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NO. 95480-1
COA NO. 49130-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

KITSAP COUNTY,

Respondent,

vs.

KITSAP RIFLE AND REVOLVER CLUB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KITSAP COUNTY
Superior Court No. 15-2-00626-8

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Petitioner Kitsap County was the Plaintiff in the trial court proceedings and the Respondent in the appellate court proceedings. Kitsap County appears in this matter by and through its counsel, Christine M. Palmer and Laura F. Zippel, Deputy Prosecuting Attorneys for Kitsap County, and respectfully requests that the Court deny Kitsap Rifle and Revolver Club's ("KRRC" or the "Club") Petition for Review of the Court of Appeal's November 21, 2017 decision in *Kitsap County v. Kitsap Rifle and Revolver Club*, 1 Wn. App.2d 393, 405 P.3d 1026 (2017) (COA Cause No. 49130-3-II) (the "Opinion").

II. WHY REVIEW SHOULD BE DENIED

KRRC challenges the constitutionality of Article 2, Chapter 10.25 of the Kitsap County Code ("KCC 10.25") and its enforceability against KRRC. Generally, KCC 10.25 requires shooting facilities within Kitsap County to obtain an operating permit. The Court of Appeals correctly held that KCC 10.25 is a constitutional police power regulation and is enforceable against KRRC.

In this response to KRRC's Petition for Review, Kitsap County relies upon and incorporates its briefing in this matter including the Response Brief of Kitsap County file in the appellate proceedings. For the

Court's convenience, however, Kitsap County offers the following as a summary of the issues raised by KRRC's Petition for Review and a brief explanation as to why review should be denied.

A. The Opinion Is Consistent With And Not In Conflict With Any Decision By the Supreme Court Regarding State Preemption

Review should be denied because the Opinion is consistent with this Court's holdings regarding state preemption. As indicated by KRRC, a local government's police power ceases when the state enacts a general law upon the subject. *Lenci v. City of Seattle*, 63 Wn.2d 664, 669, 388 P.2d 926, 930 (1964). The state has not enacted any regulation or stated any intent to preempt regulation regarding the operation of shooting facilities. KCC 10.25 is not preempted by state law.

Chapter 9.41 RCW is an extensive body of criminal regulations governing an individual's use of a firearm. It does not purport to impose civil regulation regarding the operations of a shooting facility or sporting facility on which firearms may be discharged. This area of regulation is untouched by the State and, thus, left to the local governments.

As the Opinion correctly holds, KCC 10.25 (which requires shooting facilities to obtain an operating permit and comply with shooting facility safety standards that promote the containment of projectiles) is not

a “firearm” regulation which is preempted by Chapter 9.41 RCW. KCC 10.25 requires a shooting facility to obtain an operating permit before allowing a firearm to be discharged at that facility. It has only a minimal and indirect effect on the use of firearms. KCC 10.25 indirectly affects firearms only in the same way that zoning laws, local tax codes, and business licensing requirements affect firearms. Because KCC 10.25 regulates the operation of shooting facilities, not the use of firearms, and imposes no criminal penalty, it is not preempted by state law.

Furthermore, even if it Chapter 9.41 RCW did apply, KCC 10.25 falls within the preemption exception which allows local government to enact firearm regulations when there is a “reasonable likelihood that humans, domestic animals, or property will be jeopardized.” RCW 9.41.300(2)(a). The state legislature's purpose in creating this exception was to allow local governments “relatively *unlimited* authority in one specific area – *i.e.*, the discharge of firearms in areas where people, domestic animals, or property would be endangered.” *City of Seattle v. Ballsmider*, 71 Wn. App. 159, 163, 856 P.2d 1113 (1993).

When KCC 10.25 was enacted, the Kitsap County Board of County Commissioners specifically found as follows:

WHEREAS, RCW 9.41.300(2) provides that a county may also, by ordinance, restrict the discharge of firearms in any portion of its jurisdiction where

there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized so long as such ordinance shall not abridge the right of the individual guaranteed by Article 1, section 24 of the state Constitution to bear arms in defense of self or others; and

WHEREAS, the Kitsap County Board of Commissioners (Board) finds that the requirement of an operating permit for the establishment and operation of all shooting ranges provides assurance of the safe conduct of recreational and educational shooting activities in Kitsap County.

CP 48.

KCC §10.25.060 expressly states its purpose as follows:

The purpose of this article is to provide for and promote the safety of the general public by establishing a permitting procedure and rules for the development and operation of shooting range facilities.

The appellate court recognizes that when the Kitsap County Board of County Commissioners adopted KCC 10.25 and made these legislative pronouncements, it was aware of the Court of Appeal's decision issued one month earlier in *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 283, 337 P.3d 328 (2014) where it was determined that KRRC's range facilities were inadequate to prevent bullets from leaving the property and it was more likely than not that bullets would escape the shooting areas and possibly strike persons or property in the future. Opinion at page 15.

Accordingly, the Opinion's holding that Chapter 10.25 is not preempted by state law is consistent with Supreme Court decisions regarding state preemption. Review should be denied.

B. The Court of Appeals Did Not Create Any New “Statutory Exceptions” to RCW 9.41.290 In Conflict With Any Washington Holding

KRRC incorrectly claims that the Opinion creates a new “statutory exception” to RCW 9.41.290 for “shooting associations” or “gun ranges” which, KRRC argues, is in conflict with case law. However, the Opinion does not create any new exceptions to Chapter 9.41. Instead it correctly holds that Chapter 9.41 does not regulate or state an intention to preempt regulations governing the operation of shooting facilities. The Opinion is not in conflict with any other court holding.

C. The Opinion Is Consistent With Case Law Regarding The Sufficiency of Legislative Findings in The Enactment of Police Power Regulation

KRRC challenges the sufficiency of the legislative findings which qualify KCC 10.25 for the preemption exception outlined in RCW 9.41.300(2)(a). In holding that the legislative findings were sufficient, the Opinion is consistent with Washington case law on this issue and, therefore, review should be denied.

KRRC incorrectly asserts that the preemption exception of RCW 9.41.300(2)(a) does not apply to KCC 10.25 because Kitsap County's Board of County Commissioners did not make specific legislative findings that shooting ranges in Kitsap County present "a reasonable likelihood that humans, domestic animals or property will be jeopardized." As the Opinion correctly holds, KRRC provided no legal authority to support its contention that such specific findings are required. There is no such requirement in Washington law and RCW 9.41.300(2)(a), in particular, does not require this. As the Opinion states, local governments are not required to hold special investigations or make formal findings before they exercise their police power. *Petstel Inc. v. County of King*, 77 Wn.2d 144, 151, 459 P.2d 937 (1969). Opinion at page 14.

D. The Opinion Is Consistent With Case Law Regarding the Second Amendment and Article 1, Section 24

The Opinion is consistent with Ninth Circuit and other court holdings, including the United State Supreme Court, which consistently apply "intermediate scrutiny" to firearm regulations which might implicate the Second Amendment. The Opinion correctly holds that KCC 10.25 does not substantially burden a Second Amendment right because it does not prohibit the discharge of firearms and only affects the manner in which an entity can operate a shooting range. Opinion at 21.

The Opinion also correctly holds that KCC 10.25 satisfies intermediate scrutiny because its requirement of an operating license to ensure that shooting facilities meet certain standards is substantially related to its purpose of promoting the safety and protection of the public as well as shooting facility participants, spectators, and neighbors by establishing rules for the development and operation of shooting range facilities Opinion at pages 21-22.

The Opinion correctly analyzed KCC 10.25 in the context of article 1, section 24 of the Washington Constitution. KRRC's petition for review fails to recognize that the rights protected by article 1, section 24 are not identical to the rights protected by the Second Amendment and thus courts must analyze these issues separately. KRRC appears to assert that the Court of Appeals was required to apply a strict scrutiny analysis under article 1, section 24, however, that is not the proper analysis set forth by the Washington Supreme Court. The Washington Supreme Court has ruled that, under article 1, section 24, the right to bear arms is subject to "reasonable regulation," (i.e., "reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought."). *State v. Jorgenson*, 179 Wn.2d 145, 156, 312 P.3d 960, 964 (2013).

E. The Application of KCC 10.25 Does Not Violate KRRC's Non-Conforming Use Rights

Contrary to KRRC's assertions, its status as a non-conforming use with respect to Kitsap County's zoning regulations does not exempt it from police power regulations. During both the trial court and appellate court proceedings, KRRC repeatedly asserted that, pursuant to the holding in *Rhod-A-Zelea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998), it is not subject to police power regulation such as KCC 10.25 because it is a "nonconforming use." However, *Rhod-A-Zelea* determinatively establishes that a property owner's non-conforming use status is a concept and right enjoyed only with respect to zoning regulations and does not apply to other police power regulations. *Id.* at 6-9. Accordingly, non-conforming uses must comply with subsequently-enacted police power regulations. *Id.* at 9.

The Opinion correctly holds, consistent with other Supreme Court holdings, that application of KCC 10.25 to KRRC does not violate its "non-conforming use" rights.

F. The Enforceability of KCC 10.25 With Respect to the Bargain and Sale Deed Does Not Present A Legal Issue of Substantial Public Interest

While this case is important to the parties, it does not present a

legal issue that is of substantial public interest. The “deed” issues raised by KRRC are not recognized or supported by any legal authority, are specific to the facts of this case, and do not have general application.

The Opinion correctly rejects KRRC’s argument that the Bargain and Sale Deed (“Deed”) transferring ownership of the subject property from Kitsap County to KRRC renders KCC 10.25 unenforceable against KRRC. KRRC incorrectly, and without legal authority, asserts that the title warranties in the Bargain and Sale Deed include a right to “quiet use and enjoyment” of the property guaranteeing continued use of the property and precluding future restrictions on use. There is no such “quiet use and enjoyment” warranty. The five covenants made in a statutory warranty deed are solely with respect to title defects, not uses free from government restriction. See *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 162, 951 P.2d 817, 820 (1998). Furthermore, the Deed itself contains no express or implied promise or agreement by Kitsap County regarding the future regulation of the property or regarding KRRC’s right to continued use of the property without future or further restriction.¹ To the contrary, the deed contains restrictive covenants which limit KRRC’s use of the property.

¹ For this reason, KRRC’s argument that the Deed constitute a “contract” by which KRRC has the right to operate its shooting range consistent with its historical use free from restriction or regulation also fails.

KRRC incorrectly, and without legal authority, asserts that the Deed confirms KRRC's nonconforming use status and constitutes a "special permit" to continue in its nonconforming uses and activities without further regulation. There is no support for this position in any legal authority or in the express language of the Deed itself.

The Court of Appeals was correct in rejecting KRRC's unsupported position that the Deed restricts Kitsap County's ability to enforce regulations regarding activities or uses that occur on such property.

III. CONCLUSION

The Opinion does not conflict with any Washington case law or holding and does not involve an issue of substantial public interest. For these reasons, the Court should deny KRRC's petition for review.

IV. NOTIFICATION OF ADDITIONAL CASES

Kitsap County hereby notifies the Court of the existence of following additional pending cases between the parties:

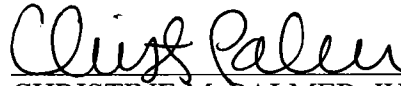
COA Cause No.: 48781-1-II

COA Cause No.: 50011-6-II

COA Cause No.: 50574-6-II

Respectfully submitted this 5th day of March, 2018

TINA ROBINSON
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Christine Palmer", written over a horizontal line.

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CERTIFICATE OF SERVICE

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

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

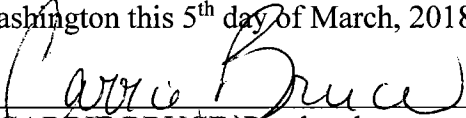
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Anna M. Barvir [X] Via U.S. Mail; and
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SIGNED in Port Orchard, Washington this 5th day of March, 2018.


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