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

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

Respondent,

v.

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

Appellant,

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.

Case No.: 43076-2-II

APPELLANT'S MOTION TO STRIKE RESPONDENT'S REVISED STATEMENT OF ADDITIONAL AUTHORITIES

///

///

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

I. IDENTITY OF MOVING PARTY

Appellant Kitsap Rifle and Revolver Club (the "Club").

II. RELIEF REQUESTED

1. Relief Requested: The Club requests that the Court strike, in its entirety, *Respondent Kitsap County's Revised Statement of Additional Authorities*, dated June 20, 2014 ("Revised Statement"). The Revised Statement should be stricken because it re-files citations previously stricken by the Court's June 18, 2014 order. It should also be stricken for presenting new legal theories in violation of RAP 10.8.

The Club further requests that the Court sanction Respondent Kitsap County (the "County") pursuant to RAP 18.9 by requiring the County to pay the Club's reasonable attorney fees incurred in moving to strike the County's two improper statements of additional authorities.

2. Alternative Relief Requested: If the revised statement is not stricken in its entirety, the Club requests the filing of the attached *Appellant's Response to Respondent's Statement of Additional Authorities*, dated May 9, 2014.

///

///

///

///

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

III. GROUNDS FOR RELIEF SOUGHT

A. The County's Revised Statement Should Be Stricken Because It Re-Files Stricken Authorities and Presents New Legal Theories in Violation of RAP 10.8.

On February 20, 2014, the County filed *Respondent Kitsap County's Statement of Additional Authorities* ("Original Statement"). The Club moved to strike that statement on the grounds that it presented argument and new issues. *Appellant's Mot. to Strike Respondent's Statement of Additional Authorities* at 6–8 (May 9, 2014). On June 18, 2014, the Court granted the Club's motion to strike, without qualification or explanation. *Order Granting Appellant's Mot. to Strike Respondent's Statement of Additional Authorities and Denying Appellant's Request to File Response Br.* (June 18, 2014) ("Order"). The Order did not authorize the County to correct, revise, or refile any portion of the statement.

On June 20, 2014, the County attempted to "re-submit" the stricken statement with revisions. Revised Statement at 1, fn. 1. The Revised Statement cites each and every legal authority that was stricken from the record as part of the Original Statement. *Compare* Revised Statement at 1–6, *with* Original Statement at 1–7. When a court strikes a statement of additional authorities without leave for it to be re-filed, it is self evident that a party may not disregard that order and re-file the same

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

list of authorities. The Revised Statement should be stricken because it is contrary to the Court's June 18, 2014 Order.

In addition, the Revised Statement should be stricken because it presents new legal theories in violation of RAP 10.8. *See Maziar v. Wash. State Dept. of Corr.*, 71068-1-I, 2014 WL 1202985, *8 fn. 11 (Wash. App. Mar. 24, 2014) (striking portion of statement of additional authorities containing new legal theories as a violation of RAP 10.8). The Club previously objected that the authorities in the Original Statement presented new legal theories in violation of RAP 10.8. The Revised Statement does nothing to address that objection. This provides additional grounds to strike the Revised Statement.

B. The County Should Receive Sanctions Pursuant to RAP 18.9 for Misusing Its Statements of Additional Authorities.

Because the County re-filed stricken authorities without leave of the Court and in violation of the June 18, 2014 Order, the Club respectfully requests that the Court sanction the County pursuant to RAP 18.9. *See Podiatry Ins. Co. of America v. Isham*, 65 Wn. App. 266, 828 P.2d 59 (1992) (requiring appellant to pay respondent's attorney fees for extra time spent to prepare motions addressing noncompliance); Karl Tegeland, 3 Wash. Prac., Rules Practice RAP 10.7 (7th ed.) ("[the] court

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

will ordinarily impose monetary sanctions under RAP 18.9(a) if an improper brief is submitted").

The Club has incurred significant attorney fees moving to strike the County's Original Statement and Revised Statement. The Club requests that the Court sanction the County's misuse of statements of additional authorities by requiring the County to pay the Club's attorney fees incurred in moving against the statements. Alternatively, the Club requests that the Court impose any sanction it deems appropriate under the circumstances. *See State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976) (discussing appellate court's inherent authority to fashion sanctions).

C. The County's Revised Statement Includes Nine Never-Before-Cited Cases That Raise New Legal Theories in Violation of RAP 10.8.

The Revised Statement presents nine additional cases the County has never before cited. *See* Revised Statement at 6–7, ¶¶ 10–15. Each of these cases was published before the County filed its response brief on the merits. The County has never explained why it did not include them in that extensive brief or in its Original Statement.

Although the County's reasons for citing these cases are not always clear, each of them appears to pertain to one or more new legal

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

theories, providing another reason to strike the Revised Statement. *See Maziar*, 2014 WL 1202985 at *8 fn. 11 (striking portion of statement of additional authorities containing new legal theories in violation of RAP 10.8). In addition, the cases should be stricken because they do not support the County's arguments in this appeal. They are either irrelevant or supportive of the Club, for the reasons discussed below.

- "10. *Lincoln Shiloh Assoc., Ltd v. Mukilteo Water Dist.* ["*Lincoln Shiloh*"], 45 Wn. App. 123, 131, 724 P.2d 1083 (1986) (discussing construction of findings of fact vis a vis the trial court's conclusions of law)." Revised Statement at 6.

In *Lincoln Shiloh* the court of appeals construed ambiguous findings of fact so as to support the trial court's conclusions of law. 45 Wn. App. at 131. The idea of an "ambiguous finding" is a new legal theory the County did not brief in its response on the merits. It also has no apparent relevance in this appeal, which involves primarily legal errors.

Lincoln Shiloh is distinguishable because it involved an appellant that lacked evidence that it had changed its position in reliance government statements. *Id.* In contrast, there is unrefuted evidence that the Club would have acted differently if it had known during the Deed negotiations that the County's chief enforcement officer believed there were unresolved code enforcement issues at the property and that, as the County now contends, the Deed was intended to convey title without

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

resolving any of those issues or confer any other benefits on the Club. *See Amended Brief of Appellant* (March 8, 2013) ("Club's Opening Br.") at 64–65 (citing testimony of Club attorney Regina Taylor (VT 2893:13–2894:4) and executive officer Marcus Carter (VT 2092:3–20, 2090:4–23) regarding Club's reliance on County's representations).

- "11. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 267 P.3d 435 (2011) (citing *White v. Wilhelm*, 34 Wn. App. 763, 771, 665 P.2d 407 (1983) (discussing threshold for a restrictive covenant to be considered "ambiguous")." Revised Statement at 6.

The County cites *Jensen* and *White* to suggest special rules apply in determining whether a covenant is ambiguous. This is a new legal theory the County did not brief in its response on the merits.

Jensen holds that real estate covenants should be interpreted according to their manifest intent, the circumstances surrounding their formation are relevant in discerning that intent regardless of whether they are ambiguous, and courts should "strive" to effectuate the "purposes intended by the drafters of those covenants." 165 Wash. App. at 106. These rules support the conclusion that the 2009 Deed, with its improvement clause drafted by the Club's attorney and accepted by the County, was intended to benefit the Club and secure its right to continue operating as it then existed. *See* Club's Opening Br. at 47–49 (analyzing improvement clause and County resolution approving Deed) (citing VT

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

2881:25–2882:2; Ex. 400 at 1–2; Ex. 477); Club's Opening Br. at 53–54 (analyzing communications from County officials surrounding execution of the Deed) (citing Exs. 293, 330, 332, 336, 293, 405).

- "12. *Hanson Indus., Inc. v. Cnty. of Spokane*, 114 Wn. App. 523, 531, 58 P.3d 910 (2002) (discussing construction of ambiguous deed provision as to drafter)." Revised Statement at 6.

The County cites *Hanson Industries* to suggest the improvements clause in the Deed is ambiguous and therefore must be construed against the Club as drafter. This is a new legal theory the County omitted from its response brief on the merits.

Moreover, the rule of interpretation against the drafter only applies if there is ambiguity that cannot be resolved through extrinsic evidence and other canons of construction. *See Washington Prof'l Real Estate LLC v. Young*, 163 Wn. App. 800, 818, 260 P.3d 991 (2011) ("a reviewing court should not resort to the rule of interpretation that construes an agreement against its drafter unless the intent of the parties cannot otherwise be determined").

The Deed's improvements clause unambiguously grants the Club the right to "upgrade or improve" its facilities within its historical eight acres so long as they are "consistent with management practices for a modern shooting range." CP 4089 (¶ 3) (2009 Deed); *see also*, Club's Opening Br. at 42–43 (discussing improvement clause). If there is any

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

ambiguity in the clause, the extrinsic evidence in the record uniformly supports the Club's interpretation and precludes application of the rule of interpretation against the drafter. Still further, whether any deed provision should be construed against the drafter is in doubt as a result of the 2011 ruling in *Jensen* that courts should effectuate the intent of the drafter when construing a real estate covenant. *Jensen*, 165 Wn. App. at 106.

- "13. *Tiegs v. Boise Cascade Corp.*, 83 Wn. App. 411, 418, 922 P.2d 115 (1996) *affirmed*, 135 Wn.2d 1 (1998) (quoting *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982)) (discussing "'*the issue of the reasonableness of the defendant's conduct* and the weighing of the relative interests of the plaintiff and defendant'" for nuisance per se analysis (emphasis in the *Tiegs* opinion))." Revised Statement at 6.

The County cites *Tiegs* to suggest the trial court's injunctions must be affirmed because they prohibit activities the legislature has deemed nuisances per se. This new theory differs from the County's argument that the injunctions must be affirmed based on the substantial evidence and abuse of discretion standards. *See Brief of Respondent Kitsap County* (July 1, 2013) at 45–48.

Tiegs held that when a party violates a statute in a way that interferes with a landowner's use and enjoyment of property, there is a private nuisance per se and the reasonableness of the conduct and relative interests of the parties are irrelevant because the legislature has "already struck the balance in favor of the innocent party." 83 Wn. App. at 418.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Tiegs, however, does not hold that a court can issue an excessive injunction that prohibits lawful, reasonable activities, which was one of the trial court's errors in this case. *Tiegs* says nothing about the scope of an injunction because it was a case for damages in which no injunction was ever sought or issued.

To the extent *Tiegs* applies here at all, it shows that the Club is innocent of creating a sound nuisance between 8 am and 10 pm because the State legislature authorizes sound from shooting ranges during those hours without limit, and there can be no contrary determination of the reasonableness of that conduct or the balance of interests. *See* Club's Opening Br. at 16–18 (citing RCW 7.48.120; RCW 7.48.160; KCC 17.110.515; *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 P. 976 (1922)).

- "14. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424 (1972) (J. Stewart) (discussing the right to enjoy property as a fundamental civil right)." Revised Statement at 7.

It is difficult to discern why the County cites *Lynch*, which appears to have no relation to any argument or legal theory presented by the County in its response on the merits. *Lynch* held the property rights possessed by owners of savings and checking accounts are protected civil rights under 42 U.S.C. § 1983. 405 U.S. at 552. *Lynch* involved no

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

nonconforming use issues, nuisance claims, alleged violations of local land use code, contract with the government, defense of estoppel, conflict among landowners in a community, or issues regarding the scope of an injunction. It has no apparent relevance in this appeal.

- "15. *Johnson v. Cont'l West*, 99 Wn.2d 555, 560–61, 663 P.2d 482 (1983) (discussing reliance on affidavits or comments of individual legislators to establish legislative intent) (citing *Woodson v. State*, 95 Wn.2d 257, 623 P.2d 683 (1980)). Revised Statement at 7.

The County presumably intends *Johnson* and *Woodson* to discourage the Court from placing any weight in the written statements of Commissioner Brown regarding the intent of the Deed, which became part of the County's official public record leading up to its execution. *See* Club's Opening Br. at 53 (citing Commissioner Brown's March 18, 2009 letter (Ex. 293) stating, "the Club and its improvements were not at odds with the County's long-term interest in the property"). The suggestion that cases involving statutory construction apply to interpretation of a government contract such as the Deed is a novel theory the County has never before presented.

Johnson and *Woodson* are distinguishable because they involve interpretation of legislation, whereas this case involves interpretation of a contract. *See Johnson*, 99 Wn.2d at 560 (construing tort reform statute); *Woodson*, 95 Wn.2d at 264 (construing osteopath licensing statute).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Moreover, if *Johnson* and *Woodson* were applicable, they would support consideration of the extrinsic evidence cited by the Club to prove the intent of the Deed, such as the Resolution and the written statements made by Commissioner Brown for inclusion in the record. *See Johnson*, 99 Wn.2d at 560 (determining legislative intent with reference to statements in legislative record made by sponsor of tort reform bill).

Like the statements of the legislative sponsor in *Johnson*, the statements of Commissioner Brown are highly relevant to the intent of the Deed because he helped bring the Deed before the Commissioners and signed it. Likewise, the Resolution is of the utmost importance because it expresses the County's intentions in signing the Deed and the Commissioners adopted the Resolution. *See* Club's Opening Br. at 48–49 (citing *Baker v. Lake City Sewer Dist.*, 30 Wn.2d 510, 518, 191 P.2d 844 (1948) ("[a resolution] is simply an expression of the opinion or mind of the official body concerning some particular item of business")). This extrinsic evidence is highly relevant in determining the manifest intent and legal effect of the Deed.

///

///

///

///

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

For the reasons discussed above, the additional cases introduced for the first time in the County's Revised Statement pertain to new legal theories and do not support the County's arguments in this appeal. They are all distinguishable or support the Club's appeal. Therefore, they should be stricken along with the rest of the Revised Statement, as a violation of RAP 10.8. *See Maziar*, 2014 WL 1202985 at *8 fn. 11 (striking portion of statement containing new legal theories).

D. The Club Requests the Filing of Its Response Brief If the County's Revised Statement Is Not Stricken in Its Entirety.

If the Court chooses not to strike the revised statement in its entirety, it should order the filing of the attached *Appellant's Response to Respondent's Statement of Additional Authorities* (May 9, 2014). This is the same response brief that the Club included with its motion to strike the County's Original Statement so as to reduce the prejudice caused by that statement if it was not ordered stricken. Because the Court chose to strike the Original Statement, it did not order the filing of the Club's response.

Because the County's Revised Statement raises the same issues of prejudice to the Club, the Club again offers its response brief to ameliorate that prejudice. If the Court declines to strike any portion of the Revised Statement, the Club's response brief should be filed. *See Rye v. Seattle Times Co.*, 37 Wn. App. 45, 55–56, 56 n. 2, 678 P.2d 1282 (1984)

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

(holding party violated RAP 10.8 by filing 10-page statement of "additional authorities and new arguments," but noting the other party was, "in fairness . . . given the right to file a response"); *Plum Creek Timber Co., L.P. v. Wash. State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 587 fn. 2, 993 P.2d 287 (2000) (declining to strike supplemental brief containing improper argument because the other party had filed a substantive response, which removed any "disadvantage" created by the statement of additional authorities).

///

///

///

///

///

///

///

///

///

///

///

///

///

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

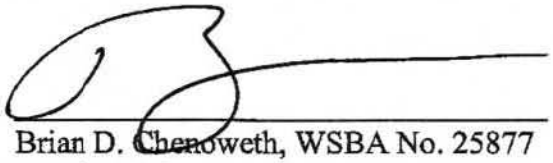
IV. CONCLUSION

For the reasons stated above, the Club respectfully requests that the Court strike the County's Revised Statement in its entirety. The Club further requests the imposition of an appropriate sanction on the County for misusing statements of additional authorities and violating the Court's June 18, 2014 Order, such as by ordering the County to pay the Club's reasonable attorney fees related to its motions to strike the County's two statements of additional authorities.

Alternatively, if the Court declines to strike any portion of the County's revised statement, the Club requests the filing of the attached response brief.

DATED: June 25, 2014.

CHENOWETH LAW GROUP, P.C



Brian D. Chenoweth, WSBA No. 25877
Brooks M. Foster, OR Bar No. 042873
(pro hac vice)
510 SW Fifth Ave., Fifth Floor
Portland, OR 97204
Phone: (503) 221-7958
Of Attorneys for Appellant

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

CERTIFICATE OF FILING AND SERVICE

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

On the date stated below, copies of *APPELLANT'S MOTION TO STRIKE RESPONDENT'S REVISED STATEMENT OF ADDITIONAL AUTHORITIES*, dated June 25, 2014, and *APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF ADDITIONAL AUTHORITIES*, dated May 9, 2014, were electronically filed with Division II of the Washington Court of Appeals and served upon the following individuals by e-mail and U.S. Mail, postage prepaid, at Portland, Oregon:

Neil R. Wachter
Jennine Christensen
Kitsap County Prosecutor's Office
Civil Division
614 Division St., MS-35A
Port Orchard, WA 98366
(Of Attorneys for Respondent Kitsap County)

C.D. Michael
Michael & Associates, PC
180 E. Ocean Blvd., Ste. 200
Long Beach, CA 90802
(Of Attorneys for National Rifle Association)

David S. Mann
Gendler & Mann, LLP
1424 Fourth Ave., Ste. 715
Seattle, WA 98101-2278
(Of Attorneys for CK Safe & Quiet, LLC)

DATED: June 25, 2014.

CHENOWETH LAW GROUP, PC

J. Patrick Graves, Jr.
Chenoweth Law Group, P.C.
510 SW Fifth Ave., Fifth Floor
Portland, OR 97204
(503) 221-7958

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

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

Respondent,

v.

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

Appellant,

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.

Case No.: 43076-2-II

APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF ADDITIONAL AUTHORITIES

///

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Appellant Kitsap Rifle and Revolver Club (the "Club") presents the following response to *Respondent Kitsap County's Statement of Additional Authorities* (the "statement"). The County's statement presents new authorities and legal arguments omitted from its prior briefing. The Club has moved to strike the County's statement. Alternatively, the Club requested an order for this response to be filed to address the substance of the County's statement. The statement uses nine sub-headings to present additional authorities and arguments. The Club responds to each sub-heading by number, below.

1. **"Failure to assign specific error to a factual finding is not technicality."**

Response: **The Four Findings of Fact Challenged in the Club's Opening Brief Are Reversible Based on the Club's Arguments and Citations to the Record.**

The County's first sub-heading argues an appellant's "[f]ailure to assign specific error to a factual finding is not a technicality."[1] The implication is that this Court cannot reverse any of the four findings of fact challenged in the Club's opening brief because the Club did not list them in its assignments of error. The County first raised this argument in its response brief on the merits.[2] In reply, the Club showed the omission of the four findings from its assignments of error was immaterial because

[1] *Respondent Kitsap County's Statement of Additional Authorities* ("Statement") at 1.
[2] *See Brief of Respondent Kitsap County* ("County's Resp.") at 41–43.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

the argument section of the Club's opening brief specifically challenged each of them while presenting arguments and citations to the record to support their reversal.[3] The Club's reply cited multiple cases to support this conclusion.[4]

The County now cites two additional cases on this issue, *Matter of Estate of Lint* ("*Lint*"), 135 Wn.2d 518, 532, 957 P.2d 755 (1998), and *In re Estate of Palmer* ("*Palmer*"), 145 Wn. App. 249, 265, 187 P.3d 758 (2008). In both cases, the court of appeals reviewed findings where the appellant presented specific arguments or citations to the record to support their reversal.[5] The court only declined to review a finding of fact where the opening brief presented no argument or evidence on the issue.

Lint and *Palmer* are consistent with the cases cited by the Club on this issue. They support the conclusion that the four findings of fact expressly challenged in the Club's opening brief are subject to review because the brief contains argument and citations to the record proving

---

[3] *See Amended Reply Brief of Appellant* ("Club's Reply") at 6–8.

[4] *Id.* (citing *In re Disciplinary Proceeding Against Conteh*, 175 Wn.2d 134, 144, 284 P.3d 724 (2012) (holding appellant did not waive right to challenge factual findings because briefing clearly identified them and explained arguments for reversal); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709–10, 592 P.2d 631 (1979) (same); *State v. Armenta*, 134 Wn.2d 1, 14 n. 9, 948 P.2d 1280 (1997) (reviewing trial court's failure to make a particular finding of fact because the issue was presented in appellant's argument even though it was not included in assignments of error)).

[5] *Matter of Estate of Lint*, 135 Wn.2d at 532; *In re Estate of Palmer*, 145 Wn. App. at 265.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

each finding is erroneous.[6] The Club did not waive its challenge to Findings of Fact 23, 25, 26, or 57.

2. "Appeals briefs may not incorporate trial court briefing by reference and issues raised therein are waived."

Response: This Court Already Rejected the County's Argument That the Club's Citations to Trial Briefing Were Improper.

The Court recently denied the County's motion to strike portions of the Club's reply brief.[7] There, the County argued the Club's reply brief improperly cited some of the Club's briefing to the trial court.[8] The County's statement of additional authorities cites four cases on this issue, which were all previously cited in the County's motion to strike.[9] Therefore, the cases are not "additional" authorities at all.

Moreover, the Court has already rejected the County's argument to which these cases relate. As the Club previously explained, the cases are all distinguishable because the Club did not incorporate trial briefing into its reply brief or cite the trial briefing to circumvent page limits. The Club

---

[6] *See Amended Brief of Appellant* ("Club's Opening Br.") at 53 (assigning error to FOFs 23, 25, 26); *id.* at 52 (assigning error to FOF 57).

[7] *See Order Denying Respondent's Motion to Strike Portions of Reply Brief* (April 22, 2014).

[8] *See Respondent Kitsap County's Motion to Strike Portions of Reply Brief* ("County's Mot. to Strike") at 16–17.

[9] *Compare* Statement at 2 *with* County's Mot. to Strike at 16–17 (citing *In re Guardianship of Lamb*, 173 Wn.2d 173, 183, n. 8, 265 P.3d 876 (2011); *US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 111–12, 949 P.2d 1337 (1997); *Multicare v. State, Dep't of Soc. & Health Servs.*, 173 Wn. App. 289, 299, 294 P.3d 768 (2013); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 499–500, 176 P.3d 510 (2008)).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

cited the trial briefs for procedural facts in response to the County's procedural waiver argument. There is no reason to revisit the issue.

3. "Findings in one's favor are implicit credibility findings by the trial court."

Response: The Findings of Fact on Appeal Are Disproven by Documentary Evidence Regardless of Whether the Findings Imply any Credibility Determinations.

The County cites four cases related to the argument of amicus CK Safe & Quiet, LLC ("CKSQ") that the trial court made implied credibility findings in favor of the County.[10] CKSQ suggests these implied credibility findings prevent reversal of any of the trial court's findings of fact. The Club has already answered CKSQ's amicus brief by showing the error in CKSQ's attempt to skew the standard of review with concepts of "implied credibility."[11]

As the Club explained, most of the issues in this appeal are questions of law subject to de novo review, to which concepts of "credibility" do not apply.[12] The Club further explained that the four findings of fact challenged in this appeal are disproven by documentary

---

[10] *See* Statement at 2–3; *Brief of Amicus Curiae CK Safe & Quiet, LLC* ("CKSQ Br.") at 4.

[11] *See Appellant's Answer to Brief of Amicus Curiae CK Safe & Quiet, LLC* ("Club's Answer to CKSQ Amicus Brief") at 3–4.

[12] *See* Club's Reply at 9–10.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

evidence that is not subject to any type of credibility determination.[13] The cases cited by the County do not change these conclusions.

The four challenged findings of fact are reviewed for substantial evidence.[14] Substantial evidence is the amount of evidence "sufficient to persuade a rational fair-minded person the premise is true."[15] In an appeal involving substantial evidence review, each party has an opportunity to show why substantial evidence does or does not exist.[16] The substantial evidence rule is more deferential to certain types of evidence than others.[17] For example, documents have no "demeanor" so their meaning is just as easily determined by the court of appeals as by the trial court.[18] Concepts

---

[13] *See e.g.*, Club's Opening Br. at 48–49 (citing Ex. 477) (discussing how County resolution approving the Deed supports estoppel); Club's Opening Br. at 52–53 (citing Exs. 330, 332, 336, 293, and 405 regarding County's approval of Club).

[14] *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d 873, 879 (2003) ("[f]indings of fact are reviewed under a substantial evidence standard").

[15] *Id.*; *see also, Raven v. Dept. of Social and Health Svcs.*, 177 Wn.2d 804, 809, 829, 306 P.3d 920 (2013) (reversing finding of neglect for lack of substantial evidence); *Miles v. Miles*, 128 Wn. App. 64, 71, 114 P.3d 671 (2005) (reversing finding for lack of substantial evidence and declining to infer credibility determination where none was expressed by factfinder).

[16] *Sunnyside Valley Irrigation Dist.*, 149 Wn.2d at 880; *see also, Sommer v. Dept. of Soc. & Health Servs.*, 104 Wn. App. 160, 175, 15 P.3d 664 (2001) (reversing and remanding where appellant showed evidence of trial court's error and respondent failed to show contrary evidence).

[17] *Dolan v. King Cnty.*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011) ("[a]ppellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required").

[18] *Id.*; *see also*, *Carlson v. City of Bellevue*, 73 Wn.2d 41, 48, 435 P.2d 957 (1968) (applying de novo review where evidence referenced on appeal consisted of objective, documentary evidence); *Anderson v. Island Cnty.*, 81 Wn.2d 312, 318, 501 P.2d 594 (1972) (applying de novo review and reversing trial court when record on review consisted of public hearing testimony and documentary evidence); *Smith v. Skagit Cnty.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969) *holding modified State v. Post*, 118 Wn.2d 596,

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

of credibility and deference do not always apply during substantial evidence review, and they certainly do not substitute for it.

The Club's opening brief expressly challenged findings of fact 23, 25, 26, and 57.[19] These findings should receive no deference because documentary evidence disproves them. The Club showed in its opening brief that findings of fact 23, 25, and 26 are disproven by documents regarding the negotiations and public process leading up to the 2009 Deed. Those documents prove the County communicated to the Club its intent for the Deed to clarify the Club's land use status, settle any potential claims about the Club's facilities and operations, and secure the Club's control over its facility.[20] Similarly, finding of fact 57 is contradicted by an August 2006 email to a County official that notified the County of the Club's intent to replace "culvert pipes" at its facility.[21]

This Court stands in the same position as the trial court in looking at this documentary evidence. The documents have no demeanor and are

---

826 P.2d 172 (1992) (observing de novo review is appropriate where the "court of review stands in the same position as the trial court in looking at the facts of the case").

[19] *See* Club's Opening Br. at 52–53.

[20] *Id.* at 53 (assigning error to FOFs 23, 25, and 57). The Club's opening brief cites ample documentary evidence that plainly shows the County negotiated and intended the Deed to resolve the Club's land use status. *See* Ex. 477 (resolution approving the Deed); Ex. 552 (adopting resolution); Ex. 555 (audio recording of May 9, 2009 BOCC meeting); Exs. 330, 332, 336, 293, 405 (letters drafted by County officials regarding intent of Deed). The County has not shown how these pieces of evidence could be reasonably interpreted as anything other than expressions of intent in support of the Club's interpretation of the Deed. Of particular interest is the resolution (Ex. 477), which states the Club should maintain control over its property.

[21] *See* Club's Opening Br. at 52 (citing Ex. 416 at 2–3). The County has never argued or submitted evidence suggesting it did not receive the email.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: briane@northwestlaw.com

not subject to credibility determinations of any type. They disprove findings of fact 23, 25, 26, and 57, which should be reversed.[22] The County's case law regarding implied credibility determinations has no bearing on this analysis.

4. "Trial court is best situated to weigh evidence and assess witness credibility."

Response: Such Generalities Are No Substitute for the De Novo, Substantial Evidence, and Abuse of Discretion Standards of Review to Be Applied in This Appeal.

Under sub-heading 4, the County cites three cases to support its argument that the trial court is "best situated to weigh evidence and assess witness credibility."[23] The County fails to mention that one of these cases was abrogated in 1998.[24] Another case was already cited for the same purpose in the County's response brief on the merits.[25] In all three cases, witness credibility was critical to the issues on appeal.[26]

---

[22] *Smith*, 75 Wn.2d at 718.

[23] *See* Statement at 3 (citing *State v. McCrorey*, 70 Wn. App. 103, 106, 851 P.2d 1234 (1993) *abrogated by State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998); *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831 (1973); *State v. Cyrus*, 66 Wn. App. 502, 506, 832 P.2d 142 (1992), *rev. den.*, 120 Wn.2d 1031 (1993)).

[24] *State v. McCrorey*, 70 Wn. App. at 106 *abrogated by State v. Head*, 136 Wn.2d at 619.

[25] *See Brief of Respondent Kitsap County* at 77 (citing *In re Sego*, 82 Wn.2d 736, 738, 513 P.2d 831, 833 (1973)).

[26] *See In re Sego*, 82 Wn.2d at 738 (holding credibility and moral character of appellant were critical to issue of whether appellant should be permanently deprived of parenting rights after being convicted of murder); *State v. McCrorey*, 70 Wn. App. at 106 (holding credibility was material to issue of whether trial court erred by accepting police officer's recollection of arrest); *State v. Cyrus*, 66 Wn. App. at 506 (same).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

This case is different because it does not require this Court to determine whether one witness or another was telling the truth. Instead, it requires the Court to correct the trial court's numerous legal errors and reverse four findings of fact disproven by documentary evidence. These issues cannot be resolved by generalities regarding the weighing of evidence and witness demeanor.

As shown above, the four findings of fact at issue in this appeal are disproven by documentary evidence to which concepts of credibility and deference do not apply. If those documents could be explained away using other evidence, it is incumbent on the County to prove that with citations to the record. Otherwise, there is no substantial evidence to support the challenged findings, and they must be reversed.

Likewise, deference and credibility have no bearing on de novo review of the trial court's numerous legal errors. Any conclusion of law resulting from misapplication of the law must be reversed.[28] The same is true for the trial court's declaratory judgment and injunction remedies, which must be reversed for abuse of discretion if they are not supported by the correct legal standards correctly applied.[30] The Club has shown

///

---

[28] *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d at 880 ("[q]uestions of law and conclusions of law are reviewed de novo").

[30] *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: briane@northwestlaw.com

numerous legal errors in the trial court's conclusions of law and remedies.[31] Therefore, they must be reversed.

5. "The appellate courts do not weigh expert testimony."

Response: Reversing the Trial Court's Erroneous Legal Conclusion That the Club Is a Safety Nuisance Does Not Require the Weighing of Expert Testimony.

The County cites *Johnston-Forbes v. Matsunaga*[32] ("*Johnston*") and *In re Marriage of Sedlock* ("*Sedlock*")[33] in support of the argument that "appellate courts do not weigh expert testimony."[34] This argument relates to trial court's legal conclusion that the Club is a safety nuisance. The Club agrees appellate courts should not act like trial courts by weighing competing expert testimony. Instead, the Club is asking the Court to reverse the trial court's legal conclusion that the Club is a safety nuisance because the trial court correctly found harm from a bullet leaving the Club is only possible, not likely or probable.[37] As a matter of law, a

---

[31] *See generally,* Club's Reply at 60–69.

[32] 177 Wn. App. 402, 413, 311 P.3d 1260 (2013) *review granted,* 179 Wn.2d 1022, 320 P.3d 718 (2014) (stating in dicta "Washington appellate courts generally do not weigh expert testimony" and affirming trial court's denial of respondent's motion to exclude expert testimony).

[33] 69 Wn. App. 484, 491–92, 849 P.2d 1243 (1993) (affirming trial court's assessment of conflicting expert testimony regarding value of damages where trial court adopted median figure within range of conflicting testimony).

[34] Statement at 3–4.

[37] *See* CP 4070 (FOF 68) (finding bullets from Club "will possibly strike persons or damage property in the future"). This finding and the absence of an express finding of a probability or likelihood of harm from the Club mean the trial court found no such risk. *See Fulle v. Boulevard Excavating, Inc.*, 20 Wash. App. 741, 744, 582 P.2d 566 (1978) (denying respondent's cross appeal because "[i]n absence of a finding by the trial court

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

"reasonable and probable" risk of harm is required to prove a public safety nuisance.[38] Reversing the trial court's legal conclusion requires no reconsideration of its findings; it only requires application of the correct legal standard to those findings.[39]

The County never cross-appealed the trial court's finding of a mere possibility of harm from the Club. Nevertheless, the County asks this Court to find the Club creates a likelihood of harm from an errant bullet based on expert testimony presented at trial. The Club discussed this testimony in its reply brief to show it was disputed and that it was reasonable for the trial court to disagree with that testimony when it correctly found the Club creates only a possibility of harm.

There is no finding or evidence that a bullet from the Club ever harmed anyone in the community or is likely to do so. The finding of a mere possibility of harm does not prove a public safety nuisance. The Court should not accept the County's invitation to re-weigh the expert evidence and modify the trial court's finding of a mere possibility of harm, which is not at issue in this appeal. The trial court's conclusion that the

///

---

upon these material facts, we must imply a finding against the party having the burden of proof").

[38] *See* Club's Opening Br. at 23–25 (citing *Hite v. Cashmere Cemetery Assn.*, 158 Wash. 421, 424, 290 P. 1008 (1930)).

[39] *Id.*; *see also*, Club's Reply at 24–31 (discussing trial court's legal errors and analyzing expert testimony cited by the County).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Club is a public safety nuisance should be reversed because an activity that creates a mere possibility of harm is not a public safety nuisance.

6. "The superior court's injunctive powers derive from the state constitution and may not be legislatively abridged."

Response: Legislation Authorizing Sound from the Club Without Limit Between 8 am and 10 pm Abolishes or Prevents a Cause of Action; It Does Not Abridge the Court's Injunctive Powers.

In sub-heading 6, the County argues, "the superior court's injunctive powers derive from the state constitution and may not be legislatively diminished."[42] The County then cites dicta from several pre-1960 cases in support of this argument.[43] The argument misses the mark because the Club has never advocated for state legislation to diminish the trial court's injunctive powers. The cases cited by the County are, therefore, distinguishable.

The Club's argument is that state legislation defines what constitutes a public nuisance.[44] Because sounds from shooting ranges are exempt under state and local regulations, sounds from the Club are

---

[42] Statement at 4.

[43] *Id.* (citing *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415, 63 P.2d 397 (1936); *United Steelworkers of Am. v. United States*, 361 U.S. 39, 60, 80 S.Ct. 177, 4 L.Ed.2d 169 (1959); *McInnes v. Kennell*, 47 Wn.2d 29, 38, 286 P.2d 713, 718 (1955)).

[44] *See* Club's Opening Br. at 16–18 (citing RCW 7.48.120; RCW 7.48.160; KCC 17.110.515; *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 P. 976 (1922) (defining "nuisance" to mean "the unlawful doing of an act"); *Judd*, 49 Wn.2d at 622); *see also*, Club's Reply at 17–18 (citing same).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

authorized by statute.[45] This provides grounds to reverse the trial court's legal conclusion that sound from the Club is a public nuisance. Because sound from the Club is not a public nuisance, it provides no grounds to terminate the Club's nonconforming use right or enjoin any activity at the Club. This argument does not rely on any legislation that abridges the injunctive power of a trial court. State laws defining public nuisance do not prevent a court from issuing an appropriately tailored injunction if a public nuisance is proven.

One of the County's additional cases firmly establishes that the legislature can abolish a cause of action, as the State and local legislatures have done here, without abridging the court's injunctive power. As explained in *Blanchard v. Golden Age Brewing Co.*,

> "there is a vital distinction between legislative abolition of causes of action and a legislative interference with the judicial processes respecting an *existing* cause of action. . . . The judicial power is not affected merely because litigation decreases or a certain type of litigation is abolished."[47]

---

[45] State and local regulations exempt shooting ranges from sound limitations between 7 am and 10 pm. *See* WAC 173-60-040, WAC 173-60-050; KCC 10.28.040; KCC 10.28.050(2). An activity that is done or maintained under the express authority of a statute cannot be deemed a nuisance. RCW 7.48.160; *see also, Judd v. Bernard*, 49 Wn.2d 619, 622, 304 P.2d 1046 (1956) (declining to find nuisance because doing so would "usurp legislative and lawfully delegated administrative powers of the state").

[47] 188 Wn. at 419 (emphasis in original).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Accordingly, the legislature can abolish a public nuisance action with respect to certain types of activities without infringing on the injunctive power of the court. The County overlooks this vital distinction.

Washington defines a public nuisance to include only "unlawful" activity.[48] State and local legislatures expressly authorize shooting ranges to create sound without limit between the hours of 8 am and 10 pm.[49] Therefore, sound from the Club cannot be a public nuisance during those hours, and the trial court erred in concluding otherwise. Sound from the Club between 8 am and 10 pm provides no grounds to enjoin any of its activities.

7. **"RCW 64.06.013, 64.06.010(4)[.]"**

Response: Washington's Real Estate Disclosure Form Statutes Do Not Excuse the County's Failure to Disclose Known Material Facts.

The County's seventh sub-section suggests two statutes exempting commercial sellers from providing real estate disclosure forms under certain circumstances excuse the County's failure to disclose to the Club the adverse allegations of its chief enforcement officer prior to execution of the 2009 Deed.[50] The common law duty to disclose known material facts in a real estate transaction, however, is independent of any statutory

---

[48] RCW 7.48.120.
[49] WAC 173-60-040, WAC 173-60-050; KCC 10.28.040; KCC 10.28.050(2).
[50] Statement at 5 (citing RCW 64.06.013, RCW 64.06.010(4)).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

duty to provide a disclosure form.[51] The County's concealment of its chief enforcement officer's allegations strongly supports the Club's affirmative defense of estoppel. Arguments about whether the County was required to provide a disclosure form are beside the point.

The County should be estopped from repudiating its words and actions that induced the Club to enter into the 2009 Deed. These actions include the County's enactment of the Resolution approving the Deed, which provides: "the County finds that it is in the public interest . . . to provide that [the Club] continue to operate with full control over the property."[53] They also include the following statements made by Kitsap County Commissioner Josh Brown, who signed the Deed:

- [F]or over 80 years, the [Club] has provided a much needed amenity in Central Kitsap . . . [the Club] and its improvements [are] not at odds with the County's long-term interest in the property, and would not jeopardize future planning efforts."[54]
- "[The County] isn't trying to shut down [the Club]. It is a great public amenit[y]."[55]

---

[51] *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 391, 241 P.3d 1256 (2010) ("[i]ndependent of the obligations in a lease or a residential real estate sales contract, the vendor or lessor has an affirmative duty to disclose material facts, of which the . . . seller has knowledge, and which are "not readily observable upon reasonable inspection by the purchaser"); *Jackowski v. Borchelt*, 174 Wn.2d 720, 739, 278 P.3d 1100 (2012) (discussing the "independent duty" doctrine and allowing appellant to maintain fraud claim regardless of whether contract was formed).

[53] The Resolution provides, "the County finds that it is in the public interest . . . to provide that [the Club] continue to operate with full control over the property." Ex. 477. *See* Club's Opening Br. at ?? (discussing Resolution).

[54] Ex. 293 (Commissioner Brown's March 18, 2009 letter included as part of the "public record").

[55] Ex. 330 (Commissioner Brown's March 9, 2009 email to Club member).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

- "[The County] should honor the terms of the lease currently in place . . . outside the change in title, [the Club] will notice no substantive difference."[56]
- "The transfer of land to [the Club] is just for the footprint they have leased over with DNR for the past 83 years."[57]
- "The [Club]'s lease is ancillary to the exchange and has no bearing on the Club's status. The details of the exchange constitute a change in landlord only . . . [The Club] brings a new dimension to the [County] while providing the community with the much needed shooting sports opportunities as they have for 80 years."[58]

In addition to these statements, the language of the Deed itself and communications from the Club's attorney to the County show that the County led the Club to believe the Deed was intended to secure the Club's ongoing existence, control over its property, and right to improve and maintain the property consistent with standards for modern shooting ranges.[59]

Around the same time, prior to the execution of the Deed, the County's chief enforcement officer, Steve Mount, informed the County's employee charged with negotiating the Deed, Matt Keough, that there

---

[56] Ex. 336. (Commissioner Brown's March 17, 2009 email to Club member).
[57] Ex. 405 (Commissioner Brown's May 15, 2009 email to constituent).
[58] Ex. 332 (Commissioner Brown's March 16, 2009 email to Club member).
[59] An email sent by the Club's volunteer attorney to County officials confirmed that the County intended to "partner" with the Club and approve its land use status. Ex. 550. The Deed includes no provision suggesting that the parties believed the Club to be a nuisance or in violation of the land use code. Rather, the Deed acknowledges the Club's right to lawfully improve its existing use. Paragraph three of the Deed contains an improvement clause granting the Club the right to "upgrade or improve" its facilities within its historical eight acres so long as they are "consistent with management practices for a modern shooting range." CP 4089 (¶ 3). The Club's attorney drafted this clause to ensure the Club could lawfully improve its facility. VT 2881:25–2882:2; Ex. 400 at 1–2. The County agreed to include her requested language in the Deed

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

were "unresolved" "zoning enforcement issues" regarding clearing of the property and expansion of Club activities, and that he was concerned about the Club's hours of operation, noise, and safety.[60] Mount also held a meeting with the County Commissioners regarding the Club's code compliance status.[61] The Club was never informed of any of these facts.[62]

In sum, the Club relied on the County's numerous approvals, statements of intent, and other inducements when it negotiated and executed the 2009 Deed. Those inducements were contrary to the position of the County's chief enforcement officer regarding his unresolved code enforcement issues with the Club. He communicated that position to the County's Deed negotiating agent and Commissioners, but the County kept them secret from the Club until after the Deed was executed. Under these circumstances, it would create manifest injustice to allow the County to repudiate its inducements and proceed with its case against the Club. The trial court erred in failing to grant the Club's affirmative defense of estoppel, regardless of whether the County was required to give the Club a statutory disclosure form.

///

///

---

[60] VT 2827:3–9, 2828: 19–23, 2829:19–2831:3.
[61] VT 415:17–25; 574:9–576:3.
[62] VT 2887:1–7, 2891:18–25; VT 2090:4–15, 2095:6–10, 2097:2–7.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

8. **"To establish the 'act' element of equitable estoppel with an actor's silence, the proponent must prove fraudulent effect, intent to mislead and actual misleading."**

Response: **The Club's Estoppel Defense Arises from the Outward Acts and Words of the County Regarding the Intent of the Deed and Its Approval of the Club, Which Misled the Club Even While the County Knew and Kept Secret the Allegations of Its Chief Enforcement Officer.**

The County's eighth sub-section argues the Club's estoppel defense falls within the narrow subset of "mere silence" estoppel cases.[68] These cases require the additional elements of fraud, intent to mislead, and actual misleading.[69] In these distinguishable cases, the only misleading conduct was the party's failure to disclose material information.[70]

As shown above, this is not a mere silence case because the words and actions of the County, including the Commissioners and negotiating agent Matt Keough, induced the Club to execute the 2009 Deed. Moreover, if this were a mere silence case in which the Club were required to prove the elements of fraud, intent to mislead, and actual misleading by the County, those elements would be well proven. To sell a property without disclosing one's knowledge that the chief code

---

[68] Statement at 5 (citing *Nickell v. Southview Homeowners Assn.*, 167 Wn. App. 42, 58, 271 P.3d 973 (2012) *review denied*, 174 Wn.2d 1018, 282 P.3d 96 (2012); *Codd v. Westchester Fire Ins. Co.*, 14 Wn.2d 600, 606–07, 128 P.2d 968 (1942) (quoting *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 34, 159 P. 1077 (1916)).

[69] *Id.*

[70] *Nickell*, 167 Wn. App. at 58; *Codd* 14 Wn.2d at 1018.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

enforcement officer believes it has unresolved code violations can only be considered fraudulent.

9. "Kitsap County Code definitions and processes for permit review[.]"

Response: There Is No Guarantee the County Will Issue a CUP for the Club to Re-Open If Its Nonconforming Use Right Is Terminated.

The County cites several provisions of the Kitsap County Code that relate to the County's conditional use permit (CUP) application and review process.[75] These code provisions relate to the trial court's decision to terminate the Club's nonconforming use right, enjoin all shooting activities at its property, and allow it to reopen only if it first obtains a CUP from the County.

The Club has argued termination of its nonconforming use right was in error and the possibility that the Club could reopen with a CUP does not alleviate that error, chiefly because there is no guarantee the County will ever issue a CUP.[76] The County's Chief Building Official confirmed this at trial when he testified, "the County cannot guarantee that the Club would receive a [CUP] if it applies for one."[77]

---

[75] Statement at 6.

[76] KCC 17.421.030(C) (allowing denial of CUP). *See also*, Club's Opening Br. at 67 (citing VT 283:1–17 (testimony of County Building Official Jeff Rowe); KCC 17.421.030.B (authorizing broad range of CUP conditions)).

[77] VT 283:14–17.

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Under Kitsap County Code, the ultimate decision to grant or deny a conditional use permit lies with a hearings examiner appointed by the County[78] who considers the County's recommendations when making a decision.[79] The hearings examiner has discretion to apply a variety of broad "decision criteria" and deny the application or impose virtually any condition on its approval.[80]

Requiring a CUP would make sense if the Club were attempting to open a new shooting range at a location that had no history of such use. The Club, however, has been operating a shooting range at its property since 1926. The trial court's decision effectively wipes out the Club's long history of community service and decades of work invested into its

///

///

///

///

---

[78] KCC 2.10.040 (describing hearings examiner appointment process); KCC 17.421.010, 17.421.020 (providing that hearings officer oversees CUP application).

[79] KCC 17.421.030(C).

[80] KCC 17.421.030. The hearings examiner "may impose any requirement that will protect the public health, safety, and welfare." KCC 17.421.030(B)(8). He or she may "[r]equire [additional] structural features or equipment." KCC 17.421.030(B)(2). There is virtually no limit on the hearing's officer's discretion because he or she may "[i]ncrease requirements in the standards, criteria, or policies established by this title." KCC 17.421.030(B)(1).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

facility. The decision should be reversed and the Club's nonconforming use right reaffirmed and reinstated.

DATED: May 9, 2014.

CHENOWETH LAW GROUP, P.C

Brian D. Chenoweth, WSBA No. 25877
Brooks M. Foster, OR Bar No. 042873
(pro hac vice)
510 SW Fifth Ave., Fifth Floor
Portland, OR 97204
Phone: (503) 221-7958

Of Attorneys for Appellant
Kitsap Rifle and Revolver Club