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

NOS 43076-2-II

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

Respondent/Cross-Appellant,

vs.

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

Appellants/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

BRIEF OF *AMICUS CURIAE* KITSAP COUNTY ALLIANCE OF PROPERTY OWNERS

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I. INTRODUCTION

Appellant Kitsap Rifle and Revolver Club (the "Club") assigns error to the trial court's termination of the Club's nonconforming use right and argues that the legal authority cited by the trial court and Respondent Kitsap County (the "County") does not support the termination remedy. The County argues that Kitsap County Code (the "Code") provides for the termination remedy. However, no County ordinance expressly provides for termination of a vested nonconforming use right. Therefore, a critical issue in this case is whether the Code implicitly authorizes termination in this particular case.

The Club argues the law does not permit that implication, and both parties recognize that substantive due process plays a role in analyzing the termination remedy.[1] This brief submitted by the Kitsap Alliance of Property Owners ("KAPO") shows that substantive due process prevents the Code from being interpreted to terminate the Club's nonconforming

[1] *See Amended Brief of Appellant* ("Club's Opening Brief") at 9–12 (discussing protection of nonconforming use rights and limited grounds for termination under *Rhod-A-Zalea & 35th, Inc. v. Snohomish County* ("*Rhod-A-Zalea*"), 136 Wn.2d 1, 7, 959 P.2d 1024 (1988)); *Response Brief of Respondent Kitsap County* at 51 ("[a nonconforming use] is allowed to continue due to the fairness and due process concerns of the landowner") (quoting *King Cnty., Dept. of Dev. & Envtl. Servs. v. King Cnty.*, 177 Wn.2d 636, 643, 305 P.3d 240, 244 (2013); citing *Rhod-A-Zalea*, 136 Wn.2d at 6); *Amended Reply Brief of Appellant* at 36 ("[t]he parties further agree one of those constitutional limits [on regulation of a nonconforming use right] is that a nonconforming use must be allowed to intensify as a matter of substantive due process").

use right because less burdensome remedies are available.

Substantive due process prohibits an ordinance from being interpreted to cause undue oppression to a landowner. Termination of the Club's nonconforming use right is unduly oppressive under the circumstances of this case. The trial court's decision to permanently terminate the Club's nonconforming use right effected a significant, permanent, and unanticipated deprivation of property rights. It is unduly oppressive because each of the Code violations and nuisance conditions identified by the trial court can be remedied without terminating the Club's right to use its property as a nonconforming shooting range.

The prospect that the Club could reopen pursuant to a conditional use permit ("CUP") does not make it constitutional to interpret County ordinances to provide for termination. There is no guarantee a CUP would issue. Requiring a CUP would put the Club in the same position as a landowner who wishes to establish a gun club at a property where it never existed, even though the Club has been operating at its property since 1926. The Club has vested nonconforming use rights, which cannot be so easily lost when a mere intensification of the same use has occurred over the course of decades.

To affirm the trial court's decision would be an unconstitutional violation of substantive due process. It would create chaos and

uncertainty among local landowners by allowing the government discretion to terminate their nonconforming use rights for a single illegality or Code violation. It would also allow private litigants, as is the case here with amicus Central Kitsap Safe & Quiet, LLC, to influence the County to permanently shut down a nonconforming use by identifying the slightest illegality, regardless of how easily it could be corrected. Indeed, it would cast an unforeseeable cloud of uncertainty over property rights throughout the entire State of Washington. This erosion of private property rights must not be allowed.

The Court should protect landowners by reversing the trial court's termination of the Club's nonconforming use right on the grounds that this remedy violates the core constitutional principle of substantive due process.

II. STATEMENT OF THE CASE

KAPO adopts the statement of the case submitted to this Court by the Club.

III. ARGUMENT

A. The Code Must Be Construed to Avoid Unconstitutionality.

The trial court cited the Code as authority for termination of the

Club's nonconforming use right.[2] In this appeal, the Club argues termination is not expressly provided by any ordinance in the Code, and it was error for the trial court to so broadly interpret the Code to imply that remedy.[3] The County responds that the termination remedy is supported by the Code, but never identifies a specific provision that expressly provides for termination.[4] The Code should not be interpreted to provide an implied remedy of termination in this case because doing so would render the Code unconstitutional or, at minimum, raise serious constitutionality concerns. Conversely, it is reasonable to interpret the Code to provide no implied remedy of termination, and that reasonable interpretation should be given effect in this appeal to preserve the constitutionality of the Code.

In *Anderson v. Morris*, the Washington Supreme Court observed, "[w]here a statute is susceptible to more than one interpretation, it is our duty to adopt a construction sustaining its constitutionality if at all possible."[5] This rule applies to the Kitsap County Code and ordinances at issue here, which are subject to the same constitutional limits as the statutes and regulations at issue in *Anderson*.

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[2] COL 26-33.
[3] *See* Club's Opening Brief at 11–12.
[4] Brief of Respondent Kitsap County at 54-56.
[5] 87 Wn.2d 706, 716, 558 P.2d 155 (1976).

In *Anderson*, the Department of Social and Health Service ("DSHS") interpreted one of its regulations in a way that conflicted with federal regulations.[6] The court found the interpretation unconstitutional because it violated the Supremacy Clause of the United States Constitution.[7] The court rejected it and adopted a reasonable interpretation that was constitutional.[8]

To be sure, this Court need not expressly find a Code interpretation unconstitutional in order to reject it. This rule of interpretation is much broader in application, and is also applied defensively to avoid issues of constitutionality by creating a strong preference for reasonable interpretations of the Code that fall safely within constitutional boundaries.[9]

The County's termination remedy asserted in this case relies on a Code interpretation that clearly raises the constitutional issue of substantive due process. As will be shown, interpreting the Code to terminate the Club's nonconforming use right would render the Code

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[6] 87 Wn.2d at 707–8.

[7] *Id.* at 716.

[8] *Id.*; *see also*, *City of Spokane v. Vaux*, 83 Wn.2d 126, 129–30, 516 P.2d 209 (1973) (rejecting interpretation of ordinance that would have been unconstitutional).

[9] *Martin v. Aleinikoff*, 63 Wn.2d 842, 849–50, 389 P.2d 422 (1964) (rejecting interpretation of statute that raised questions of substantive due process, so as to avoid the issue).

unconstitutional or, at minimum, raise significant concerns about its constitutionality. The Court should avoid these issues and keep its decision safely within the bounds of substantive due process by adopting a more reasonable interpretation of the Code that does not provide for implied termination of the Club's nonconforming use right.

B. Substantive Due Process Protects Landowners From Unduly Oppressive Government Action.

The United States was founded on the inalienable rights to life, liberty, and property, and the dream of pursuing these rights free from undue government oppression. These values are enshrined in Article I, Section 3 of the Washington Constitution. It declares: "No person shall be deprived of life, liberty, or property, without due process of law."[10] This has been the law of Washington since it became a state in 1889. This language mirrors the 14th Amendment to the Federal Constitution, which says, "No State shall . . . deprive any citizen of life, liberty, or property, without due process of law."[11] These State and Federal rights are coextensive and equal.[12]

Since at least 1987, Washington has followed "the classic, 3-

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[10] Const. art. I, § 3.
[11] U.S. Const. amend. XIV, § 1.
[12] *See Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 711, 257 P.3d 570 (2011).

pronged, substantive due process test of reasonableness."[13] Under that test, "a police power action must be reasonably necessary to serve a legitimate state interest."[14] In addition, the action must not be "overly oppressive" with respect to an individual landowner.[15] If a government action is overly oppressive or not reasonably necessary to serve a legitimate government interest, it must be invalidated.[16] This protects both landowners and the government because a violation of substantive due process will often constitute a compensable taking if allowed to stand.[17] By invalidating unduly oppressive government action, a court reduces or eliminates the government's liability for interpretation or application of a regulation that goes too far.

One of the most influential cases regarding substantive due process in Washington is *Presbytery of Seattle v. King County* ("*Presbytery*").[18] There, the court observed that the third prong of the *Orion* test—whether the regulatory action is unduly oppressive on the landowner—"will

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[13] *Orion Corp. v. State*, 109 Wn.2d 621, 646, 747 P.2d 1062 (1987).
[14] *Id.* at 646–47. In the case at hand, to extent that a small group of landowners that live nearby the Club have managed to manipulate the County into pursuing termination of the Club's nonconforming use rights in lieu of a private nuisance action against the Club, this is not a legitimate state interest.
[15] *Id.* at 647.
[16] *Id.* at 648–49.
[17] *Id.* at 649.
[18] 114 Wn.2d 320, 330, 787 P.2d 907 (1990).

usually be the difficult and determinative one."[19] The court then adopted a series of factors for determining whether a regulation is unduly oppressive. The court derived the first three factors from prior case law: (1) "the nature of the harm sought to be avoided"; (2) "the availability and effectiveness of less drastic protective measures"; and (3) "the economic loss suffered by the property owner."[20] The court also endorsed the following additional factors:

> "On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the **feasibility of less oppressive solutions** would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, **temporary or permanent nature of the regulation**, the **extent to which the owner should have anticipated such regulation** and how feasible it is for the owner to alter present or currently planned uses."[21]

The *Presbytery* factors are "nonexclusive."[22] They are intended to "assist the court" in answering the ultimate question of whether a regulation or regulatory action is "unduly oppressive to the landowner."[23] The dictionary defines "oppression" to mean the "unjust or cruel exercise

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[19] *Id.*
[20] *Id.* at 331.
[21] *Id.* (emphasis added).
[22] *Id.*
[23] *Id.*

of authority or power."[24] In evaluating the oppressiveness of the termination remedy in this case, the "feasibility of less oppressive solutions," the "permanent nature" of the termination remedy, and the "extent to which the owner should have anticipated" the County's lawsuit seeking termination are of particular interest.

C. Termination of the Club's Nonconforming Use Right Would Be Unduly Oppressive.

To uphold the trial court's termination of the Club's nonconforming use right would be unconstitutionally oppressive and a violation of substantive due process because it is an enormous and permanent deprivation far out of proportion to any legitimate government interest it might serve. There are less oppressive ways to serve the government's interests. The termination remedy should be reversed and the Club's nonconforming use right reinstated.

The trial court terminated the Club's nonconforming use right on the grounds of expansion, enlargement, change, increase, illegality, and nuisance.[25] The trial court did not say exactly what government interest would be served by terminating the Club's nonconforming use right. The

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[24] "oppression," Merriam–Webster Online Dictionary, http://www.merriam-webster.com/dictionary/oppression (last visited May 1, 2014).
[25] COL 26-33.

County argues there is a general interest in increasing the conformity of land uses within its jurisdiction.[26] That general interest alone cannot terminate a nonconforming use right or no such right would survive rezoning. The very nature of a vested nonconforming use right is that it preserves nonconformity regardless of the government's general interest in limiting certain land uses through zoning. In addition, this vague and undefined interest is not aligned with the trial court's grounds for termination, which were much more specific.

Each of the trial court's grounds for termination is an example of an illegality—i.e., some activity or condition allegedly made unlawful by code, statute, or common law. As such, there are specific remedies available to address each of them without terminating the Club's entire nonconforming use right. Under the Code, these other remedies include abatement orders, civil penalties, and injunctions.[27] Considering this, it was neither reasonable nor necessary to terminate the Club's nonconforming use right. Less restrictive remedies and a less oppressive Code interpretation should have been adopted.

The fact that the trial court's remedy leaves open the possibility that the Club could resume operations subject to a CUP underscores the

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[26] Brief of Respondent Kitsap County at 54-56.
[27] KCC 17.530, *et seq.*

availability of less oppressive remedies. If there are conditions that could be imposed through a CUP to remedy the Club's alleged problems, those very same conditions could be imposed by a judicial abatement order or injunction without terminating the Club's nonconforming use right or requiring the Club to obtain a CUP for its entire operation.

If the County had made some effort to prove that a CUP is the only way to remedy alleged problems with the Club, then this appeal could address that argument. The County, however, has never taken that position, and the trial court made no such finding. The County sought termination of the Club's nonconforming use right and a CUP without even attempting to prove it was the least oppressive way to remedy the alleged problems with the Club.

By terminating the Club's nonconforming use right so that the only way the Club can reopen is with a CUP, the trial court put the Club in the same position as a landowner who wants to develop a shooting range or gun club at a location where none has ever existed. There is no guarantee a CUP will issue, which means the County has the power to prevent the Club from ever re-opening.[28] This is the epitome of throwing out the baby with the bathwater. A CUP would also give the County the power to

[28] KCC 17.420.020.A, 040.C; KCC 17.421.020.A, 030.B

impose conditions on the Club that have no relationship to any of the alleged illegalities in this case.[29] This termination remedy is unduly oppressive, less restrictive remedies are available, and the possibility of a CUP on unspecified and discretionary conditions reinforces these conclusions.

The permanent nature of the termination remedy further proves its oppressiveness and the availability of less oppressive remedies. There is no finding or evidence that shutting down the Club for any length of time was necessary to remedy any of the alleged Code violations or nuisance conditions, let alone a finding or evidence that it was necessary to permanently strip the Club of its nonconforming use right.

Finally, this is not a case where the Club should have anticipated this action by the County to terminate its nonconforming use right. As the Club has shown, the County was supportive of the Club in the negotiations leading up to the 2009 Deed, and expressly resolved for this deed to secure the Club's control of its property.[30] The County also agreed to language in the Deed confirming the Club's right to improve its facility within the

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[29] KCC 17.420.040.B; KCC 17.421.030.B

[30] Brief of Respondent Kitsap County at 11. Club's Opening Brief at 6 (resolution authorizing the deed).

historical eight acres.[31] About 18 months later, the County brought this action to terminate the Club's nonconforming use right based on the same facilities and operations that were in place when the parties executed the Deed.[32] Not only does this call into question the consideration exchanged between the County and Club for the 2009 Deed, but no reasonable landowner in the Club's position could have anticipated this. In addition, the absence of an express termination ordinance in the Code itself means the County's action to terminate the Club's nonconforming use rights could not have been reasonably anticipated.

Under these circumstances, interpreting the Code to imply the remedy of termination would violate the Club's substantive due process rights. The termination remedy should be reversed.

D. Substantive Due Process Case Law Supports Reversal of the Termination Remedy.

Washington case law includes many examples of courts invalidating government action as unduly oppressive to a landowner. The cases discussed below support reversal of the termination remedy imposed by the trial court here.

City of Seattle v. McCoy reversed a trial court's decision to enforce

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[31] Brief of Respondent Kitsap County at 12.
[32] Club's Opening Brief at 7.

a regulation by closing a restaurant temporarily for one year.[33] The regulation stated that any building used for the unlawful delivery or sale of a controlled substance "is a nuisance which shall be . . . abated[.]"[34] Many illegal drug deals had occurred at the restaurant.[35] The city had a legitimate interest in policing its drug laws, and the owner could not guarantee the restaurant would be free from drug crime.[36] Nevertheless, closing the restaurant for one year was unduly oppressive because it was unlikely to eliminate such crime from the area, the government could still enforce its drug laws with the restaurant open, and the closure represented a complete (albeit temporary) deprivation of the landowner's use of its property as a restaurant.[37] On the whole, the harm to the landowner's rights outweighed the benefits of closure when compared with other, less oppressive means that were available to serve the government's stated interest. The closure order violated substantive due process and was reversed.

Rivett v. City of Tacoma is another case in which a remedy provided by an ordinance was invalidated as unduly oppressive to a

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[33] 101 Wn. App. 815, 819, 4 P.3d 159 (2000).
[34] *Id.* at 824.
[35] *Id.* at 822–23.
[36] *Id.* at 840.
[37] *Id.* at 842–43.

landowner.[38] The ordinance required landowners to notify the city of any defect in a sidewalk abutting their property; if the landowner failed to provide the notice, it would be required to indemnify the city against any tort claim arising from the defect, regardless of whether the landowner knew of the defect or caused it.[39] The ordinance served the city's interest in receiving notice of dangerous sidewalks.[40] Nevertheless, it was unduly oppressive because the burden of unlimited indemnity was too extreme a remedy for a mere failure to give notice.[41] A less oppressive remedy, such as a modest fine, might have been upheld.

Guimont v. Clarke struck down an ordinance requiring a landowner to pay each tenant a relocation fee of $7,500 before closing a mobile home park.[42] The ordinance served the government's legitimate interest in assisting mobile home residents who could not afford to relocate.[43] The court reasoned:

> "While the closing of a mobile home park is the immediate cause of the need for relocation assistance, it is the general unavailability of low income housing and the low income status of many of the mobile home owners that is the more fundamental reason why the relocation assistance is necessary. An individual park owner who desires to close a

[38] 123 Wn.2d 573, 870 P.2d 299 (1994).
[39] *Id.* at 581–82.
[40] *Id.* at 581.
[41] *Id.* at 582–83.
[42] 121 Wn.2d 586, 613, 854 P.2d 1 (1993).
[43] *Id.* at 610–611.

> park is not significantly more responsible for these general society-wide problems than is the rest of the population. **Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.**"[44]

It was less oppressive to require society as a whole to solve its society-wide problems without putting that "staggering" burden on a small group of landowners. To do so was unduly oppressive.[45]

Landowners are not the only group protected from oppressive government action by substantive due process. In *Willoughby v. Department of Labor and Industries*, the court invalidated a statute prohibiting partial disability payments to prisoners serving life sentences.[46] The state argued this was necessary to reduce fraudulent claims, conserve state fiscal resources, and promote prison discipline. However, these interests could have been served in less oppressive ways that would not permanently deprive prisoners of significant funds to which they had a "vested" right.[47] Accordingly, the statute violated substantive

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[44] *Id.* at 611.

[45] *Id.*; *see also*, *Sintra, Inc. v. City of Seattle* 119 Wn.2d 1, 20–24, 829 P.2d 765 (1992) (holding ordinance unduly oppressive where it required landowner to pay $218,000 redevelopment fee to convert low-income residential property to commercial property because there were "less drastic" ways to serve the government's interest in reducing homelessness).

[46] 147 Wn.2d 725, 732–38, 57 P.3d 611 (2002).

[47] *Id.* at 732–33.

due process.[48]

As these cases illustrate, the "difficult and determinative" inquiry of whether a regulatory action is unduly oppressive depends primarily on whether there are less oppressive ways to serve the stated government interests. Where, as in this case, less oppressive remedies are available to serve the government's interests, they must be applied. To ensure this, an oppressive ordinance must be invalidated, and an interpretation of an ordinance that creates dubious constitutionality must be rejected. These protections are critical in safeguarding individual life, liberty, and property against the overwhelming power of the state.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision terminating the Club's nonconforming use right, and/or remand this case back to the trial court with instructions to interpret the Code in a way that does not create constitutional violations of the Club's substantive due process rights.

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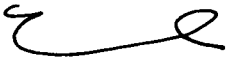
[48] *Id.*

DATED this ____ of May, 2014.

SHERRARD McGONAGLE TIZZANO, P.S.



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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on the date and in the manner indicated below, I cause the AMICUS BRIEF OF KITSAP ALLIANCE OF PROPERTY OWNERS to be served on:

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MATTHEW A. LIND