] *See also*, Brief at 42 (citing *Hearst Communications, Inc.* v. *Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (explaining the "objective manifest theory of contracts" and the "context rule")).

[92] Resp. at 71 (citing *Bauman v. Turpen*, 139 Wn. App. 78, 86, 160 P.3d 1050 (2007); *Riss v. Angel* 131 Wn.2d 612, 621, 934 P.2d 669 (1997)).

[93] Resp. at 69–70 (citing *Newport Yacht Basin Assn. of Condo. Owners* ("*Newport Yacht*") v. *Supreme Nw., Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012)).

[94] Brief at 44–46 (citing *G.O. Geyen v. Time Oil Co.*, 46 Wn.2d 457, 460–61, 282 P.2d 287 (1955) (reversing trial court when it failed to effectuate an implied contractual duty to allow another party to perform its contractual obligations); *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 426, 922 P.2d 115 (1996) *aff'd sub nom. Tiegs v. Watts*, 135 Wn.2d 1 (1998) (affirming trial court's construction of implied duty preventing seller from frustrating the purpose of a sale contract)).

with modern shooting range practices.[95] The "public access" clause required the Club to immediately provide public access to its shooting ranges.[96] The "confinement" clause permits the Club to continue operating its nonconforming shooting range as it then existed, within the Club's historical eight acres of active use.

Despite the plain language of the Deed that goes well beyond a mere transfer of title, the trial court concluded the Deed cannot be read as anything more than a property conveyance.[97] That conclusion is based on a misinterpretation of the Deed and on the erroneous finding that the "only evidence produced at trial to discern the County's intent at the time of the [Deed] was the deed itself." CP 4058 (FOF 26). The Club's opening brief discusses the overwhelming extrinsic evidence proving the parties intended the Deed to clarify and cement the Club's land use rights, resolve actual and potential disputes, and allow the Club to continue as it then existed.[98]

The County argues extrinsic evidence cannot be considered because the Deed is unambiguous.[99] The express language of the Deed—and its necessary implications—would support the Club's interpretation

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[95] Brief at 42–43 (citing CP 4088 ¶ 3).
[96] *Id.* at 44–46 (citing CP 4089 ¶ 4).
[97] CP 4083 (COL 36).
[98] Brief at 47–53.
[99] Resp. at 71–72 ("only in the case of ambiguity will the court look beyond the document to ascertain intent from surrounding circumstances").

even if no extrinsic evidence were considered. Brief at 42–46. More importantly, Washington law uses extrinsic evidence to construe a contract regardless of ambiguity. *Wimberly*, 136 Wn. App. at 336–37.

According to the County, the Court's "primary task" is "to determine the drafter's intent and the purpose of the covenant at the time it was drafted." Resp. at 71. The Club agrees. Club attorney Regina Taylor drafted the Deed's "improvement" clause, which the County accepted. It states the Club "may upgrade or improve the property and/or facilities within the historical approximately 8 (eight) acres in a manner consistent with 'modernizing' the facilities consistent with management practices for a modern shooting range."[100] The manifest intent of this clause was to allow the Club to improve its facility within the historical eight acres, protect its existing facilities and operations from County enforcement action, and give the Club the security it needed to indemnify the County against potential multi-million dollar cleanup liability at the property.[101]

The County also states that courts assign particular weight to the intent of the grantor when construing a Deed.[102] The Club agrees that evidence of the County's intent is relevant, which is why the Club introduced overwhelming evidence that the County intended the Deed to secure the Club as it then existed. Chief among that evidence is the

[100] Exs. 400, 550 (App. 13, 12); VT 2879:22–2882:16; CP 4088 ¶ 3.
[101] Brief at 64–65 (citing testimony of Club's Executive Officer and attorney).
[102] Resp. at 70 (citing *Newport Yacht*, 168 Wn. App. 56 at 64)).

County's Resolution (Ex. 477) (App. 15 at 3) authorizing the Deed, which the County failed to address in its response. The Resolution plainly and publicly documents the County's intent for the Deed "to provide that [the Club] continue to operate with full control over the property."[103]

The County attempts to minimize the significance of Matt Keough's testimony, yet quotes the portion of his testimony where he explained "that the existing facilities were – that they were going to – they were expected to continue and that going beyond the existing facilities, as I recall, was not – was an item for future discussion."[104] This testimony shows the Deed was intended to secure the Club's right to continue as it then existed within its historical eight acres, while any future site development outside that area would be subject to County development code and permitting. In addition, Keough's testimony was not describing an unspoken belief. He was responding to a question about what the parties' negotiating agents "discussed" regarding their intentions and expectations in entering into the Deed.[105]

The County similarly attempts to minimize the significance of

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[103] Ex. 477 at 3 (App. 15 at 3) (emphasis added); Brief at 48–49; *see also,* Exs. 478, 552, 553 (meeting minutes regarding approval of the Resolution and Deed) (App. 16, 17, 18); *Baker v. Lake City Sewer Dist.*, 30 Wn.2d 510, 518, 191 P.2d 844 (1948) ("[a resolution] is simply an expression of the opinion or mind of the official body concerning some particular item of business").

[104] VT 2846:17–2847:15 (emphasis added); Resp. at 15;

[105] Resp. at 15 (quoting [VT] 2846:17–2847:15); *Chevalier v. Woempner*, 172 Wn. App. 467, 477, 290 P.3d 1031 (2012) (effectuating intent of parties' negotiating agents).

Commissioner Brown's March 18, 2009 letter.[106] The County argues "a trial court could reasonably find this letter to be a general expression of support for [the Club], not necessarily written on behalf of the BOCC or of the County to affirm a land use." Resp. at 15. The trial court did not make that finding, however, and the argument is beside the point because Commissioner Brown was one of the signatories of the Deed and approved the Resolution. Brown was acting as Commissioner for District 3, where the Club is located,[107] when he signed and delivered the letter and executed the Deed. As with Keough, his manifest intentions are evidence of the intent of the Deed, regardless of whether the letter is attributable to his Commissionership alone, as opposed to the entire BOCC or County. Commissioner Brown's letter is among the types of extrinsic evidence of intent considered under the context rule.[108]

The County suggests the Club's interpretation of the Deed is unreasonable because it would exempt the Club from all "ordinary permit requirements" of the County, even building permits. Resp. at 69. The County misconstrues the Club's position. The Club does not maintain that the Deed exempts it from building permits within its historical eight

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[106] Resp. at 15 (citing Ex. 293) (App. 19).

[107] Kitsap County, *Josh Brown, District 3 Commissioner (January 2007–Present)*, Kitsap County Commissioners (Oct. 4, 2013), http://www.kitsapgov.com/boc/brown/brown.htm; CP 4053 (FOF 4) (stating Club's address, which is inside District 3).

[108] *See, e.g., Thompson v. Schlittenhart*, 47 Wn. App. 209, 211–12, 734 P.2d 48 (1987) (determining the intent of a deed based on monuments on the ground, city maps, and past conveyances).

acres. Nor does the Club maintain that the Deed exempts it from any permits required by state or federal regulatory agencies. The Club interprets the Deed to exempt it from County permits when engaged in the standard activities of a modern shooting range, such as construction, maintenance, and clearing of berms, bays, shooting areas, and adjacent areas. CP 4088 ¶ 3 (improvement clause). The Club historically engaged in such activities, and it has continued to do so while updating its practices to conform to standards for modern shooting ranges.

As the trial court found, the Club applied for a County building permit for an ADA ramp after entering into the Deed. CP 4060 (FOF 32). This is consistent with the Club's reasonable interpretation of the Deed and shows the Club has not taken the "unreasonable" position described by the County. The only unreasonable position is the County's contention that the Deed confers no benefits to the Club and imposes no enforceable obligations on the County.

The County suggests the dispositive fact is that the Deed does not "expressly waiv[e] compliance with any rules governing alteration" of the Club within its historical eight acres.[109] This simplistic argument ignores the Deed's express words, their implication, and the extrinsic evidence of its intent. It also fails to address the Club's point that a release and

[109] Resp. at 72–73 ("[t]here is no express waiver, settlement, release, or other representation that KRRC would be exempt from zoning laws or permitting regulations").

settlement was not discussed because there were no pending adversarial allegations by the County that would have caused the Club to negotiate such a provision with its "win-win" "partner."[110] Still further, such arguments cut both ways because the Deed does not expressly reserve the right for the County to sue the Club over its existing facilities and operations, even while saying they can continue. There is no evidence the County ever negotiated for such a provision, which the Club would not have accepted.

Finally, the County discusses the Open Public Meetings Act, which "requires governing bodes to conduct a public meeting with notice." Resp. at 73–74. The County cites *Feature Realty, Inc. v. City of Spokane*, where a settlement agreement was ineffective under OPMA because it was approved only in an executive session, without a public meeting and notice.[111] In contrast, there is no dispute that the Deed was entered into by the parties after a public meeting and notice in compliance with OPMA.[112] There is also no dispute that the Resolution was in

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[110] Ex. 550 at 1 (App. 12) (email from R. Taylor); Brief at 54. The County argues the intentions of the parties to the Deed is a question of fact. Resp. at 72. To the extent the interpretation of the Deed is a legal question dependent on the written contract itself, review is *de novo*. *Wimberly*, 136 Wash. App. at 407. To the extent the Club's facts supporting its interpretation of the Deed are at issue, the question is whether the County has substantial evidence to disprove any of them. *Raven v. Dept. of Social and Health Svcs.*, 177 Wn.2d 804, 809, 829, 306 P.3d 920 (2013) (reversing finding of neglect for lack of substantial evidence).

[111] 331 F.3d 1082 (9th Cir. 2003); Resp. at 74.

[112] Brief at 54, 48–49; Ex. 477 at 3 (Resolution) (App. 15 at 3); *see also*, Exs. 478, 552, 553 (meeting minutes regarding approval of the Resolution and Deed) (App. 16, 17, 18);

compliance with OPMA. *Id.* The Club is not attempting to enforce an agreement entered into behind closed doors in violation of OPMA. The Deed is not void under OPMA, and OPMA is not a rule of contract interpretation. The manifest intent of the Deed must be given effect.

I. Estoppel Is Proven with Clear, Cogent, and Convincing Evidence.

The trial court issued no findings of fact or conclusions of law regarding the Club's estoppel defense, but did not grant it. The question here is whether there is clear, cogent, and convincing evidence to support the defense under the correct legal standards.[113] If so, the trial court erred. The opening brief discusses the evidence and law that show the defense should have been granted. Brief at 55–71. In response, the County fails to identify any legal standard or evidence upon which the trial court could have properly denied the defense. This Court should reverse the denial of equitable estoppel. If, under contract law, the Deed did not secure the Club's land use and infrastructure status as it then existed and resolve potential claims by the County, then the Deed should be given that effect as a matter of equitable estoppel.

This Court will answer whether it was fair for the County to make statements to induce the Club to agree to the Deed as written, knowing and

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Ex. 555 (audio recording of May 11 and 13, 2009 Kitsap County Board of Commissioners' meeting).

[113] *See* Resp. at 76 n 205 (citing *Kramarevcky v. Dept. of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993)).

having full access to the development and facilities that existed at the time of the sale, and not disclose there were alleged code violations and a threat to the Club's nonconforming use. If this had been an arms length commercial transaction, it would support a fraud claim. Here, where the seller is a local government, it is even more incumbent on the government to deal with its citizens in an open and fair manner. The fact that the trial court found there were no concrete enforcement plans at the time of the sale (FOF 24) does not dispose of the defense, because the allegations of its code enforcement authority were undisputedly known to the County at the time, but not disclosed.

The County should be estopped in its governmental capacity because it is necessary to avoid manifest injustice and will improve the way Kitsap County functions. *Id.* at 68–71. The County does not argue estoppel is unnecessary to avoid manifest injustice or that estoppel will not improve the truthfulness and fairness with which Kitsap County conducts land transactions. The County also does not dispute that if it is estopped in its governmental capacity, its claims in this action should be denied to the extent they arise from conditions that existed at the time of the Deed. *Id.* at 71.

The County should also be estopped in its proprietary capacity because it acted in that capacity in connection with the sale and Deed.

The County does not deny that it acted in that capacity, or that it cannot be estopped in that capacity if the basic elements of estoppel are present.[114] The County also does not dispute that, if it is estopped, it should be held liable for breach of contract; nor that the case should then be remanded for determination of the Club's damages, which include all costs of defense and any abatement costs incurred by the Club as a result of this action.[115]

The County does not dispute that its chief enforcement officer, Steve Mount, disclosed his allegations against the Club to the Commissioners and to Matt Keough prior to execution of the Deed.[116] The County does not dispute that their knowledge is the County's knowledge,[117] or that it concealed Mount's allegations from the Club.[118] The County offers no explanation as to why it did this, even while the Commissioners sang the Club's praises and passed an official Resolution to secure the Club's control of its property through the Deed.[119] The County does not attempt to explain why it did not raise any code or land use issues with the Club prior to the Deed—having previously written letters to the Club in 2007 and 2008 stating the only prior regulatory

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[114] Brief at 58–65 (discussing how the Club satisfies the three basic elements of estoppel); *id.* at 68 (discussing how the County acted in its proprietary capacity).
[115] *Id.* at 68.
[116] *Id.* at 61 (citing VT 415:17–25, 574:9–576:3).
[117] It is black letter law that knowledge of a government official is imputed to the government entity. *King v. Riveland*, 125 Wn.2d 500, 508, 886 P.2d 160 (1994).
[118] Brief at 61–62.
[119] *See id.* at 48–49 (discussing the County's Resolution (Ex. 477) (App. 15) approving the Deed); *id.* at 52–53 (citing communications (Exs. 330, 332, 336, 293, 405) regarding County's approval of Club).

action it had ever threatened was considered closed.[120] The County does not dispute that its position in this case is inconsistent with or a repudiation of its words and actions in connection with the Deed.[121] The County's lack of explanation suggests the Club was not misled by the gaffe of some hapless county representative. It was misled by the County Commissioners and by the County's negotiating agent, all acting and speaking in their official capacity to support the Club and induce it into the Deed—even while they knew the County's enforcement authority disagreed, and that the Club was not aware of his position.[122]

The County begins its estoppel analysis by speculating the Club would have purchased its "long-time range property" even if it had known "the County would one day sue[.]" Resp. at 75. The implication is that the County's statements of intent, approvals of the Club, and concealment of its enforcement official's allegations were not material or relied upon. The evidence, however, shows the Club would have negotiated differently, not that it would have lost all interest in the property.[123] For example, one

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[120] Exs. 143, 144 (App. 24, 25); VT 2070:1–2072:1 (testimony of Marcus Carter regarding County's letters); *see also*, VT 2060:19–2062:5, 2063:7–17, 2068:14–24.

[121] Brief at 58–62 (discussing County's inconsistency in its position).

[122] *Id.* at 64–66 (discussing Club's reliance on the County's representations).

[123] *Id.* at 64–65 (discussing testimony of Regina Taylor and Marcus Carter regarding indemnity and public access provisions and Club's desire to secure its facility and operations). The Club's attorney testified she would have advised the Club not to sign the Deed if she knew the County was reserving the right to shut the Club down due to existing conditions. VT 2893:13–2894:4. The Club's Executive Officer explained that the indemnity provision was acceptable because of the County's assurances that the Club would continue. VT 2097:8–2098:19. The Club had significant bargaining power given

option, which the County has not foreclosed, is that the Club could have prevented the sale so DNR could keep the property and ensure the Club's continued existence.[124] Moreover, the County does not dispute that its present claims adversely affect the value of the transaction or impair the Club's purpose in entering into it, which makes its prior inducements and concealment material.[125] The County's words and actions were material and the Club relied on them.

The County's next argument is that when a government is a so-called "pass-through seller" and the buyer is a "long-time tenant," the government has no duty to notify the tenant of any violations alleged internally by its chief code enforcement officer. Resp. at 75–76. Yet the County cites no case law or authority that would assign any independent significance to these facts, and fails to explain why a local government should be held to a lower standard than a commercial seller. The County was the seller and the Club was the buyer. Therefore, the County had a duty to disclose material facts and deal with the Club honestly and in good faith.[126] Instead, the County concealed material facts and, if the trial

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the County's undisputed desire to complete the land swap with DNR, DNR's refusal to complete the swap if it did not include the Club property, and the County's determination not to remain the property's owner. CP 4056–57 (FOF 16–19).

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

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

[126] Brief at 59–60 (discussing law regarding seller's duty to disclose) (citing *Sorrell v.*

decision is upheld, will have succeeded in repudiating multiple assurances and statements of intent that the Club relied on in publicly supporting the DNR/County land swap and taking title to the property subject to indemnity, public access, and other obligations. This manifest injustice strongly supports estoppel.[127]

The County implies the estoppel defense can be denied on the grounds that the Club lacks "clean hands."[128] Under this theory, a party "may not base a claim of estoppel on conduct, omissions, or representations induced by his or her own conduct, concealment, or representations." Resp. at 77 n. 210. The County, however, fails to show its concealment of Mount's allegations or its statements of approval and intent that induced the Club to execute the Deed were somehow wrongfully induced by the Club. The County is responsible for those words and actions, which it should be estopped from repudiating.

The County argues the government cannot be estopped from changing its position on "matters of law" or from enforcing zoning ordinances. Resp. at 78–79. The cited cases, however, were all decided

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Young, 6 Wn. App. 220, 225, 491 P.2d 1312 (1971)).

[127] In a footnote, the County insinuates the Club has not faithfully performed its duty to indemnify or that it did not give the County consideration for the property. Resp. at 77 n. 208. The County, however, has never sought rescission or claimed the Deed is ineffective for lack of consideration, and it never alleged a claim for breach of contract. Moreover, there is no evidence the County has ever sought indemnity from the Club. With nothing to indemnify, there can be no breach. The mutuality of consideration and the Club's performance of its Deed obligations are not legitimate issues in this appeal.

[128] Resp. at 77 (citing *Kramarevcky*, 122 Wn.2d at 739 n. 1).

on the grounds that the government's original words or actions had been unauthorized, in violation of law, or unofficial.[129] That is not the case here, where the Deed and Resolution were official acts of the County Commissioners and within their authority to dispose of public property and negotiate binding settlements to resolve actual or potential disputes.[130] The County does not dispute that its Commissioners possessed this general authority at the time of the Deed.[131]

This is not the typical "estoppel against the government" scenario where some low level functionary mistakenly told a landowner he could build and his permit application was later denied. The County's argument

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[129] *See* Resp. at 78–79 n. 216, 219. In *Theodoratus*, the Department of Ecology gave a developer a report stating his pending water right would be quantified based on system capacity. 135 Wn.2d at 587–88, 600. This was an incorrect statement of law because "statutes, case law, and recent legislative history" left "no doubt" that beneficial use is the only lawful way to quantify a water right. *Id.* at 590, 599–600. When Ecology later attempted to change its position, the developer argued for estoppel based on his reliance on the prior statement. *Id.* As the court of appeals would explain in *Dykstra v. Skagit County*, Ecology "originally acted ultra vires in measuring [the] water right." *Dykstra*, 97 Wn. App. at 677 Therefore, there was no estoppel. The same rule was dispositive in the County's other cases. *Miller*, 111 Wn. App. at 166; *Steinmann*, 9 Wn. App. at 483.

[130] Brief at 58–62. County commissioners have "broad general powers" to "have the care of the county property . . . and, in the name of the county to prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law." *Finch v. Matthews*, 74 Wn.2d 161, 173, 443 P.2d 833, 841 (1968); RCW 36.32.120(2).

[131] Even if the Commissioners were supportive of this action against the Club (which is not evident in the record), estoppel would still apply. An authorized government action is subject to estoppel regardless of whether the government has changed its mind about the decision. *See State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143–44, 401 P.2d 635 (1965) (holding liquor control board could be estopped from repudiating prior official approval of application for change of location after applicant had relied on approval); *Board of Regents of the Univ. of Washington v. City of Seattle*, 108 Wn.2d 545, 741 P.2d 11 (1987) (estopping State from challenging legality of condemnation award to which it had previously acquiesced); *City of Charlestown Advisory Planning Commn. v. KBJ. LLC*, 879 N.E.2d 599, 603 (Ind. App. 2008) (holding a change in "political winds" does not justify repudiation of a prior approval).

would allow the government to deceive its counterparties and repudiate its official words and actions in authorized transactions. Estoppel evolved as a legal doctrine to prevent this, and even a county is accountable.

The County's final argument against estoppel is that the Club had "convenient and available means" to learn the "state of the facts" and therefore cannot blame the County for withholding or misrepresenting them.[132] In *Chemical Bank*, the party seeking estoppel could have determined that the government representations it relied upon were *ultra vires*. 102 Wn.2d at 911. Here, the Commissioners' concealment and statements of intent and approval were part of an official transaction and within the scope of their authority to dispose of property and settle potential disputes. *Chemical Bank* is inapposite.

Moreover, the County does not explain what exactly the Club could have conveniently learned on its own prior to entering into the Deed. There is no evidence that the Club could have learned: (1) enforcement officer Steve Mount was secretly alleging the Club to be an unlawful nuisance; (2) the County did not intend the Deed to approve and secure the Club as it then existed, which is what the County said was intended; or (3) the Resolution and other official approvals used to authorize the Deed were not intended to be binding on the County or final

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[132] Resp. at 79–80 (citing *Chem. Bank v. Washington Pub. Power Supply Sys.*, 102 Wn.2d 874, 691 P.2d 524 (1984)).

decisions regarding the Club's ongoing facilities and operations, which is how they appeared. There is certainly no evidence of any public records the Club could have conveniently obtained to learn, prior to signing the Deed, that the County's assurances and statements of intent were false, without legal effect, and contradicted by its enforcement officer.

If the Deed did not secure the Club's existing facilities and operations and set aside potential disputes with the County as a matter of contract law, it should have that effect under the doctrine of equitable estoppel. Each element of estoppel is present here and the trial court erred by failing to grant and give effect to the affirmative defense.

J. The Trial Court's Injunctions Should Be Reversed Because They Are Premised on the Trial Court's Errors, Arbitrary, Excessive, and Not Tailored to Prevent Specific Harms.

In its opening brief, the Club advocated for the two injunctions and warrant of abatement to be reversed and permanently set aside. Brief at 71–72, 78. Alternatively, the Club asked them to be reversed and remanded with instructions for them to be narrowly tailored to reflect clear and objective standards that prevent specifically identified harms. *Id.*

The first injunction shuts down the Club and only allows it to reopen under a CUP. CP 4085 ¶ 6. There is no guarantee the County will ever issue such a permit. VT 283:1–17. There is no basis for the injunction because termination of the nonconforming use right and the

trial court's other decisions were in error. Brief at 74–75. In addition, even if some or all of the trial court's decisions regarding nuisance, expansion, or permitting violations were affirmed, they would provide no grounds to prohibit all activity at the Club or require a CUP. *Id.* at 75–76.

The trial court drafted the second injunction to apply even if the Club were to obtain a CUP. The injunction prohibits shooting before 9 am or after 7 pm. CP 4085 ¶ 7(d). It also prohibits use of rifles of greater than "nominal .30 caliber," fully automatic firearms, cannons, and exploding targets. *Id.* ¶ 7(a)–(c). These prohibitions are arbitrary and excessive. Brief at 76–77. They are arbitrary because there is no finding or substantial evidence that any of the prohibited activities are, per se, illegal. They are excessive because they prohibit a substantial amount of activity that is lawful, consistent with the Club's historical use of its property, and pre-dates any allegations of a nuisance. *Id.* at 74—75. The injunctions are not appropriately tailored to remedy any specific harm.

The County argues the injunctions should be affirmed because they are reviewed for abuse of discretion and subject to deference. Resp. at 45–47. The County then implies the injunctions were not an abuse of discretion because there is substantial evidence to support them. *Id.* at 47. The County fails to articulate clearly, however, what that evidence is.

The County also disregards the rule that an injunction is an abuse

of discretion if it is based on incorrect legal standards or the incorrect application of legal standards.[133] The Club has identified errors throughout the trial court's decision, including incorrect legal standards, incorrect application of legal standards, and erroneous findings of fact. The injunctions cannot stand because they are based on the trial court's other erroneous decisions. The County does not argue the injunctions should be affirmed even if the trial court committed error.

The County asserts the trial court was allowed to consider, as factors relevant to the injunctions, "the availability of other adequate remedies, misconduct by the plaintiff, and the relative hardship if injunctive relief is granted or denied."[134] The County, however, does not explain what factors, if any, the trial court considered in fashioning the injunctions. Moreover, the three factors cited by the County support reversal. The County fails to show a less excessive remedy would not be adequate. This is unsurprising given that this Court previously determined the harm of shutting down the Club pending appeal outweighed the risk of allowing it to continue.[135] The County also fails to argue or show that any misconduct by the Club (if there was any) warrants an excessive or

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[133] Brief at 72 (citing *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004)). If the trial court's ruling is based on an "erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

[134] Resp. at 46 (citing *Wimberly*, 136 Wn. App. at 339; *Hollis v. Garwall, Inc.*, 88 Wn. App. 10, 16, 945 P.2d 717 (1997) *aff'd*, 137 Wn.2d 683 (1999)).

[135] *See Ruling Granting Stay on Conditions* at 5 (dated April 23, 2012).

punitive injunction under the circumstances.

According to the County, the Club is challenging the "immediate effectiveness of the trial court's injunctions." Resp. at 46. More accurately, the Club is challenging the immediate termination of its vested nonconforming use right, which was in error, and which provides no grounds for injunctive relief. The Club is also challenging each underpinning illegality that the injunctions may have been intended to remedy—i.e., nuisance, expansion, lack of permits. Because the trial court erred in some or all of its determinations of illegality, the injunctions must be reversed. In addition, even if there were some illegality, the injunctions must be reversed because they are arbitrary, irrational, not based on any clear or objective distinction between what is unlawful and lawful, and excessively prohibit activities never shown or found to be unlawful.

As discussed in the opening brief, an injunction must be narrowly tailored to remedy a specific, proven harm.[136] The response does not argue against this rule or distinguish *Chambers v. City of Mount Vernon*, where an excessive injunction was reversed. 11 Wn. App. 357, 361, 522 P.2d 1184 (1974). The trial court's injunctions violate this principle because even if there were some illegality or harm to remedy, they are not narrowly tailored to address it. Instead, they blindly entrust specific

[136] Brief at 72–73 (citing *DeLong v. Parmelee*, 157 Wn. App. 119, 150, 236 P.3d 936 (2010) *review granted, cause remanded*, 171 Wn.2d 1004 (2011); *Chambers v. City of Mount Vernon*, 11 Wn. App. 357, 361, 522 P.2d 1184 (1974)).

remedies to the County's CUP process while shutting down the Club and permanently prohibiting a substantial amount of lawful, harmless conduct. The injunctions do not reflect any clear and objective distinction between lawful and unlawful activities or improvements.

Because the trial court erred in terminating the Club's nonconforming use right, it also erred in shutting down the Club and requiring it to obtain a CUP in order to resume excessively limited operations. If the Club retains its nonconforming use right, then it is exempt from the zoning rules that require a CUP for certain uses in certain zones.[137] Similarly, the trial court's decisions regarding nuisance, expansion, and permits were in error, so they provide no grounds to shut the Club down or require a CUP. The first injunction must be reversed.

The first injunction would be in error even if this Court were to affirm some or all of the trial court's decisions regarding nuisance, expansion, and permits. The remedy, in that case, would need to be appropriately tailored to address a specific harm without needlessly prohibiting lawful activities. If any aspect of the Club were a nuisance, for example, the harm could be remedied by an injunction preventing or requiring abatement of that *specific* nuisance. With respect to sound, that would require an objective standard to identify when the sound from the

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[137] KCC 17.420.020 (CUP ordinance) (App. 6); KCC 17.460.020 (nonconforming use ordinance) (App. 2).

Club is and is not a public nuisance. With respect to safety, that would require a clear standard to identify when and under what conditions an activity at the Club is and is not so unsafe as to constitute a public nuisance. With respect to expansion, change of use, or enlargement, that would require a distinction between what is prohibited and what is a lawful continuation or intensification of the use. With respect to permitting violations, that would require only that the Club obtain permits or, at worst, that the Club cease using specific unpermitted areas or improvements, pending permits. The trial court did not tailor the first injunction to address any of the specific illegalities it found.

The possibility that the Club can reopen with a CUP does not make shutting the Club down appropriately tailored. Instead, it is an abdication of the trial court's responsibility to remedy specific harms. The County does not dispute that the Club might be denied a CUP and never receive one. The County does not dispute that a CUP would give it broad power to impose conditions on the Club and the use of its property, without direct judicial oversight over the process. The County does not dispute that it has never informed the Club, courts, or anyone of the specific conditions it would impose on the Club as part of a CUP. There is no finding or showing that the County has the expertise necessary to determine what

those conditions should be.[138] Requiring a CUP for the Club to reopen was arbitrary, excessive, and not appropriately tailored to address a specific harm. The first injunction must be reversed even if some aspect of the trial court's decision is affirmed.

Like the first injunction, the second injunction limiting hours of operation and prohibiting certain activities is an abuse of discretion not supported by the record. The trial court did not find and the County does not argue that the activities prohibited by the second injunction are nuisances per se, or that they cannot be allowed at the property under any circumstances without creating a nuisance. The County does not attempt to explain the second injunction or show substantial evidence that would support any of its parts. The second injunction should be reversed along with the first. At minimum, the injunctions should be remanded with instructions for the trial court to narrowly tailor them to address specific harms or violations, without needlessly prohibiting lawful and reasonable use of the property.[139]

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[138] In contrast to the County, the Club has a wealth of expertise regarding firearm safety and range management. *See* CP 822–23, 839–40 (App. 28) (list of certifications and qualifications of Club Executive Officer Marcus Carter); VT 1676:11–1677:3 (describing his experience as a U.S. Army military police officer); VT 1677:4–19 (explaining his master gunsmith training and NRA firearms instructor classes); VT 1678:2–24 (describing his experience owning and operating gunsmith and ammunition manfacturing businesses); VT 1680:1–16 (describing his firearms instructor and range safety officer certifications); VT 1689:1–14 (describing his range safety development experience).

[139] In its "counterstatement" of the issues, the County implies that the trial court's second injunction is "not inconsistent with the range's pre-1993 historical operation." Resp. at 2. The response brief does not expand on this proposition, which is incorrect. The second

The trial court did not issue a specific warrant of abatement, but only preserved the right to do so pursuant to a supplemental, post-judgment proceeding. CP 4085 ¶ 8. The opening brief argues the warrant of abatement should be reversed and permanently set aside because there are no violations of law to be remedied. Brief at 78. Alternatively, the warrant of abatement was in error because it fails to set forth any specific conditions or requirements for abatement. The County's response does not dispute that a warrant of abatement, like any injunction, must be tailored to remedy a specific harm. The response does not even attempt to defend the warrant of abatement. Therefore, it should be reversed and permanently set aside. At minimum, the Court should hold that any warrant of abatement must be tailored to remedy a specific harm.

The County suggests the excessive scope of the trial court's injunctions should be excused on the grounds that the Club is of little redeeming social value. Resp. at 64, 46. The record proves otherwise. The Club provides a plethora of firearms safety courses to educate and train inexperienced shooters, which now more than ever is essential as

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injunction prohibits shooting during times when the Club historically operated. Brief at 36–37 (discussing evidence of Club's historical hours). It prohibits cannons, fully automatic weapons, and exploding targets, even though the trial court's own findings of fact recognize that these activities occurred at the Club at, prior to, or around the time of the 1993 acknowledgment of its vested nonconforming use right, and prior to any nuisance allegations. CP 4073 (FOF 22). Similarly, the record proves that rifles larger than nominal .30 caliber were fired at the Club before 1993, as Andrew Casella and Marcus Carter both testified regarding those historical activities. VT 1854: 13–1855:2; VT 1720:1–1721:13, 1782:21–1784:24. The second injunction prohibits activities that are not unlawful or nuisances per se, and which should be allowed to continue.

inexperienced shooters are purchasing firearms in droves.[140] The Club has trained thousands in basic firearms safety and self-defense, and it also provides classes in hunter education and children's Olympic-style shooting.[141] Every year it hosts the "Courage Classic" charity shooting competition.[142]

The Club actively supports local law enforcement and promotes shooting in supervised environments with safety infrastructure. Law enforcement officers from multiple state and federal agencies train at the Club.[143] The Club regularly provides supplemental pre-deployment training and shooting practice for members of the military.[144] The Club subsidizes a "Take It To The Range" program, which enables law enforcement officers to issue cards to individuals shooting in uncontrolled areas that can be redeemed at the Club for a free day of safe shooting.[145] The Club provides significant benefits to the community. Greatest of all may be that it provides safety infrastructure, training, and supervision for shooters who could otherwise shoot lawfully without these safeguards on properties throughout Kitsap County greater than five acres.[146]

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[140] *See* CP 822–23, 826–27, 837 (describing Club's training programs) (App. 28).
[141] VT 1917:16–1918:25, 1875–1876:9 (testimony of Club witness Merton Cooper); VT 1965:15–1966:6; 2133:19–22 (testimony of Club Executive Officer Marcus Carter).
[142] VT 1988:1–1989:7.
[143] VT 1973:11–1974:13.
[144] CP 827.
[145] VT 1701:19–1702:14.
[146] KCC 10.24.090 (App. 40).

CONCLUSION

For the reasons stated above, the Club respectfully requests an order:

(1) reversing the trial court's declaratory judgment terminating the Club's nonconforming use right;

(2) reversing the trial court's judgment declaring the Club a public nuisance, and declaring it is not a nuisance;

(3) reversing every aspect of the trial court's injunction and warrant of abatement and either permanently setting them aside or remanding with instructions for the trial court to narrowly tailor them to reflect clear and objective standards and to prevent specifically identified harms;

(4) granting the Club's accord and satisfaction defense or alternative equitable estoppel defense, and either dismissing the County's claims or remanding with an order to give effect to the Club's interpretation of the Deed; and

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(5) granting the Club's breach of contract counter-claim and remanding with an order to determine the Club's damages, including defense and abatement costs.

DATED: October 21, 2013

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CERTIFICATE OF SERVICE

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

On the date stated below, a copy of **AMENDED REPLY BRIEF OF APPELLANT** was served upon the following individuals by placing it in the U.S. Mail, postage prepaid, at Portland, Oregon:

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