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

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,

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

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ON APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY
The Honorable Susan K. Serko

ANSWER TO AMENDED PETITION FOR DISCRETIONARY REVIEW

TINA R. ROBINSON
Kitsap County Prosecuting Attorney

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

(253) 804-5027

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APPENDIX NO. 2

Findings of Fact, Conclusions of Law and Orders (Feb. 9, 2012), *Kitsap County v. Kitsap Rifle and Revolver Club*, Pierce County Superior Court Cause No. 10-2-12913-3.

I. IDENTITY OF RESPONDENT

Kitsap County was Plaintiff in the trial court and Respondent in the Court of Appeals. The County appears by and through attorney Neil R. Wachter, Special Deputy Prosecuting Attorney for Kitsap County, to respectfully request that this Court deny Kitsap Rifle and Revolver Club ("KRRC" or the "Club")'s amended petition for review (the "Petition").

II. COURT OF APPEALS DECISION

The decision is *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (Divison II, Oct. 28, 2014), as amended by the February 10, 2015 order of the Court of Appeals (the "Opinion"; attached hereto as App. 1). The trial court's February 9, 2012 judgment[1] granted declaratory and injunctive relief against illegal land uses, unpermitted development and public nuisances at KRRC's shooting ranges. Division II reversed declaratory judgment that KRRC forfeited its real property's[2] nonconforming "shooting range" use status by engaging in illegal uses and "expanded uses" contrary to common law and local code, reversed a ruling that expanded hours of operation was an expanded use, affirmed conclusions that commercial and military firearms training and

[1] Findings of Fact, Conclusions of Law and Orders (CP 4052-4092) (the "Judgment"), attached hereto as Appendix 2. This brief's references to "FOF" or "COL" are to numbered paragraph(s) of the trial court's judgment.

[2] The "Property" refers to KRRC's real property identified in the caption to this action, a 72-acre parcel in central Kitsap County. The Property is zoned "rural wooded". FOF 9 (CP 4055).

activities dramatically increasing noise impacts each constituted expanded uses, and remanded for entry of a modified declaratory judgment and remedy for the expanded uses and for KRRC's years of unpermitted earthwork to modify existing ranges and create new earthen shooting bays.

The Court of Appeals further affirmed public nuisance rulings and injunctive orders necessitated by KRRC's disruptive shooting sounds and by KRRC's failure to prevent bullet escapement to the nearby community.

III. COUNTERSTATEMENT OF PETITION'S ISSUES

1. Did the Court of Appeals err in affirming that loud, percussive shooting sounds from the Property create a public nuisance when (a) trial witnesses did not all testify to interference with use and enjoyment of their homes from dramatically increased hours of shooting, frequent prolonged rapid-fire shooting, exploding targets, and use of high-caliber rifles and automatic weapons and (b) noise regulations exempt "authorized shooting ranges" from decibel standards? Petition at 1-2.

2. Did the Court of Appeals err in affirming that commercial and military training uses of the Property constitute "expanded uses" of KRRC's nonconforming "shooting range" land use of the Property prohibited under Washington common law and the Kitsap County Code[3] -

[3] The Kitsap County Code ("KCC" or the "Code") is published and maintained online at http://www.codepublishing.com/wa/kitsapcounty (last visited 4-14-15).

as distinguished from intensifications - where (a) KRRC has not sought review of the trial court's findings of KRRC's historic shooting activities and (b) KRRC has not sought review of the court's conclusion that these commercial uses are prohibited in the "rural wooded" zone? Petition at 2.

3. Did the Court of Appeals err in affirming that bullet escapement creates a public nuisance when the trial court found that it was likely that bullets have escaped and will escape the Property and that KRRC's safety protocols and physical infrastructure are inadequate to contain bullets, based on testimony of bullet strikes to nearby houses and expert testimony to populated "surface danger zones" vulnerable to bullet strikes from weapon systems commonly used at KRRC? Petition at 2.

4. "If the trial court's noise or safety nuisance decisions are reversed or remanded, should the permanent injunction and warrant of abatement intended to remedy these decisions also be reversed or remanded?" Petition at 2.[4]

5. Did the Court of Appeals err in affirming the trial court's public nuisance noise or bullet escapement injunctions without explicitly analyzing whether each such injunction is properly tailored to abate its corresponding public nuisance conditions? Petition, at 2-3.

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[4] KRRC's fourth issue, quoted verbatim, sets forth a possible consequence of reversal or remand but is not a separate issue subject to RAP 13.4(b) analysis.

IV. CONTINGENT CROSS-PETITION ISSUES PRESENTED FOR REVIEW UNDER RAP 13.4(d)

1. Did the Court of Appeals err in concluding that KRRC's expanded and illegal land uses and its unpermitted range development activities on the Property did not act to terminate the nonconforming "shooting range" use as a matter of declaratory judgment under the Kitsap County Code's nonconforming use provisions allowing continuation of a use only "so long as it remains otherwise lawful"?

2. Did the Court of Appeals err in finding that KRRC's "300-meter range" project was outside the eight-acre nonconforming use area of the Property, inconsistent with the trial court's findings?

V. STATEMENT OF THE CASE

Kitsap County filed this action on September 9, 2010 and filed its trial complaint on August 29, 2011. CP 2-88, 1695-1757. The trial court conducted a 14-day bench trial in Fall 2011 and entered its Judgment on February 9, 2012. CP 4052. KRRC filed its timely notice of appeal on February 15, 2012. CP 4114–4156.[5]

The Judgment compared KRRC's 2011 facilities, operations, uses

[5] KRRC remains an operational live-fire shooting range, pursuant to a stay of judgment pending appeal. Ruling Granting Stay on Conditions (4-23-12); Order Clarifying Stay and Denying Motion to Modify and Motion for Contempt (8-27-12).

and impacts with those in 1993.[6] In that span, the Property underwent

> conversion from a small-scale lightly used target shooting range in 1993 to a heavily used range with an enlarged rifle range and a 11-bay center for local and regional practical shooting competitions . . . .

COL 33.[7] After 1993, KRRC made dramatic changes to uses of and facilities at eight-acres of active use (the "eight acres"), including:

- Transformation from a daylight range with two developed shooting ranges (one rifle and one pistol) into a heavily-used range open to members from 7 a.m. to 10 p.m. year-round, and into a center for practical shooting[8] training and competitions. FOF 29, 30, 70, 80.

- Clearing, grading and excavation to lengthen the rifle range, to construct 11 earthen practical shooting "bays"[9], and to "underground" a seasonal water course into twin 475-foot long culverts crossing the

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[6] In 1993, the Chair of the Board of County Commissioners wrote a letter to shooting ranges in unincorporated Kitsap County, recognizing their nonconforming use status. FOF 10, citing Ex 315 (COA Respondent's Brief, App. 3). This letter established a land use benchmark in the case. COL 6, 33. KRRC treated the letter as exempting the Club from county permitting. RP 1712:20–1713:15, 2185:20–2186:11, 2287:14-19.

[7] See also FOF 80 ("In the early 1990's, shooting sounds from the range were typically audible for short times on weekends, or early in the morning during hunter sight-in season (September). Hours of active shooting were considerably fewer.")

[8] Practical shooting refers to practice and competition for shooting in mock self-defense scenarios, often with multiple targets and "bad guy/good guy" decisions for the participant. RP 335:25-336:12, 367:2-11. Practical shooting frequently occurs at multiple bays on the Property, creating a cacophony from multiple rapid fire shooters. Ex 28, 132 (YouTube videos).

[9] The shooting bays facilitate shooting in up to 180, 270 or 360 degrees. Ex 133.

Property – all done without required site development permitting, engineering or wetland study. FOF 33-36, 53-56.

- For-profit use by National Firearms Institute[10] and by contractors providing firearms training to U.S. Navy personnel. FOF 72-79.

- Permissive use of automatic weapons, cannons and exploding targets, and frequent and incessant rapid-fire shooting. FOF 81-87.[11]

In 2005, KRRC undertook a major clearing and grading project outside the eight acres to establish a new "300-meter range", again without required site permitting. KRRC abandoned the project after the County demanded a conditional use permit for an expanded use. FOF 40-46. The Opinion regarded KRRC's development work as confined to the eight-acres, which is incorrect as to the 300-meter range. Opinion at 12, n. 4.[12]

1. Nonconforming Use and the Land Use Injunction

The trial court recognized KRRC's nonconforming "shooting

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[10] National Firearms Institute is the trade name for a firearms training business registered at the Property's street address starting in 2002. COL 73.

[11] KRRC's changes to its uses and facilities post-dated the building of nearby down-range residential developments where several of the County's witnesses resided. See e.g. Ex 1 ("Area Map with Selected Residences"), Ex 3 ("Kitsap Rifle & Revolver Club Complaints"), Ex 5 ("Year of Construction" for El Dorado Hills plats), Ex 6 ("Year of Construction" for Whisper Ridge plats).

[12] In its answer to KRRC's motion for reconsideration, the County asked Division II to correct its error of treating the 300-meter range as outside the eight acres, which the Court refused based on timeliness. See Kitsap County's Answer to Motion for Reconsideration (12-31-14) ("Answer on Recon.") at 3-6; Court's February 10, 2015 order at 2 (App. No. 3). See also Order Granting Appellant's Motion for Extension of Time to File a Motion for Reconsideration (12-18-14) (for reconsideration motion filed on 11-18-14).

range" use of its existing eight-acre range[13], but ruled that KRRC's changed uses were no mere intensifications: The Club's

> (1) expanded hours;
>
> (2) commercial, for-profit use (including military training);
>
> (3) increasing the noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber and practical shooting

"significantly changed, altered, extended and enlarged the existing use." COL 8. The trial court entered declaratory judgment that

> [KRRC's] activities and expansion of uses . . . terminated the legal nonconforming use status of the Property as a shooting range by operation of KCC Chapter 17.460 and by operation of Washington common law regarding nonconforming uses . . . .

Judgment, at 33 (CP 4084). The trial court declared the Club's "shooting range" use could resume only upon issuance of a conditional use permit for a "private recreational facility" or other recognized use under Chapter 17.381 KCC. Id. Furthermore, the court ruled that public nuisance conditions and unpermitted range development projects each constituted illegal uses violating the Property's nonconforming use. COL 11, 27-32.

Based on its holdings and declaratory judgment, the trial court entered its land use injunction:

> enjoining use of the Property as a shooting range until violations of Title 17 Kitsap County Code are resolved by

[13] COL 6.

> 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 4085). Division II vacated this injunction and remanded the case to address the affirmed expanded uses and unpermitted development. Opinion at 44-45, 47.

2. Outrageous Noise, Bullet Escapement, and the Public Nuisance Injunction

The trial court held found KRRC liable for common law and statutory public nuisances, finding the Club's expanded activities and "blue sky" ranges unleashed disruptive noises and intolerable risks of bullet escapement upon the nearby community. On noise, the court wrote:

> 84. The testimony of County witnesses who are current or former neighbors and down range residents is representative of the experience of a significant number of home owners within two miles of the Property. The noise conditions described by these witnesses interfere with the comfort and repose of residents and their use and enjoyment of their real properties. The interference is common, at unacceptable hours, is disruptive of activities indoors and outdoors. Use of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the "sounds of war" and the Court accepts this description as persuasive.
>
> 85. Expanded hours, commercial use of the club, allowing use of explosive devices (including Tannerite), higher caliber weaponry and practical shooting competitions affect the neighborhood and surrounding

environment by an increase in the noise level emanating from the Club in the past five to six years.

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

FOF 84-86. As to bullet escapement, the trial court found KRRC's range facilities and operations endanger the neighboring residential areas:

67. The parties presented several experts who opined on issues of range safety. The Property is a "blue sky" range, with no overhead baffles to stop the flight of accidentally or negligently discharged bullets. The Court accepts as persuasive the SDZ diagrams developed by Gary Koon in conjunction with the Joint Base Lewis-McChord range safety staff, as representative of firearms used at the range and vulnerabilities of the neighboring residential properties. The Court considered the allegations of bullet impacts to nearby residential developments, some of which could be forensically investigated, and several of which are within five degrees of the center line of the KRRC Rifle Line.[14]

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

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

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[14] See COA Respondent's Brief at 32-34 (explaining use of surface danger zone mapping to depict the vulnerabilities of numerous residences, public roads including state Highway 3 and at least one school within range of KRRC).

FOF 67-69. Accordingly, KRRC's failure

> to develop its range with engineering and physical features to prevent escape of bullets from the Property's shooting areas despite the Property's proximity to numerous residential properties and civilian populations and the ongoing risk of bullets escaping the Property to injure persons and property, is . . . an unlawful and abatable common law nuisance.

COL 21. The public nuisance conditions are continuing and "cause the County and public actual and substantial harm") COL 13.[15] The trial court therefore issued a public nuisance injunction:

> 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;[16]
>
> 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 4085).

Citing unchallenged factual findings on safety and noise, Division II upheld the public nuisance holdings and injunction. Opinion at 24.

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[15] See also COL 12 (applying KCC 17.455.110's prohibition on uses producing "noise, smoke dirt, dust, odor, vibration ... which is materially deleterious to surrounding people, properties or uses.").

[16] The term "nominal .30 caliber" was defined in trial as a shooting term of art for a rifle firing a round "about .30 inches in diameter". RP 2797:17-2798:1.

VI. ARGUMENT

A. THE PUBLIC NOISE NUISANCE SURVIVES APPLICATION OF RCW 7.48.130 AND DECIBEL REGULATIONS, AND KRRC RAISES NO RAP 13.4(B) ISSUE

KRRC petitions for review of the trial court's public nuisance rulings on noise, claiming violation of RCW 7.48.130. Petition at 6.

> A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

RCW 7.48.130. The Opinion, at 29, noted that there were no explicit findings on this point, and KRRC claims that conflicts in testimony equate to inconsistent and insufficient causes for complaint. Petition at 6-7.

KRRC's RCW 7.48.130 argument ignores the trial court's authority to make implicit findings of credibility and evidentiary weight.[17] KRRC's citation to testimony "by six of the 18 community [trial] witnesses" (Petition at 7) ignores that unchallenged findings are verities and presumes that the trial court accorded witnesses equal veracity.[18]

KRRC relies on the distinguishable case of *State ex rel. Warner v. Hayes Inv. Corp.*, in which neighbors of a public beach and trailer park

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[17] See *Trotzer v. Vig*, 149 Wn. App. 594, 611 n.13, 203 P.3d 1056, *review denied*, 166 Wn.2d 1023 (2009) (recognizing trial court's implicit findings of credibility).
[18] See *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n,*, 173 Wn. App. 778, 791, 295 P.3d 314 (Div. 2, 2013) (findings of fact are verities on appeal absent assignment of error) (citing *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 808, 828 P.2d 549 (1992)).

testified to alleged public nuisances ranging from loud noises to vulgar language to public drinking.[19] The Court affirmed rejection of these wide-ranging complaints which established "some occasional minor annoyance from the operation ... of the respondents' camp."[20] From this testimony, the Court concluded the offending activities "[did] not affect 'equally the rights of an entire community or neighborhood'."[21] *Warner* did not even reach RCW 7.48.130's clause allowing unequal "extent of the damage".

In contrast, this Judgment found testimony describing everyday exposure to and disruption by KRRC's "sounds of war" was representative of a significant number of residents within two miles of KRRC. FOF 84.[22]

KRRC claims to be "fully exempt" from decibel standards between 7 a.m. and 10 p.m. Petition at 8.[23] However, the enabling statute does not abridge statutory or common law actions or remedies. RCW 70.107.060.

KRRC's noise argument identifies no directly conflicting Supreme Court authority and creates no issue of substantial public interest, particularly in the highly fact-specific realm of public nuisance noise.

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[19] *State ex rel. Warner v. Hayes Inv. Corp. ("Warner")*, 13 Wn.2d 306, 309, 125 P.2d 262 (1942).
[20] *Warner*, 13 Wn.2d at 310.
[21] *Warner*, 13 Wn.2d at 311 (citing former Rem.Rev.Stat. § 9912's and current RCW 7.48.130's "prerequisite of a public nuisance").
[22] The trial court's findings refute KRRC's suggestion that its neighbors suffer an "inconvenience". Petition at 8 (citing *Rea v. Tacoma Mausoleum Assn.*, 103 Wash. 429, 435, 174 P. 961 (1918)).
[23] Citing Opinion at 22; RCW 70.107.080; WAC 173-60-050; KCC 10.24.040.

B. THE OPINION'S RECITAL OF TIMING OF NOISE INCREASES DOVETAILS WITH ITS EXPANDED NONCONFORMING USE REVIEW UNDER COMMON LAW, AND KRRC RAISES NO RAP 13.4(B) ISSUE

KRRC asserts the Opinion overlooked an inconsistency in the findings' timelines relating to expanded use and public nuisance noise. On one hand, the Opinion affirmed that multiple changed uses caused a dramatic increase in KRRC's sound output in about 2005 or 2006. Petition at 11 (citing Opinion at 4).[24] On the other hand, commercial firearms training started at KRRC in 2002 and continued through 2010. Petition at 11 (citing Opinion at 15). Thus, claims KRRC, "for-profit commercial and military training at the Club did not perceptibly increase the intensity or volume of the Club's use of its property." Petition at 11. This section of the brief answers that attack on the Opinion's expanded use rulings, and then presents the County's contingent cross-petitions.

1. Expanded Use Analysis of For-Profit Activities

Where findings are inconsistent, a judgment will be upheld if one or more of the findings support the judgment.[25] Here, the trial court

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[24] The Opinion, at 4, cited CP 4073. See also FOF 85 (dramatic increases in KRRC's noise output occurred "in the past five to six years" before trial.

[25] *Dept. of Revenue v. Sec. Pac. Bank of Washington N.A.*, 109 Wn. App. 795, 807, 38 P.3d 354 (Div. 2, 2002) (citing *In re Marriage of Getz*, 57 Wn. App. 602, 606, 789 P.2d 331 (1990); *Lloyd's of Yakima Floor Center v. Department of Labor and Indus.*, 33 Wn. App. 745, 752, 662 P.2d 391 (Div. 2 1982) (citing cases)).

recited commercial uses as one of several activities *contributing* to increased public nuisance noise in 2005-2006. FOF 85. From this supposed inconsistency, KRRC seeks review of the "expanded use" ruling for commercial uses. Petition at 12.

The Judgment applied both common law and local zoning code to evaluate uses as "intensified" or "expanded" (or illegal). In affirming two of the three expanded uses, the Opinion primarily applied the case law.

This Court has pronounced that "[u]nder Washington common law, nonconforming uses may be intensified, but not expanded."[26] The Opinion cited *McGuire*, *Keller*, and the seminal *Rhod-A-Zalea*[27] case for this proposition, Opinion at 9-10. In *Keller*, the Court distinguished "intensified" uses from expanded or enlarged uses:

> When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. 1 R. Anderson, Supra at s 6.47; 8 A. McQuillan, Municipal Corporations s 25.207 (3rd ed. 1976). Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. *Jahnigen v. Staley*, 245 Md. 130, 137, 225 A.2d 277 (1967). The test is whether the intensified use is "different in kind" from the nonconforming use in existence when the zoning ordinance was adopted. 3 A. Rathkopf, The Law of Zoning and

[26] *City of University Place v. McGuire ("McGuire")*, 144 Wn.12d 640, 649, 30 P.3d 453 (2001) (citing *Keller v. City of Bellingham*, 92 Wn.2d 726, 731-32, 600 P.2d 1276 (1979)).

[27] *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998),

Planning, ch. 60-1, s 1 (4th ed. Cum.Supp.1979).

Keller, 92 Wn.2d at 731. KRRC alludes to its constitutionally-protected right of intensification. Petition at 2. That right is limited:

> This right, however, *only* refers to the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use.[[28]]

The case of *Meridian Minerals Co. v. King County*,[29] instructs that "intensified" vs. "expanded' use analysis applies even without a local ordinance governing expanded uses. *Meridian* concerned a grading permit sought by a nonconforming rock quarry dating from 1905 on the Enumclaw Plateau, zoned "agricultural" in 1958.[30] The county had previously denied applications for a "re-zone" or an unclassified use permit to operate a commercial quarry, so the case turned on whether the county "erred in refusing to issue a grading permit allowing Meridian to intensify, enlarge, and expand its nonconforming land use."[31]

King County's code had no provision "regarding variations in use (e.g. expansion, enlargement, or intensification)".[32] Nevertheless, the Court affirmed that the county properly rejected the proposed permit on

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[28] *Rhod-Z-Zalea*, 136 Wn.2d at 6 (emphasis in original) (citing 1 Robert M. Anderson, American Law of Zoning § 6.01; Richard L. Settle, Washington Land Use and Environmental Law and Practice § 2.7(d) (1983).
[29] *Meridian Minerals Co. v. King County ("Meridian")*, 61 Wn. App. 195, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991).
[30] *Meridian*, 61 Wn. App. at 198-99.
[31] *Meridian*, 61 Wn. App. at 204-05.
[32] *Meridian*, 61 Wn. App. at 205.

the basis of the *extent of the change* the permit would have allowed in the property's established quarry use, writing:

> As acknowledged in *Keller*, nonconforming uses do not always remain static. *Keller*, at 731 (citing 1 R. Anderson, Zoning § 6.47 (2d ed. 1976)). The issue thus arises as to the extent changes in a nonconforming use are tolerated without requiring a rezone or conditional use permit.[33]

The Court recognized that the proposed grading permit would not transform the "type of activity", but found the resulting tremendous increase in quarrying activity would cross over from an intensification:

> Meridian's proposed intensification is different in kind from that which existed in 1958 and would constitute a prohibited enlargement of the nonconforming use. The nature and purpose of the original use would change with the proposal and would have a substantially different impact and effect on the surrounding area.[34]

Meridian's application of the *Keller* analysis matters to this case's treatment of commercial use as an expanded use, because Division II declined to affirm expanded or illegal uses under KCC 17.460.020 of the Code's nonconforming use chapter (17.460 KCC). Opinion at 11.[35]

KRRC articulates no conflict between the Opinion's expanded use

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[33] *Meridian*, 61 Wn. App. at 208.
[34] *Meridian*, 61 Wn. App. at 210.
[35] KCC 17.460.020 provides:

> Where a lawful use of land exists that is not allowed under current regulations, but was allowed when the use was initially established, that use may be continued ***so long as it remains otherwise lawful***, and shall be deemed a conforming use. (emphasis added).

analysis and *Keller*, and raises no issue of substantial public interest.

Review, based on KRRC's nonconforming use issue, would be futile because the Opinion left intact the conclusion applying former KCC 17.455.060 (COL 35; Opinion at 12), which provides in pertinent part:

> A. 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.[36]

Review of KRRC's nonconforming use issue would also be futile because the Opinion did not vacate conclusions that KRRC's commercial and new uses are disallowed in the rural wooded zone and violations of Title 17 KCC (zoning) are enjoinable nuisances per se. COL 25, 11.[37]

2. Contingent Cross-Petitions on Nonconforming Use

If this Court grants review, the County would respectfully petition for review of Division II's failure to also affirm expanded and illegal use findings under KCC 17.460.020's prohibition on nonconforming uses of land not remaining "otherwise lawful".[38] Opinion at 11. The Opinion's

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[36] See Answer on Recon. at 3, 16-18 (explaining application of former KCC 17.455.060 despite its repeal, effective July 1, 2012).

[37] Citing KCC 17.530.030 and 17.110.515.

[38] See *Hartley v. City of Colorado Springs*, 764 P.2d 1216, 1224 (Colo. 1988) (applying strict construction to zoning provisions allowing continuance of nonconforming uses and liberal construction to zoning provisions restricting nonconforming uses) *(citing City & County of Denver v. Board of Adjustment,* 31 Colo.App. 324, 331, 505 P.2d 44, 47 (1972); *Hooper v. Delaware Alcoholic Beverage Control Comm'n,* 409 A.2d 1046, 1050 (Del.Super.Ct.1979); *Brown*

construction is not consistent with other provisions of KCC Title 17[39] and is particularly troublesome for public nuisance, which is plainly an "illegal use" of the core "shooting range" use. COL 32. This contingent petition seeks to restore declaratory judgment that KRRC must obtain land use approval to continue its "shooting range" use.

If this Court grants review, the County would also respectfully petition for review of Division II's mistaken ruling that the 300-meter range project was not subject to KCC 17.460.020(C)'s prohibition on geographic expansion of nonconforming uses. Opinion at 11-12; see *supra* at 6, n. 12.

C. THE OPINION PROPERLY AFFIRMED THE PUBLIC SAFETY NUISANCE CAUSED BY KRRC'S MODIFIED OPERATIONS AND FACILITIES LACKING ENGINEERING CONTROLS TO PREVENT BULLET ESCAPE TO NEARBY POPULATED AREAS, AND KRRC RAISES NO RAP 13.4(B) ISSUE

KRRC posits that the Opinion erroneously affirmed the public nuisance rulings by giving short shrift to probability of harm and social utility analyses. Petition at 12-13.

County v. Meidinger, 271 N.W.2d 15, 18–19 (S.Dak. 1978) (citations omitted); 1 R. Anderson, American Law of Zoning § 6.35, at 557–58 (3d ed. 1986)).

[39] See e.g. KCC 17.100.030, providing in pertinent part:

> It shall be unlawful for any person, firm, or corporation to erect, construct, establish, move into, ***alter, enlarge***, use or cause to be used, any buildings, structures, improvements, or ***use of premises*** contrary to the provisions of this title . . . . (emphasis added).

KRRC cites *Hite v. Cashmere Cemetery Association,* holding that likelihood of harm must be "reasonable and probable", rather than just a possibility.[40] *Hite* affirmed dismissal of private nuisance based on a cemetery neighbor's fears that germs from cemetery could migrate to the a drinking water well, which the Court adjudged to be highly improbable.[41]

KRRC cites *Turner v. City of Spokane* for the proposition that a court "ought not to interfere, where the injury apprehended is of a character to justify conflicting opinions as to whether it will in fact ever be realized".[42] The *Turner* court affirmed dismissal of nuisance claims against a proposed quarry.[43] The Court noted that the trial court's decision

> would not prevent appellants from applying for an injunction after, for example, the first blast, if they show that they have been damaged, or are in real danger of suffering damage.[[44]]

In contrast, Kitsap County presented evidence of five houses down range of KRRC's rifle range, each struck by bullets over the 15 years preceding trial. FOF 67.[45] Moreover, the findings include the Club's failure to develop its range with available engineering and physical

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[40] Petition at 13 (citing *Hite v. Cashmere Cemetery Assn.,* 158 Wash. 421, 424, 290 P.1008 (1930).
[41] *Hite*, 158 Wash. at 424.
[42] Petition at 13 (citing *Turner v. City of Spokane*, 39 Wn.2d 332, 335, 235 P.2d 300 (1951).
[43] *Turner*, 39 Wn.2d at 333.
[44] *Turner*, 39 Wn.2d at 337-38.
[45] See also COA Respondent's Brief at 37-38 (summarizing bullet strikes to houses approximately 1.5 miles down range of KRRC).

features "despite ... the ongoing risk of bullets escaping the Property to injure persons and property". COF 21. Read together, the findings assign a more-probable-than-not likelihood to future bullet escapement from the Property. The fact that no *person* has yet to be hit offers no comfort.

KRRC claims that the Opinion also conflicts with *Lakey v. Puget Sound Energy, Inc.*, which rejected residential plaintiffs' nuisance based on fear of electromagnetic currents from a nearby substation, based on the facility's social utility.[46] The Opinion properly analyzed the social utility question in light of the obvious lethality of KRRC's blue-sky ranges, Opinion at 27, and KRRC presents no direct conflict with cited cases.[47]

VII. CONCLUSION

For the foregoing reasons, the Court should deny KRRC's petition for review.

Respectfully submitted this 5th day of April, 2015.

TINA R. ROBINSON
Prosecuting Attorney

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

[46] Petition at 14 (citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 924-25, 296 P.3d 860 (2013).

[47] Space constraints limit an answer to KRRC's remaining issue(s), which challenge the tailoring of public nuisance orders. Petition at 15-18. These orders addressed nuisance conditions discussed extensively in earlier briefing in the case. See generally, COA Respondent's Brief at 29-39.

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 Brooks Foster The Chenoweth Law Group 510 SW Fifth Ave., Ste. 500 Portland, OR 97204	[X] [X] [ ]	Via U.S. Mail Via Email: As Agreed by the Parties Via Hand Delivery
David S. Mann Gendler & Mann LLP 936 N. 34th St. Suite 400 Seattle, WA 98103-8869	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery
Matthew A. Lind Sherrard McGonagle Tizzano, PS 19717 Front Street NE, PO Box 400 Poulsbo, WA 98370-0400	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery
Richard B. Sanders Goodstein Law Group 501 S G St Tacoma, WA 98405-4715	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery

C.D. Michel Michel & Associates, P.C. 180 E. Ocean Blvd, Ste 200 Long Beach, CA 90802	[X] [X] [ ]	Via U.S. Mail Via Email Via Hand Delivery

SIGNED in Port Orchard, Washington this 15th day of April, 2015.

Batrice Fredsti

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

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 5/8/15

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Thank you for your email. Here's the Answer originally filed with the amended pages inserted. This attachment does not include the two appendices. The two appendices are over the 50 page email filing limit and were mailed to the court for inclusion with the brief after the original filing.

Please let us know if we need to resend those two appendices.

Thanks,

Batrice

Batrice Fredsti
Legal Assistant to Ione George,
Christy Palmer and Michael Witek
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

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We received the attached "Amended Table of Contents...". It doesn't appear clear enough where to insert/replace pages. Please resubmit the Answer to Amended Petition for Discretionary Review that was previously filed on April 15, 2015, with the amended pages already inserted and we will replace the one we have in the file with the new one. Thank you.

Supreme Court Clerk's Office

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Good morning,

Attached for filing with the court is Kitsap County's Amended Table of Contents and Table of Authorities for Respondent's Answer to Amended Petition for Discretionary Review (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,
Christy Palmer and Michael Witek
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