CASE NO. 43076-2-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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

Respondent,

vs.

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

Appellants,

and

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

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY
Superior Court No. 10-2-12913-3

BRIEF OF RESPONDENT KITSAP COUNTY

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I. COUNTERSTATEMENT OF THE ISSUES

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2. Did the Superior Court err by granting declaratory judgment that KRRC's illegal land uses of its property each acted to terminate the property's legal nonconforming use as a shooting range?

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5. Did the Superior Court err in finding that shooting range operations at KRRC's real property constituted a public noise nuisance based upon prolonged, repeated, and extraordinarily intrusive noise forced upon area residents within their homes?

6. Did the Superior Court err in finding that shooting range operations at KRRC's real property created a public safety nuisance based upon KRRC's failure to build infrastructure to prevent escape of bullets to

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7. Did the Superior Court abuse its discretion in crafting its injunction against public nuisance-causing range activities at KRRC's property by limiting hours of operation, restricting the caliber of rifles shot, and prohibiting use of exploding targets and cannons, not inconsistent with the range's pre-1993 historical operation?

8. Did the Superior Court err in concluding that a 2009 deed conveying real property from Kitsap County to KRRC did not resolve land use status or settle potential enforcement actions, and in rejecting KRRC's counterclaim that Kitsap County breached this contract by filing this suit?

9. Did the Superior Court err in concluding that the Open Public Meetings Act limited the effect of the 2009 deed to its written terms approved by Kitsap County's legislative body, when neither the deed nor its authorizing resolution addressed land use or permitting?

10. For the Superior Court's implicit denial of KRRC's accord and satisfaction defense, did KRRC waive challenge by not briefing it?

11. Did the Superior Court err by implicitly holding that KRRC failed to prove its equitable estoppel defense by clear, cogent and convincing evidence, which asserted that the 2009 deed should act to estop Kitsap County from enforcing its land use and permitting codes?

II. INTRODUCTION

This action is Kitsap County's suit for declaratory judgment that KRRC forfeited its real property's nonconforming land use as a recreational shooting range, for injunction against continuing its land use without a county-issued conditional use permit, and for injunction against public nuisances of obnoxious heavy gunfire and explosion noises and endangerment of nearby residential communities due to bullet escapement.

In its opening brief[1], KRRC preserved few challenges to the findings of fact. KRRC assigned formal error to none of the trial court's 90 numbered findings and to none of its evidentiary rulings. KRRC assigned no error to rejection of KRRC's proposed findings. In the text, KRRC challenged a handful of the findings, without clear delineation. On these bases alone (which cannot be cured in reply), the Court may truncate KRRC's appeal under its rules, most notably RAP 10.3(g) and 10.4(c). Substantial evidence establishes any finding for which KRRC may claim it preserved challenge, and for the most critical factual findings –reciting risk of bullet impacts to central Kitsap County populations – KRRC challenges semantics and the trial court's *application* of its findings.

KRRC disputes comprehensive public nuisance and land use findings and conclusions established by the trial evidence, which included:

[1] Amended Brief of Appellant ("Brief").

- KRRC's transformation of its lightly-used daylight target range with two developed shooting ranges (one rifle and one pistol) into: a heavily-used range open to members from 7 a.m. to 10 p.m. year-round, where members and guests may shoot any and all (legal) weapons and rapid fire shooting is commonplace; a center for urban combat-oriented training; a "range for rent" by contractors training U.S. Navy personnel; and a hub for "practical shooting".
- KRRC's clearing, grading and excavation conducted over 15 years in which the Club lengthened its rifle range, constructed 11 earthen "shooting bays" for practical shooting in 180, 270 or 360 degrees, and buried a seasonal watercourse in twin 475-foot long culverts – all done without site permitting, engineering or wetland study.
- KRRC's routine imposition of sounds akin to urban combat – incessant rapid fire shooting and occasional exploding targets - upon people inside their houses, both nearby and as distant as 1.7 miles down range (all built and occupied before KRRC's changes).
- Bullet strikes to several houses 1.5 to 1.7 miles directly downrange of KRRC's rifle range over 15 years preceding this action.
- KRRC's "blue sky" range in which all shooting areas, old and new, lack overhead baffles to intercept bullets shot from designated firing areas.

- Undersized backstops and berms at KRRC's shooting areas.
- KRRC's reliance upon a 1993 County letter to shooting ranges confirming "grandfathered" status, to avoid virtually all permitting.
- KRRC's reliance upon events in 2009 when Kitsap County became a pass-through owner of the parcel KRRC had leased from the State for decades, and the County sold the parcel to the Club under a bargain and sale deed which KRRC now claims acted to "settle" potential site development violations and to resolve the land use.

After a lengthy bench trial, the court entered a plaintiff's verdict, holding that KRRC created enjoinable public nuisances of obnoxious noise and endangerment of public safety from bullet escapement. The court further held that KRRC's unpermitted site developments and its illegal and changed land uses could not be reconciled with the previous nonconforming land use or with the "private recreational facility" use under local code, thereby ending that nonconforming use status.

The trial court heard conflicting testimony about range safety, bullet impacts, noise impacts, site development, wetland classification, land use and transfer of the real property. The court assessed and weighed conflicting accounts of activities and impacts, circa 1993 and present-day, and looked past simplistic explanations like "no person has yet to be hit by a bullet" to instead evaluate the totality of a substantial trial record.

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kitsap County filed this action on September 9, 2010. CP 2-88.[2] On August 29, 2011, Kitsap County filed its third and final amended complaint for injunction, declaratory judgment and abatement of nuisance. CP 1695-1757.[3] This complaint asserted Kitsap County Code ("KCC" or "Code") violations, asserted common law and statutory public nuisances, sought declaratory judgment of nonconforming use status under common law and the Code, and sought injunctions:

> (a) enjoining Defendants from operating a shooting range on the Property[4] until such time as the Property is in compliance with applicable regulations and no longer operates so as to endanger persons or property outside the Property . . . ;
>
> (c) prohibiting Defendants from operating the Property as a shooting range and prohibiting access and use of the Property by any persons to discharge firearms until such time as all shooting areas on the Property come into compliance with applicable codes and accepted shooting range industry safety standards;[5]

On September 13, 2011, KRRC filed its answer, affirmative defenses and counterclaims. CP 1771-1787.[6] Of the affirmative defenses,

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[2] The complaint originally named KRRC and Sharon Carter (d/b/a National Firearms Institute) as defendants. CP 2.
[3] Hereafter "Third Amended Complaint".
[4] KRRC's 72-acre parcel of real property. CP 1696 (Third Amended Complaint, ¶3).
[5] CP 1712 (Third Amended Complaint, pp. 18-19). "Defendants", plural, was a scrivener's error; KRRC was the lone defendant at trial.
[6] Hereafter, "Answer". KRRC's affirmative defenses are found at CP 1778 – 1782.

KRRC's Brief raises only equitable estoppel and accord and satisfaction.[7]

The Answer asserted counterclaims for declaratory judgment:

> 1. That Kitsap County's amended nonconforming use ordinance was unconstitutional;
>
> 2. That a 2009 bargain and sale deed authorized KRRC's facilities and operations, that "the Club's current facilities and operations may continue without further permits or approvals from the County", and that Kitsap County "breached" this contract by filing this action;
>
> 3. That KRRC enjoys a nonconforming land use right to operate its facilities and operations as currently configured; and
>
> 4. Determining which county code violations existed at KRRC's property.[8]

A 14-day bench trial began on September 28, 2011 and ended on October 28, 2011, with written closing arguments filed November 7, 2011. CP 4052-4053. On February 9, 2012 the trial court issued its judgment, entitled "findings of fact, conclusions of law and orders", which was effective immediately.[9] The trial court granted declaratory judgment that:

> 1. Kitsap County's Motion pursuant to Chapter 7.24 RCW for judgment declaring that the activities and expansion of uses at the Property has terminated the legal

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[7] KRRC assigns error only to denial of equitable estoppel and accord and satisfaction. Brief, at 2. KRRC did not substantively brief accord and satisfaction, thereby waiving this challenge. Brief, at 40, 55; *State v. Ashcraft,* 71 Wn.App. 444, 456 n. 3, 859 P.2d 60 (Div. 1 1993) ("Failure to present argument in a brief waives an appeal of that error.") (citing *Murphy v. Murphy,* 44 Wn.2d 737, 270 P.2d 808 (1954)).

[8] COL 1782 – 1785. Of the counterclaims, KRRC assigns specific error to only to denial of its "breach of contract" counterclaim. Brief, at 2.

[9] CP 4052 - 4092 (attached as Appendix 1 to Respondent's Brief). "FOF", "COL" or "Order" hereafter refer to numbered paragraph(s) of the trial court's judgment.

> nonconforming use status of the Property as a shooting range by operation of KCC Chapter 17.460 and by operation of Washington common law regarding nonconforming uses, is hereby GRANTED.
>
> 2. The Property may not be used as a shooting range until such time as a County conditional use permit is issued to authorize resumption of use of the Property as a private recreational facility or other recognized use pursuant to KCC Chapter 17.381.[10]

The trial court issued two injunctions:

> 6. A permanent, mandatory and prohibitive injunction is hereby issued enjoining use of the Property as a shooting range until violations of Title 17 Kitsap County Code are resolved by application for and issuance of a conditional use permit for use of the Property as a private recreational facility or other use authorized under KCC Chapter 17.381. The County may condition issuance of this permit upon successful application for all after-the-fact permits required pursuant to Kitsap County Code Titles 12 and 19.
>
> 7. A permanent, mandatory and prohibitive injunction is hereby issued further enjoining the following uses of the Property, which shall be effective immediately:
>
> a. Use of fully automatic firearms, including but not limited to machine guns;
>
> b. Use of rifles of greater than nominal .30 caliber;
>
> c. Use of exploding targets and cannons; and
>
> d. Use of the Property as an outdoor shooting range before the hour of 9 a.m. in the morning or after the hour of 7 p.m. in the evening.[11]

The parties have filed no motions to reconsider or clarify the judgment.

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[10] Orders 1, 2 (Appendix 1).
[11] Orders 6, 7 (Appendix 1).

On February 15, 2012, KRRC filed its timely notice of appeal. CP 4114 - 4156. Pending appeal, KRRC remains an operational live-fire shooting range.[12]

B. FACTS

1. The Subject Property and Historical Background

This case concerns KRRC's uses of its 72-acre parcel of real property ("Property") in unincorporated central Kitsap County. FOF 1, 4.

> 8. The Property consists of approximately 72 acres, including approximately ***eight acres of active or intensive use and occupancy containing the Club's improvements, roads, parking areas, open shooting areas, targets, storage areas, and associated infrastructure. ("Historical Eight Acres")***. Exhibits 135-36, 438, 486. The remaining acreage consists of timberlands, wetlands and similar resource-oriented lands passively utilized by the Club to provide buffer and safety zones for the Club's shooting range. Id.[13]

The Court adopted KCCR's names for the Property's shooting areas:

> 15. For purposes of these factual findings, the Court will use the names the Club has given to shooting areas at the Property, which include a rifle range, a pistol range, and shooting bays 1-11 as depicted in Exhibits 251 and 251A (June 2010 Google earth imagery). . . . [14]

Exhibit 251 is reproduced as Appendix 2 to this brief. The Property is

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[12] See Ruling Granting Stay on Conditions (4-23-12), Order Clarifying Stay and Denying Motion to Modify and Motion for Contempt (8-27-12).

[13] FOF 8 (emphasis added). Here, the trial court quotes from lease agreements between DNR and its former tenant KRRC to describe 8-acre "historical" use and 64.41-acre passive use areas of the Property. Ex 135 (2002 lease, p. 1). Ex 136 (2003 lease, p. 1).

[14] FOF 15. Exhibit 251 is aerial imagery depicting the Property's pistol range, rifle range and shooting bays (numbered). Exhibits dubbed "A" are blown up courtroom versions.

located along windy Seabeck Highway in a rural area southwest of Silverdale. RP 200:15-19, 294:24 – 295:4, 409:18 – 410:8, Ex. 1.

KRRC dates back to 1926 and the Club incorporated as a not-for-profit organization in 1986. FOF 6-7. KRRC leased the Property from the State Department of Natural Resources ("DNR") for decades, over which time DNR periodically harvested and re-planted timber on the Property's wooded portions. FOF 7, 13. KRRC became owner of record on June 18, 2009, when (a) the State conveyed the Property and another DNR parcel via quit-claim deed to Kitsap County, and (b) Kitsap County conveyed the Property via bargain and sale deed to KRRC ("2009 Deed"). FOF 11, 14; Ex. 146, 147[15]. On that date at 3:15 p.m., these two deeds were sequentially recorded, meaning Kitsap County was momentarily the Property's fee owner. Ex. 146, 147 (each bearing auditor's time stamp).

2. Negotiations and the 2009 Deed

KRRC's equitable estoppel defense and breach of contract counterclaim rely on the 2009 Deed and negotiations. KRRC challenges the trial court's deed interpretation, but formally assigned error to none of the findings regarding the negotiations and parties' intentions.

[15] The trial court attached the 2009 Deed (entitled "Bargain and Sale Deed with Restrictive Covenants") to its judgment, which is attached here as Appendix 2. CP 4087 - 4092. The Property is contiguous with several larger DNR parcels deeded by the State to the County in 2009 to become the County's "Newberry Hill Heritage Park". Ex. 1, 3, 146; RP 400:16 – 401:4.

Kitsap County long sought to develop a large greenbelt or parkland area in central Kitsap County. FOF 16. In early 2009, the County and State were negotiating a land trade in which the County would receive a group of DNR parcels, including the Property. FOF 16, 17. KRRC was concerned that the County could become its landlord, and could exercise a lease clause to end KRRC's tenancy. FOF 17, 18. KRRC preferred to own its long-used shooting range, and the County did not want liability for the Property's potential heavy metals contamination. FOF 19.

In March 2009, Club officers met with County officials including Commissioner Josh Brown. Soon after, the parties' attorneys and County Parks staff began negotiating a land sale. FOF 19, 20. A county attorney drafted a bargain and sale deed, and the parties exchanged revisions until agreement was reached. FOF 20. On May 11, 2009, the Board of County Commissioners ("BOCC") voted to approve the 2009 Deed.[16] FOF 22.

The 2009 Deed sets out covenants, "the benefits of which shall inure to the benefit of the public and the burdens of which shall bind the Grantee . . .".[17] The covenants include provisions that the grantee "releases and agrees to hold harmless, indemnify and defend Kitsap

[16] The County obtained a "supplemental appraisal report" valuing the Property at $0 based on presumed heavy metals contamination (hence, no public auction). FOF 21, 22. The appraiser was instructed to consider potential contamination. RP 2850:19-25.
[17] 2009 Deed, p. 1. Kitsap County was the grantor; KRRC was the grantee.

County . . ."[18] and that the grantee agrees to maintain commercial general liability insurance coverage.[19] Covenant No. 3 provides in pertinent part:

> 3. ***Grantee shall confine its active shooting range facilities on the property consistent with its historical use of approximately eight (8) acres of active shooting ranges*** with the balance of the property serving as safety and noise buffer zones; provided that Grantee may upgrade or improve the property and/or facilities within the historical approximately eight (8) acres in a manner consistent with "modernizing " the facilities consistent with management practices for a modern shooting range. "Modernizing" the facilities may include, but not be limited to: (a) construction of a permanent building or buildings for range office, shop, warehouse, storage, caretaker facilities, indoor shooting facilities, and/or classrooms; (b) enlargement of parking facilities; (c) sanitary bathroom facilities; (d) re-orientation of the direction of individual shooting bays or ranges; (e) increasing distances for the rifle shooting range; (f) water system improvements including wells, pump house, water distribution and water storage; (g) noise abatement and public safety additions. ***Also, Grantee may also apply to Kitsap County for expansion beyond the historical eight (8) acres, for "supporting" facilities for the shooting ranges or additional recreational or shooting facilities, provided that said expansion is consistent with public safety, and conforms with the . . . rules and regulations of Kitsap County for development of private land.***[20]

By its terms, the 2009 Deed

> "did not release the Club from current or future actions brought under public nuisance or violation of County codes

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[18] 2009 Deed, ¶ 1. Covenant No. 1 addressed liability due to death or injury resulting from use of the Property or from violation of environmental laws. Id.

[19] 2009 Deed, ¶ 2. Covenant No. 2 required insurance which "does not exclude any activity to be performed in fulfillment of Grantee's activities as a shooting range" with minimum coverage of $1 million per occurrence, $2 million in the aggregate. Id.

[20] 2009 Deed, ¶ 3 (emphasis added). Additionally, Covenant No. 4 requires the grantee to offer the public access to the Property "at reasonable prices". 2009 Deed, ¶ 4.

for violation of its historical and legal nonconforming uses.[21]

The trial court made several findings regarding the negotiating parties' intentions:

> 23. The minutes and recordings of BOCC meetings on and around May 11, 2009 do not reveal an intent to settle disputed claims or land use status at the Property.
>
> 24. At the time of the property transaction, Kitsap County had no plan to pursue a later civil enforcement or an action based upon land use changes or site development permitting.
>
> 25. During the negotiation for the property transaction, the parties did not negotiate for the resolution of potential civil violations of the Kitsap County Code at the Property and the parties did not negotiate to resolve the Property's land use status.
>
> 26. The only evidence produced at trial to discern the County's intent at the time of the 2009 Bargain and Sale Deed was the deed itself....
>
> 27. The deed does not identify nor address any then-existing disputes between the Club and County, other than responsibility for and indemnification regarding environmental issues and injuries or deaths of persons due to actions on the range. [22]

In the body of its brief, KRRC disputes Findings of Fact 23, 25 and 26.[23]

Deeding parties' intentions are questions of fact and supposed intent evidence is all subject to the trial court's credibility and weight

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[21] FOF 28.
[22] FOF 23, 24, 25, 26, 27.
[23] Brief, at 53.

determinations.[24] This evidence included the KRRC executive officer's and lawyer's alleged subjective understandings of intentions. RP 2092:3-19 2097:2-4, 2891:8-17, 2906:7-17.

As evidence of County intent, KRRC cites to deposition testimony of former County Parks employee Matt Keough,[25] who acknowledged the 8-acre area cited in DNR leases but did not articulate County intentions for land use status or permitting in alignment with KRRC's. RP 2844:4–2845:1, 2845:3-8, 2845:22–2846:6, 2846:17–2847:6.[26] For example:

> QUESTION: Okay. But was it your understanding that the eight acres that was already the active range was not going to require any after-the-fact permit or anything like that, correct?
>
> MR. WACHTER: Object to the form. It calls for a legal conclusion.
>
> THE COURT: I think it does. Sustained.
>
> MR. CHENOWETH: I'm just offering it for the County's intent and understanding in the contract negotiations.
>
> THE COURT: Okay. So --
>
> MR. CHENOWETH: But not as a binding legal statement on the County.
>
> THE COURT: All right. I'll allow the answer.
>
> ANSWER: As I stated, I wouldn't reference it as the

[24] See infra, at 41-42.
[25] Brief, at 51 (citing RP 2827:3-9, 2828:19-23, 2845:22-2846:13).
[26] The trial court regarded Keough's testimony as non-binding in so far as it set forth legal conclusions. RP 2849:5-25.

> eight acres. I don't recall ever, it being discussed as eight acres of area available for the active development. I do recall 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.[27]

As further evidence of County intent, KRRC cites to a March 18, 2009 letter from Commissioner Josh Brown to DNR for a public hearing conducted by that agency. Ex. 293.[28] In the letter, Commissioner Brown voiced his support for KRRC potentially leasing the Property without a "non-default termination clause". Id. A trial court could reasonably find this letter to be a general expression of support for KRRC, not necessarily written on behalf of the BOCC or of the County to affirm a land use.[29]

3. Zoning and the 1993 Letter.

Use of the Property as a shooting range pre-dates modern zoning. RP 192:10–13, 204:16-18. The trial court found and concluded the property is zoned "rural wooded" under KCC Chapter 17.301, and has had the same essential zoning designation since before the year 1993. FOF 9, COL 24. The County's zoning tables do not list "shooting range" as a

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[27] RP 2846:17 – 2847:15.
[28] Brief, at 52-53.
[29] Commissioner Brown's letter (ex 293, admitted for non-truth, context purposes, RP 2115:9 – 2116:24) recounts a September 2003 briefing in which the BOCC is said to have assured the Interagency Committee for Outdoor Recreation that the BOCC supported KRRC's application for a grant for improvements at the Property, that the Club's proposed "improvements were not at odds with the County's long-term interest in the property, and would not jeopardize future planning efforts", and that this "conclusion has not changed". Id.

recognized use and the closest land use in the zone is "private recreational facility", which requires a conditional use permit.[30]

In 1993, the BOCC Chair wrote a letter to the county's shooting ranges about their land use status ("1993 letter"):

> 10. On September 7, 1993, then-BOCC Chair Wyn Granlund authored a letter to the four shooting ranges in unincorporated Kitsap County at the time, stating that the County recognized each as "grandfathered." Exhibit 315. [31]

The addressees included KRRC, Poulsbo Sportsman's Club ("PSC") and Bremerton Trap and Skeet Club, and the letter stated in pertinent part:

> Dear Sirs:
>
> Pursuant to your requests, this is to confirm that the shooting ranges your organizations currently have in use, which are listed above, are considered by Kitsap County to be lawfully established, non-conforming uses (grandfathered).[32]

The 1993 letter (Appendix 3) established a land use benchmark, and the trial court compared the Property's facilities, operations, uses and impacts as of 1993 with those as of 2011. COF 6, 33. KRRC treated the letter as exempting the Club from county permitting. RP 1712:20–1713:15, 2185:20–2186:11, 2287:14-19.

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[30] COL 25.b (citing KCC 17.381.040 (Table E), KCC 17.110.647); RP 211:16 – 212:9.
[31] FOF 10. (Henceforth "1993 letter").
[32] App. 3 (Ex 315). KRRC, PSC and the Bremerton Trap and Skeet Club continue to operate shooting ranges in the county. RP 1342:6-15, 2343:4-9. KRRC and PSC are each located in central Kitsap, about five miles apart. RP 1482:9-13.

4. Uses of the Property, Circa 1993.

The trial court described the Property and uses as of 1993:

> 29. For several decades prior to 1993, the Club operated a rifle range and a pistol range at the Property. As of 1993, the pistol range consisted of a south-to-north oriented shooting area defined by a shooting shed on its south end and a back stop on the north end and the rifle range consisted of a southwest-to-northeast oriented shooting area defined by a shooting shed on its southwest end and a series of backstops going out as far as 150 yards to the northeast. ***As of 1993, the developed portions of the Property consisted of the rifle range, the pistol range, and cleared areas between these ranges, as seen in a 1994 aerial photograph (Exhibit 8). During and before 1993, the Club's members and users participated in shooting activities in wooded or semi-wooded areas of the Property, on the periphery of the pistol and rifle ranges and within its claimed eight-acre "historic use" area.***
>
> ***30. As of 1993, shooting occurred at the Property during daylight hours only. Shooting at the Property occurred only occasionally, and usually on weekends and during the fall "sight-in" season for hunters.***[33]

As of the early 1990's, "shooting sounds from the range were typically audible for short times on weekends, or early in the morning during hunter sight-in season (September). Hours of active shooting were considerably fewer". FOF 80. At that time, "shooting sounds at the Property [were] occasional and background in nature". FOF 81. At that

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[33] FOF 29, 30 (emphasis added). To illustrate, neighbor Terry Allison testified that after he moved into his house next to the Property in 1988, "Kitsap Rifle and Revolver Club was a primarily hunters' club, not a lot of use. There were not a lot of days that I could even hear gunshots from the club." RP 1016:25 – 1017:3. See ex. 1, 3 (maps identifying Allison's residential property).

time, "rapid-fired shooting, use of automatic weapons, and use of cannons at the Property occurred infrequently". FOF 83. Shooting at exploding targets was found "not common" as of 1993. FOF 87.

5. Site Development on "Historical Eight Acres".

In 1996, KRRC submitted a "pre-application conference request" form to Kitsap County's Department of Community Development ("DCD"),[34] stating its intention to build facilities including a 200-meter rifle line. FOF 31, ex. 134. From 1996 forward, KRRC embarked on a comprehensive and unpermitted[35] program to construct eleven new earthen "shooting bays" and to lengthen the Property's rifle range to 200 yards, as evidenced by aerial photography over the years:

> 33. From approximately 1996 forward, the Club undertook a process of developing portions of its claimed "historic eight acres", clearing, grading and sometimes excavating wooded or semi-wooded areas to create "shooting bays" bounded on at least three sides by earthen berms and backstops. Aerial photography allowed the Court to see snapshots of the expansion of shooting areas defined by earthen berms and backstops and verify testimony of the time line of development: 2001 imagery (Exhibits 9 and 16A) depicts the range as consisting of the pistol and rifle ranges, and shooting bays at the locations of present-day Bays 1, 2, 3, 9, 10 and 11. Comparing the 2001 imagery with March 2005 imagery (Exhibit 10), no new shooting bays were established during that interval.

[34] COL 2 provides that "[DCD] is the agency charged with regulating land use, zoning, building and site development in unincorporated Kitsap County and enforcing the Kitsap County Code."

[35] FOF 32 (noting that KRRC applied for a county building permit for an ADA ramp).

> "Birds Eye" aerial imagery from the MS Bing website from an unspecified date later in 2005 provided the clearest evidence of the state of development at the Property (Exhibits 462, 544, 545, 546, 547), which included clearing and grading work performed in the eastern portion of the Property after the March 2005 imagery. (See discussion below under the subject of the proposed 300 meter range). June 2006 and August 2006 imagery (Exhibits 11 and 12) reveals clearing and grading to create a new shooting bay at the location of present-day Bay 7. February 2007 imagery (Exhibit 13) reveals clearing and grading work to create new shooting bays at the locations of present-day Bay 8 and present-day Bay 6, and reveals clearing to the west of Bays 7 and 8 to accommodate a storage unit or trailer at that location. February 2007 imagery also reveals that the Club extended a berm along the north side of the rifle range and extended the length of the rifle range by clearing, grading and excavating into the hillside to the northeast of that range. April 2009 imagery (Exhibit 14) reveals establishment of a new shooting bay, Bay 4, and enlargement of Bay 7. May 2010 imagery (Exhibit 15) reveals establishment of a new shooting bay, Bay 5, enlargement of Bay 6, and additional clearing to the west of Bays 8 and 7 up to the edge of a seasonal pond (the easternmost of two ponds delineated as wetlands on club property, discussed below).[36]

KRRC constructed berms and backstops, usually using the spoils from excavating "cut slopes" into hillsides on the Property. FOF 37. Repeatedly, KRRC excavated in excess of 150 cubic yards and created "cut slopes" taller than five feet in height and with greater than a three-to one slope ratio – triggers for site development activity permit ("SDAP")s under Chapter 12.10 KCC. FOF 34, 35, 55; COL 30, 31. Repeatedly,

[36] FOF 33. Although KRRC does not challenge the court's detailed site findings, they are partially recited to underscore the scope and the gravity of the work for which KRRC claimed to require no site development or land use permitting.

KRRC failed to apply for required grading, SDAP and critical area permits. FOF 36, 56; COL 30, 31.[37]

In 2006, KRRC executed a mammoth earth-moving project: The Club excavated two parallel 475-foot long trenches across the entire historical area, installed 24-inch diameter culverts the continuous length of each trench ("24-inch culverts"), filled each trench and re-graded over the top. FOF 54. This work "undergrounded" [38] a seasonal water course that enters the Property from an adjacent road culvert and crosses the Property toward wetlands in the Property's north. FOF 53. The work required soil excavation and re-grading far in excess of 150 cubic yards. FOF 53, 54. KRRC performed this project without applying for a permit, without engineering and without hiring a wetland scientist to delineate impacts on the wetland buffer into which the culverts discharge. FOF 56, 61, 62, 63.

For KRRC's earthwork projects requiring an SDAP for grading and excavation, as well as for projects requiring critical areas approval (including multiple encroachments upon a wetland buffer), these activities constituted illegal uses of the Property, which acted to terminate the nonconforming use as a shooting range. COL 28, 29, 30, 31.

Of all the site development findings, KRRC challenges only Finding 57, that "[p]rior to the discovery site visits by County staff and

[37] At least one SDAP was required for work after the land sale. FOF 34, 35; COL 31.
[38] RP 563:5-14.

agents in January 2011, the County was unaware of the cross-range culverts".[39] In fact, the trial record establishes that County actors were oblivious to these culverts during prior site visits and that KRRC performed this work completely off the regulatory grid.[40] RP 560:23–561:4, 562:18–563:4, 658:24–660:6, 794:5-19, 795:1-10; 2851:2–2852:14; ex 61, 62, 496. KRRC may care about Finding 57 because it would color any assessment of extrinsic evidence for deed interpretation and would cut against applying equitable estoppel, discussed *infra.* KRRC's undisclosed work to install the 24-inch culverts was a major project requiring an SDAP (at minimum) which is *still* subject to after-the-fact county permitting, as explained by Douglas Frick of DCD's development engineering division:

> Q. Do you believe based on your site investigation that SDAP permitting was required for any aspect of the

[39] Brief, at 52 (challenge in text; no assignment of error).

[40] KRRC writes that "the Club informed the County DCD about the culvert work before it took place". Brief, at 52 (citing Ex 416 at 2-3). Exhibit 416 consists of an email chain including an August 17, 2006 email from KRRC to the State updating KRRC's scope of work to be performed at the Property pursuant to the "IAC grant", which included this bullet point: "Rifle range improvements (this would include berm reconstruction to redirect noise away from community and increase range safety; ***allow for handicap access to 100 yd. target line by replacing culvert pipe*** and running concrete walkway) ($25,000)." Ex. 416, p. 2 (emphasis added). As notice, this email was neither timely nor effective: The email, with its cryptic reference to replacing "culvert pipe", was forwarded to DCD on October 2, 2006, after work on the 24-inch culvert was underway. FOF 54, ex. 416. The former "culvert pipe[s]" consisted of several disjointed segments 20 feet or less in length, interspersed with "drainage swales" crossing the rifle range. RP 797:1-17, 2052:23 – 2053:16, 2160:18 – 2161:16. The record contains no evidence that Kitsap County was notified that KRRC undertook this major site development to convey storm and surface water across the entire "active" shooting area. See also Ex 66, 67; Ex 491, sheets 3 and 4 (CD of AHBL topographic survey from January 2011 (RP 219:13 - 220:6), depicting length and path of twin continuous culverts running east-to-west, the inlets and outlets of which are outside of developed shooting areas).

culverts? And I will direct your attention to the northern end of those culverts.

A. The culverts themselves because they collected water, it went into the property and conveyed it into a wetland, no doubt, if we had been aware of it, that would have been the subject of an SDAP. Whenever you're in essence connecting to the county storm system at Seabeck Highway and then altering native drainage patterns, that would definitely be -- it's one of the main criteria for an SDAP.

Q. And you believe that would have been then subject to county review?

A. Yes. The fact that there was a drainage swale identified on the site, again, I don't have any specification information on what that drainage swale was, but depending on its classification, it would have been also required an HPA, Hydraulic Project Approval, it could have required other agencies to be involved, certainly Corps of Engineers with the intrusion of those pipes into the wetlands.

Q. Mr. Frick, is there something called after-the-fact permitting in the area of Title 12 or development engineering?

A. It's not specifically called out but it's done all the time.

Q. Would you expect that to be required for the 24-inch culverts?

A. Yes.[41]

KRRC's wetland expert admitted that the 24-inch culverts "potentially" extended into a 150-foot buffer for the Property's wetland,

[41] RP 816:8 – 817:10.

and that KRRC failed to submit the required wetland study to relevant regulatory agencies. RP 2659:6-24.

6. Development Outside the Historic Area: 300-meter Range.

KRRC's site development program on the Property was not confined to the 8-acre "historical area". In March and April 2005, KRRC began work to build a "300-meter range" in the forest:

> 40. In March of 2005, DCD received complaints that KRRC was conducting large scale earthwork activities and that the noise from shooting activities from the range had substantially increased. The area in which earth-moving activities took place is a large rectangular area in the eastern portion of the Property, with a north-south orientation. This area would become known as the proposed "300 meter range", and it is clearly visible in each aerial image post-dating March 2005. In March of 2005, DCD staff visited the 300 meter range area and observed "brushing" or vegetation clearing that appeared to be exploratory in nature.
>
> 41. In April of 2005, DCD staff visited the 300 meter range and discovered recent earthwork including grading, trenching, surface water diversion, and vegetation removal including logging of trees that had been replanted after DNR's 1991 timber harvest. ***The entire area of the cleared 300 meter range was at least 2.85 acres and the volume of excavated and graded soil was greater than 150 cubic yards.***[42]

Again, KRRC's work exceeded Title 12 KCC regulatory thresholds and the Club failed to apply for the required SDAP. FOF 51, COL 27.

Unlike other earthwork projects on the Property, the County had

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[42] FOF 40, 41 (emphasis added).

regulatory contact with KRRC for the 300-meter range project. In April 2005, DCD issued a verbal "stop work" order, with which the Club complied. FOF 42. KRRC submitted conceptual drawings and a cover letter stating that this "range re-alignment project" was "not an expansion of the current facilities." FOF 42, 43 (citing ex. 138, 272). At a pre-application meeting, the County stated its expectation that KRRC must apply for permits, including a conditional use permit ("CUP"):

> 44. On June 21, 2005, KRRC officers met with DCD staff, including DCD [staff] representing disciplines of code enforcement, land use and planning, site development and critical areas. County staff informed KRRC that the Club needed to apply for a Conditional Use Permit ("CUP") per Kitsap County Code Title 17 because the site work in the 300 meter range area constituted a change in or expansion of the Club's land uses of the property. County staff also informed the Club that it would need to apply for other permits for its work, including a site development activity permit per Kitsap County Code Title 12. County staff identified several areas of concern, which were memorialized in a follow-up letter from the County to the Club dated August 18, 2005 (Exhibit 140).[43]

KRRC requested that the County drop its demand for the Club to apply for a CUP, which the County declined to do. FOF 45.

> Nor did the County issue a notice of code violation or a notice informing the Club that it had made an administrative determination pursuant to the County's nonconforming use ordinance, KCC Chapter 17.460.[44]

By summer 2006, KRRC abandoned its plans to develop the 300 meter

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[43] FOF 44.
[44] FOF 45.

range. FOF 46. In 2007, the Club replanted the 300 meter range with hundreds of fir trees, without a plan for their planting or care. FOF 48. These new trees all died, and the 300 meter range area remains deforested. Id. KRRC never applied for a conditional use permit and asserts that by abandoning the 300-meter range project, it need not do so. FOF 50-51; Brief, at 38 (citing 278:17-279:15). However, KRRC still uses the 300-meter range area to store target stands, barrels, props and building materials. FOF 49.[45] The trial court concluded:

> 27. The Club's unpermitted site development activities at the 300 meter range (2005) constituted an expansion of its use of the property in violation of KCC 17.455.060 because the use of the Property as a private recreational facility in the rural wooded zone requires a conditional use permit per KCC Chapter 17.381. Furthermore, the Club's failure to obtain site development activity permitting for grading and excavating each in excess of 150 cubic yards of soil as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.[46]

Of KRRC's site development reviewed by the trial court, all of it post-dated significant changes nearby in central Kitsap County, including the development of unincorporated Silverdale, increased population densities in and around Silverdale coinciding with establishment of the Naval Sub base Bangor, construction of numerous new houses including

[45] Ex. 516, 517, 518; RP 2147:10-21; 2204:6-21.
[46] COL 27.

those in the down-range El Dorado Hills and Whisper Ridge subdivisions, and construction of four-lane arterial State Highway 3 connecting north and south Kitsap. RP 137:11-24, 194:25 – 195:10, 196:21 – 197:4, 197:9 – 198:1, 198:18 – 200:9, 1010:7-8, 1014:18 – 1015:10. The trial evidence included to-scale maps and aerial images depicting central Kitsap, including the KRRC Property and nearby structures with building "footprints". Ex. 1, 3, 4, 5, 6;[47] KRRC's site development would support the advent of new land uses and profound changes to shooting activities at the Property between 1993 and present-day.

7. Commercial and Military Uses at the Property

Prior to 2002, the Property did not host for-profit firearm training. FOF 77. Starting in 2002, a sole proprietorship registered to Sharon Carter d/b/a National Firearms Institute ("NFI"), provided firearms and self-defense courses at the Property, usually taught by her husband Marcus Carter. FOF 73, 74, 75. The NFI kept separate books from KRRC. Id.

In about 2003, Surgical Shooters, Inc. ("SSI") began conducting small arms[48] training for U.S. Navy service members at the Property,

[47] Ex. 1 ("Area Map with Selected Residences"), Ex. 3 ("Kitsap Rifle & Revolver Club COMPLAINTS"), Ex. 4 (zoning map), Ex. 5 ("Year of Construction" for El Dorado Hills plats), Ex. 6 ("Year of Construction" for Whisper Ridge plats).

[48] "Small arms" refers to firearms ranging from pistols and revolvers to military-style rifles. RP 1019:17-1020:4, 1199:5-10. The term includes large sniper rifles which fire the ".50 cal BMG" round. RP 1199:11-1200:6.

under contract with the Navy. FOF 74.[49] Under an oral arrangement, SSI paid NFI a per-day fee and NFI remitted one-half of that fee to KRRC. Id. NFI coordinated SSI's visits to the Property and provided a range safety officer ("RSO") during each training session. Id.

In about 2004, Firearms Academy of Hawaii ("FAH") replaced SSI, and from approximately 2004 until Spring 2010, FAH regularly provided small arms training to Navy personnel at the Property, again under contract with the Navy and again with oral per-day fee arrangements between FAH and NFI, and NFI and KRRC. FOF 75. NFI coordinated FAH's visits and made sure an RSO was present. Id.

FAH typically trained about 20 service members at a time at the Property's pistol range in courses taking place over three consecutive weekdays, as often as three weeks per month. FOF 75. During FAH's tenure, Navy personnel toured the pistol range and found it acceptable. FOF 76.[50] No application was made to Kitsap County for permits or approvals for military training at or SSI's and FAH's commercial use of the Property. FOF 77.[51]

After KRRC became the Property's owner, it hosted a military

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[49] On at least one occasion during the early 1990's, U.S. Navy personnel used the Property for a firearm qualification exercise. FOF 72.
[50] There was no evidence that the Navy inspection accounted for community safety.
[51] The Navy maintains shooting practice facilities on three federal properties in Kitsap County. RP1216:22-1217:11.

automatic weapons demonstration at its rifle range:

> 78. In November 2009, U.S. Navy active duty personnel were present on the property on at least one occasion for firearms exercises not sponsored or hosted by the FAH. On one such occasion, a military "Humvee" vehicle was parked in the rifle range next to the rifle range's shelter. A fully automatic, belt-fed rifle (machine gun) was mounted on top of this Humvee, and the machine gun was fired in small bursts, down range.[52]

The next spring, Navy training ceased at the Property. FOF 79.

8. Action or Practical Shooting at the Property

KRRC's new shooting bays paved the way to a new era of pistol shooting at the Property:

> 70. The Property is frequently used for regularly scheduled practical shooting practices and competitions, which use the shooting bays for rapid-fire shooting in multiple directions. Loud rapid-fire shooting often begins as early as 7 a.m. and can last as late as 10 p.m.

Practical shooting refers to practice and competition for shooting in mock self-defense scenarios, often with multiple targets and "bad guy/good guy" decisions for the participant. RP 335:25-336:12, 367:2-11. Practical shooting frequently occurred at multiple bays on the Property, creating a cacophony from layer upon layer of rapid fire shooting. Ex. 28, 132. In a day of practical shooting competition, each participant may discharge

[52] FOF 78. Ex. 121 (photo), RP 2199:22-2201:10.

rounds numbering in the hundreds.[53]

9. The Public Noise Nuisance: Expanded Hours, High Caliber, Rapid-fire, Automatic Fire and Exploding Targets

The trial court made comprehensive findings of the Property's noise-related uses and impacts in current day:

> 80. The Club allows shooting between 7 a.m. and 10 p.m., seven days a week. Shooting sounds from the Property are commonly heard as early as 7 a.m. and as late as 10 p.m. In the early 1990's, shooting sounds from the range were typically audible for short times on weekends, or early in the morning during hunter sight-in season (September). Hours of active shooting were considerably fewer.
>
> 81. Shooting sounds from the Property have changed from occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration. Rapid fire shooting sounds from the Property have become common, and the rapid-firing often goes on for hours at a time.
>
> 82. Use of fully automatic weapons at KRRC now occurs with some regularity.
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> . . . .
>
> 84. The testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the Property. The noise conditions described by these witnesses interfere with the comfort and repose of residents and their use and enjoyment of their real properties. The interference is

[53] KRRC Range expert Scott Kranz, P.E., testified that at least 1,000 rounds would be discharged in a typical practical shooting competition, though he had never attended one. RP 371:14-19.

common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the "sounds of war" and the Court accepts this description as persuasive.

85. Expanded hours, commercial use of the club, allowing use of explosive devices (including Tannerite), higher caliber weaponry[54] and practical shooting competitions affect the neighborhood and surrounding environment by an increase in the noise level emanating from the Club in the past five to six years.

86. The Club allows use of exploding targets, including Tannerite targets, as well as cannons, which cause loud "booming" sounds in residential neighborhoods within two miles of the Property, and cause houses to shake.[55]

KRRC assigned error to none of these Findings, but challenges the nuisance injunctions based on variations in witnesses' testimony as to impacts including intrusive sound. Brief, at 21-22.

10. The Public Safety Nuisance and Supporting Facts

The trial court found KRRC's range facilities and operations endanger the neighboring residential areas:[56]

67. The parties presented several experts who opined on issues of range safety. The Property is a "blue sky" range, with no overhead baffles to stop the flight of accidentally or negligently discharged bullets. The Court

[54] The term "nominal .30 caliber" was defined in trial as a shooting term of art describing a rifle firing a round "about .30 inches in diameter". RP 2797:17-2798:1. The trial court adopted this term as defining the upper limit of rifles allowed. Order 7.b.

[55] FOF 80, 81, 82, 84, 85, 86.

[56] KRRC takes issue with Finding 68's "more likely than not" verbiage referring to the eight historically used acres, but does not assign error to the range safety findings. Brief, at 2, 23.

> accepts as persuasive the SDZ diagrams developed by Gary Koon in conjunction with the Joint Base Lewis-McChord range safety staff, as representative of firearms used at the range and vulnerabilities of the neighboring residential properties. The Court considered the allegations of bullet impacts to nearby residential developments, some of which could be forensically investigated, and several of which are within five degrees of the center line of the KRRC Rifle Line.
>
> 68. The County produced evidence that bullets left the range based on bullets lodged in trees above berms. The Court considered the expert opinions of Roy Ruel, Gary Koon, and Kathy Geil and finds that more likely than not, bullets escaped from the Property's shooting areas and that more likely than not, bullets will escape the Property's shooting areas and will possibly strike persons or damage private property in the future.
>
> 69. The Court finds that KRRC's range facilities are inadequate to contain bullets to the Property, notwithstanding existing safety protocols and enforcement.[57]

KRRC claims that "[t]he trial court's findings of fact do not support its conclusion that the Club is a safety nuisance". Brief, at 24. However, as discussed *infra*,[58] a finding may be mislabeled as a conclusion, and at least one safety finding is embedded in Conclusion 21:

> **[T]he failure of the Defendant to develop its range with engineering and physical features to prevent escape of bullets from the Property's shooting areas despite the Property's proximity to numerous residential properties and civilian populations and the ongoing risk of bullets escaping the Property to injure persons and property**, is

[57] FOF 67, 68, 69.
[58] See 43, infra.

. . . an unlawful and abatable common law nuisance.[59]

The court also concluded that the "continued existence of public nuisance conditions on the subject Property has caused and continues to cause the County and the public actual and substantial harm." COL 13.

The Court's finding of Finding 67 adopts the County's surface danger zone ("SDZ") maps, admitted as Exhibits 207, 208, 209, 210, 211 (Appendix 4) which require some deciphering. County expert witness Gary Koon, a retired United States Marine Corp officer certified in range safety, explained the concept of the surface danger zone ("SDZ"), a military term for the geographic depiction of the area into which bullets will fall, based upon the weapon system and direction and origin of fire.[60] The SDZs are based on extensive testing and modeling conducted by the military for numerous weapon/ammunition combinations. RP 1200:11-1201:2. SDZs account for shooter error and accidental discharge. RP 1242:5-11. Koon testified that the military's safety standard for training purposes is that

> unless you have a waiver, no one or nothing . . .that's not designed to be shot should be in that geographical footprint, that surface danger zone for that weapon system.[61]

Koon testified that only two methods exist to protect populated areas from

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[59] COL 21 (emphasis added).
[60] RP 1197:8-1199:4, 1201:5-22. At the time of trial, Mr. Koon resided in the Whisper Ridge neighborhood. RP 1194:8-15.
[61] RP 1201:5-10.

the escape of bullets from a shooting range: The range must either own the property within the SDZ or it must implement engineered solutions to keep bullets from escaping. RP 1215:18-23, 1216:14-21. Koon endorsed applying a SDZs to a civilian range:

> Q. Do you believe it appropriate to apply a military SDZ to civilian range?
>
> A. Absolutely. The reason is because those impact areas are not based on a -- they're based on physics. They're based on where those bullets are going to go when they ricochet off a target, when the shooter has shooting error and shoots over or under a target. They're based on studies and testing done with live ammunition and computer based modeling. That surface danger zone doesn't change whether you are on a military base. It doesn't change in the weapon system and the bullet fired doesn't change whether you're in Iraq or Afghanistan. It doesn't change whether you take that exact same rifle and bullet and go to the Kitsap Rifle and Revolver Club. That bullet, the physics of it flying and hitting an object and going off someplace else, is the same no matter where you are.[62]

Apart from training exercises, Koon testified to real-world applications of SDZ in populated areas of Iraq and Afghanistan, where, as a U.S. Marine, he mapped SDZs to determine whether civilians would be killed or injured by operations. RP 1218:17-22.

Each of KOON's SDZ maps depict the impact zone for a weapon/ammunition combination that is fired at KRRC (and, for Ex. 207, 208, 209, and 211, commonly used on civilian ranges) based on modeling

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[62] RP 1227:10-25. See also RP 1226:25 – 1227:9 (citing other uses of SDZs for civilian ranges).

using the rifle range shooting line as a point of origin for each of four rifles and using a position averaging the locations of the pistol range shooting line and Bays 1, 2, 3 and 4 for the 9 mm pistol. RP 1224:3-1226:2. The five SDZ maps depict impact areas which include numerous residences, public roads including state Highway 3 and at least one school: For instance, the 9 mm pistol SDZ encompasses the Klahowya Secondary School[63], and the Barrett ".50 cal BMG" rifle SDZ reflects that weapon's four-mile range, which could theoretically hit parts of central Kitsap County across Dyes Inlet to the east.[64] The 9 mm is commonly used for practical shooting. RP 1235:14-16.

Koon testified that the KRRC's shooting bays created many new directions of gunfire in addition to those created by the rifle and pistol ranges, including 360 degrees of shooting in Bay 7. RP 1257:8-21 1260:7-14; Ex. 133. During a discovery site visit, Koon located bullets in a tree that fallen just downrange of the pistol range and in the trees atop the rifle range. RP 1256:5-25, Ex. 125, 126, 127.

KRRC's range expert Scott Kranz, P.E. testified that to be safe for the community, an outdoor shooting range must employ engineering

[63] Identified in Ex. 1, 4, RP 123:2-12.
[64] RP 1231:4-15, 1234:1-1235:13; Ex 207 ("5.56 mm ball" / rifle), Ex. 208 ("7.62 special ball" / rifle), Ex. 209 ("7.62 military special ball" / rifle), Ex. 210 (Barrett ".50 cal BMG" / rifle) Ex. 211 (9 mm pistol). (Appendix 5).

controls and institutional controls.[65] The simplest engineering controls are earthen berms and backstops, found on most outdoor ranges. Backstops are directly behind a target and side berms are placed along the edge of a shooting area to intercept ricochets. RP 373:3-20, 1212:17-1213:5. A range is dubbed "blue sky" unless it is indoors or baffles have been installed. RP 339:15-20. Baffles are physical barriers downrange from the firing position which capture errant bullets. RP 339:20-24. KRRC's engineering controls consist of side berms and bullet impact berms behind the targets (backstops). RP 333:20-23.

Once, all shooting ranges were "blue sky" ranges. RP 1368:25-1369:2. KRRC is a blue sky range as the Property's pistol and rifle ranges and shooting bays all lack overhead baffles. RP 1471:14-15, 2160:2-7.

The County called Roy Ruel, P.E., to testify as a firearms and range expert. Ruel evaluated the Property's shooting areas to develop a "hazard assessment" of the KRRC range and assembled a summary of acceptable standards for outdoor ranges as compared with KRRC's. Ex. 159, 160. Ruel also developed an SDZ map, which depicts overlapping

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[65] RP 333:16-19. Mr. Kranz explained:

> A. Engineering controls has to do with physical features that contain the bullets like side berms and the bullet impact berms. Institutional controls has more to do with the rules, signage, range safety officers that are there present, video cameras for monitoring range use.
> Q. Is either one more or less important than the other?
> A. They're both -- they're both equally important. RP 333:9-15.

impact zones from KRRC's (collective) shooting areas which threaten residential areas. Ex. 161; RP 1484:17-1486:12.

Ruel opined that "bullets will be exiting the pistol range", which lacks sufficient engineering controls to stop escape to the downrange surface danger zone and called for raising the backstop's height and installing overhead baffles. RP 1471:12-1472:2, 1472:3-11; ex. 160, 161. For the Property's shooting bays, Ruel held the same opinion about bullet escape and recommended raising the height of berms and backstops and installing overhead baffles.. RP 1481:1-16; ex. 160.

As for the Property's rifle range, Ruel testified that the rifle range lacked a right-hand side berm, that its left-hand side berm was insufficient at only five feet elevation above the shooter's position, and that a person shooting a rifle from the rifle range's shelter could clear the backstop behind the 200-yard target line by raising the rifle's muzzle by only two degrees. RP 1473:1-1474:8, 1477:25-1478:9, 1488:19-1489:9, 1489:23-13. A typical "medium range" rifle could reach downrange residences with 20 to 30 degrees of muzzle lift. RP 1491:13-1492:7; Ex. 162. Ruel opined on the rifle range's safety:

> Q. Can you describe for the Court your conclusions about whether this range as configured can be operated safely?
>
> A. No, it cannot. It definitely poses a hazard to the

> residential area that's located somewhere around two miles downrange, easily, easily hit by bullets exiting the rifle range.
>
> Q. When you say "easily," what do you mean?
>
> A. Because ordinary rifles that would be used at that range can strike into that housing area very easily, and you can overshoot actually into the water on the other side.[66]

Ruel testified that it was "extremely likely" that a rifle shot will escape the Property to strike populated areas like the El Dorado Hills and Whisper Ridge neighborhoods, and that this "has happened at some point." RP 1498:12-19. He opined that overhead baffles were feasible for KRRC. RP 1483:22-1484:3. The nearby PSC has installed overhead baffles at its pistol and rifle shooting areas, starting in 1994.[67] PSC's baffles have intercepted bullets that would otherwise have escaped that club's shooting areas. RP 1362:23-1363:18.

The trial testimony included accounts from residents of five houses in the El Dorado Hills located about 1.5 miles northeast of the Property, each of which were struck by projectiles over the past 15 years at the

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[66] RP: 1474:13 -22.

[67] RP 1351:3-18, 1352:8-14, 1354:3-12, 1355:3-14, 1356:21-1358:11, 1359:13-20 (Testimony of PSC's Archivist James Reynolds, describing that club's program to install engineering controls of concrete block side walls and overhead baffles at shooting areas, and identifying before and after photos of PSC's overhead baffles), ex. 75, 76, 77; 78, 79, 80, 81. PSC consulted a professional engineer who reviewed and approved their plans for overhead baffles, which were based upon the NRA Range Source Book reference. RP 370:15-19, 1355:12-22. Like KRRC, PSC is open to the public. RP 1343:18-21.

house's side oriented generally toward the southwest:[68]

- Hughes residence (rifle bullet struck siding in mid-1990's),[69]
- Former Swanson residence (rifle bullet struck window in mid-1990's, narrowly missing a child),[70]
- Evans residence (unknown projectile struck skylight in 1999),[71]
- Slaton residence (rifle bullet penetrated exterior wall in July 2007),[72] and
- Fairchild residence (rifle bullet penetrated garage door in March 2008).[73]

Each of these five houses was within five degrees of a line bisecting and projecting from the Property's rifle range. FOF 57, Ex. 1, 2.[74] The County's lay witness residences are depicted in maps (Ex. 1, 2, 3).

The Washington State Patrol investigated the bullet strikes to the Slaton and Fairchild residences. RP 1553:4-7. A WSP team including Forensic Scientist Cathy Geil measured and tested the penetrations and

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[68] Ex. 1, 2, 3.
[69] RP 911:18-913:14, 913:23-914:15, 915:1-8.
[70] RP 501:24-502:10, 502:24-503:3, 504:6-508:19.
[71] RP 1121:19-1122:14, 1124:13-21.
[72] RP 988:9-15, 989:2-22, 990:6-10, 996:19-16. County firearms/range expert Roy Ruel concluded that the KRRC rifle range was the "probable origin of that bullet". RP 1497:4-16. See also ex. 157 (Sheriff's Office incident report), ex. 163, 164, 165 (County expert Roy Ruel's SDZ map for the Slaton house, trajectory chart for the Slaton house, and elevation profile for the El Dorado Hills neighborhood, respectively).
[73] RP 1143:18-22, 1147:7-21. Witness Arnold Fairchild searched for, but never found the bullet. RP 1150:14-24.
[74] Former area resident William Fernandez testified about his own close call with KRRC while he was out for a walk in the county park one day in Fall 2008, on a logging road adjacent to the Property. RP 402:10-18. The gun range was active at the time, and Fernandez heard the sound of a bullet striking a tree above where he was walking in the park. RP 402:25-404:7.

points of impact, Geil analyzed the bullet recovered from the Slaton house, and Geil concluded that both impacts were from rifle cartridges with likely ranges of 2.7-3.3 miles (Fairchild) and 2.7-2.8 miles (Slaton).[75] Geil opined that the shots were each consistent with a long distance shot not originating in the neighborhood itself.[76] Geil developed and mapped probable angles of approach for the rifle shots, depicting a pie shaped area for each shot's potential origin (which included the area of the Property).[77]

IV. ARGUMENT

A. THE TRIAL COURT'S FINDINGS OF FACT MUST STAND BECAUSE KRRC HAS WAIVED CHALLENGE TO FINDINGS GIVEN, HAS WAIVED CHALLENGE TO REFUSAL OF ITS PROPOSED FINDINGS, BEARS THE BURDEN OF PROOF TO DISPROVE SUBSTANTIAL EVIDENCE AND CANNOT OVERCOME THE DEFERENCE TO THE TRIAL COURT'S EVALUATION OF CREDIBILITY AND OF EVIDENTIARY MERIT.

On appeal from a bench trial, "review is limited to determining whether substantial evidence supports the trial court's findings of fact and,

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[75] RP 1554:19-1555:3, 1557:19-25, 1560:18-21, 1566:12-22, 1581:11-1582:17, 1586:6-14.

[76] RP 1563:24-2, 1571:16-25, RP 1582:18-1583:2.

[77] RP 1567:2-14, 1568:2-16, 1571:16-8, 1584:24-1585:10, 1587:10-1588:8; Ex. 214, 215. Geil's maps depicted the areas from which the shots hitting the Fairchild and Slaton houses originated, without pinpointing exact origins. RP 1630:15-25.

if so, whether the findings support the trial court's conclusions of law."[78]

KRRC's brief has drastically narrowed the scope of factual review.

1. KRRC Makes no Assignments of Error to Factual Findings, which are Verities on Appeal, and if Challenge is not Waived the Court Reviews Findings under the Substantial Evidence Standard.

In its brief, KRRC failed to separately assign error to the findings of fact as required by RAP 10.3(g), and failed to "use headings and separate findings that clearly refer to each finding by number."[79] None of KRRC's seven assignments of error identify specific trial court findings, and several of these assignments identify questions of *law*[80]:

1. The trial court erred in declaring the Club's nonconforming use right terminated.

2. The trial court erred in judging the Club a public noise nuisance.

3. The trial court erred in judging the Club a public safety nuisance.

4. The court erred in concluding the Club unlawfully expanded, changed, or enlarged its nonconforming use.

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[78] *In re Washington Builders Ben. Trust,* 173 Wn.App. 34, 65, 293 P.3d 1206 (Div. 2 2013) (citing *City of Tacoma v. State,* 117 Wn.2d 348, 361, 816 P.2d 7 (1991)).

[79] See *In re Disciplinary Proceeding Against Conteh,* 175 Wn.2d 134, 144, 284 P.3d 724 (2012) (citing *State v. Neeley,* 113 Wn.App. 100, 105, 52 P.3d 539 (2002) (Appellate court may waive RAP 10.3(g) violation if "briefing makes the nature of the challenge perfectly clear, particularly where the challenged finding can be found in the text of the brief.") (citing *Daughtry v. Jet Aeration Co.,* 91 Wn.2d 704, 709–10, 592 P.2d 631 (1979); RAP 1.2(a))).

[80] See *In re Estate of Krappes,* 121 Wn.App. 653, 660 n. 11, 91 P.3d 96, *review denied,* 152 Wn.2d 1033 (2004) ("RAP 10.3(g) does not require an appellant to assign error to conclusions of law.").

5. The court erred in denying the Club's accord and satisfaction defense and related breach of contract counterclaim.

6. The court erred in denying the Club's estoppel defense.

7. The court erred in its issuance of two injunctions and a warrant of abatement.[81]

Unchallenged findings of fact are verities on appeal.[82] For any challenge not waived:

> There is a presumption in favor of the trial court's findings and . . . the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.[83]

The substantial evidence standard "requires that there be sufficient evidence in the record to persuade a reasonable person that a finding of fact is true".[84] The appellate court may not substitute its evaluation of the evidence for that made by the trier of fact.[85] Rather, the Court defers to the

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[81] Brief, at 2. KRRC assigns no error to the trial court's evidentiary rulings.

[82] *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n,*, ___ Wn.App. ___, 295 P.3d 314, 320 (Div. 2, 2013), citing *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 808, 828 P.2d 549 (1992). See also *Cowiche Canyon,* 118 Wn.2d at 809 (Failure to present argument in an opening brief waives assignment of error for any claimed assignment).

[83] *Fisher Props., Inc. v. Arden–Mayfair, Inc.,* 115 Wn.2d 364, 369, 798 P.2d 799 (1990) (citing *Leppaluoto v. Eggleston,* 57 Wn.2d 393, 401, 357 P.2d 725 (1960)).

[84] *Recreational Equip., Inc. v. World Wrapps NW, Inc.*, 165 Wn.App. 553, 558, 266 P.3d 924 Div. 1 2011) (citing *Pardee v. Jolly,* 163 Wn.2d 558, 566, 182 P.3d 967 (2008) (internal citation omitted)). Moreover, when the court itself acts as fact-finder, there is a "well-established presumption'" that "the judge [has] adhered to basic rules of procedure'". *Williams v. Illinois* 132 S.Ct. 2221, 2235 (2012) (lead opinion) (quoting *Harris v. Rivera,* 454 U.S. 339, 346-47, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981)).

[85] *Recreational Equip.*, 165 Wn.App. at 558-59 (citing *Pardee*, 163 Wn.2d at 566 (internal citation omitted)); *Goodman v. Boeing Co.,* 75 Wn.App. 60, 82–83, 877 P.2d 703 (1994)).

trier of fact to resolve conflicting testimony and to evaluate the persuasiveness of the evidence and credibility of the witnesses.[86]

> We have carefully reviewed the evidence in this regard, and appellants' contentions with respect thereto. Suffice it to say the testimony is conflicting, and the trial court was clearly entitled under the evidence to find either that appellants had failed to sustain their burden of proof or that, in fact, no misrepresentations had been made by respondents. Either determination would find ample justification or support in the evidence. Under these circumstances we will not substitute our judgment for that of the trial court.[87]

2. KRRC Has Waived Challenge to Proposed Findings Not Given, by Failing to Specifically Assign Error and by Not Reciting Verbatim.

Generally, if a trial court does not make a finding of fact, the appellate courts presume against the making of such fact.[88]

> In the absence of a finding on a factual issue [courts] must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.[89]

Moreover, the appellate court need not consider an assignment of error based on the trial court's refusal to enter a proposed finding of fact if appellant's brief does not present the proposed finding verbatim as

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[86] *Boeing Co. v. Heidy,* 147 Wn.2d 78, 87, 51 P.3d 793 (2002).
[87] *Brown v. Herman,* 75 Wn.2d 816, 821 454 P.2d 212 (1969) (citing *Safeco Ins. Co. v. Dairyland Mut. Ins. Co.,* 74 Wn.2d 669, 446 P.2d 568 (1968); *Dix Steel Co. v. Miles Constr. Inc.,* 74 Wn.2d 114, 443 P.2d 532 (1968)).
[88] *Recreational Equip.*, 165 Wn.App. at 565, citing *In re Estate of Bussler,* 160 Wn.App. 449, 465, 247 P.3d 821 (2011) (quoting *In re Welfare of A.B.,* 168 Wn.2d 908, 927 n. 42, 232 P.3d 1104 (2010) (quoting *State v. Armenta,* 134 Wn.2d 1, 14, 948 P.2d 1280 (1997))).
[89] *Armenta*, 134 Wn.2d at 14 (citing cases).

required by RAP 10.4.[90] In its brief, KRRC assigns no error to the trial court's failure to adopt any of its proposed findings (attached as Appendix 6). Nor does KRRC quote a single proposed finding verbatim. KRRC may not cure these defects in its reply.[91]

3. In Part, KRRC's Challenges to Conclusions are Reviewed as Challenges to Factual Findings, with the Attendant Burden and Presumptions.

When a finding of fact is misidentified as a conclusion of law, it is reviewed as a finding of fact (and the corollary holds true).[92] For instance, a conclusion reciting contract performance is properly analyzed as a finding of fact.[93] Questions of law are of course reviewed *de novo*,[94] which may first require identifying mixed questions of fact and law so as to apply the correct standard of review. A party's intentions constitute questions of fact (if relevant), whereas the legal consequences of such intentions are questions of law.[95] Interpreting a deed presents such a mixed question of

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[90] *Scruggs v. Jefferson County,* 18 Wn.App. 240, 243, 567 P.2d 257 (1977) (citing RAP 10.4, CAROA 43).
[91] See 3 Karl B. Tegland, Washington Practice: Rules Practice RAP 10.3 author's cmt. 4 (7th ed. 2012), citing *Bayley v. Kane,* 16 Wn.App. 877, 878-79, 560 P.2d 1165 (Div. 2 1977) (citing cases).
[92] *Willener v. Sweeting,* 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (citations omitted).
[93] Id.
[94] *Recreational Equip.*, 165 Wn.App. at 559, citing *Pardee*, 163 Wn.2d at 566 (internal citation omitted).
[95] *Pardee*, 163 Wn.2d at 566, citing *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

fact and law."[96] The parties' intent to a deed is a question of fact, while the legal consequence of that intent is a question of law. [97] Contract interpretation presents a question of law, *if* it is unnecessary to rely on extrinsic evidence.[98] Also, whether a nuisance exists may present a mixed question of fact and law.[99]

Once the Court reviews for substantial evidence, it will determine whether the findings of fact support the conclusions of law and judgment.[100] Even if there are inconsistencies in the findings, a judgment will be upheld if one or more of the findings support the judgment.[101]

In the body of its brief, KRRC disputes Findings of Fact 23,[102] 25,[103] 26,[104] and 57[105], each discussed in the Facts section, supra.

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[96] *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.,* 168 Wn.App. 56, 64, 277 P.3d 18 (Div. 1 2012) (citing *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.,* 170 Wn.2d 442, 459 n. 7, 243 P.3d 521 (2010)).
[97] Id.
[98] *In re Marriage of Bernard,* 165 Wn.2d 895, 902, 204 P.3d 907 (2009); *Marshall v. Thurston County,* 165 Wn.App. 346, 351, 267 P.3d 491 (2011).
[99] See e.g. *Kappenman v. Klipfel,* 765 N.W.2d 716, 729 (N.D. 2009) (citing *City of Fargo v. Salsman,* 760 N.W.2d 123, 127 (N.D. 2009)).
[100] *State v. Brockob,* 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue,* 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).
[101] *Dept. of Revenue v. Sec. Pac. Bank of Washington N.A.,* 109 Wn.App. 795, 807, 38 P.3d 354 (Div. 2, 2002) (citing *In re Marriage of Getz,* 57 Wn.App. 602, 606, 789 P.2d 331 (1990); *Lloyd's of Yakima Floor Center v. Department of Labor and Indus.,* 33 Wn.App. 745, 752, 662 P.2d 391 (Div. 2 1982) (citing cases)).
[102] Brief, at 53.
[103] Brief, at 53.
[104] Brief, at 53.
[105] Brief, at 52.

B. THE TRIAL COURT'S DECLARATORY JUDGMENTS AND INJUNCTIONS ARE ENTITLED TO GREAT DEFERENCE AND REVIEWED UNDER THE ABUSE OF DISCRETION STANDARD.

1. Declaratory Judgments are Reviewed under the "Customary" Standard

The trial court's judgment is framed as a succession of declaratory judgments, where the trial court ruled that findings each supported the conclusion that KRRC's claimed nonconforming use was terminated as a matter of law. The courts apply "customary principles of appellate review to an appeal of a declaratory judgment", reviewing conclusions of law de novo and (challenged) findings of fact for abuse of discretion.[106] On review, the trial court's findings of fact will not be disturbed unless they are not supported by substantial evidence.[107]

2. Orders for Injunctive Relief are Reviewed for Abuse of Discretion and are Entitled to Great Deference

Injunctive relief is an equitable remedy and the trial court's decision to grant an injunction and the terms of that injunction are reviewed for

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[106] *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n,*, ___ Wn.App. ___, 295 P.3d 314, 320 (Div. 2, 2013), citing *To–Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001) and *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003)

[107] RCW 7.24.070; *Summit-Waller Citizens Ass'n v. Pierce County*, 77 Wn.App. 384, 895 P.2d 405, review denied, 127 Wn.2d 1018 (1995), citing *Nollette v. Christianson,* 115 Wn.2d 594, 599–600, 800 P.2d 359 (1990).

abuse of discretion.[108] The trial court "*may* consider a number of factors", including "the availability of other adequate remedies, misconduct by the plaintiff, and the relative hardship if injunctive relief is granted or denied."[109] "These factors are not, however, essential elements for the grant of injunctive relief."[110]

Though KRRC has challenged the immediate effectiveness of the trial court's injunctions, a trial court has discretion to decide whether to apply an equitable grace period.[111]

> This discretion is to be exercised in light of the particular case's facts and circumstances. Because the trial court has broad discretionary authority to fashion equitable remedies, such remedies are reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.[[112]]

Thus, KRRC seems to suggest that the trial court abused its discretion by both immediately enjoining KRRC's continued use of the Property as a shooting range absent a conditional land permit issued under Kitsap

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[108] *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n,* ___ Wn.App. ___, 295 P.3d 314 (Div. 2, 2013), citing *Kucera v. Dep't of Transp.,* 140 Wn.2d 200, 209, 995 P.2d 63 (2000); *Niemann v. Vaughn Cmty. Church,* 154 Wn.2d 365, 374, 113 P.3d 463 (2005); *Steury v. Johnson,* 90 Wn.App. 401, 405, 957 P.2d 772 (1998).

[109] *Wimberly v. Caravello,* 136 Wn.App. 327, 339, 149 P.3d 402 (Div. 3 2006) (emphasis in original), citing *Hollis v. Garwall, Inc.,* 88 Wn.App. 10, 16, 945 P.2d 717 (1997), *aff'd,* 137 Wn.2d 683, 974 P.2d 836 (1999).

[110] Id.

[111] *Recreational Equip.*, 165 Wn.App. at 559, citing *Heckman Motors, Inc. v. Gunn,* 73 Wn.App. 84, 88, 867 P.2d 683 (1994).

[112] *Recreational Equip.*, 165 Wn.App. at 559 (footnotes omitted).

County zoning code and entering an injunction restricting hours of operation and specific shooting activities to minimize the public nuisance risks and impacts of bullet escape and intrusive noise.

As noted above, the appellate courts presume against facts which the trial court does not actually make. Moreover, as regards equitable relief:

> It is not a function of this appellate court to speculate whether the trial court would have made the findings argued by [appellant]. And, ***even if we engaged in such speculation, it is not a function of this appellate court to reweigh the trial court's equitable considerations and determine whether we would have decided the case differently.*** Rather, the proper review standard of this court is to decide whether the trial court's findings are supported by substantial evidence and whether those findings support the court's discretionary determination that it should grant equitable relief.[[113]]

Thus, the core inquiry is, again, whether substantial evidence exists in the record.

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[113] *Recreational Equip.*, 165 Wn.App. at 565 (emphasis added).

C. KRRC MADE PROFOUND CHANGES TO AND ENLARGEMENTS OF ITS USE, OPERATION AND DEVELOPMENT OF ITS SHOOTING RANGE WHICH ENDED ITS NONCONFORMING LAND USE AND REQUIRES APPLICATION FOR AND ISSUANCE OF A CONDITIONAL USE PERMIT TO RECONCILE KRRC'S USES AND IMPACTS WITH THE USES AND RIGHTS OF NEARBY PROPERTY OWNERS, WHICH THE TRIAL COURT APPROPRIATELY DETERMINED AS A MATTER OF DECLARATORY JUDGMENT.

KRRC contends that the remarkable changes in its use, operation and development of the Property as a shooting range constitute intensifications of use which do not negate its nonconforming land use as a recreational shooting range. Brief, at 25-26. KRRC further contends that even if these changes were not simply intensifications, the protected status lives on because the County's nonconforming use ordinance includes no provision for "amortization". Brief, at 12. These contentions raise issues of nonconforming land use protections under case authority and local zoning code, the trial court's power to pronounce declaratory judgments, and the need for amortization code provisions when (a) the court has pronounced declaratory judgment on land use status for which the Appellant did not request clarification or modification and (b) that judgment is presently stayed.

1. Declaratory Judgment is Appropriate to Resolve Actual, Present, and Existing Disputes such as the Property's Disputed Claimed Nonconforming Land Use Status.

The Uniform Declaratory Judgments Act ("UDJA"), codified at Chapter 7.24 RCW, provides that courts have the power to "declare rights, status and other legal relations whether or not further relief is or could be claimed" and that "declarations have the force and effect of a final judgment or decree, and may be either affirmative or negative in form and effect."[114] The court may declare the rights, status or other legal relations of persons, including municipal corporations, affected by a statute, municipal ordinance or contract, and the UDJA's enumerations do not limit the court's powers to terminate a controversy or remove an uncertainty.[115] "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate"[116] and KRRC has not challenged the trial court's authority to issue the declaratory judgments sought by Kitsap County to resolve this case's disputed issues.

To invoke the UDJA, a plaintiff must establish a justiciable controversy, i.e.:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and

[114] RCW 7.24.010.
[115] RCW 7.24.020, RCW 7.24.050, RCW 7.24.130.
[116] CR 57.

> (4) a judicial determination of which will be final and conclusive.[117]

The parties' stark difference of positions regarding the preservation or voiding of the Property's nonconforming land use status presented an actual, present and existing dispute for the trial court. In this action, the trial court applied the UDJA to "terminate a controversy" and "remove an uncertainty" of the Property's land use status under Washington law and local code governing disfavored nonconforming uses. KRRC seeks to undercut the Court's declaratory judgments and the land use injunction with a procedural deficiency in the local code, but KRRC cannot point to any authority exempting this subject matter from the broad authority granted to courts to issue declaratory judgments.

The trial court is empowered to determine questions of fact when necessary or incidental to the declaration of rights, status, and other legal relations.[118] The trial court performed fact finding to reach declaratory judgment as to KRRC's rights as a land owner/user, to evaluate its land use status and to evaluate evidence KRRC proffered of the land transfer's circumstances.

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[117] *Coppernoll v. Reed,* 155 Wn.2d 290, 300, 119 P.3d 318 (2005); citing *To-Ro Trade Shows v. Collins,* 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), and *Diversified Indus. Dev. Corp. v. Ripley,* 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

[118] *Trinity Universal Ins. Co. v. Willrich,* 13 Wn.2d 263 (1942), 268; 124 P.2d 950 (citing cases).

2. The Law Disfavors Nonconforming Land Uses, and Ultimately Requires Property Owners to Conform their Uses to Modern Local Zoning Codes.

Nonconforming land use doctrine is rooted in the common law, and has been subsequently codified in local zoning ordinances. Courts recognize that zoning is a critical tool for local jurisdictions to achieve land use goals.[119]

Our state Supreme Court very recently analyzed the subject of nonconforming use in *King County, Dept. Of Development & Environmental Services v. King County.*[120] The Court discussed the fundamental meaning, the root of the doctrine and the landowner's burden:

> Generally, a nonconforming use is a use that "lawfully existed" prior to a change in regulation. Despite that the use may no longer be permitted, it is allowed to continue due to the fairness and due process concerns of the landowner. *Rhod-Azalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998). The doctrine is "intended to protect only those uses which were legally established before" the change in regulation. 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 6.11 (Kenneth H. Young ed., 4th ed. 1996). The landowner has the burden to prove that (1) the use existed prior to the contrary zoning ordinance, (2) the use was lawful at the time, and (3) the applicant did not abandon or discontinue the use for over a year prior to the relevant change. *McMilian v. King County*, 161Wn. App. 581, 591, 255 P.3d 739 (2011).[121]

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[119] *Northend Cinema, Inc. v. Seattle,* 90 Wn.2d 709, 718, 585 P.2d 1153 (1978) (citing *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974)).
[120] *King County, Dept. Of Development & Environmental Services v. King County,* No. 87514-6, slip op. (Wash. June 27, 2013)
[121] Id, slip op. at 7.

The Supreme Court considered whether a landowner had established a "use" under the King County Code and favorably compared that Code with the evolution of nonconforming use case law.[122]

The Court appears to recognize the doctrine's disapproval of uses not established legally, writing:

> This interpretation of the code is also consistent with our case law applying the nonconforming use doctrine. Nonconforming uses are disfavored, and we have repeatedly held that the doctrine is a narrow exception to the State's nearly plenary power to regulate land through its police powers. Consistent with the narrowness of this doctrine, we held in *Rhod-A-Zalea* that a landowner does not "vest" the entire code at the time the use is established, but that only the use itself is vested and a landowner must still comply with subsequent changes to the land use code not involving that specific use. *Rhod-A-Zalea*, 136 Wn.2d at 6-7. Thus, even where a nonconforming use was lawfully established, the rights of a landowner may still be limited to only what is required to protect the landowner's due process interests. Nonetheless, the use must actually exist before it can be termed a "preexisting use" and a due process right attaches to a landowner.[[123]]

In concluding, the Court gets to the very crux of this case's land use declaratory judgment, the establishment of illegal new uses:

> A component of establishing a preexisting use is that the use be lawfully established. This rule has been consistently recognized by our cases. *Rhod-AZalea*, 136 Wn.2d at 6 (stating rule that use must have "lawfully existed" prior to becoming a nonconforming use); *McMilian*, 161 Wn. App. at 590-91 (holding that petitioner's status as a trespasser precluded a finding that

[122] Id. slip op. at 10-11.
[123] Id, slip. op. at 11.

> the use lawfully existed, and therefore the use could not be a nonconforming use); *First Pioneer Trading Co. v. Pierce County*, 146 Wn. App. 606, 614, 191 P.3d 928 (2008) (discussing petitioner's failure to obtain proper permitting and finding that petitioner had not established a nonconforming use). ***What these cases recognize is that when a landowner utilizes unlawful methods to establish a nonconforming use, that unlawfulness precludes a subsequent finding of a lawful nonconforming use.***[124]

It is well established that a party asserting a legal nonconforming use has the burden of proof.[125] One of the elements of the proponent's common law burden is to prove that "the use was continuous, not occasional or intermittent."[126]

"A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use."[127] Under Washington's common law, "nonconforming uses may be intensified, but not expanded."[128]

> When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used.

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[124] Id., slip op. at 13-14 (emphasis added).
[125] *Miller v. City of Bainbridge Island*, 111 Wn.App, 152,43 P.3d 1250 (2002), *Ferry v. City of Bellingham,* 41 Wn.App. 839, 706 P.2d 1103 (1985).
[126] *Jefferson County v. Lakeside Indus .*,106 Wn.App. 380, 385, 23 P.3d 542,29 P.3d 36 (2001), review denied. 145 Wn.2d 1029 (2002); See also 1 Robert M. Anderson, Zoning sec. 6.32, at 550 (3d ed.1986).
[127] *Rhod-A-Zalea,* 136 Wn.2d at 7.
[128] *City of University Place v. McGuire,* 144 Wn.2d 640, 649, 30 P.3d 453 (2001).

> The test is whether the intensified use is 'different in kind' from the nonconforming use in existence when the zoning ordinance was adopted.[129]

Local governments "are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution."[130] Here, KRRC's appeal raises no challenge to Kitsap County's nonconforming use chapter. With that, the stage is set to evaluate the Property's new and/or illegal uses under the local code.

3. Chapter 17.460, Kitsap County Code.

In the Kitsap County Code, Title 17 governs zoning and land use and the county DCD is charged with its implementation and enforcement.[131] Title 17 "shall be liberally interpreted and construed to secure the public health, safety, and welfare and the rule of strict construction shall have no application."[132] A "use" of land means "the nature of occupancy, type of activity or character and form of improvements to which land is devoted."[133] The Code defines a "nonconforming use" as "a use of land which was lawfully established or

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[129] *Keller v. Bellingham,* 92 Wn.2d 726, 730, 600 P.2d 1276 (1979)(internal citations omitted).
[130] *Rhod-A-Zalea,* 136 Wn.2d at 7.
[131] KCC 17.530.010 provides: "The director is authorized to enforce this title, and to designate county employees as authorized representatives of the department to investigate suspected violations of this title, and to issue orders to correct violations and notices of infraction." The "director" means "the director of the Kitsap County department of community development or a duly authorized designee". KCC 17.110.225.
[132] KCC 17.100.070.
[133] KCC 17.110.730.

built and which has been lawfully continued but which does not conform to the regulations established by this title or amendments thereto."

Chapter 17.460 KCC (Nonconforming use) governs the continuation of nonconforming uses of land thusly:

> Where a lawful use of land exists that is not allowed under current regulations, but was allowed when the use was initially established, that use may be continued so long as it remains otherwise lawful, and shall be deemed a nonconforming use.[134]

This is consistent with the common law approach of determining the use of the land established and maintained at the time a municipal authority imposes a zoning ordinance.[135] KRRC's illegal uses may violate the "otherwise lawful" requirement of this section.

Title 17 KCC sets forth the County's zoning tables at Chapter 17.381 (Allowed Uses). Under the title, "no use shall produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses."[136] Furthermore, "[a]ny use, building or structure in violation of this title is unlawful, and a public nuisance".[137]

KCC 17.455.060 provides:

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[134] KCC 17.460.020.
[135] *Miller v. City of Bainbridge Island,* 111 Wn.App. 152, 164, 43 P.3d 1250 (2002).
[136] KCC 17.455.110.
[137] KCC 17.530.030.

> A use or structure not conforming to the zone in which it is located shall not be altered or enlarged in any manner, unless such alteration or enlargement would bring the use or structure into greater conformity with the uses permitted within or requirements of the zone in which it is located.[138]

"Development" means "any manmade change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations."[139] No where in the Code (or in the common law), does the holder of a nonconforming use escape the legal requirements for developing one's land.

For purposes of the land use table, uses are either permitted, prohibited or require a conditional use permit:

> "Prohibited use" means any use which is not expressly allowed and does not meet the criteria under Section 17.100.040.[140]

4. The Court's Common law and Chapter 17.460, KCC Conclusions

The trial court undertook a painstaking endeavor to assess the illegal and new uses, as well as the illegal public nuisance uses. Comparing its findings of fact for conditions as of 1993, with the findings

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[138] This is former KCC 17.455.060, repealed after issuance of the court's judgment.
[139] (Former) KCC 17.110.220.
[140] KCC 17.110.635. For uses not specifically listed in Title 17, KCC 17.100.040 establishes the DCD Director's ability to compare a proposed use with a listed use to determine if the uses are similar. "If determined similar, the unspecified use shall meet all code requirements and follow the approval process prescribed for the listed use". KCC 17.100.040.

for modern conditions at the Property, the Court entered conclusions which can only be described as comprehensive.

The trial court recognized and concluded that the Club enjoyed a nonconforming use status for the existing historical eight acres. COL 6. KRRC's drastic changes, i.e. expanding hours, establishing commercial for-profit use[141] (including military training) and drastically increasing noise conditions by allowing explosive devices and higher caliber weaponry greater than .30 caliber and practical shooting, constituted expansions, and not intensifications of its land use. COL 8, 9. Further, the trial court found that the Property's conversion from a "small-scale lightly used target shooting range in 1993 to a heavily used range with an enlarged rifle range and [an] 11-bay center for local and regional practical shooting competitions" furthermore established a dramatic change in intensity of use and resulting sound, thereby terminating the Property's use as a shooting range. COL 33.

The trial court invoked the UDJA to compare the KRRC's various land uses with the zoning tables applicable to the rural wooded zone. COL 22, 23, 24, 25. Under KCC 17.381.040(E), the court found that the

[141] KRRC claims that its commercial and training uses for small arms tactical training ceased as of the spring of 2010, and may not be considered as "changed uses". Brief, at 34-35. However, KRRC has never tendered a written assurance of discontinuance of these land uses, as authorized in KCC 17.530.050. Nor does the trial record reflect that the "NFI" has ceased doing business on the Property.

commercial uses made of the property are prohibited in the rural wooded zone. COL 25.a. The court found that the Property's land use was most comparable to a private recreational facility, under KCC 17.110.647. The trial court did not accept that this definition could encompass official training of law enforcement officers or of military personnel, not could it conclude that this definition encompassed the use of automatic weapons, uses of rifles greater than common hunting rifles, or professional level competitions. COL 25.b. The trial court found that these land uses are "expansions of or changes to the nonconforming use of the Property as a shooting range under KCC 17.460 and Washington's common law", terminating the nonconforming use of the Property by operation of law. Repeatedly, the trial court concluded that illegal activities, including failures to apply for required site development and other regulatory permits were each illegal uses of the land, which each thereby terminated the nonconforming use of the Property as a shooting range. COL 27, 28, 29, 30, 31, 32, 33.

As to land use, the trial court finally concluded that by operation of KCC Chapter 17.381, the Property would require a conditional use permit before resuming use as a shooting range or private recreational facility. COL 34. In effect, the trial court concluded that KRRC had both engaged in illegal use of the Property in violation of Chapter 17.460 KCC and the

common law, and had established fundamental changes in its land use's nature and character.

D. KRRC BECAME A PUBLIC NOISE NUISANCE BY ROUTINELY IMPOSING SOUNDS AKIN TO URBAN WARFARE UPON RESIDENTS OF RURAL AND RESIDENTIAL CENTRAL KITSAP COUNTY WHO WERE RARELY BOTHERED BY THE RANGE BEFORE THE LAST DECADE BUT NOW LIVE WITH SOUNDS OF RAPID FIRE URBAN COMBAT EXERCISES, AUTOMATIC WEAPONS FIRE AND DETONATION OF EXPLODING TARGETS.

The court concluded that the "conditions of (1) ongoing noise caused by shooting activities, and (2) use of explosives at the Property . . . each constitute a public nuisance." COL 2. The continued existence of public nuisance conditions on the subject Property has caused and continues to cause the County and the public actual and substantial harm. COL 13. The trial court's unchallenged findings of fact explain how KRRC became a noise nuisance to its neighbors and downrange residents, and why the court had to impose common-sense restrictions on hours of operation, rifle calibers and activities.

In its brief, KRRC offers a shotgun approach to the court's public nuisance finding, challenging proof of a noise nuisance against any "authorized shooting range" in Washington, proof of a noise nuisance absent evidence of decibel measurements, and proof of a public nuisance

under RCW 7.48.130 when eyewitness noise accounts vary. This discussion must begin with the basis of nuisance law itself.

The common law of nuisance is largely founded upon the principle that a property owner must "sic utere tuo ut alienum non laedas"[142] ("use your own property in such a manner as not to injure that of another").[143]

In 18th-century English law, a public nuisance was "an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.'"[144] At common law, the term "public nuisance" encompassed a wide variety of offenses, with the common thread being an interference with the public's health, safety or morals.[145] A public nuisance action has long been a suit in which the plaintiff "relied on the injunctive relief provided

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[142] *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 387, 47 S.Ct. 114 (1926).
[143] *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation,* 492 U.S. 408, 109 S.Ct. 2994 (1989) (citing *Village of Euclid,* 272 U.S. at 387).
[144] *Tull v. U.S.,* 481 U.S. 412, 420, 107 S.Ct. 1831(1987) (citing W. Prosser, Law of Torts 583 (4th ed. 1971)("Prosser")(footnote omitted).
[145] *Tull,* 481 U.S. at 421, n. 5 (quoting Prosser at 583-585)(footnotes omitted) ("Public nuisances included 'interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the publice [sic] peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold.'").

by courts in equity".[146] Although Washington codified nuisance law before the turn of the (last) century, the common law is not eclipsed.[147] The "essence" of equity jurisdiction is the trial court's authority "to do equity and mould each decree to the necessities of each case."[148]

The state statutes dealing with nuisances are found generally at Chapter 7.48 RCW. Furthermore, the state has given the counties the authority to "declare by ordinance what shall be deemed to be a nuisance within the county" and to bring an action for damages and other relief.[149]

State law also grants to counties the authority to develop a process by which nuisance "buildings, structures, and premises or portions thereof" may be abated.[150] Chapter 9.56 of the Kitsap County Code provides for the abatement of public nuisances, including "conditions which are inimical to the health and welfare of the residents of Kitsap County".[151] Kitsap County Code defines "nuisance" in part as follows:

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[146] *Tull,* 481 U.S. at 424 (quoting Prosser at 603).
[147] *Miller v. French,* 530 U.S. 327, 360, 120 S.Ct. 2246 (2000) (J. Breyer, Dissenting) (A statute's silence on the exercise of a court's equitable powers is read "as authorizing the exercise of those powers".) (citing *Lockerty v. Phillips,* 319 U.S. 182, 186–187, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943) (finding that courts were deprived of equity powers where the statute explicitly removed jurisdiction), *Scripps–Howard Radio, Inc. v. FCC,* 316 U.S. 4, 8-10, 62 S.Ct. 875, 86 L.Ed. 1229 (1942) (refusing to read silence as depriving courts of their historic equity power), and *Califano v. Yamasaki,* 442 U.S. 682, 705-706, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (same).
[148] *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587 (1944).
[149] RCW 36.32.120.
[150] Chapter 35.80 RCW et seq., RCW 7.48.010 (granting authority to obtain warrant of abatement).
[151] KCC 9.56.010 (emphasis added).

> Doing an act, omitting to perform any act or duty, or permitting or allowing any act or omission, which significantly affects, injures, or endangers the comfort, repose, health or safety of others, is unreasonably offensive to the senses, or obstructs or interferes with the free use of property so as to interfere with or disrupt the free use of that property by any lawful owner or occupant.[152]

1. Public Nuisance

Public nuisances are prescribed by, both the common law and statute. A public nuisance is one that affects equally the rights of an entire community or neighborhood; a private nuisance is one that is not a public nuisance.[153] A public nuisance is defined as an unlawful act affecting equally the rights of an entire neighborhood that either annoys, injures or endangers the comfort, repose, health or safety of others, or in any way renders other persons insecure in life, or in the use of property.[154] Washington State recognizes in addition to the common law definition of nuisance that a nuisance is an interference with the comfortable enjoyment of one's property.[155] Comfortable enjoyment means mental quiet as well as physical comfort.[156]

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[152] KCC 9.56.020(10)(a).
[153] RCW 7.48.130; RCW 7.48 .150.
[154] RCW 7.48.120, RCW 7.48.130.
[155] *Goodrich v. Starrett,* 108 Wash. 437, 184 P. 220 (1919).
[156] *Everett v. Paschall,* 61 Wash. 47, 111 P. 879 (1910).

Under Washington law no lapse of time can legalize a public nuisance.[157]

2. Nuisance in fact

Nuisance activities most typically are a result of a tangible and offensive effect that invades another's property, such as noise. Non-invasive activities may also be nuisances when they are objectionable to a person of ordinary sensibilities and/or when the activity causes a tangible ill effect on another's property. A neighbor's reasonable fear of harm can be the sole basis for nuisance since comfortable enjoyment includes mental quiet.[158] This typifies the experience of KRRC's neighbors and down range residents, who repeatedly expressed fear at going into their yards during times of heavy fire at the Property.

If this was a tort action for *private* nuisance, the County would need to prove that the interference to a plaintiff's use or enjoyment must

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[157] RCW 7.48.190

[158] *Everett v. Paschall,* 61 Wash. 47, 50-51 (Tuberculosis sanitarium in residential district was a nuisance because it instilled fear of contagion in the minds of neighbors, nothwithstanding that the fear was not based in science; the fear itself was real, not imaginery.); *Ferry v. City of Seattle,* 116 Wash. 648, 203 P. 40 (1922) (city reservoir with 57-foot embankment on a hillside created a "reasonable apprehension" that it might collapse and flood the area below.

be unreasonable in order to obtain injunctive relief.[159] However, even if public nuisance implicitly requires assessing reasonableness of KRRC's uses and activities, the trial court record made pertinent findings, including the Club's failure to take reasonable and feasible steps to mitigate sound and stop bullet escape.

Assuming an unreasonableness requirement, courts "determine the reasonableness of a defendant's conduct by weighing the harm to the aggrieved party against the social utility of the activity".[160] Factors include "the character of the neighborhood where the activity occurs and the 'degree of community dependence on the particular activity.'"[161] Reasonableness is a question of fact in a nuisance action,[162] and as noted elsewhere proposed factual findings *not* adopted by the trial court are presumed to be made contrary to the proponent's position.[163]

The Club contends that the lack of quantitative evidence undercuts

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[159] *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 923, 296 P.3d 860 (2013) (citing *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 689, 709 P.2d 782 (1985) (" 'In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.' " (quoting The Restatement (Second) of Torts § 821D cmt. d at 102 (1979))); *Grundy v. Thurston County,* 155 Wn.2d 1, 6, 117 P.3d 1089 (2005) (" 'Nuisance is a substantial and unreasonable interference with the use and enjoyment of land.' " (internal quotation marks omitted) (quoting *Bodin v. City of Stanwood,* 79 Wn.App. 313, 318 n. 2, 901 P.2d 1065 (1995))).

[160] *Lakey*, 176 Wn.2d 923-24 (citing *Highline Sch. Dist. No. 401 v. Port of Seattle,* 87 Wn.2d 6, 17 n. 7, 548 P.2d 1085 (1976); Morin v. Johnson, 49 Wn.2d 275, 280, 300 P.2d 569 (1956).)

[161] *Lakey*, 176 Wn.2d at 924 (citing *Highline Sch. Dist.*, 87 Wn.2d at 17 n. 7, 548 P.2d 1085; *Jones v. Rumford,* 64 Wn.2d 559, 562–63, 392 P.2d 808 (1964)).

[162] *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d .

[163] See generally Appendix 6, KRRC's Proposed Findings of Fact.

the claims of public nuisance. However, proof of noise levels is not necessary to establish nuisance conditions. In fact, the state Noise Control Act of 1974 provides statutory authority for regulation of noise levels within permissible ranges but specifically provides that "[n]othing 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."[164] Thus, while WAC 173-60-050(1) provides that sounds discharged from "authorized shooting ranges" are exempt from regulatory decibel thresholds, this WAC does not preclude local regulation of noise nuisances.[165]

3. Nuisance per se

Unlawful nonconforming uses and any violation of Kitsap County's zoning laws codified in Title 17 KCC are nuisances per se.[166] "A nuisance per se is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance."[167] Engaging in any business or profession in defiance of a law regulating or prohibiting the same is a nuisance per se.[168] "'Where the legislative arm of the government has declared by statute and zoning

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[164] RCW 70.107.060 (1).
[165] WAC 173-60-060.
[166] KCC 17.110.515
[167] *Tiegs v. Watts,* 135 Wn.2d 1, 13, 954 P.2d 877 (1998).
[168] *Kitsap County v. Kev, Inc.,* 106 Wn.2d 135, 138, 720 P.2d 818 (1986).

resolution what activities may or may not be conducted in a prescribed zone, it has in effect declared what is or is not a public nuisance. What might have been a proper field for judicial action prior to such legislation, becomes improper when the law-making branch of government has entered the field.'"[169] However, it is not contrarily true that an act which is permitted by law cannot be a nuisance.[170] "[A] lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner."[171] Moreover, injunctive relief is available against violations of zoning ordinances which are declared by ordinance to be nuisances.[172]

E. KRRC BECAME A PUBLIC SAFETY NUISANCE BY MODIFYING AND OPERATING ITS SHOOTING AREAS WITHOUT ENGINEERING CONTROLS TO PREVENT BULLET ESCAPE TO POPULATED "SURFACE DANGER ZONES".

As described above, the trial court adopted plaintiff's expert Gary Koon's surface danger zones and depictions of vulnerabilities to nearby and downrange residences and found that "range facilities are inadequate to contain bullets to the Property, notwithstanding existing safety

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[169] *Shields v. Spokane School Dist. No. 81,* 31 Wn.2d 247, 254, 196 P.2d 352 (1948)(quoting *Robinson Brick Co. v. Luthi,* 115 Colo. 106, 169 P.2d 171 (1946)).
[170] *Jones v. Rumford,* 64 Wn.2d 559, 392 P.2d 808 (1964)(citing *Hardin v. Olympic Portland Cement Co.,* 89 Wash. 320, 325, 154 P. 450, 451 (1916).
[171] *Hardin,* 89 Wash. at 325.
[172] *City of Mercer Island v. Steinmann,* 9 Wn. App. 479, 513 P.2d 80 (1973).

protocols and enforcement." FOF 67, 68. The court concluded that "the Property's ongoing operation without adequate physical facilities to confine bullets to the Property constitute[s] a public nuisance." COL 3.

KRRC contends that Finding 67 suffers a fatal defect because it is framed in terms of the Property's shooting areas, i.e. the 8-acre historical area. Brief, at 23. This is a distinction without a difference because the expert and lay testimony established that a bullet escaping from the shooting areas can travel well past the Property's boundaries to reach the neighboring parks and residential areas. KRRC's other concern with Finding 67 is the clause finding that bullets "will possibly strike persons or damage private property in the future." Brief, at 23. The range safety findings must be considered together with the embedded finding in Conclusion 21, reciting KRRC's failure

> to develop its range with engineering and physical features to prevent escape of bullets from the Property's shooting areas despite the Property's proximity to numerous residential properties and civilian populations and the ongoing risk of bullets escaping the Property to injure persons and property . . .[173]

This is the substantial risk demanding enjoinment: KRRC's existing facilities can't stop the escape of bullets. Even if the risks were regarded as low in probability, the outcome of bullet escapement will be death or injury.

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[173] COL 21.

KRRC points to the requirement that the likelihood of harm must be "reasonable and probable", rather than just a possibility.[174] The Club's cited case pertains to a cemetery, and the neighbor's fears that it could contaminate their drinking water well, which would require migration of germs through 20 feet of soil and then through 300 feet of the water table, which the Court adjudged to be highly improbable.[175] In any event, the trial court's facts demonstrate that Kitsap County has been sitting on a time bomb. The way that KRRC is configured, it would be reasonable and probable that bullets have escaped to populated areas, and the County's evidence demonstrates that bullets have already escaped the Property. The trial court's public safety nuisance findings and conclusion are based on the inescapable conclusion that the Property's shooting ranges, as currently configured, cannot keep the community safe. Without the injunction, history will repeat itself.

F. THE TRIAL COURT PROPERLY INTERPRETED THE SCOPE AND MEANING OF THE BARGAIN AND SALE DEED; IT DID NOT SETTLE LAND USE STATUS OR KRRC'S CODE VIOLATIONS.

The trial court rejected KRRC's bid to transform the 2009 Deed into an agreement settling potential claims and updating land use status:

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[174] Brief, at 23-24 (citing *Hite v. Cashmere Cemetary Assn.*, 158 Wash. 421, 424, 290 P.1008 (1930).
[175] Hite, 158 Wash. at 424.

> 36. The 2009 Bargain and Sale Deed cannot be read as more than a contract transferring the Property from the County to the KRRC, with restrictive covenants binding only upon the Grantee KRRC. Paragraph 3 stands as an acknowledgement of eight geographic acres of land that were used for shooting range purposes. The language in the 2009 Bargain and Sale Deed does not prohibit Kitsap County from enforcing its ordinances or otherwise acting pursuant to the police powers and other authorities granted to it in Washington's Constitution and in the Revised Code of Washington.[176]

RCW 64.04.040 governs bargain and sale deeds, under which a fee simple estate is assigned with statutory covenants imposed upon the grantor. KRRC makes no claim regarding the statutory covenants, but its exclusive focus is upon the 2009 Deed's restrictive covenants. Since 1993, KRRC's position has been that the 1993 letter and then the 2009 Deed have exempted it from ordinary permit requirements. This is wrong even if KRRC enjoyed a legal nonconforming use today – KRRC still must apply for and obtain required grading permits for its site work.[177] Taken to an extreme, KRRC's position would give the Club a pass on having to apply for a county building permit to erect a structure within the "historical" eight acres.

As noted above, interpreting a deed presents a mixed question of fact and law.

> "[D]eeds are construed to give effect to the

[176] COL 36.
[177] See *Rhod-A-Zalea*, 136 Wn.2d at 17.

> intentions of the parties, and ***particular attention is given to the intent of the grantor*** when discerning the meaning of the entire document."[178]

In general, courts determine the parties' intent "from the language of the deed as a whole".[179] Where "reasonably possible", meaning is given to every word.[180]

KRRC argues that extrinsic evidence compels its alternative interpretation of the 2009 Deed. This reliance fails for several reasons. First, KRRC fails to identify its proposed findings of fact bearing on deed interpretation.[181] Second, Washington follows the rule "that, where the plain language of a deed is unambiguous, extrinsic evidence will not be considered".[182]

The rule disfavoring extrinsic evidence, recognizes that a deed's language constitutes the best evidence for interpreting the deed over time:

> This rule is a practical consequence of the permanent nature of real property—unlike a contract for personal

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[178] *Newport Yacht*, 168 Wn.App. at 64 (emphasis added) (quoting *Zunino v. Rajewski,* 140 Wn.App. 215, 222, 165 P.3d 57 (2007)).

[179] *Newport Yacht,*168 Wn.App. at 64 (citing *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (citing *Zobrist v. Culp,* 95 Wn.2d 556, 560, 627 P.2d 1308 (1981))).

[180] *Newport Yacht,*168 Wn.App. at 64 (citing *Hodgins v. State,* 9 Wn.App. 486, 492, 513 P.2d 304 (1973) (citing *Fowler v. Tarbet,* 45 Wn.2d 332, 334, 274 P.2d 341 (1954))).

[181] See _____, supra.

[182] *Newport Yacht,*168 Wn.App. at 64-65 (footnote omitted)(citing *Sunnyside Valley*, 149 Wn.2d at 880, 73 P.3d 369; *In re Estate of Little,* 106 Wn.2d 269, 287, 721 P.2d 950 (1986); *City of Seattle v. Nazarenus,* 60 Wn.2d 657, 665, 374 P.2d 1014 (1962); *Tacoma Mill Co. v. N. Pac. Ry. Co.,* 89 Wn. 187, 201, 154 P. 173 (1916) ("[I]f the intention of the parties may be clearly and certainly determined from the language they employ, recourse will not be had to extrinsic evidence for the purpose of ascertaining their intention.")).

> services or a sale of goods, the legal effect of a deed will outlast the lifetimes of both grantor and grantee, ensuring that evidence of the circumstances surrounding the transfer will become both increasingly unreliable and increasingly unobtainable with the passage of time. Accordingly, the language of the written instrument is the best evidence of the intent of the original parties to a deed.[[183]]

The surrounding circumstances are reviewed only when necessary to discern intent.[184] For example, extrinsic evidence can be used to interpret whether a bargain and sale deed for a "right of way" actually conveyed a fee interest in real property despite the absence of explicit verbiage to that effect.[185]

The deed in question is a bargain and sale deed *with restrictive covenants*. The Court's primary task in interpreting a restrictive covenant "is to determine the drafter's intent and the purpose of the covenant at the time it was drafted."[186] The drafter's intent is determined by "examining the clear and unambiguous language of a covenant."[187] "'Only in the case of ambiguity will the court look beyond the document to ascertain intent

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[183] *Newport Yacht,* 168 Wn.App. at 64.
[184] *Veach v. Culp,* 92 Wn.2d 570, 573, 599 P.2d 526 (1979). See also *Thompson v. Schlittenhart,* 47 Wn.App. 209, 211–12, 734 P.2d 48 (1987) ("Th[e] intent is to be gathered from the language of the deed if possible, but when necessary by resort to the circumstances surrounding the entire transaction.").
[185] *Roeder Co. v. K & E Moving & Storage Co., Inc.*, 102 Wn.App. 49, 57, 4 P.3d 839, review denied, 142 Wn.2d 1017 (2001).
[186] *Bauman v. Turpen,* 139 Wn.App. 78, 86, 160 P.3d 1050 (Div. 1 2007) (citing *Riss v. Angel,* 131 Wn.2d 612, 621, 934 P.2d 669 (1997) (rejecting the argument that free use of land is the paramount consideration in construing restrictive covenants)).
[187] *Bauman*, 139 Wn.App. at 88-89 (citing *Burton v. Douglas County,* 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965).

from surrounding circumstances.""[188].

> However, admissible extrinsic evidence does not include: 1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; 2) evidence that would show an intention independent of the instrument; or 3) evidence that would vary, contradict or modify the written word.[[189]]

While the interpretation of a restrictive covenant is a question of law reviewed de novo, intent is a question of fact reviewed for substantial evidence.[190] Here, the trial court found that the 2009 Deed itself provided the only (credible) evidence with which to discern the County's intent at the time. FOF 26. Thus, if, after considering the 2009 Deed in its entirety, the trial court erred by finding that its meaning was clear, then the trial court's factual findings that Kitsap County had no intention to settle potential code enforcement claims or land use status are reviewed for substantial evidence. FOF 23, 25. As explained supra, the trial record supports those findings.[191]

The 2009 Deed recognizes use of the eight geographical acres "consistent with its historical use" without expressly waiving compliance with any rules governing alteration of that use. There is no express

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[188] *Ross v. Bennett,* 148 Wn.App. 40, 46, 203 P.3d 383 (2008), review denied, 166 Wn.2d 1012 (2009) (quoting *Mountain Park Homeowners Ass'n, Inc. v. Tydings,* 125 Wn.2d 337, 344, 883 P.2d 1383 (1994)).
[189] *Ross*, 148 Wn.App. at 46 (citing cases).
[190] *Bauman*, 139 Wn.App. at 89 (citing cases).
[191] See 13, 53, supra.

waiver, settlement, release, or other representation that KRRC would be exempt from zoning laws or permitting regulations.

G. WASHINGTON'S OPEN PUBLIC MEETINGS ACT RESTRICTS THE ABILITY OF ELECTED OFFICIALS TO RENDER DECISIONS NOT PUBLICLY ANNOUNCED, FURTHER LIMITING THE EFFECT OF THE BARGAIN AND SALE DEED.

KRRC assigns error to Conclusion of Law 37 that the Open Public Meetings Act of 1971 ("OPMA") restricts the 2009 Deed's effect, arguing "OPMA is not a tool of contract interpretation".[192] KRRC claims the *County* intended the 2009 Deed to settle the Property's land use status, asserting the County acted in a proprietary capacity in selling the Property to KRRC.[193] However, "[i]In exercising its proprietary power, a municipality may not act beyond the purposes of the statutory grant of power or contrary to express statutory or constitutional limitations."[194]

The OPMA applies to all "governing bodies", here the BOCC.[195] When taking action to adopt an ordinance or resolution, the OPMA

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[192] Brief, at 55.
[193] Brief, at 61-62, 68.
[194] *Burns v. City of Seattle,* 161 Wn.2d 129, 154, 164 P.3d 475 (2007) (citing *City of Tacoma v. Taxpayers of City of Tacoma,* 108 Wn.2d 679, 695, 743 P.2d 793 (1987)).
[195] RCW 42.30.010, 42.30.020(2).

requires governing bodies to conduct a public meeting with notice, and action taken in violation of the OPMA "shall be null and void".[196]

Under the OPMA, "final action" to sell public property must occur in a public meeting.[197] The same holds true for a settlement agreement. In *Feature Realty, Inc. v. City of Spokane*[198], the Ninth Circuit considered whether a settlement agreement approved only in executive session could bind the City of Spokane. The Court held the action was null and void:

> Fortunately, the Washington Supreme Court has resolved those policy concerns and provided us with a clear road map in this case. If the action is not "explicitly specified" in the exception, then such action must take place in public, or it is null and void. *Miller*, 138 Wn.2d at 327, 979 P.2d 429. While there is no suggestion the city council acted in bad faith when it approved the settlement in executive session, the fact remains it settled claims made against the city and the individual members of the council personally, using hundreds of thousands of dollars out of the public fisc to do so, as well as agreeing to abandon certain publicly-owned lands to the developers. Its decision took place behind closed doors, with no opportunity for public comment. The statutory procedures at issue here are essential to protect the interests of the public. *Cf. Nelson v. Pac. County,* 36 Wn.App. 17, 24, 671 P.2d 785 (1983). They were ignored, and the settlement agreement is therefore null and void.[199]

Moreover, KCC 17.460.030 delegates to the DCD Director the authority to recognize a changed nonconforming land use. KRRC's interpretation

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[196] RCW 42.30.060(1). The OPMA is remedial in its purposes and is to be liberally construed. RCW 42.30.910.
[197] RCW 42.30.020(3), 42.30.110(1)(c).
[198] *Feature Realty, Inc. v. City of Spokane,* 331 F.3d 1082 (9th Cir. 2003).
[199] *Feature Realty, Inc. v. City of Spokane,* 331 F.3d at 1090-91 (footnote omitted).

of the 2009 Deed runs into a brick wall: The OPMA requires the BOCC's explicit public vote upon a settlement agreement, and there was none.

H. UNDER THE COURT'S FACTUAL FINDINGS, KRRC CANNOT MEET THE HIGH BURDEN TO PROVE EQUITABLE ESTOPPEL SO AS TO REWRITE THE 2009 DEED AND ITS HISTORY.

KRRC claims it "would not have executed the [2009] Deed as it was written" had it known then what it knows now.[200] In effect, KRRC claims it would not have purchased its long-time range property had it known the County would one day sue to enforce its own land use and site development codes, so Kitsap County should be estoped from:

> 1. "[D]enying any duty to disclose the allegations of its code compliance supervisor prior to selling the Property to the Club . . .";
>
> 2. "[D]enying that the Deed was intended to secure the Club's right to continue and improve its nonconforming shooting range . . ."; and
>
> 3 "[D]enying that it made a final determination that the Club's facilities and operations were lawful at the time of the Deed."[[201]]

The trial court pronounced no ruling on equitable estoppel, and is presumed to have found against the holder of the burden of proof.[202] KRRC suggests that a municipal land seller has an affirmative duty to

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[200] Brief, at 57.
[201] Brief, at 71.
[202] See *Armenta*, 134 Wn.2d at 14 (citing cases).

notify a prospective buyer of each development and zoning violation.[203] KRRC would apply that duty to a municipal pass-through seller who sells real property to the long-time tenant, who itself committed the violations.

Whether equitable estoppel applies to the facts is a question of law reviewed de novo.[204] Equitable estoppel is not favored and a proponent must prove by clear, cogent and convincing evidence these elements:[205]

> "(1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission."[206]

To establish injury, "a party must establish he or she justifiably relied to his or her detriment on the words or conduct of another".[207] KRRC's

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[203] KRRC cites to inapposite California and Connecticut cases. Brief, at 60 (citing *Barder v. McClung,* 93 Cal.App.2d 692, 209 P.2d 808 (1949) (Purchaser's action for fraud against seller of real property that seller developed in violation of zoning code); *Morgera v. Chiappardi,* 2003 WL 22705753 (Conn. Super. Ct. 2003), *aff'd,* 864 A.2d 885 (2005) (Unpublished trial court opinion for fraud action against real property seller who failed to inform purchaser of code's limit on capacity of houses on the property)).

[204] *Bank of Am., NA v. Prestance Corp.,* 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

[205] *Kramarevcky v. Dep't of Soc. and Health Servs,* 122 Wn.2d 738, 744, 863 P.2d 535 (1993) (citing cases) (equitable estoppel asserted against government and private parties).

[206] *Kramarevcky,* 122 Wn.2d at 743 (citing *Robinson v. Seattle,* 119 Wn.2d 34, 82, 830 P.2d 318, *cert. denied,* 506 U.S. 1028, 113 S.Ct. 676, 121 L.Ed.2d 598 (1992)).

[207] *Kramarevcky,* 122 Wn.2d at 747 (citations omitted).

"injury" may be its perpetual obligations under the 2009 Deed[208] and investing in improvements before paying the costs of permitting.[209]

A proponent of equitable estoppel must possess "clean hands",[210] and, against a municipality, must also prove it is "necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel."[211] Thus, "the finder of fact must be convinced the fact in issue is 'highly probable'".[212]

KRRC asserts that "a government cannot correct an earlier mistake to the detriment of those who relied upon it", citing cases which simply reiterate the doctrine's elements and policies and the lack of an actual

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[208] KRRC may claim it exchanged valuable consideration for the Property when it agreed to hold harmless, indemnify and defend Kitsap County and to maintain commercial general liability insurance (2009 Deed at ¶¶ 1-2), however the Club's 2009, 2010 and 2011 insurance policies name the County *Parks Department* as the only additional County insured (for KRRC's county fair participation, RP 2189:12-2190:17) and, more importantly, *exclude* pollution and lead contamination from coverage. Ex 198, Ex 199, Ex 200 (each policy at § I.2.f (pp. 2-3), "Additional Exclusions" at ¶ 4 (pp. 8-9), and Schedule of Additional Insureds (appended).).

[209] Brief, at 67 (citing RP 2222:18 - 2223:8).

[210] *Kramarevcky,* 122 Wn.2d at 739, n.1 (citing *Mutual of Enumclaw Ins. Co. v. Cox,* 110 Wn.2d 643, 650-51, 757 P.2d 499 (1988) (citing 31 C.J.S. Estoppel § 75, at 453-54 (1964) ("A party may not base a claim of estoppel on conduct, omissions, or representations induced by his or her own conduct, concealment, or representations.")).

[211] *Kramarevcky,* 122 Wn.2d at 738 (citing *Shafer v. State,* 83 Wn.2d 618, 622, 521 P.2d 736 (1974); *Finch v. Matthews,* 74 Wn.2d 161, 169, 443 P.2d 833 (1968)).

[212] *Kramarevcky,* 122 Wn.2d at 744 (citing *Colonial Imports*, 121 Wn.2d at 735; *In re Sego,* 82 Wn.2d 736, 739, 513 P.2d 831 (1973)).

knowledge requirement.[213] KRRC asserts "the County can be estopped in its proprietary capacity from denying the intent of the deed" because a municipality "acts in a proprietary capacity when it undertakes to dispose of public lands".[214] The doctrine is applied "temperately against any level of government" and is "less likely to be applied when a municipality has acted in a governmental capacity".[215]

Where representations allegedly relied upon are matters of law, equitable estoppel will not be applied.[216] Here, KRRC seeks to estop Kitsap County from challenging nonconforming land use status, which is itself disfavored. Moreover, estoppel is poorly suited to enjoin the exercise of police power to protect the public's health and safety:

> It can also be seriously questioned whether the doctrine of equitable estoppel can require or prevent the exercise of the police power, particularly in the fields of public health and safety. 'Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered.'.[[217]]

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[213] Brief, at 62, citing *Kramarevcky*, 122 Wn.2d at 743 (citing *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975); and *Strand v. State,* 16 Wn.2d 107, 119-21, 132 P.2d 1011 (1943) (State officials' actual knowledge of the falsity of their representations was not necessary in a quiet title action involving tidelands deeded by the State, because State land commissioner's affirmative statutory duty to delineate the nature of tidelands imputed knowledge of tidelands' legal description to state officials.).
[214] Brief, at 68 (citing *Strand,* 16 Wn.2d at 117 (citing cases)).
[215] *City of Mercer Island v. Steinmann,* 9 Wn.App. 479 at 481-82 (citing cases).
[216] *State Dept. of Ecology v. Theodoratus,* 135 Wn.2d 582, 599-600, 957 P.2d 1241 (1998) (citations omitted).
[217] *Ford v. Bellingham-Whatcom County Dist. Bd. of Health,* 16 Wn.App. 709, 716, 558 P.2d 821 (Div. 1 1977) (quoting *Shea v. Olson,* 185 Wash. 143, 153, 53 P.2d 615 (1936)).

In this case, equitable estoppel would interfere with Kitsap County's discharge of its zoning and development codes in its governmental capacity.[218] "'The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance.'"[219]

KRRC cites the County's "superior knowledge" and "silence regarding the adverse claims of its enforcement officer" during negotiations.[220] However, "creating" an estoppel requires that:

> "The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, ***but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.***" 11 Am. & Eng.Ency.Law (2d ed.), p. 434.[[221]]

KRRC was represented by legal counsel during the 2009 negotiation, and was hardly "destitute of any convenient and available means" to ascertain

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[218] Compare *Board of Regents v. City of Seattle,* 108 Wn.2d 545, 552, 741 P.2d 11 (1987) (Board of Regents, acting to manage tract for benefit of the university, acts in a proprietary capacity and will be held to standards of private property owner).

[219] *Miller v. City of Bainbridge Island,* 111 Wn.App. 152,166, 43 P.3d 1250 (Div. 2 2002) (quoting *Dykstra v. Skagit County,* 97 Wn.App. 670, 677, 985 P.2d 424 (1999), review denied, 140 Wn.2d 1016, 5 P.3d 8 (2000)). See also *Steinmann,* 9 Wn.App. at 483 (citing cases) ("[A] municipality is not precluded from enforcing zoning regulations if its officers have issued building permits allowing construction contrary to such regulations, have given general approval to violations of the regulations, or have remained inactive in the face of such violations.").

[220] Brief, at 60, 61.

[221] *Chemical Bank v. Washington Public Power Supply System,* 102 Wn.2d 874, 905, 691 P.2d 524 (1984) (emphasis provided) (citing *Leonard v. Washington Employers, Inc.,* 77 Wn.2d 271, 280, 461 P.2d 538 (1969) (quoting *Wechner v. Dorchester,* 83 Wash. 118, 145 P. 197 (1915)) (citation omitted)).

the state of the facts.[222] KRRC failed to negotiate for the specific terms it now asks the Court to adopt in equity. The trial court properly said no.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's judgment and the injunctions issued thereunder.

Respectfully submitted this 1st day of July, 2013.

RUSSELL D. HAUGE
Prosecuting Attorney

NEIL R. WACHTER, WSBA #23278
Senior Deputy Prosecuting Attorney
Attorney for Kitsap County

[222] RP 2860:22-2861:22; RP 2869:5-15 (identifying ex 550, an email regarding the land sale negotiation from Club's attorney Regina Taylor to County staff and to Club officers and attorney Bruce Danielson (admitted as non-truth context evidence (RP 2872:14-20)).

CERTIFICATE OF SERVICE

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

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

Brian D. Chenoweth Brooks Foster The Chenoweth Law Group 501 SW Fifth Ave., Ste. 500 Portland, OR 97204	[X] Via U.S. Mail [X] Via Email: *As Agreed by the Parties* [] Via Hand Delivery
David Scott Mann Gendler & Mann LLP 1424 4th Ave., Ste. 715 Seattle, WA 98101-2297	[X] Via U.S. Mail [X] Via Email: [] Via Hand Delivery

SIGNED in Port Orchard, Washington this 15th day of July, 2013.

Carrie Bruce

CARRIE A. BRUCE, Paralegal
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
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APPENDIX

1. Findings of Fact, Conclusions of Law and Orders (with attached Bargain and Sale Deed with Covenants) (CP 4052-4092)

2. Trial Exhibit 251: 2010 Google Earth aerial image of KRRC shooting areas

3. Trial Exhibit 315: September 7, 1993 letter from former Commissioner Wyn Granlund

4. Trial Exhibits 207, 208, 209, 210, 211: Surface Danger Zone maps

5. Proposed Findings of Fact and Conclusions of Law of Plaintiff Kitsap County (CP 3987-4025)

6. Proposed Findings of Fact and Conclusions of Law of Defendant Kitsap Rifle and Revolver Club (CP 4026-4051)

7. KCC 9.56.010

8. KCC 12.08.010

9. KCC Chapter 12.10

10. KCC Chapter 12.16

11. KCC Chapter 17.100.040

12. KCC CHAPTER 17.100.070

13. KCC CHAPTER 17.110

14. KCC CHAPTER 17.301

15. KCC CHAPTER 17.381

16. KCC CHAPTER 17.421

17. KCC 17.455.060

18. KCC 17.455.110

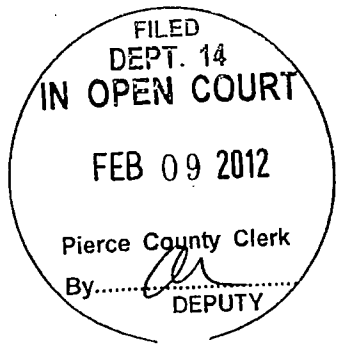
19. KCC CHAPTER 17.460

20. KCC CHAPTER 17.530

21. KCC CHAPTER 19.100

Appendix 1

Findings of Fact, Conclusions of Law and Orders (with attached Bargain and Sale Deed with Covenants) (CP 4052-4092)



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiff,

v.

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

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.

NO. 10-2-12913-3

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

THIS MATTER having come on regularly for trial before the undersigned Judge of the above-entitled Court, and the matter having been tried to the bench; presentation of preliminary motions and evidence commenced on September 28, 2011 and concluded on October 27, 2011; the Court allowed submission of written closing arguments and submissions of Findings of Fact

and Conclusions of Law no later than 9:00 a.m. on November 7, 2011. The parties' briefs and proposed Findings of Fact were received timely; the parties appeared through their attorneys of record Neil Wachter and Jennine Christensen for the Plaintiff and Brian Chenoweth and Brooks Foster for the Defendant; and the Court considered the motions, briefing, testimony of witnesses, argument of counsel, proposed Findings of Fact and Conclusions of Law, and the records and files herein, and being fully advised in the premises, now, therefore, makes the following findings of fact, conclusions of law and orders, which shall remain in effect until further order of this court:

I. FINDINGS OF FACT

JURISDICTION

1. All events cited in these Findings took place in unincorporated Kitsap County, Washington, except where noted. Port Orchard is the county seat for Kitsap County, and references to official action by the Kitsap County Board of County Commissioners ("BOCC") or to meetings or BOCC proceedings at the Kitsap County Administration Building refer to events at County facilities located in Port Orchard, except where noted to the contrary.

2. On October 22, 2010, the Court denied defendant Kitsap Rifle and Revolver Club's motion to change venue in this action, finding that the Pierce County Superior Court has jurisdiction over the parties and is the proper venue for the action pursuant to RCW 2.08.010 and RCW 36.01.050. The Court denied the motion without prejudice, and the defendant did not renew its motion.

PARTIES

3. Plaintiff Kitsap County ("County") is a municipal corporation in and is a political subdivision of the State of Washington.

4. Defendant Kitsap Rifle and Revolver Club ("KRRC" or "the Club", more particularly described below) is a Washington non-profit corporation and is the owner of record of the subject property, which is located at 4900 Seabeck Highway NW, Bremerton, Washington (hereinafter referred to as the "Property") and more particularly described as:

36251W

PART OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER AND PART OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER, SECTION 36, TOWNSHIP 25 NORTH, RANGE 1 WEST, W.M., KITSAP COUNTY, WASHINGTON, LYING NORTHERLY OF THE NORTH LINES OF AN EASEMENT FOR RIGHT OF WAY FOR ROAD GRANTED TO KITSAP COUNTY ON DECEMBER 7, 1929, UNDER APPLICATION NO. 1320, SAID ROAD BEING AS SHOWN ON THE REGULATION PLAT THEREOF ON FILE IN THE OFFICE OF THE COMMISSIONERS OF PUBLIC LANDS AT OLYMPIA, WASHINGTON.******IMPROVEMENTS CARRIED UNDER TAX PARCEL NO. 362501-2-002-1000******

5. Defendant Sharon Carter (d/b/a "National Firearms Institute") was dismissed from this action on February 14, 2011 upon Plaintiff's motion. No other defendants have been named.

KRRC

6. Defendant Kitsap Rifle and Revolver Club (the "Club" or "KRRC") is a non-profit organization founded by charter on November 11, 1926 for "sport and national defense." Exhibits 475–76. It was later incorporated in 1986. Exhibit 271.

7. From its inception, the Club occupied the 72-acre parcel (the "Property") identified above. For many decades, the Club leased the Property from the Washington State Department of Natural Resources ("DNR"). Exhibits 135–36.

8. The Property consists of approximately 72 acres, including approximately eight acres of active or intensive use and occupancy containing the Club's improvements, roads, parking areas, open shooting areas, targets, storage areas, and associated infrastructure

("Historical Eight Acres"). Exhibits 135-36, 438, 486. The remaining acreage consists of timberlands, wetlands and similar resource-oriented lands passively utilized by the Club to provide buffer and safety zones for the Club's shooting range. Id.

ZONING

9. The property is zoned "rural wooded" under Kitsap County Code Chapter 17.301. The Property has had this same essential zoning designation since before the year 1993.

10. On September 7, 1993, then-BOCC Chair Wyn Granlund authored a letter to the four shooting ranges in unincorporated Kitsap County at the time, stating that the County recognized each as "grandfathered." Exhibit 315.

THE SUBJECT PROPERTY - OWNERSHIP, LEASES AND DNR USES

11. Until June 18, 2009, the 72-acre subject property was owned by the State of Washington Department of Natural Resources ("DNR"). DNR owned several contiguous parcels to the north of the subject property, and managed parts of these contiguous properties and parts of the subject property for timber harvesting. DNR leased the Property to KRRC under a series of lease agreements, the two most recent of which were admitted into evidence. Exhibits 135 and 136. The lease agreements recite that eight acres of the property are for use by the Club as a shooting range and that the remaining 64.4 acres are for use as a "buffer". The lease agreements do not identify the specific boundaries of these respective areas. Id.

12. Prior to the instant litigation, the eight acres of the property claimed by KRRC to be its "historic use" area had not been surveyed by a professional surveyor or otherwise specifically defined.

13. Over the decades of its ownership of the Property and adjacent properties, DNR periodically conducted timber harvesting and replanting. The most recent DNR timber harvest on the Property was in approximately 1991, when the eastern portions of the Property were clear-cut and successfully replanted.

14. On June 18, 2009, deeds were recorded with the Kitsap County Assessor's Office transferring the Property first from the State of Washington to Kitsap County and immediately thereafter from Kitsap County to KRRC. The first deed was a quit claim deed transferring DNR land including the Property from the State to the County. Exhibit 146. The second deed was a bargain and sale deed ("2009 Deed") transferring the Property from the County to KRRC. Exhibit 147 (attached to these Findings of Fact).

15. For purposes of these factual findings, the Court will use the names the Club has given to shooting areas at the Property, which include a rifle range, a pistol range, and shooting bays 1-11 as depicted in Exhibits 251 and 251A (June 2010 Google earth imagery). The well house referenced in testimony is located between Bays 4 and 5 and the "boat launch" area referenced in testimony is west of Bay 8.

PROPERTY TRANSFER

16. For several years dating back to the 1990's, Kitsap County sought to acquire property in Central Kitsap County to be developed into a large greenbelt or parkland area. Prior to 2009, Kitsap County acquired several large parcels in Kitsap County for use in a potential "land swap" with the State DNR. DNR owned several large parcels including the Subject Property, which were the object of the County's proposed transaction ("DNR parcels").

17. In early 2009, negotiations with the State reached a stage when the DNR and the County began to discuss specific terms of the contemplated transaction. DNR informed the

County that it would be deeding the DNR parcels including the subject property to Kitsap County, so that the County would take over DNR's position as landlord to KRRC.

18. KRRC became aware that the County could become the Club's landlord as a result of the land swap and became concerned that the County might exercise a "highest and best use" clause in the lease agreements between the Club and DNR, so as to end the Club's use of the Property for shooting range purposes.

19. In March 2009, Club officials met with County officials including Commissioner Josh Brown, in an effort to secure the County's agreement to amend the lease agreement to remove the highest and best use clause. Soon after, the County and Club began discussing whether the County should instead deed the property to KRRC. KRRC very much wanted to own the property on which its shooting range was located and Kitsap County was not interested in owning the Property due to concern over potential heavy metals contamination of the Property from its use as a shooting range for several decades.

20. In April and May 2009, Club officers and club member/attorney Regina Taylor negotiated with Kitsap County staff members, including Matt Keough of the County Parks Department and Deputy Prosecuting Attorney Kevin Howell of the County Prosecutor's Office Civil Division. A bargain and sale deed was drafted by Mr. Howell, and the parties exchanged revisions of the deed until they agreed upon the deed's final terms.

21. At the County's request, certified appraiser Steven Shapiro conducted an appraisal of the KRRC property, which he published as a "supplemental appraisal report" dated May 5, 2009. Exhibit 279. This appraisal report presumed that the Property was lead-contaminated and that a $2-3 million cleanup may be required for the property. The appraisal report valued the Property at $0, based upon its continued use for shooting range purposes and

the potential costs of environmental cleanup. The appraisal did not split out values to be assigned to the "historic use" and "buffer" areas of the Property.

22. On May 11, 2009, the BOCC voted on and approved the sale of the Property from Kitsap County to the Club, pursuant to the terms of the 2009 Deed. Exhibit 147 (attached). The County did not announce or conduct a sale of the Property at public auction pursuant to Chapter 36.34 RCW because the County and KRRC relied upon the value from Mr. Shapiro's supplemental appraisal report.

23. The minutes and recordings of BOCC meetings on and around May 11, 2009 do not reveal an intent to settle disputed claims or land use status at the Property.

24. At the time of the property transaction, Kitsap County had no plan to pursue a later civil enforcement or an action based upon land use changes or site development permitting.

25. During the negotiation for the property transaction, the parties did not negotiate for the resolution of potential civil violations of the Kitsap County Code at the Property and the parties did not negotiate to resolve the Property's land use status.

THE BARGAIN AND SALE DEED

26. The only evidence produced at trial to discern the County's intent at the time of the 2009 Bargain and Sale Deed was the deed itself. While the Club argues in closing that ". . . the Commissioners decided to support the Club. . . ." (KRRC's Brief on closing Arguments, p.3), the Commissioners were not called as witnesses in the case and the parties' intent is gleaned from the four corners of the document. (Exhibit 147).

27. The deed does not identify nor address any then-existing disputes between the Club and the County, other than responsibility for and indemnification regarding environmental issues and injuries or death of persons due to actions on the range.

28. 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.

PROPERTY USAGE - 1993 AND PRIOR

29. For several decades prior to 1993, the Club operated a rifle range and a pistol range at the Property. As of 1993, the pistol range consisted of a south-to-north oriented shooting area defined by a shooting shed on its south end and a back stop on the north end and the rifle range consisted of a southwest-to-northeast oriented shooting area defined by a shooting shed on its southwest end and a series of backstops going out as far as 150 yards to the northeast. As of 1993, the developed portions of the Property consisted of the rifle range, the pistol range, and cleared areas between these ranges, as seen in a 1994 aerial photograph (Exhibit 8). During and before 1993, the Club's members and users participated in shooting activities in wooded or semi-wooded areas of the Property, on the periphery of the pistol and rifle ranges and within its claimed eight-acre "historic use" area.

30. As of 1993, shooting occurred at the Property during daylight hours only. Shooting at the Property occurred only occasionally, and usually on weekends and during the fall "sight-in" season for hunters.

SITE DEVELOPMENT AT THE PROPERTY

31. On July 10, 1996, the Kitsap County Department of Community Development ("DCD") received from KRRC a "Pre-Application Conference Request" form, which was admitted as Exhibit 134. Under "project name", KRRC listed "Range Development – Phase I" and under "proposed use", KRRC stated:

> "Due to 50C-1993, KRRC is forced to enhance its operations and become more available to the general public. Phase I will include a water and septic system(s), a class room/community facility and a 200 meter rifle line. Material will not be removed from the premissis [sic]; it will be utilized for safety berms and acoustical baffeling [sic]. These enhancements will allow KRRC to generate a profit to be shared with the State School Trust (DNR). Local business will also profit from sportsmen visiting the area to attend our rich sporting events."

Id.

32. There is no evidence of application by the Club or by DNR or by any agent of either, for any county permits or authorizations before or after the Club's 1996 pre-application conference request, other than a pre-application meeting request submitted by the Club in 2005 (discussed below) and a County building permit for construction of an ADA ramp serving the rifle line shelter in 2008 or 2009.

33. From approximately 1996 forward, the Club undertook a process of developing portions of its claimed "historic eight acres", clearing, grading and sometimes excavating wooded or semi-wooded areas to create "shooting bays" bounded on at least three sides by earthen berms and backstops. Aerial photography allowed the Court to see snapshots of the expansion of shooting areas defined by earthen berms and backstops and verify testimony of the time line of development: 2001 imagery (Exhibits 9 and 16A) depicts the range as consisting of the pistol and rifle ranges, and shooting bays at the locations of present-day Bays 1, 2, 3, 9, 10 and 11. Comparing the 2001 imagery with March 2005 imagery (Exhibit 10), no new shooting bays were established during that interval. "Birds Eye" aerial imagery from the MS Bing website from an unspecified date later in 2005 provided the clearest evidence of the state of development at the Property (Exhibits 462, 544, 545, 546, 547), which included clearing and grading work performed in the eastern portion of the Property after the March 2005 imagery. (See discussion below under the subject of the proposed 300 meter range). June 2006 and

August 2006 imagery (Exhibits 11 and 12) reveals clearing and grading to create a new shooting bay at the location of present-day Bay 7. February 2007 imagery (Exhibit 13) reveals clearing and grading work to create new shooting bays at the locations of present-day Bay 8 and present-day Bay 6, and reveals clearing to the west of Bays 7 and 8 to accommodate a storage unit or trailer at that location. February 2007 imagery also reveals that the Club extended a berm along the north side of the rifle range and extended the length of the rifle range by clearing, grading and excavating into the hillside to the northeast of that range. April 2009 imagery (Exhibit 14) reveals establishment of a new shooting bay, Bay 4, and enlargement of Bay 7. May 2010 imagery (Exhibit 15) reveals establishment of a new shooting bay, Bay 5, enlargement of Bay 6, and additional clearing to the west of Bays 8 and 7 up to the edge of a seasonal pond (the easternmost of two ponds delineated as wetlands on club property, discussed below).

34. Bay 6, Bay 7 and the northeast end of the rifle range are each cut into hillsides, creating "cut slopes" each in excess of five feet in height and a slope ratio of three to one. The excavation work performed to create Bay 6 and Bay 7 and to extend the rifle range to the northeast required excavation significantly in excess of 150 cubic yards of material at each location. The excavation work into the hillside for Bay 7 took place in phases after 2005 and before April 2009. The excavation work into the hillside for Bay 6 took place in phases between August 2006 and May 2010, and the excavation work at Bay 6 between April 2009 and May 2010 required excavation in excess of 150 cubic yards of material. The excavation work into the hillside at the northeast end of the rifle range took place between August 2006 and February 2007.

35. One of the earthen berms constructed after February 2007 is a continuous berm that separates Bay 4 and Bay 5 and other developed areas on the Property from the Property's undeveloped areas to the north and west. Starting at the northeast corner of Bay 3, this berm runs to the east to define the northern edge of Bay 4, then turns northeast and curves around a cleared area used for storage around the Property's well house, and then turns north to form the western and northern edges of Bay 5. This berm was constructed in phases after February 2007, and the part of this berm forming the western and northern edges of Bay 5 was constructed between April 2009 and May 2010. This latter phase of the berm's construction between April 2009 and May 2010 required movement of more than 150 cubic yards of material. This berm also is more than five feet in height and has a slope ratio of greater than three to one.

36. For each hillside into which there was excavation and creation of cut slopes at the Property, there were no applications for County permits or authorizations, and no erosion or slope maintenance plans were submitted to or reviewed by the County. For each location on the Property where clearing, grading, and/or excavation occurred, there were no applications made for County permits such as grading permits or site development activity permits.

37. Over the years, the Club used native materials from the Property to form berms and backstops for shooting areas, usually consisting of the spoils from excavating into hillsides on the Property.

38. There is no fence around the active shooting areas of the Property to keep out or discourage unauthorized range users.

SITE DEVELOPMENT AT THE PROPERTY - 300 METER RANGE

39. In approximately 2003, KRRC began the process of applying to the State of Washington Interagency Committee for Outdoor Recreation ("IAC") for a grant to be used for

improving the range facilities. KRRC identified the project as a "range reorientation" project to build a rifle range that did not have its "back" to the Seabeck Highway.

40. In March of 2005, DCD received complaints that KRRC was conducting large scale earthwork activities and that the noise from shooting activities from the range had substantially increased. The area in which earth-moving activities took place is a large rectangular area in the eastern portion of the Property, with a north-south orientation. This area would become known as the proposed "300 meter range", and it is clearly visible in each aerial image post-dating March 2005. In March of 2005, DCD staff visited the 300 meter range area and observed "brushing" or vegetation clearing that appeared to be exploratory in nature.

41. In April of 2005, DCD staff visited the 300 meter range and discovered recent earthwork including grading, trenching, surface water diversion, and vegetation removal including logging of trees that had been replanted after DNR's 1991 timber harvest. The entire area of the cleared 300 meter range was at least 2.85 acres and the volume of excavated and graded soil was greater than 150 cubic yards.

42. DCD staff issued an oral "stop work" directive to the Club, with which the Club complied. DCD recommended to the Club that it request a pre-application meeting to discuss various permits and authorizations that would be required in order to proceed with the project.

43. KRRC submitted a "pre-application meeting request" to DCD on May 12, 2005 along with a cover letter from the Club president and conceptual drawings of the proposed project (Exhibits 138 and 272). The letter stated that the range re-alignment project was "not an expansion of the current facilities."

44. On June 21, 2005, KRRC officers met with DCD staff, including DCD representing disciplines of code enforcement, land use and planning, site development and

critical areas. County staff informed KRRC that the Club needed to apply for a Conditional Use Permit ("CUP") per Kitsap County Code Title 17 because the site work in the 300 meter range area constituted a change in or expansion of the Club's land uses of the property. County staff also informed the Club that it would need to apply for other permits for its work, including a site development activity permit per Kitsap County Code Title 12. County staff identified several areas of concern, which were memorialized in a follow-up letter from the County to the Club dated August 18, 2005 (Exhibit 140).

45. Later in 2005 and in the first half of 2006, the Club asked the County to reconsider its stance that the Club was required to apply for a CUP in order to continue operating a shooting range on the Property. The County did not change its position. Nor did the County issue a notice of code violation or a notice informing the Club that it had made an administrative determination pursuant to the County's nonconforming use ordinance, KCC Chapter 17.460.

46. In the summer of 2006, KRRC abandoned its plans to develop the 300 meter range and re-directed its efforts and the grant money toward improvements of infrastructure in its existing range.

47. DCD staff persons visited the Property on at least three occasions during 2005, and on at least one occasion walked through the developed shooting areas en route to and from the 300 meter range area.

48. In approximately 2007, the Club replanted the 300 meter range with several hundred Douglas fir trees, and believed that by so doing it was satisfying the requirements of the landowner, DNR. The Club did not develop any formal plan for the replanting and care of the new trees. All of the new trees died, and today the 300 meter range continues to be devoid of any trees.

49. The 300 meter range has been and continues to be used for storage of target stands, barrels, props and building materials, as confirmed by photographs taken during the County's January 2011 discovery site visits to the Property and by Marcus Carter's (Executive Officer of KRRC and Club Representative at trial) testimony.

50. KRRC asserts the position that by abandoning its plans to develop the 300 meter range, it has retreated to its eight acre area of claimed "historic use" and has not established a new use that would potentially terminate the Club's claimed nonconforming use status.

51. KRRC never applied for a conditional use permit for its use of the property as a shooting range or private recreational facility, and has never applied for a site development activity permit for the 300 meter range work or for any of the earth-disturbing work conducted on the Property.

SITE DEVELOPMENT AT THE PROPERTY - TIGHTLINING WATERCOURSE ACROSS THE RANGE

52. The Seabeck Highway has been in its present location for several decades. The Seabeck Highway is a county road served by storm water features including culverts and roadside ditches. Two culverts under the Seabeck Highway were identified as particularly relevant to the litigation. First, a 42-inch diameter culvert to the east of the Club's gated entrance onto the Seabeck Highway flows from south-to-north and onto the Property ("42-inch culvert"). Second, a 24-inch diameter culvert to the west of the Club's parking lot typically flows from north-to-south, away from the Property ("24-inch culvert"). Storm and surface water flows through the 42-inch culvert during the rainy seasons.

53. Prior to the late summer of 2006, water discharged from the 42-inch culvert followed a channel leading away from the Seabeck Highway and into a stand of trees south of

the rifle range. The channel reached the edge of a cleared area to the south of the rifle range and the drainage continued across the rifle range in a northerly direction, primarily in the open and low areas (or depressions) and through and between three and five culverts of not greater than 20 feet in length. There was conflicting testimony about what the drainage did as it approached the wetland areas to the north of the rifle range. The Club's wetland expert Jeremy Downs opined that the water was absorbed into the gravelly soil present between the rifle range and the wetland areas to the north, while the County's wetland expert Bill Shiels opined that the water would be of sufficient quantity during times of peak rain fall that it would have to travel in a channel or channels as it neared the wetlands.

54. In the late summer and early fall of 2006, the Club replaced this water course with a pair of 475-foot long 24-inch diameter culverts. These "twin culverts" crossed the entire developed area of the range, from their inlets in the stand of trees by the Seabeck Highway to their outlets north of the developed areas of the range. To achieve this result, the Club used heavy earth-moving equipment to remove existing culverts and to excavate a trench the entire length of the new culverts, installed the culverts, covered up the trench with fill, then brought in additional fill from elsewhere on the Property to raise the level of the formerly depressed areas in the rifle range. Excavation and re-grading for this project required movement of far more than 150 cubic yards of soil.

55. After the Club "undergrounded" the water course into the 475-foot long culverts but prior to February 2007, the Club extended the earthen berm along the north side of its rifle range and over the top of the newly-buried culverts, nearly doubling the berm's length. Extending this berm involved excavating and re-grading soil far in excess of 150 cubic yards.

56. KRRC never applied to the County for review or approval of the cross-range culvert project, or the berm construction that followed. KRRC never developed engineering plans for this project or undertook a study to determine whether the new culverts have capacity to handle the water from the 42-inch culvert or to determine whether the outlet of the culverts is properly engineered to minimize impacts caused by the direct introduction of the culvert's storm and surface water into a wetland system. KRRC offered evidence that during July 2011 it consulted with agents of the state Department of Ecology (DOE), the Army Corps of Engineers, the state Department of Fish and Wildlife and the Suquamish Tribe with regard to its activities proximate to wetlands, but the record contains no evidence that any of these agencies evaluated subjects within the County's jurisdiction such as critical areas including wetland buffers, or assessed the capacity of the cross-range culverts.

57. Prior to the discovery site visits by County staff and agents in January 2011, the County was unaware of the cross-range culverts.

WETLAND STUDY, DELINEATIONS AND PROTECTED BUFFERS

58. The parties each commissioned preliminary delineations of suspected wetland and stream features on the Property. Wetland delineations are ordinarily conducted prior to site development activities which may affect a suspected wetland, and are ordinarily submitted to the regulating authorities (e.g. counties and DOE) for review and comment. In this instance, there was no application for a permit or authorization.

59. The County's wetland consulting firm, Talasaea Consulting, and the Club's consulting firm, Soundview Consultants, each studied wetlands to the north and west of developed areas of the Property, as well as the drainage crossing the range originating from the 42-inch culvert, and suspected wetlands in the 300 meter range. For purposes of these findings,

the Court adopts the County's suggestion to limit its findings to areas of the Property about which there are undisputedly wetlands. The Court makes no finding as to whether the County has proven that wetlands currently exist in the 300 meter range area and makes no finding as to whether the County has proven that the water course from the 42-inch culvert ever followed a channel which is capable of hosting salmonid species, prior to entering the Property's wetlands. Therefore, the Court confines its remaining analysis of the Property's wetlands and streams and their associated habitats and buffers, to the wetlands to the north and west of the developed portions of the range ("wetlands").

60. The Property's wetlands are connected to and part of a larger wetland system in the DNR parcels to the north of the Property. Ecologically, this wetland system is of high value because it is part of the headwaters of the Wildcat Creek / Chico Creek watershed, which supports migrating salmon species. The wetlands on the Property are directly connected to a tributary of Wildcat Creek, and are waters of the State of Washington, both as a finding of fact and a conclusion of law.

61. The Court heard testimony of and received the reports and maps by the parties' respective wetland expert witnesses. The County's expert, Bill Shiels of Talasaea Consultants, determined that the Property's wetlands constitute a single wetland denoted as Wetland A, and concluded that this wetland is a "category I" wetland, for which the Kitsap County Code provides a 200-foot buffer area. The Club's expert, Jeremy Downs of Soundview Consulting, determined that the wetlands on the Property constitute two separate wetlands denoted as Wetlands A and B, and concluded that each wetland is a "category II" wetland, for which the Kitsap County Code provides a 100-foot buffer area. Both experts determined that an additional 50 feet should be added to the buffer to reflect high intensity of adjacent uses, i.e. the KRRC

shooting ranges. Therefore, the County's expert and the Club's expert concluded that 250-foot and 150-foot buffers apply to the Property's wetlands, respectively. For purposes of these findings of fact, the Court will accept the Soundview conclusion that there are two protected wetlands on the Property (A and B) and that a 150-foot buffer applies to those wetlands. For purposes of these findings, the Court will further accept Soundview's delineation and mapping of the wetlands B which is nearest the active shooting portions of the Property.

62. To install its cross-range culverts in 2006, the Club excavated and re-graded fill in the wetland buffer within 150 feet of Wetland B. This project involved excavation and grading far in excess of 150 cubic yards of material.

63. The cross-range culverts now discharge storm water and surface water directly into Wetland B, replacing the former system which ordinarily absorbed storm water and surface water into the soil and more gradually released it into the wetlands on the Property.

64. To construct the berm that starts at the northeastern corner of Bay 3 and travels east along the edge of Bay 4, then travels northeast along the storage / well house area, and then travels north along the edge of Bay 5, the Club placed fill in the wetland buffer within 150 feet of Wetland B. This project also involved excavation and grading in excess of 150 cubic yards of material.

65. At least five locations at the property have slopes higher than five feet in height with a slope ratio of greater than three to one: (1) a cut slope at the end of the rifle range; (2) berms at Bays 4 and 5 and the berm between these bays; (3) cut slope at Bay 6; (4) cut slope at Bay 7; and (5) the extension of the rifle range berm. Each of these earth-moving projects took place after 2005, and the Club did not apply for permits or authorizations from Kitsap County.

66. Prior to this litigation, KRRC never obtained a wetland delineation for the Property or otherwise determined potential wetland impacts for any site development projects proposed for the Property.

RANGE SAFETY

67. The parties presented several experts who opined on issues of range safety. The Property is a "blue sky" range, with no overhead baffles to stop the flight of accidentally or negligently discharged bullets. The Court accepts as persuasive the SDZ diagrams developed by Gary Koon in conjunction with the Joint Base Lewis-McChord range safety staff, as representative of firearms used at the range and vulnerabilities of the neighboring residential properties. The Court considered the allegations of bullet impacts to nearby residential developments, some of which could be forensically investigated, and several of which are within five degrees of the center line of the KRRC Rifle Line.

68. The County produced evidence that bullets left the range based on bullets lodged in trees above berms. The Court considered the expert opinions of Roy Ruel, Gary Koon, and Kathy Geil and finds that more likely than not, bullets escaped from the Property's shooting areas and that more likely than not, bullets will escape the Property's shooting areas and will possibly strike persons or damage private property in the future.

69. The Court finds that KRRC's range facilities are inadequate to contain bullets to the Property, notwithstanding existing safety protocols and enforcement.

ACTION OR PRACTICAL SHOOTING

70. The Property is frequently used for regularly scheduled practical shooting practices and competitions, which use the shooting bays for rapid-fire shooting in multiple directions. Loud rapid-fire shooting often begins as early as 7 a.m. and can last as late as 10 p.m.

COMMERCIAL AND MILITARY USES OF THE PROPERTY

71. KRRC and the military shared use of the adjacent federal Camp Wesley-Harris property's shooting range facilities until sometime shortly after World War II.

72. During the early 1990's, U.S. Naval personnel are said to have conducted firearm qualification exercises at the Property on at least one occasion.

73. Sharon Carter is the owner of a sole proprietorship established as a business in Washington in the late 1980's. In approximately 2002, this sole proprietorship registered a new trade name, the "National Firearms Institute" ("NFI") and registered the NFI at the Property's address of 4900 Seabeck Highway NW., Bremerton, WA. Since 2002, the NFI provided a variety of firearms and self-defense courses, mostly taught at the Property by Ms. Carter's husband, Marcus Carter. The NFI kept its own books and had its own checking account, apart from the Club. Mr. Carter is the long-time Executive Officer of KRRC, and NFI's other primary instructor is Travis Foreman, who is KRRC's Vice-President and the Carters' son-in-law.

74. In approximately 2003, a for-profit business called Surgical Shooters, Inc. ("SSI"), began conducting official small arms training exercises at the Property's pistol range for active duty members of the United States Navy, primarily service members affiliated with the submarines based at the Bangor submarine base. For approximately one year, SSI conducted this training at the Property on a regular basis. SSI held a contract with the Navy to provide this training, and SSI had an oral arrangement with NFI. On a per-day basis, SSI paid NFI a fee for the use of the Property, one-half of which would then be remitted to the Club itself. NFI coordinated the SSI visits to the Property and made sure that a KRRC Range Safety Officer was present during each SSI training session at the Property.

75. In approximately 2004, SSI ceased providing training at the Property and was replaced by a different business, Firearms Academy of Hawaii, Inc. ("FAH"). From approximately 2004 until Spring 2010, FAH regularly provided small arms training at the Property to active duty U.S. Navy personnel, under an oral arrangement with NFI. Again, on a per-day basis, FAH paid NFI a fee for the use of the Property, one-half of which would then be remitted to the Club itself. NFI coordinated the FAH visits to the Property and made sure that a KRRC Range Safety Officer was present during each FAH training session at the Property. FAH training at the Property consisted of small weapons training of approximately 20 service members at a time. Each FAH training course took place over three consecutive weekdays at the Property's pistol range, as often as three weeks per month. At the conclusion of this arrangement, FAH paid $500 to NFI for each day of KRRC range use, half of which the NFI remitted to the KRRC.

76. The SSI and FAH training took place on the Property's pistol range. During FAH's tenure at the Property, U.S. Navy personnel inspected the pistol range and determined that it was acceptable for purposes of the training.

77. Prior to the SSI and FAH training, there is no evidence of for-profit firearm training at the Property, and these businesses did not apply for approvals or permits with Kitsap County to authorize their commercial use of the Property.

78. In November 2009, U.S. Navy active duty personnel were present on the property on at least one occasion for firearms exercises not sponsored or hosted by the FAH. On one such occasion, a military "Humvee" vehicle was parked in the rifle range next to the rifle range's shelter. A fully automatic, belt-fed rifle (machine gun) was mounted on top of this Humvee, and the machine gun was fired in small bursts, down range.

79. Official U.S. Navy training at the Property ceased in the Spring of 2010.

NOISE GENERATED FROM THE PROPERTY AND HOURS OF OPERATION

80. The Club allows shooting between 7 a.m. and 10 p.m., seven days a week. Shooting sounds from the Property are commonly heard as early as 7 a.m. and as late as 10 p.m. In the early 1990's, shooting sounds from the range were typically audible for short times on weekends, or early in the morning during hunter sight-in season (September). Hours of active shooting were considerably fewer.

81. Shooting sounds from the Property have changed from occasional and background in nature, to clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration. Rapid fire shooting sounds from the Property have become common, and the rapid-firing often goes on for hours at a time.

82. Use of fully automatic weapons at KRRC now occurs with some regularity.

83. Rapid-fired shooting, use of automatic weapons, and use of cannons at the Property occurred infrequently in the early 1990's.

84. The testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the Property. The noise conditions described by these witnesses interfere with the comfort and repose of residents and their use and enjoyment of their real properties. The interference is common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the "sounds of war" and the Court accepts this description as persuasive.

85. Expanded hours, commercial use of the club, allowing use of explosive devices (including Tannerite), higher caliber weaponry and practical shooting competitions affect the neighborhood and surrounding environment by an increase in the noise level emanating from the Club in the past five to six years.

EXPLOSIVES AND EXPLODING TARGETS

86. The Club allows use of exploding targets, including Tannerite targets, as well as cannons, which cause loud "booming" sounds in residential neighborhoods within two miles of the Property, and cause houses to shake.

87. Use of cannons or explosives was not common at the Club in approximately 1993.

AMENDMENT OF KITSAP COUNTY CODE CHAPTER 17.460

88. On May 23, 2011, the Kitsap County Board of County Commissioners adopted ordinance 470-2011 in a regularly scheduled meeting of this Board, amending the Kitsap County Zoning Ordinance's treatment of nonconforming land uses at Chapter 17.460.

89. Notice of the May 23, 2011 meeting was published in the Kitsap Sun, which is the publication used in Kitsap County for public notices of BOCC meeting agenda items.

90. There is no evidence in the record supporting the contention that this amendment was developed to target KRRC or any of the County's gun ranges.

BASED UPON the foregoing FINDINGS OF FACT, the Court hereby makes the following

II. CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over the real property, the named Defendant, and the Parties' claims and counterclaims in this action, and venue is proper.

2. The Kitsap County Department of Community Development is the agency charged with regulating land use, zoning, building and site development in unincorporated Kitsap County and enforcing the Kitsap County Code.

3. The conditions of (1) ongoing noise caused by shooting activities, and (2) use of explosives at the Property, and (3) the Property's ongoing operation without adequate physical facilities to confine bullets to the Property each constitute a public nuisance.

4. Defendant Kitsap Rifle and Revolver Club is the owner and occupant of the real property, and these orders shall also bind successor owners or occupants of the Property, if any.

5. Non-conforming uses are uniformly disfavored, as they limit the effectiveness of land use controls, imperil the success of community plans, and injure property values. Rhod-A-Zalea v. Snohomish County, 136 Wn.2d 1, 8 (1998).

> Although found to be detrimental to important public interests, non-conforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. *[cite omitted]*. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right **1028 to significantly change, alter, extend, or enlarge the existing use.

Id.

6. KRRC enjoyed a legal protected nonconforming status for historic use of the existing eight acre range.

7. KRRC was not granted the right to significantly change, alter, extend or enlarge the existing use, by virtue of the 2009 deed from Kitsap County.

8. The actions by KRRC of:

(1) expanded hours;

(2) commercial, for-profit use (including military training);

(3) increasing the noise levels by allowing explosive devises, higher caliber weaponry greater than 30 caliber and practical shooting

significantly changed, altered, extended and enlarged the existing use.

9. Such actions noted above under Conclusion of Law #8 were "expansion" of use and were not "intensification" as argued by KRRC.

10. Intensification was clarified by the Washington Supreme Court in Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). The Court stated that intensification is permissible ". . . where the nature and character of the use is unchanged and substantially the same facilities are used." Id. As noted above, the nature of the use of the property by KRRC changed, expanded and intensified from 1993 through 2009.

11. Defendant has engaged in and continues to engage in creating and/or maintaining a public nuisance by the activities described herein. The activities are described by statute and code to be public nuisances. These acts constitute public nuisances as defined by both RCW 7.48.120 and KCC 17.530.030 and 17.110.515. The activities described above annoy, injure, and/or endanger the safety, health, comfort, or repose of others. Furthermore, Kitsap County Code authorizes this action "for a mandatory injunction to abate the nuisance in accordance with the law" for any use, building or structure in violation of Kitsap County Code Title 17 (land use). KCC 17.530.030. Kitsap County Code provides that "in all zones . . . no use shall produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses." KCC 17.455.110.

12. No lapse of time can legalize a public nuisance. RCW 7.48.190.

13. The continued existence of public nuisance conditions on the subject Property has caused and continues to cause the County and the public actual and substantial harm.

14. Kitsap County has clear legal and equitable authority to protect the health, safety, and welfare of the public against public nuisances.

15. Article XI, Section 11 of the Washington State Constitution authorizes counties to make and enforce "local police, sanitary and other regulations."

16. RCW 36.32.120 (10) authorizes Kitsap County to declare and abate nuisances as follows:

> The legislative authorities of the several counties shall: ....(10) Have power to declare by ordinance what shall be deemed a nuisance within the county, including but not limited to "litter" and "potentially dangerous litter" as defined in RCW 70.93.030; to prevent, remove, and abate a nuisance at the expense of the parties creating, causing, or committing the nuisance; and to levy a special assessment on the land or premises on which the nuisance is situated to defray the cost, or to reimburse the county for the cost of abating it. This assessment shall constitute a lien against the property which shall be of equal rank with state, county, and municipal taxes.

17. The state statutes dealing with nuisances are found generally at Chapter 7.48 RCW. Injunctive relief is authorized by RCW 7.48.020. RCW 7.48.200 provides that "the remedies against a public nuisance are: Indictment or information, a civil action, or abatement." RCW 7.48.220 provides "a public nuisance may be abated by any public body or officer authorized thereto by law." RCW 7.48.250; 260 and 280 provide for a warrant of abatement and allow for judgment for abatement costs at the expense of the Defendant.

18. Kitsap County has no plain, adequate, or speedy remedy at law to cure this nuisance, and the neighbors and public-at-large will suffer substantial and irreparable harm unless the nuisance conditions are abated and all necessary permits are obtained in order for the Defendant's shooting operations to continue or to resume after imposition of an injunction.

19. The Property and the activities described on the Property herein constitute a public nuisance per se, because the Defendant engaged in new or changed uses, none of which

are authorized pursuant to Kitsap County Code Chapter 17.381 or authorized without issuance of a conditional use permit.

20. The Property and the above-described activities on the Property constitute a statutory public nuisance. The Property has become and remains a place violating the comfort, repose, health and safety of the entire community or neighborhood, contrary to RCW 7.48.010, 7.48.120, 7.48.130, and 7.48.140 (1) and (2), and, therefore, is a statutory public nuisance. Defendant has engaged in and continues to engage in public nuisance violations by the activities described herein. The activities are described by statute and code to be public nuisances as defined by both RCW 7.48.120 The activities described above annoy, injure, and/or endanger the safety, health, comfort, or repose of others.

21. The failure of the Defendant to place reasonable restrictions on the hours of operation, caliber of weapons allowed to be used, the use of exploding targets and cannons, the hours and frequency with which "practical shooting" practices and competitions are held and the use of automatic weapons, as well as the failure of the Defendant to develop its range with engineering and physical features to prevent escape of bullets from the Property's shooting areas despite the Property's proximity to numerous residential properties and civilian populations and the ongoing risk of bullets escaping the Property to injure persons and property, is each an unlawful and abatable common law nuisance.

22. To invoke the Uniform Declaratory Judgments Act, chapter 7.24 RCW, a plaintiff must establish: "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial

determination of which will be final and conclusive. Coppernoll v. Reed, 155 Wn.2d 290, 300, 119 P.3d 318 (2005); citing To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), and Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

23. As applied to the relief sought by the County in this action, an actual, present, and existing dispute is presented for determination by the Court, based upon the County's claim that any non-conforming land use status for use of the Property as a shooting range has been voided by the substantial changes in use of the Property and unpermitted development of facilities thereupon.

24. The subject property is zoned "rural wooded", established in KCC Chapter 17.301. KCC 17.301.010 provides in part that this zoning designation is intended to encourage the preservation of forest uses, retain an area's rural character and conserve the natural resources while providing for some rural residential use, and to discourage activities and facilities that can be considered detrimental to the maintenance of timber production. With this stated purpose, the zoning tables are applied to determine if any uses made of the property are allowed.

25. KCC Chapter 17.381 governs allowed land uses, and KCC 17.381.010 identifies categories of uses: A given land use is either Permitted, Permitted upon granting of an administrative conditional use permit, Permitted upon granting of a hearing examiner conditional use permit, or Prohibited. Where a specific use is not called out in the applicable zoning table, the general rule is that the use is disallowed. KCC 17.381.030. The zoning table for the rural wooded zone, found at KCC 17.381.040(Table E), provides and the Court makes conclusions as the following uses:

a. Commercial / Business Uses – With exceptions not relevant here, all commercial uses are prohibited in rural wooded zone. None of the activities occurring at the subject property

appear to be listed as commercial/business uses identified in the table. The Court concludes that the Property has been used for commercial and/or business uses for-profit entities including the National Firearms Institute, Surgical Shooters Inc. and the Firearms Academy of Hawaii, starting in approximately 2002. Furthermore, "training" generally or "tactical weapons training" specifically are uses not listed in the zoning table for the rural wooded zone.

b. Recreational / Cultural Uses – the Club is best described as a private recreational facility, which is a use listed in this section of KCC 17.381.040 (Table E) for rural wooded. KCC 17.110.647 defines "recreational facility" as "a place designed and equipped for the conduct of sports and leisure-time activities. Examples include athletic fields, batting cages, amusement parks, picnic areas, campgrounds, swimming pools, driving ranges, skating rinks and similar uses. Public recreational facilities are those owned by a government entity." No other uses identified in the recreational/cultural uses section of the rural wooded zoning table are comparable.

The Court concludes that a private recreational facility does not include uses by a shooting range to host official training of law enforcement officers or military personnel, and that these uses are new or changed uses of the Property. The Court concludes that a private recreational facility use does not encompass the use of automatic weapons, use of rifles of calibers greater than common hunting rifles, or of professional level competitions.

26. The Court finds that the land uses identified here, other than use as a private recreational facility, are expansions of or changes to the nonconforming use at the Property as a shooting range under KCC Chapter 17.460 and Washington's common law regarding nonconforming land use. By operation of law, the nonconforming use of the Property is terminated.

27. The Club's unpermitted site development activities at the 300 meter range (2005) constituted an expansion of its use of the property in violation of KCC 17.455.060 because the use of the Property as a private recreational facility in the rural wooded zone requires a conditional use permit per KCC Chapter 17.381. Furthermore, the Club's failure to obtain site development activity permitting for grading and excavating each in excess of 150 cubic yards of soil as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

28. The Club's unpermitted installation in 2006 of the twin 24-inch culverts which cross the range and empty into the wetland constituted an expansion and change of its use of the Property, and the Club's failure to obtain SDAP permitting for its excavation, grading and filling work in excess of 150 cubic yards of soil as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

29. The Club's earth moving activities within the 150-foot buffer for Wetland B violated KCC 19.200.215.A.1, which requires a wetland delineation report, a wetland mitigation report and erosion and sedimentation control measures and/or a Title 12 site development activity permit for any new development. The Court concludes that these illegal uses terminate the nonconforming use of the Property as a shooting range.

30. The Club's unpermitted construction of earthen berms starting at Bay 4 and proceeding to the north adjacent to the wetland, constituted an expansion and change of its use of the Property, and the Club's failure to obtain SDAP permitting for excavation, grading and filling work in excess of 150 cubic yards of soil and for its construction of berms with slopes greater than five feet in height with a steepness ratio of greater than three to one (KCC

12.10.030(4)) as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range.

31. The Club's unpermitted cutting into the hillsides at Bays 6 and 7 and at the end of the rifle range, excavating in excess of 150 cubic yards of soil at each location and creating cut slopes far greater than five feet in height with a steepness ratio of greater than three to one as required under Kitsap County Code Chapter 12.10 constituted an illegal use of the land. This illegal use terminates the nonconforming use of the Property as a shooting range. The Court further concludes, based on the timing of maintenance work at each cut slope location post-dating the June 2009 deeding of the Property from the County to the Club, that SDAP permitting was required for work conducted after June 2009. These illegal uses of the land terminate the nonconforming use of the Property as a shooting range.

32. The nuisance conditions at the range further constitute illegal uses of the land, which terminate the nonconforming use of the Property as a shooting range. The Club's expansion of days and hours in which shooting, generally, and rapid-fire shooting in particular, takes place on a routine basis, and the advent of regularly scheduled practical shooting practices and competitions constitute a change in use that defies and exceeds the case law's definition or understanding of "intensification" in the area of nonconforming use. These changes act to terminate the nonconforming use of the Property as a shooting range.

33. The Club's conversion from a small-scale lightly used target shooting range in 1993 to a heavily used range with an enlarged rifle range and a 11-bay center for local and regional practical shooting competitions further constitutes a dramatic change in intensity of use (and of sound created thereby), thereby terminating the nonconforming use of the Property as a shooting range.

34. By operation of KCC Chapter 17.381, the KRRC or its successor owner or occupier of the Property must obtain a conditional use permit before resuming any use of the Property as a shooting range or private recreational facility.

35. KRRC has not proven that Ordinance 470-2011, amending KCC 17.460, is unconstitutional or suffered from any defect in service or notice. This Ordinance did not amend or alter the effect of KCC 17.455.060 (existing uses) which remains in full force and effect. KCC 17.455.060 provides that uses existing as of the adoption of Title 17 (Zoning) may be continued, but also prohibits their enlargement or expansion, unless approved by the hearing examiner pursuant to the Administrative Conditional Use Permit procedure of Title 17.420. Washington case law, as in Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998), also holds that uses that lawfully existed before the enactment of zoning ordinances may continue, but the existing use may not be significantly changed, altered, extended, or enlarged.

36. The 2009 Bargain and Sale Deed cannot be read as more than a contract transferring the Property from the County to the KRRC, with restrictive covenants binding only upon the Grantee KRRC. Paragraph 3 stands as an acknowledgement of eight geographic acres of land that were used for shooting range purposes. The language in the 2009 Bargain and Sale Deed does not prohibit Kitsap County from enforcing its ordinances or otherwise acting pursuant to the police powers and other authorities granted to it in Washington's Constitution and in the Revised Code of Washington.

37. The Court furthermore concludes that the Washington Open Public Meetings Act, chapter 42.30 RCW, limits the effect of the enacting resolution and accompanying proceedings to the property transfer itself. Absent specific agreement voted upon by the governing body

during a public meeting, the 2009 Deed cannot be interpreted as a settlement of potential disputes between the parties.

BASED UPON THE FOREGOING FINDINGS OF FACT and CONCLUSIONS OF LAW the Court hereby enters the following ORDERS:

III. ORDERS

IT HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff Kitsap County's requests for affirmative relief shall be granted as follows:

DECLARATORY JUDGMENT

1. Kitsap County's Motion pursuant to chapter 7.24 RCW for judgment declaring that the activities and expansion of uses at the Property has terminated the legal nonconforming use status of the Property as a shooting range by operation of KCC Chapter 17.460 and by operation of Washington common law regarding nonconforming uses, is hereby GRANTED.

2. The Property may not be used as a shooting range until such time as a County conditional use permit is issued to authorize resumption of use of the Property as a private recreational facility or other recognized use pursuant to KCC Chapter 17.381.

JUDGMENT

3. Defendant is in violation of Chapter 7.48 RCW and Chapter 17.530 Kitsap County Code;

4. The conditions on the Property and the violations committed by the Defendant constitute statutory and common law public nuisances; and

5. Representatives of the Kitsap County Department of Community Development are hereby authorized to inspect and continue monitoring the Property before, during and after any abatement action has commenced; and

INJUNCTION (EFFECTIVE IMMEDIATELY UNLESS NOTED TO CONTRARY)

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

7. A permanent, mandatory and prohibitive injunction is hereby issued further enjoining the following uses of the Property, which shall be effective immediately:

a. Use of fully automatic firearms, including but not limited to machine guns;

b. Use of rifles of greater than nominal .30 caliber;

c. Use of exploding targets and cannons; and

d. Use of the Property as an outdoor shooting range before the hour of 9 a.m. in the morning or after the hour of 7 p.m. in the evening.

WARRANT OF ABATEMENT

8. The Court hereby authorizes issuance of a WARRANT OF ABATEMENT, pursuant to RCW 7.48.260, the detail of which shall be determined by the Court at a later hearing before the undersigned.

9. The costs of abatement shall abide further order of the Court.

10. This Court retains jurisdiction to enforce this order by all lawful means including imposition of contempt sanctions and fines.

COSTS AND FEES

11. Pursuant to KCC 17.530.030, Defendant Kitsap Rifle and Revolver Club shall pay the costs of the County to prosecute this lawsuit, in an amount to be determined by later order of the Court.

DATED this 9 day of February, 2012.

JUDGE SUSAN K. SERKO

FILED
DEPT. 14
IN OPEN COURT
FEB 09 2012
Pierce County Clerk
By..... DEPUTY