

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 31, 2014, 4:14 pm
BY RONALD R. CARPENTER
CLERK

NO. 91056-1
COA NO. 43076-2-II

E CRF
RECEIVED BY E-MAIL

IN THE SUPREME COURT 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

Petitioner,

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

KITSAP COUNTY'S MOTION TO REVISE STAY OF JUDGMENT

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

NEIL R. WACHTER
Special Deputy Prosecuting Attorney
25 W. Main Street
Auburn, WA 98101

(253) 804-5027

 ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. IDENTITY OF MOVING PARTIES1

II. RELIEF REQUESTED.....1

III. FACTS RELEVANT TO MOTION.....1

 A. Introduction.....1

 B. The Judgment.....2

 C. The Stay of Judgment4

 D. Division II’s Opinion on the Land Use Injunction5

 E. Division II’s Opinion on Public Nuisances6

 1. Endangerment of the Public.....6

 2. Excessive Noise7

 3. Nuisances Per Se.....7

 a. Expanded Uses.....8

 b. KCC 17.455.1108

 c. Site Development.....8

 F. Conditions for a Revised “Stay” Order and for Remand.....9

 1. Land Use Injunction.....9

 2. Public Nuisance Injunction.....10

IV. GROUND FOR RELIEF AND ARGUMENT.....11

 A. Traditional Stay of Judgment Power.....11

 B. Stay of Judgment in Washington12

C. Presence of Debatable Issues15

D. Balancing of Purported Harms.....19

V. CONCLUSION.....20

APPENDICES

Appendix 1. Ruling Granting Stay on Conditions (April 23, 2012)

Appendix 2. Order Clarifying Stay and Denying Motion to Modify and Motion for Contempt (Aug. 27, 2012)

TABLE OF AUTHORITIES

Table of Cases

<i>Abbassi v. INS</i> , 143 F.3d 513, 514 (9 th Cir. 1998)	12
<i>Boeing Co. v. Sierracin Corp.</i> , 43 Wn. App. 288, 716 P.2d 956 (1986), 108 Wn.2d 38, 738 P.2d 665 (1987)	14
<i>City of Mercer Island v. Steinmann</i> , 9 Wn. App. 479, 513 P.2d 80 (1973)	19
<i>In re McKenzie</i> , 180 U.S. 536, 21 S.Ct. 468, 45 L.Ed. 657 (1901)	11
<i>In re World Trade Ctr. Disaster Site Litig.</i> , 503 F.3d 167, (2d Cir.2007)	12
<i>Kitsap County v. Kev, Inc.</i> , 106 Wn.2d 135, 720 P.2d 818 (1986)	18, 19
<i>Kennett v. Levine</i> , 49 Wn.2d 605, 304 P.2d 682 (1956)	14
<i>McNeal v. Allen</i> , 95 Wn.2d 265, 621 P.2d 1285 (1980)	11
<i>Nken v. Holder</i> , 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)	11, 12, 17, 18
<i>Purser v. Rahm</i> , 104 Wn.2d 159, 702 P.2d 1196 (1985)), <i>cert.</i> <i>dismissed</i> , 478 U.S. 1029 (1986)	14
<i>Robinson Brick Co. v. Luthi</i> , 115 Colo. 106, 169 P.2d 171 (1946)	18
<i>Scripps-Howard Radio v. F.C.C.</i> , 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)	11
<i>Shamley v. Olympia</i> , 47 Wn.2d 124, 286 P.2d 702 (1955).....	14
<i>Shields v. Spokane School Dist. No. 81</i> , 31 Wn.2d 247, 196 P.2d 352 (1948).....	18

<i>Sofinet v. INS</i> , 188 F.3d 703 (7 th Cir. 1999)	12
<i>State v. A.N.W. Seed Corp.</i> , 116 Wn.2d 39, 802 P.2d 1353 (1991).....	11
<i>State v. Lombardo</i> , 32 Wn. App. 681, 649 P.2d 151 (Div. II 1982)	18
<i>State v. McIntyre</i> , 92 Wn.2d 620, 600 P.2d 1009 (1979)	11
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 954 P.2d 877 (1998)	18, 19

Court Rules

Rules of Appellate Procedure 7.3	2
Rules of Appellate Procedure 8	11
Rules of Appellate Procedure 8.1	12
Rules of Appellate Procedure 8.1(a).....	12
Rules of Appellate Procedure 8.1(b).....	13
Rules of Appellate Procedure 8.1(b)(2).....	4, 13
Rules of Appellate Procedure 8.1(b)(3).....	4, 13, 14
Rules of Appellate Procedure 8.3	5, 14
Rules of Appellate Procedure 8.6	2
Rules of Appellate Procedure 13.4(b).....	15
Washington Superior Court, Civil Rule 62.....	12, 13

Statutory Authorities

Kitsap County Code, Chapter 1.01.040	18
Kitsap County Code, Chapter 1.04.050	18

Kitsap County Code, Chapter 12.10	8
Kitsap County Code, Title 17	17
Kitsap County Code, Chapter 17.110.515	7
Kitsap County Code, Chapter 17.381.040	8
Kitsap County Code, Chapter 17.455.110	8
Kitsap County Code, Chapter 17.455.030	17
Kitsap County Code, Chapter 17.455.060	18
Kitsap County Code, Chapter 17.530.030	7
Kitsap County Code, Title 19	8
Kitsap County Ordinance No. 490 (2012)	17
Revised Code of Washington, Chapter 7.48.120.....	7

I. IDENTITY OF MOVING PARTIES

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

II. RELIEF REQUESTED

KITSAP COUNTY respectfully moves pursuant to RAP 17, RAP 8.1(b) and RAP 8.3 that this Court enter an Amended Order Staying Judgment on Conditions, to restore the trial court's injunctions governing land uses found and upheld to be expanded uses of the subject property and against public nuisance conditions created at that property, while retaining the Court of Appeals' video recording protocol.

III. FACTS RELEVANT TO MOTION

A. Introduction

This case is Kitsap County's civil enforcement action for declaratory judgment and permanent injunctions to enforce the Kitsap County Code and state law governing nonconforming land use and to enjoin public nuisances of bullet escapement and disruptive shooting and explosive sounds allowed or caused by a shooting range. After bench trial in Pierce County Superior Court, the trial court entered judgment against Petitioner KITSAP RIFLE AND REVOLVER CLUB ("KRRC" or the "Club") and as to KRRC's 72-acre parcel of real property in central Kitsap

County. In a published opinion, Division II affirmed two of three challenged “expanded uses” declared to exist upon the Property, reversed declaratory judgment that “expanded uses” and illegal uses of the subject property acted to terminate its nonconforming land use status, reversed the resulting injunction and remanded for the trial court to craft a reformed judgment to enforce the Kitsap County Code as to the affirmed expanded/illegal land uses and as to the unpermitted development, and affirmed all of the public nuisance rulings.¹

KRRC has filed its petition for review,² which extends a Title 8 “stay” order entered 32 months ago. RAP 8.6. In light of Division II’s opinion and KRRC’s tack in its PFR, it is necessary and appropriate to revisit that stay order. RAP 7.3.

B. The Judgment

On February 9, 2012, the trial court entered judgment, issuing two injunctions governing use of KRRC’s property as a shooting range.³ The “land use injunction” prohibits that use unless and until KRRC obtains a conditional use permit (“CUP”), pursuant to declaratory judgment that expanded and illegal uses acted to terminate the Property’s nonconforming

¹ *Kitsap County v. Kitsap Rifle and Revolver Club*, __ Wn. App. __, 337 P.3d 328 (Slip. Op., Oct. 28, 2014) (the “Opinion”) (Petition for Review, App. 1).

² Petition for Review, dated Dec. 1, 2014 (“PFR” or “Petition”).

³ Findings of Fact, Conclusions of Law and Orders (Feb. 9, 2012), CP, at 4052-4092 (the “Judgment”). The “Property” refers to KRRC’s parcel of real property.

use status under the Kitsap County Code⁴ and the common law.⁵

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.

Judgment, at 34 (CP at 4085). KRRC has never applied for a CUP.

The “public nuisance injunction” restricts shooting of firearms on the Property based on public nuisance findings of probability of bullet escapement and disruptive noise, providing:

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.

Judgment, at 34 (CP at 4085).

⁴ The Kitsap County Code (“KCC” or the “Code”) is published and maintained online at <http://www.codepublishing.com/wa/kitsapcounty> (last visited 12/30/14).

⁵ Judgment, at 33 (CP at 4084).

C. The Stay of Judgment

KRRC filed its notice of appeal and moved to stay judgment.⁶ Division II Commissioner Schmidt granted KRRC's motion under RAP 8.1(b)(3),⁷ thereby allowing shooting operations to resume at the Property subject to these conditions:

(1) Range safety officers must be present at all time[s] that shooting is occurring. Video recordings must be made while shooting is occurring.

(2) KRRC must allow officials from Kitsap County access to the property to monitor compliance with these conditions. It must allow those officials access to the video recordings.

(3) Shooting must be restricted to between 8:00 A.M. to 8:00 P.M.

(4) No fully automatic weapons may be fired.

(5) No cannons may be fired, except on the Fourth of July, and no exploding targets may be used.

Stay Ruling, at 6. On motion by the County⁸, the Court of Appeals adopted a protocol for video recording of shooting at the Property under

⁶ Appellant's Motion for Stay (March 30, 2012) ("Stay Motion").

⁷ Ruling Granting Stay on Conditions (April 23, 2012) ("Stay Ruling") (attached hereto as "**Appendix 1**"), at 4. The Commissioner denied KRRC's stay motion made under RAP 8.1(b)(2) (governing "decision[s] affecting property"). *Id.*

⁸ Motion and Declaration for an Order to Show Cause re Contempt for Violation of Commissioner's Ruling Granting Stay on Conditions, at 6-8 (Describing County's request for copies of recordings for a date on which loud rapid-fire rifle shooting was reported to have occurred on the Property).

the Stay Ruling.⁹ The County would ask that any amended stay order retain this protocol to promote compliance with the stay conditions.¹⁰

D. Division II's Opinion on the Land Use Injunction

The Court of Appeals affirmed declaratory judgments that the commercial/military uses of the Property and the “dramatically increased noise levels” of rapid-fire shooting and other activities that were infrequent or non-existent on the Property circa 1993 each constituted impermissible expansions of nonconforming use, but reversed declaratory judgment that increased hours of operation constituted an expansion of nonconforming use. Opinion, at 14-16, 47. The Court reversed the land

⁹ The video protocol provides:

1) Following Respondent's request, Appellant must produce and deliver to Respondent copies of requested video footage or recordings in a DVD or CD format within three business days.

2) For the video footage produced, Appellant shall identify the custodian of these records, and for footage recorded with hand-held devices, Appellant shall identify the camera operator and specific location of the filming.

3) Appellant shall video record all shooting activities at its property and preserve such recordings for not less than 60 days.

4) Appellant shall continue to operate and maintain all permanently mounted video cameras at its property.

5) Respondent shall identify an incident when requesting a recording, but Appellant may not condition the production thereof on its agreement that the request is based on a good-faith allegation that it has violated a condition of the stay.

Order Clarifying Stay and Denying Motion to Modify and Motion for Contempt (Aug. 27, 2012) (“Order Clarifying Stay”) (attached hereto as “**Appendix 2**”), at 2.

¹⁰ The Order Clarifying Stay provides no technical specifications for video recording, such as whether the recording equipment must capture an audio track. The County's request to retain this protocol should not be construed to mean that the existing protocol can fully ensure compliance with RAP 8.3 stay conditions.

use injunction and remanded for the trial court “to determine the appropriate remedy for the Club’s expansion of its nonconforming use and permitting violations”. Opinion, at 47.

KRRC petitions for review of the remand and of the judgment that commercial/military training uses of the Property constituted impermissible expansions of the shooting range use. PFR, at 1-2.

E. Division II’s Opinion on Public Nuisances

The Court affirmed the public nuisance injunction, and either affirmed or did not disturb each of the nuisances per se in the Judgment:

1. **Endangerment of the Public:** The trial court held, and the Opinion affirmed, that KRRC’s use of its Property created an unacceptable risk of bullet escapement from its Property, based on unchallenged findings that “the Club’s range facilities, including safety protocols, were inadequate to prevent bullets from leaving the property” to reach the community. Opinion, at 47. Division II rejected KRRC’s challenges based on risk of harm and social utility, noting that the Club’s proximity to “numerous residential properties and civilian populations” means its shooting activities create an unreasonable risk of property damage and personal injury to neighboring residents. Opinion, at 27-28.

KRRC petitions for review of the bullet escapement public nuisance finding based upon “possibility” of harm and upon the trial

court's failure to explicitly balance that probability against the social utility of the shooting range. PFR, at 2.

2. **Excessive Noise:** The trial court held, and the Opinion affirmed, that the community residing within two miles of the Property was subjected to noise conditions that “interfere[d] with the comfort and repose of residents and their use and enjoyment of their real properties”. Opinion, at 29. Division II cited unchallenged findings of expanded hours of operation, greater caliber of weapons allowed to be used, use of exploding targets and cannons, hours and frequency of “practical shooting” and use of automatic weapons, as creating “substantial and unreasonable” noise, thereby establishing “common law public nuisance and statutory public nuisance conditions under RCW 7.48.120, KCC 17.530.030, and KCC 17.100.515”. Opinion, at 20 (citing CP at 4078).

KRRC petitions for review of the finding that the nuisance noise constitutes a *public* nuisance. PFR, at 2.

3. **Nuisances per se:** The trial court found, and the Opinion either affirmed or did not disturb, multiple uses of the Property adjudged to be nuisances per se under KCC 17.530.030 and KCC 17.110.515.¹¹ Opinion, at 18. KRRC petitions for review of none of the nuisance per se findings:

¹¹ KCC 17.530.030 provides that “[a]ny use ... in violation of this title is unlawful, and a public nuisance” and KCC 17.110.515 provides that “any violation of this title [zoning] shall constitute a nuisance per se.”

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

b. KCC 17.455.110. The Opinion upheld public nuisance findings based on violating KCC 17.455.110’s prohibition on uses that

produce *noise*, smoke, dirt, dust, odor, *vibration*, heat, glare, toxic gas or radiation which is materially deleterious to surrounding people, properties or uses.

Opinion, at 17, 20 (emphasis added).

c. Site Development. The Opinion upheld public nuisance findings based on KRRC’s unpermitted development work at the Property, which required site development activity permits under Chapter 12.10 KCC (Permits). Opinion, at 28.¹²

¹² The Judgment found numerous “illegal uses” of the Property, based on KRRC’s excavation, grading and other earthwork done to establish new “shooting bays”, to modify the existing rifle range, and to establish a new rifle range outside the Property’s “historic” eight acres of active use, all without required development permitting. Judgment, at 30-31 (CP, at 4081-82). Some of this earthwork occurred within the protected buffer for wetlands adjacent to the Property’s shooting areas, done without wetland delineations or approvals required under Title 19 KCC (Critical Areas Ordinance). Judgment, at 30 (CP, at 4081).

F. Conditions for a Revised “Stay” Order and for Remand

1. **Land Use Injunction.** The Opinion struck the ultimate remedy of “terminating” the nonconforming land use status enjoyed by KRRC, but sets the stage to enjoin expanded or illegal uses and activities:

Land Use Injunction		
Issue	Trial Court Ruling: The Use or Activity . . .	Opinion . . .
Effect of each expanded or illegal use.	Terminates nonconforming land use status; CPU required to resume shooting range use.	Reverses termination remedy; reverses Land Use Injunction requiring CPU for core use.
Increased days and hours of operation.	Is expanded use	Reverses; this is intensification of shooting range use
Military and for-profit training	Are expanded uses	Affirms and remands for alternate remedy
Dramatically increased shooting sounds	Is expanded use	Affirms and remands for alternate remedy
Unpermitted Development	Is illegal use	Affirms and remands for alternate remedy
Title 17 KCC Nuisances per se	Is illegal use	Affirms and remands for alternate remedy

On remand of Division II’s Opinion, the County expects to ask the trial court to: (1) Enter a reformed declaratory judgment and injunction enjoining any use or activity found and affirmed to be an “expanded” use, unless said use or activity is approved pursuant to the terms of a Title 17 KCC conditional use permit, and (2) enter injunctive orders against use of

all shooting areas on the Property except for the pistol range and the rifle range, unless and until each such shooting area receives all development, critical areas and other permits required under the Code, and (3) as to the rifle range and the pistol range, set a reasonable deadline for KRRC to apply for and obtain all development, critical areas and other permits required under the Code.

By this motion, the County asks the Court to restore the land use injunction in so far as it enjoins affirmed “expanded uses” of the Property.

2. **Public Nuisance Injunction.** The Judgment and the Stay Ruling provided the following operational restrictions:

Public Nuisance Injunction		
Use or Activity	Trial Court Ruling	Stay Ruling
Hours of Operation of Outdoor Shooting Range	9 a.m. to 7 p.m.	8 a.m. to 8 p.m.
Use of fully automatic firearms	Prohibited	Prohibited
Use of rifles of greater than nominal .30 caliber	Prohibited ¹³	Allowed
Use of exploding targets and cannons	Prohibited	Prohibited, except for cannons on July Fourth

By the instant motion, Kitsap County asks this Court to restore the public nuisance injunction.

¹³ 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.

IV. GROUND FOR RELIEF AND ARGUMENT

Division II issued its stay orders pursuant to Title 8 RAP, the provisions of which should be construed in light of the rule's common law basis. *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 45, 802 P.2d 1353 (1991) (court construes court rules as it would a statute, ascertaining "the generally accepted common law"). Court rules in derogation of the common law are construed strictly. *Id.*, at 45 (citing *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980); *State v. McIntyre*, 92 Wn.2d 620, 622, 600 P.2d 1009 (1979)).

A. Traditional Stay of Judgment Power

At common law, the appellate court's power to stay judgment is an "inherent" power, said to be part of the court's "traditional equipment for the administration of justice." *In re McKenzie*, 180 U.S. 536, 551, 21 S.Ct. 468, 45 L.Ed. 657 (1901); *Nken v. Holder*, 556 U.S. 418, 421, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9-10, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)).

Stay of judgment on appeal is not a given:

A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case.

Nken, 556 U.S. at 433 (citations omitted). "The party requesting a stay

bears the burden of showing that the circumstances justify an exercise of that discretion.” Id. at 433-34 (internal quotation marks omitted) citing cases). Traditionally, the court considers four factors in considering an application for stay of civil judgment pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 425-26 (quoting *Hilton*, 481 U.S. at 776); see also *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir.2007) (applying these factors in considering whether to vacate a stay). “The first two factors ... are the most critical”, and it is not enough for the chance of success to be “better than negligible” *Nken*, 129 U.S. at 434 (citing *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999) (internal quotation marks omitted)). For the second factor, “simply showing some ‘possibility of irreparable injury,’” is insufficient. *Nken*, 129 U.S. at 434-35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

B. Stay of Judgment in Washington

RAP 8.1 (“supersedeas procedure”) provides the rules governing delay of enforcement of a trial court decision, in conjunction with CR 62. RAP 8.1(a). In an injunctive action, final judgment “shall not be stayed

during the period after its entry and until appellate review is accepted or during the pendency of appellate review” unless “otherwise ordered by the trial court or the appellate court”. CR 62(a). RAP 8.1(b) provides:

(b) Right to Stay Enforcement of Trial Court Decision. A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of a money judgment or a decision affecting real, personal or intellectual property, pending review. Stay of a decision in other civil cases is a matter of discretion.

In subsections, RAP 8.1(b) addresses (1) money judgments, (2) decisions affecting possession, ownership or use of property, and (3) other civil cases. In its motion for stay, KRRC cited to RAP 8.1(b)(2) regarding use of the Property, and alternatively to RAP 8.1(b)(3). Stay Motion, at 12-13. As noted, Division II granted a stay pursuant to RAP 8.1(b)(3):

(3) Other Civil Cases. Except where prohibited by statute, in other civil cases, including cases involving equitable relief ordered by the trial court, the appellate court has authority, before or after acceptance of review, to stay enforcement of the trial court decision upon such terms as are just. The appellate court ordinarily will condition such relief from enforcement of the trial court decision on the furnishing of a supersedeas bond, cash or other security. *In evaluating whether to stay enforcement of such a decision, the appellate court will (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed.* The party seeking such relief should use the motion procedure

provided in Title 17.

RAP 8.1(b)(3) (emphasis added).

Historically, RAP 8.3 has empowered the appellate court to stay an injunction if the movant can demonstrate that the appeal presents debatable issues and that the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation. *Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985), *cert. dismissed*, 478 U.S. 1029 (1986) (citing *Shamley v. Olympia*, 47 Wn.2d 124, 286 P.2d 702 (1955); *Kennett v. Levine*, 49 Wn.2d 605, 304 P.2d 682 (1956)). Prior to RAP 8.1(b)(3)'s current formulation, courts applied a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Where the harm was so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief would be granted unless the appeal is totally devoid of merit. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986), *reversed on other grounds*, 108 Wn.2d 38, 738 P.2d 665 (1987) (citing *Shamley*, 47 Wn.2d [at 124])).¹⁴

Under current-day RAP 8.1(b)(3), the Court may stay a trial court judgment, with terms, after considering the presence of “debatable issues” and comparing the relative injuries of the parties. In light of the common

¹⁴ In 1990, our Supreme Court adopted most of RAP 8.1(b)(3)'s current day verbiage. 115 Wn.2d 1124-26 (1990).

law on stays and the rule's formulation, the burden for obtaining or maintaining a stay remains with KRRC. With the Opinion and with KRRC's Petition, the time has come to revisit and revise the stay analysis.

C. Presence of Debatable Issues

In its Stay Ruling, Division II found that KRRC demonstrated that its appeal presented "debatable issues". That finding preceded the case's trial transcription, briefing, argument and Opinion. Thirty-two months later, the case's issues have been honed, both by the Opinion and by KRRC's selection of subjects for its PFR. The Opinion upheld each of the trial court's challenged factual findings, including, most significantly, its findings of dual public nuisances and its declarations of expanded uses that are impermissible under state and local nonconforming land use law. The Opinion upheld each of the trial court's specific restrictions in its public nuisance injunction. Opinion, at 45-46. The Opinion rejected KRRC's counterclaims and affirmative defenses asserting KRRC's position that the circumstances of the Club's 2009 purchase of the subject property from Kitsap County acted to update its nonconforming land use status and to immunize the Property from liability for its repeated, unpermitted land use and development violations. Opinion, at 32-40.

KRRC's Petition for Review asserts five numbered issues for potential review, each of which will be subjected to the rigors of RAP

13.4(b). Summarized, KRRC's Petition raises four grounds:

1. That the Opinion erred in affirming that the Washington common law and the Kitsap County Code each prohibit KRRC's "expanded uses" of its real property, as distinguished from intensifications of KRRC's existing nonconforming "shooting range" use. PFR at 1.
2. That the Opinion erred in affirming that for-profit commercial and military training uses of and activities at the Property constitute prohibited "expanded uses". PFR at 1-2.
3. That the Opinion erred in affirming the trial court's public nuisance finding and injunctive orders based on obnoxious noise, notwithstanding the unequal affect on the entire community, inconsistent trial testimony and state and local noise regulations exempting shooting ranges from decibel level standards. PFR, at 2.
4. That the Opinion erred in affirming the trial court's public nuisance finding and injunctive orders based on likelihood of bullet escapement, notwithstanding the lack of explicit finding that a bullet has ever left Club Property and the lack of an explicit analysis of the Club's social utility. PFR, at 2.

KRRC's Petition asserts no error in the nuisance per se findings upheld by

the Opinion. KRRC's Petition asserts no error in the Opinion's rejection of the Club's counterclaims and affirmative defenses.

KRRC's grounds present debatable issues for the appeal in a hypothetical sense only. Of the trial court's challenged factual findings, each has been vetted and upheld by Division II, which approved the trial court's implicit finding that KRRC's social utility was weighed where relevant to public nuisance and its finding that the testimony of neighbors were representative of affected homeowners. Opinion, 29, 26-27.

For the nonconforming use judgment, KRRC challenges application of the common law and one repealed section of Title 17 KCC (Zoning), former KCC 17.455.060, to land uses found to be new or expanded uses. The common law is consistent with former KCC 17.455.060, which provided in pertinent part that "[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." This code section, repealed effective July 1, 2012,¹⁵ was in effect at the time of trial

¹⁵ Kitsap County Ordinance No. 490 (2012), at 6-7 (available online at <http://kcwaimg.co.kitsap.wa.us/recorder/eagleweb/customSearch.jsp?pageId=Ordinances> (last visited 12/29/14; accessed by searching for Doc. No. 490-2012).

and judgment and is preserved by a “savings ordinance”.¹⁶ Thus, the trial court properly applied this code section in reaching its judgment.¹⁷

To use common law stay vernacular, KRRC’s chances on its remaining appeal are no “better than negligible”,¹⁸ and now with appeal as a matter of discretionary review and not one of right, KRRC’s debatable issues lie not in the appeal but in the remedy upon remand.

On remand, the trial court’s Judgment and Division II’s Opinion mean that KRRC will be limited to “shooting range” uses of its Property that amount to intensifications of its 1993-era use, and that KRRC will be enjoined from the commercial, military training and other uses adjudged to be “expanded uses” of the Property. Further, the trial court will address KRRC’s unpermitted development of its Property, including the Club’s establishment of blue-sky shooting bays used for KRRC’s practical shooting practices and competitions that are part of the “expanded use” of the Property. See, Opinion, at 16 (discussing uses that generated dramatically increased noise levels at the Property).

¹⁶ See KCC 1.01.040(A) (“The adoption and the repeal of ordinances by this code shall not affect . . . [a]ctions and proceedings which began before the effective date of this code.”); KCC 1.04.050 (“Whenever a reference is made to this code, or to any portion of it, or to any ordinance of Kitsap County, the reference shall apply to all amendments, corrections, and additions thereto, whenever made.”).

¹⁷ See *State v. Lombardo*, 32 Wn. App. 681, 683, 649 P.2d 151 (Div. II 1982) (under common law, “where a statute is repealed, all pending litigation must be decided according to the state of the law at the time of the decision.”).

¹⁸ *Nken*, 129 U.S. at 434 (citation omitted).

In the unlikely event that the Supreme Court grants review and KRRC prevails upon its nonconforming land use platform, KRRC must still confront remand upon the unchallenged nuisances per se established by the uses and activities on the Property. Of course, 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.” *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998).¹⁹ Accordingly, injunctive relief is available against violations of zoning ordinances which are declared by ordinance to be nuisances. *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 513 P.2d 80 (1973).

D. Balancing of Purported Harms

In this iteration of the stay question, Kitsap County does not seek cessation of all shooting activities at the Property. Rather, the County seeks restoration of the trial court’s public nuisance injunction and enjoinder against KRRC’s “expanded uses” that will require permits if they are to resume. When Division II first considered the stay question in the spring of 2012, KRRC had ceased its shooting range use altogether under the land use injunction. KRRC claimed that if the Court denied a stay, “the Club will suffer a range of harms, including financial hardship,

¹⁹ See also *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138, 720 P.2d 818 (1986) (engaging in any business or profession in defiance of a law regulating or prohibiting the same is a nuisance per se).

vandalism, degradation, and even dissolution.” Stay Motion, at 19. This parade of horrors will not arise from revising the stay.

The reformed stay question is based upon the narrowed range of outcomes upon remand and a recognition that the Property’s “shooting range” status will persist under the Opinion, albeit with severe limitations because KRRC ultimately must apply for and obtain conditional use permit approval of its expanded uses and must cure its nuisances per se.

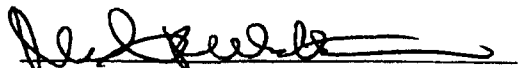
For over 30 months, the Club’s neighbors in central Kitsap County have not received the full protection of the trial court’s injunctive orders against public nuisances created at the Club’s property. This motion asks the Court to restore that protection pending appeal.

V. CONCLUSION

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

Respectfully submitted this 31st day of December, 2014.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney


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

CERTIFICATE OF SERVICE

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

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

Brian D. Chenoweth	<input checked="" type="checkbox"/>	Via U.S. Mail
Brooks Foster	<input checked="" type="checkbox"/>	Via Email: As Agreed by the Parties
The Chenoweth Law Group	<input type="checkbox"/>	Via Hand Delivery
510 SW Fifth Ave., Ste. 500		
Portland, OR 97204		

David S. Mann	<input checked="" type="checkbox"/>	Via U.S. Mail
Gendler & Mann LLP	<input checked="" type="checkbox"/>	Via Email
936 N. 34 th St. Suite 400	<input type="checkbox"/>	Via Hand Delivery
Seattle, WA 98103-8869		

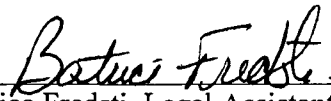
Matthew A. Lind	<input checked="" type="checkbox"/>	Via U.S. Mail
Sherrard McGonagle Tizzano, PS	<input checked="" type="checkbox"/>	Via Email
19717 Front Street NE, PO Box	<input type="checkbox"/>	Via Hand Delivery
400		
Poulsbo, WA 98370-0400		

Richard B. Sanders	<input checked="" type="checkbox"/>	Via U.S. Mail
Goodstein Law Group	<input checked="" type="checkbox"/>	Via Email
501 S G St	<input type="checkbox"/>	Via Hand Delivery
Tacoma, WA 98405-4715		

C.D. Michel
Michel & Associates, P.C.
180 E. Ocean Blvd, Ste 200
Long Beach, CA 90802

Via U.S. Mail
 Via Email
 Via Hand Delivery

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



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

Appendix 1

Ruling Granting Stay on Conditions (April 23, 2012)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

Respondent/Cross-Appellant,

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,


Appellants/Cross-Respondents,

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.

Consol Nos. 43076-2-II
43243-9-II

RULING GRANTING STAY ON
CONDITIONS

FILED
COURT OF APPEALS
DIVISION II
12 APR 23 PM 12:17
STATE OF WASHINGTON
BY  DEPUTY

Kitsap Rifle and Revolver Club (KRRC) moves to stay the trial court's order that concluded KRRC's operation of a shooting range (1) was no longer a legal non-conforming use and (2) constituted a public nuisance. The trial court's order enjoined KRRC from operating the shooting range until it had obtained a conditional use permit from Kitsap County and permanently enjoined certain activities at the shooting range.

Concluding that KRRC has demonstrated that it is entitled to a stay upon conditions, this court grants its motion.

KRRC began operating a shooting range in 1926. The active area of the range is an eight acre portion of a 72 acre parcel. Until 2009, KRRC leased the land for the range from the State of Washington. In 2009, after the State transferred ownership of the land to Kitsap County, the County conveyed ownership to KRRC. According to the County, KRRC began expanding the operations of the range in 1998 and by 2003 was hosting commercial small arms training exercises.

In 2010, Kitsap County commenced an action for injunction, declaratory judgment and abatement of nuisance. It alleged that while KRRC's use of the property as a shooting range had been a legal non-conforming use in the past, KRRC's expansion of the operations of the shooting range had terminated that legal non-conforming use. It also alleged that the operation of the shooting range constituted a public nuisance in that shooting occurred from 7:00 A.M. until 10:00 P.M., that automatic weapons were often fired, that cannons and other explosive devices were detonated, and that stray or ricocheted ammunition could strike homes adjoining the property. The County sought to abate the nuisance and to have the shooting range declared a non-conforming use. It asked the court to enjoin operation of the shooting range until it obtained a conditional use permit and to permanently enjoin certain activities.

KRRC responded to the action by noting that no evidence had been presented of stray ammunition injuring anyone on the adjoining properties or of striking anything on

those properties. After a lengthy trial, the court found that KRRC's operation of the shooting range constituted a nuisance in the following regards:

21. The failure of [KRRC] 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 [KRRC] 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.

Mot. for Stay, Ex. 1 at 27 (Findings of Fact and Conclusions of Law).

The court also found that KRRC's expansions of the use of the shooting range to include commercial small arms training, use of automatic weapons and professional competitions had terminated the legal nonconforming use status of the shooting range. The court enjoined any operation of the shooting range until KRRC had obtained a conditional use permit for a private recreational facility. It also permanently enjoined the following uses of the property: (a) use of fully automatic firearms, (b) use of rifles with calibers greater than .30, (c) use of exploding targets and cannons, and (d) shooting before 9:00 A.M. or after 7:00 P.M.

KRRC seeks a stay of the trial court's order pending its appeal. First, it contends that it is entitled to a stay under RAP 8.1(b)(2), which provides that "a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property . . . by filing in the trial court a supersedeas bond or cash" It contends that the trial court's order affects its rights to use its property, so it is entitled to a stay. *Henry v.*

Bitar, 102 Wn. App. 137, 139-40, 5 P.3d 1277 (2000), *review denied*, 142 Wn.2d 1029 (2001). Kitsap County responds that RAP 8.1(b)(2) is not applicable because the trial court granted injunctive relief, making RAP 8.1(b)(3) applicable instead.

To the extent the trial court's order found that KRRC's operation of the shooting range no longer constituted a legal nonconforming use of its property, the order affected KRRC's right to use of its real property and entitled it to a stay of that portion of the order, provided that it filed a supersedeas bond, cash or alternate security approved by the trial court. But KRRC did not file such a bond, cash or alternate security. While the property itself may serve as security if it has value, under RAP 8.1(c)(2), the parties dispute whether the property has an assessed value of \$71,000 or whether the property is valueless because of lead contamination. KRRC has not shown that it is entitled to a stay under RAP 8.1(b)(2).

KRRC alternately seeks a stay under RAP 8.1(b)(3). Under that rule, it must first "demonstrate that debatable issues are presented on appeal." RAP 8.1(b)(3)(i). If it does, then this court must consider the injury that KRRC would suffer if a stay is not granted against the injuries that Kitsap County would suffer if a stay is granted. RAP 8.1(b)(3)(ii). If the fruits of an appeal would be totally destroyed in the absence of a stay, then a stay should be granted, unless the appeal is totally devoid of merit. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986), *rev'd on other grounds*, 108 Wn.2d 38 (1987).

KRRC argues that there are debatable issues about the trial court's findings of a risk of harm to the adjoining properties, among others. And it argues that without a stay of the trial court's order, it will suffer dire financial consequences that could lead to cessation of KRRC's activities and to vandalism and degradation of the property. Kitsap County responds that the trial court's extensive findings of fact and conclusions of law conclusively resolve all of the issues in its favor, so KRRC does not demonstrate any debatable issues on appeal. And it responds that a stay of the trial court's order would again expose the adjoining property owners to the risk of harm and to the nuisances created by the shooting range.

Given that Kitsap County did not commence this enforcement action until 2010, and that the increased operations of the shooting range had been occurring since at least 2003, Kitsap County does not show that the risk of harm to the adjoining property owners is so great that it overcomes the harm that will befall KRRC if all shooting range operations are enjoined while this appeal is pending. KRRC has shown that the harm it will suffer in the absence of a stay is greater than the harm that Kitsap County will suffer from the imposition of a stay. Therefore, KRRC has demonstrated that it is entitled to a stay under RAP 8.1(b)(3).

However, in granting a stay, this court must stay the trial court's order "upon such terms as are just." RAP 8.1(b)(3). Kitsap County, as a protector of the adjoining property owners' interests in peaceful enjoyment of their properties, has a valid concern about the amount of noise that the shooting range had been creating. In order to address that

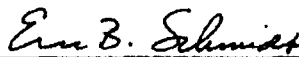
concern, while still allowing KRRC some ability to operate, this court conditions its stay of the trial court's order as follows. The injunction against all operation of a shooting range on the KRRC property, until such time as it receives a conditional use permit, is stayed pending a decision in this appeal. However, KRRC's operation of the shooting range is subject to the following conditions:

- (1) Range safety officers must be present at all time that shooting is occurring. Video recordings must be made while shooting is occurring.
- (2) KRRC must allow officials from Kitsap County access to the property to monitor compliance with these conditions. It must allow those officials access to the video recordings.
- (3) Shooting must be restricted to between 8:00 A.M. to 8:00 P.M.
- (4) No fully automatic weapons may be fired.
- (5) No cannons may be fired, except on the Fourth of July, and no exploding targets may be used.

It is hereby

ORDERED that KRRC's motion for a stay of the trial court's order is GRANTED under RAP 8.1(b)(3), subject to the above conditions.

DATED this 23rd day of April, 2012.



Eric B. Schmidt
Court Commissioner

cc: Brian D. Chenoweth
Neil R. Wachter
Jennie Christensen
Hon. Susan Serko

Appendix 2

Order Clarifying Stay and Denying Motion to Modify and Motion for Contempt (August 27, 2012)

(1) Following Respondent's request, Appellant must produce and deliver to Respondent copies of requested video footage or recordings in a DVD or CD format within three business days.

(2) For the video footage produced, Appellant shall identify the custodian of these records, and for footage recorded with hand-held devices, Appellant shall identify the camera operator and specific location of the filming.

(3) Appellant shall video record all shooting activities at its property and preserve such recordings for not less than 60 days.

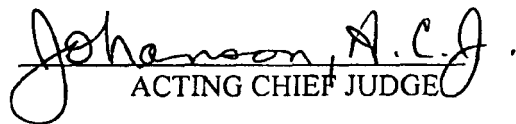
(4) Appellant shall continue to operate and maintain all permanently mounted video cameras at its property.

(5) Respondent shall identify an incident when requesting a recording, but Appellant may not condition the production thereof on its agreement that the request is based on a good-faith allegation that it has violated a condition of the stay.

Finally, Appellant must produce the requested June 1, 2012 video footage and recordings within five days of the date of this ruling. It is

SO ORDERED.

DATED this 27th day of August, 2012.


ACTING CHIEF JUDGE

OFFICE RECEPTIONIST, CLERK

To: Batrice Fredsti
Cc: Neil Wachter (nwachter@auburnwa.gov); Carrie A. Bruce; Shelley E. Kneip; Christine M. Palmer
Subject: RE: Email filing for: Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Rec'd 12/31/14

From: Batrice Fredsti [mailto:bfredsti@co.kitsap.wa.us]
Sent: Wednesday, December 31, 2014 4:08 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Neil Wachter (nwachter@auburnwa.gov); Carrie A. Bruce; Shelley E. Kneip; Christine M. Palmer
Subject: Email filing for: Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Good Afternoon,

Attached for filing with the court is Kitsap County's Motion to Revise Stay of Judgment (prepared by Neil R. Wachter, WSBA No. 23278) for the following case:

Kitsap County v. Kitsap Rifle and Revolver Club, Supreme Court No. 91056-1

Please let us know if you have any questions.

Sincerely,

Batrice Fredsti
Legal Assistant to Ione George
Kitsap County Prosecutor's Office
614 Division Street, MS-35A
Port Orchard, WA 98366
Phone: (360) 337-7032
Fax: (360) 337-7083
bfredsti@co.kitsap.wa.us