

NO. 35834-4-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

SECURITY SERVICES NORTHWEST, INC.,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.

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COURT OF APPEALS
BY STATE
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BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Jefferson County believes that the issues pertaining to the assignments of error may best be stated as follows:

A. Whether the nature and scope of a legal nonconforming use is determined by the nature and scope of the use which was lawfully established prior to the enactment of the County Zoning Ordinance.

B. Whether SSNW waived its argument that it had lawfully changed and expanded its use after the 1992 Jefferson County Zoning Code went into effect.

C. Whether a nonconforming use may be dramatically expanded and changed without the landowner obtaining any governmental approval.

D. Whether there was substantial evidence in the record to support the findings of the Examiner and the trial court as to the limited nature and scope of the nonconforming use.

II. INTRODUCTION

The trial court's LUPA decision should be affirmed. In the summer of 2005, Jefferson County discovered that Security Services Northwest, Inc. (SSNW) had been operating a paramilitary training camp on Rural Residential land above Discovery Bay, without any land use approvals. SSNW had also constructed numerous buildings without obtaining any permits. SSNW acknowledged its failure to obtain land use or building approvals, but argued that all of its activity should be

treated as a nonconforming use. The County examined evidence presented by SSNW and others and issued enforcement orders prohibiting firearms training, paramilitary activities, training of third parties and other similar activities on the site. SSNW appealed the enforcement orders to the Jefferson County Hearing Examiner.

The issue which was presented by the parties to the Hearing Examiner was the nature and scope of any legal nonconforming use of the property as of January 6, 1992, when the first Jefferson County Zoning Code was enacted. Substantial evidence supported the Examiner's determination that only a very limited commercial use of the property had occurred prior to 1992, and that such use had not included commercial firearms training, paramilitary training, or third party training of any kind. The Examiner concluded that even the limited commercial use of the property before 1992 had not been lawfully established.

On appeal, the Honorable Jay Roof of Kitsap County Superior Court affirmed the Examiner's decision as to the lawfulness of the County's enforcement orders. Judge Roof concluded that a limited lawful use had been established prior to January 6, 1992, but affirmed the Examiner's determination that any nonconforming use was narrow in size and scope. SSNW's Motion for Reconsideration was denied.

The trial court's orders should be affirmed. Nonconforming uses are disfavored, and it is the Plaintiff's burden to prove not only the existence of a nonconforming use, but the nature and scope of the prior use. Substantial evidence supported the Examiner's determination, as affirmed by the trial court, that the nonconforming use should be limited to the nature and scope of the use as of January 1992, when the County's Zoning Ordinance was enacted.

III. STATEMENT OF THE CASE

A. Factual Background.

Security Services Northwest, Inc. (SSNW) was formed in 1995. (Log 195, page 10-12). Prior to that time, a sole-proprietorship owned by Joseph D'Amico (SSNW's current president) operated from property owned by the Gunstone family in rural Jefferson County. In 1987, Mr. D'Amico entered into a rental agreement with Charles and Irene Gunstone to lease a residence at 3501 Old Gardiner Road. (Log 98, pages 18-19). That is the only property interest held by D'Amico or SSNW in the area. D'Amico claimed at the hearing that SSNW has an "oral contract" with the Gunstones to operate on 3600 acres above Discovery Bay. However, he could not identify the date, the parties or any significant terms of such contract. (VI VRP 9-10).

The evidence shows only a very limited commercial use of the property before enactment of the January 6, 1992 Jefferson County Zoning Code. The commercial use by Security Services occurred in a

residential structure. Between 1988 and early 1992, the only commercial activity on the property was small scale dispatching of security guards, with or without canines and, beginning in 1990, contracting for installation of alarms by Mr. D'Amico. (Appellant's Exhibit 10). Armored car deliveries apparently did not begin until 1993. (Log 98, p. 48). There was no commercial weapons training of customers or third parties on the property until after 2001. (Log 206, pp. 3-4, 18, 29-30; IV VRP pp. 25-28; IV VRP 51-56).

All of the records produced by SSNW which were dated prior to 1992 relate **exclusively** to the provision of security guards and alarm installation. (See Log 98, pages 21-30; Appellant's Exhibits 10 and 13.) Significantly, no pre-1992 documentation was produced reflecting (a) any training activity onsite; (b) any commercial firearm use on the property; (c) any use of the property by third party customers for commercial purposes; or (d) any military or paramilitary activity.

The evidence further reflected that in January 1992, Security Services employed only two full-time armed guards based in the Jefferson County area: Joe D'Amico and Glen Bishop. SSNW employee Bob Grewell testified that he was hired in March 1992, and that only Bishop and D'Amico had preceded him as armed guards. (V VRP pp. 37-42). As the third guard hired, Grewell was designated "K-3" (Appellant's Exhibit 26). The absence of organized firearms training

prior to March 1992 was confirmed by trainer Bruce Carver, whose first firearm training of SSNW employees occurred in 1992, after Grewell had been hired (and therefore after the January 1992 Zoning Code was in effect). VIII VRP, p. 57. Carver testified that he first trained D'Amico, Bishop and Grewell in 1992.¹ SSNW points to the testimony of Doug Tangen to argue that SSNW provided firearms training of its own employees on site before 1992. But as Tangen clearly testified, he offered only "open hand" training (without weapons) of SSNW employees. (VI VRP, pp. 39-40, 56-57).

Industrial insurance documents produced by SSNW at the close of the hearing confirmed the very limited nature of commercial activity on the property prior to 1992. Log 227, pp. 6 and 8, shows approximately 4,000 to 5,000 total man hours of work by SSNW employees in 1991. This equates to less than three full-time employees (or FTE's), including secretaries and administrative staff. (Compare this with 37 new armed employees hired and trained onsite in October 2005 alone. VI VRP, p. 20 - D'Amico).

Even after January 1992, firearms training of SSNW employees onsite was minimal until after September 2001. Mr. Carver testified that the state licensing agency for private security guards required only a

¹ As Grewell acknowledged, part-time guards were occasionally hired from local police departments after 1992, but were not trained or certified on the Gunstone property. (V VRP, page 59).

70% score on a test involving 25-30 rounds of ammunition. (VIII VRP, pp. 60, 62). Since there were only three armed guards in March 1992, this would involve less than 100 total rounds annually. While Mr. Carver said there might be some practice training at six month intervals, the total annual firearm use on the property in the early to mid 1990s would not have exceeded a few hundred rounds. Significantly, the only written records of firearm training prior to 2001 reflect very small scale certifications in January 1996 (Appellant's Exhibit 39) and January 1998 (Appellant's Exhibit 45).

Importantly, **none** of the evidence of firearm use on the property prior to 2001 **involved commercial training of customers or third parties**. Even Joe D'Amico's highly dubious testimony regarding Sequim police officers (which is directly contradicted by the City of Sequim's own records in Log 206) confirmed that there was no commercial contract, transaction or payment involving activity of the City of Sequim or any other customer or client on the property before 2001. (IV VRP, page 56; V VRP, page 72).²

There was no substantial change in the nature of SSNW's activities between 1992 and 2001, according to contemporaneous

² Mr. D'Amico persuaded the current Sequim sheriff Robert Spinks in 2005 to write a letter representing that Sequim had trained on the property since 1992. (Log 120; Log 206, pp. 1-2). However, Officer Spinks had only been with the city for one year and had no personal knowledge of prior use. (IV VRP, p. 49). A Public Disclosure Act request proved there had been no training of Sequim employees prior to 2005. (Log 206, pp. 3-4, 18, 29-30).

documents. Mr. D'Amico produced a number of exhibits from this time period, all of which describe SSNW's business as consisting of (a) providing security guards; (b) installing and monitoring alarm systems; and (c) armored car deliveries. (See Log 98, pages 46, 60, 66; Log 211 and 213; Appellant's Exhibits 10, 41, 44.) There is not a hint of the property being used as a paramilitary training facility (or a commercial training facility of any kind) prior to December 2004.

Recently, however, SSNW dramatically expanded and changed the nature of its operations. After September 11, 2001, and especially between May and September of 2005, the SSNW facility provided commercial "Counter Assault Team" (CAT) training on an adjacent 3600 acre property owned by Discovery Bay Land Company (a closely held Gunstone company). (Log 98, pp. 10-13; Appellant's Exhibit 53). Recent activities included the use of assault weapons, car bombs, night vision training, marine and amphibious operations, helicopter landings and the like. (See, Log Items 1, 12, 54 and 98, page 16). The new facility was named "Fort Discovery," and catered to post-9/11 counter-terror and military training operations. (Log 128).

From May through September of 2005, numerous units of the U.S. military, including Navy Seals and other Special Operations forces, were training on the property in groups of 12 to 18 trainees in four-day sessions. (Log Items 11, 22, 155; IX VRP, p. 53). According to

military weapons trainer Jeff Hall, each trainee was discharging 4,000 rounds of ammunition per session, resulting in a four day total barrage of 48,000 to 72,000 rounds. (VII VRP, pp. 16-17).

The following chart compares the use of the property between 1991 and 2005:

	<u>Pre-1992</u>	<u>2005</u>
Nature of Activities	K-9 patrols, alarm installations	Military training; counter terror training; amphibious landings; helicopter training; night vision and survival training; bomb training
Armed employees	2 (D'Amico and Bishop) ³	150-200 (at least 37 new employees trained in the six weeks prior to hearing) ⁴
Area utilized for training	20 acres	3,700 acres
Average rounds of ammunition per month	0-20 ⁵	96,000-144,000 ⁶
Shooting ranges	0-1 ⁷	7
Buildings devoted to business	1	At least 5

The property where the weapons training and military activity occurs is in the community of Gardiner above Discovery Bay, in an area

³ V VRP, pp. 37-42, p. 57.

⁴ VI VRP, p. 20 - D'Amico.

⁵ Based on two armed employees, 50 rounds per session, 0-2 training sessions per year. VIII VRP, p. 57.

⁶ Based on Hall testimony of 4,000 rounds per trainee times 12 trainees per session (VII VRP, p. 17) and D'Amico admission of training sessions of 18 trainees (IX VRP, p. 53); conservatively assumes two training sessions per month. (See Log Items 11, 22 and 155).

zoned Rural Residential, as reflected in Jefferson County Zoning and Land Use maps. In the spring and summer of 2005, the sound of gunfire and explosions carried across the water in neighborhoods surrounding Discovery Bay. Neighbors complained about the loud, disruptive and dangerous activities in this residential neighborhood.

In response to those complaints, the County investigated and found that SSNW had failed to obtain – or even apply for – any permits for its activities and that most of its principal activities were impermissible under the Jefferson County Code. It was also learned that several buildings had been constructed on the property, without any permits. These include a 46-student classroom building, a bathroom building which includes toilets and showers for trainers, a bunkhouse, and several shooting ranges. (Log 98, page 13). In addition, the existing residence and office had been remodeled and the kitchen upgraded without permits. At the hearing, Mr. D’Amico testified that he knew permits were needed, but intentionally decided to circumvent the law. (III VRP, pp. 59-61).

Indeed, the defiance was even more flagrant when placed in context. In January 2004, SSNW had decided to bid on a contract with the Department of Defense for construction of a military training facility. SSNW sent its representative Peter Joseph to meet with DCD

⁷ Grewell testimony, V VRP, pp. 46-48.

Director Al Scalf to determine whether such a use would be allowable on the property, and what the permitting process would entail. (IX VRP, pp. 42-43). SSNW was specifically advised by Mr. Scalf that, at a minimum, SSNW would need a Conditional Use Permit and a hearing, and that commercial weapons use would probably not be permitted. (IX VRP, pp. 43-44). SSNW did not win the military contract. Nonetheless, notwithstanding its actual knowledge of the permitting process as outlined by Mr. Scalf, SSNW went ahead and built and operated a military training facility (including the classroom facility, the bathrooms and showers, bunkhouses and numerous shooting ranges) without seeking any permits or following the procedure outlined by Mr. Scalf. (IV VRP, pp. 17-18, 20-21).

Therefore, following an extensive investigation over many weeks, the Jefferson County Building Department issued a Stop Work Order on or about July 8, 2005, for the unpermitted structures on the property. The Department of Health issued a Stop Work Order on August 5, 2005, based on SSNW's failure to obtain a septic permit, a public water system approval and a food service permit. (The septic system was not to code, and was on the verge of failure. Log 161). Subsequently, the Jefferson County Department of Community Development served a Stop Work Order and Notice and Order of Enforcement on August 11, 2005 to preclude any use by SSNW of the

facilities for weapons training or use, counter-assault team training and related activities, until necessary permits and applications were submitted and evaluated by the Department of Community Development and the Jefferson County Hearings Examiner. (Log 133).

SSNW deliberately ignored the Stop Work Orders. (Log 137).

Military and paramilitary training operations continued, in violation of the County's orders, during August and early September. (IX VRP, pp. 75-76; Log 155). Accordingly, Jefferson County was compelled to seek and obtain a Temporary Restraining Order and a Preliminary Injunction in Jefferson County Superior Court, prohibiting further violation of the Stop Work Orders and Enforcement Order. (Log Items 198, 205).

B. Procedural Background.

SSNW appealed the Orders to the Jefferson County Hearing Examiner. SSNW asked the Examiner to invalidate the Stop Work Orders, or to offer SSNW relief from those orders, based on a theory of nonconforming use. Specifically, SSNW asked the Examiner to find that because SSNW's predecessor (Joseph D'Amico dba Security Services) was operating a business on the property before the enactment of the 1992 Jefferson County Code, all of SSNW's subsequent activities -- including operation of a paramilitary training camp -- were nonconforming uses which could not be challenged.

The hearing before the Examiner occurred over a three day period in mid-November 2005. SSNW called seven witnesses, and the County called three witnesses. In addition, approximately 15 citizens gave short testimony near the conclusion of the hearing. The written record was extensive, including approximately 300 exhibits provided by SSNW, the County and other interested parties. During the hearing, Mr. D'Amico acknowledged that SSNW had continued to provide Counter-Assault Team (CAT) training to 37 new employees shortly before the hearing, in violation of the court-imposed preliminary injunction. (VI VRP, page 20).⁸

After reviewing the testimony and other evidence, and considering the extensive briefing by counsel, Hearing Examiner Irv Berteig issued his Findings, Conclusions and Decision on January 10, 2006. He denied SSNW's appeal of the Stop Work Orders, rejecting SSNW's argument that its activities on the property were "grandfathered" under the Nonconforming Use Doctrine.

The Examiner concluded that (a) SSNW had not established a lawful commercial use even prior to enactment of the 1992 Jefferson County Zoning Code; and (b) that even if some limited lawful use of the property was occurring prior to 1992, the current use was a dramatic

⁸ Judge Verser subsequently determined that SSNW had violated the spirit and intent of his Preliminary Injunction, and therefore imposed even stricter requirements. (CP 204-211).

alteration and expansion which does not qualify for nonconforming use status.

SSNW appealed the Hearing Examiner's Findings, Conclusions and Decision by means of the Land Use Petition Act (LUPA), RCW 36.70C.005, to the Hon. Jay Roof of Kitsap County Superior Court. (Kitsap County Cause No. 06-2-00223-9). After reviewing the extensive record before the Examiner as well as the briefing and argument of counsel, Judge Roof issued an order dated November 1, 2006 which affirmed the Hearing Examiner's decision in large part but reversed as to the Examiner's determination that no nonconforming use had been established. (CP 382). Judge Roof remanded to the Examiner for the sole purpose of further defining the scope and nature of SSNW's limited nonconforming use as of January 6, 1992, based on the record established in the November 2005 hearing.

SSNW filed a Motion for Reconsideration which was denied by the trial court on December 13, 2006. (CP 411). This appeal followed.

IV. LEGAL ARGUMENT

A. Standard of Review.

This is an appeal of a decision under the Washington Land Use Petition Act ("LUPA"), RCW 36.70C.005, et seq. The Land Use Petition Act, which was enacted by the Washington State Legislature in 1995, provides for expeditious review of local land use decisions. It replaces the common law writ of review. With regard to the standard

for review, LUPA which gives considerable deference to the factual findings and statutory interpretation of the local administrative body. RCW 36.70C.130; Timberlake Christian Fellowship v. King County, 114 Wn. App. 174, 180, 61 P.3d 332 (2002), rev. den., 149 Wn.2d 1013.

Under LUPA, a reviewing court may grant relief to a disappointed permit applicant only if the applicant carries the burden of establishing that the agency's decision was clearly erroneous or unlawful, not supported by substantial evidence, or in violation of the Constitution. RCW 36.70C.130. While there are several stated elements of the LUPA standard of review, that standard is, in essence, similar to that of the writ of review under the old writ statute, RCW 7.16.120. The Court must affirm unless it finds that there was "no substantial evidence" to support the decision, or that the decision constituted an "error of law." City of University Place v. McGuire, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). Moreover, if the appellant claims that the county incorrectly applied the law to the facts, the "clearly erroneous" standard must be met. RCW 36.70C.130(1)(d).

1. Substantial Evidence Test.

Under the "no substantial evidence" standard, the Court must give considerable deference to the factual findings of the quasi-judicial decision maker:

This factual review is deferential, and requires us to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact finding authority, a process that necessarily entails acceptance of the fact finder's view regarding the credibility of witnesses and the weight to be given reasonable, but competing inferences.

71 Wn. App. at 371-72.

When reviewing administrative findings, a court may not reweigh the evidence in an effort to reach different conclusions than those of the agency. Providence Hospital v. DSHS, 112 Wn.2d 353, 360, 770 P.2d 1040 (1989); Hilltop Terrace Ass'n. v. Island County, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). This standard applies to challenges under the Land Use Petition Act. RCW 36.70C.130; Ahmann-Yamane, LLC v. Tabler, 105 Wn. App. 103, 111, 19 P.3d 436 (2001). As the Court of Appeals held in Miller v. City of Bainbridge Island, 111 Wn. App. 152, 43 P.3d 1250 (2002):

We defer to the Hearing Examiner on factual determinations and, under subsection (c) above, we will not overturn the Examiner's findings of fact unless they are not supported by evidence that is substantial in view of the entire record before the Examiner.

Id. at 162.

If there is substantial evidence in the record to support the agency's decision, it should be affirmed. Mere disagreements with some of the Examiner's findings is not sufficient to warrant reversal. In this case, as there is substantial evidence in the record which reasonably

justifies the County's issuance of the Stop Work Orders, and the limitations on nonconforming use status for SSNW, this Court should affirm the decision below.

2. Error of Law Standard.

Under the "error of law" or "contrary to law" standard, while the Court reviews legal issues de novo, the interpretation given to statutes and ordinances by agencies responsible for their enforcement is given substantial deference. Thus, where an administrative agency or official is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight on review. Overton v. Washington State Economic Assistance Authority, 96 Wn.2d 552, 555, 637 P.2d 652 (1981); Heinmiller v. Dept. of Health, 127 Wn.2d 595, 601, 903 P.2d 433 (1995).

The deference which is afforded to a local decision maker in interpreting statutes and ordinances within his jurisdiction is acknowledged explicitly in the Land Use Petition Act at 36.70C.130(1)(b), which states that the petitioner has the burden of establishing that the land use decision is an erroneous interpretation of the law, "after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise."

In this case, both Jefferson County Code Administrator Al Scalf and Hearing Examiner Irv Berteig have expertise in interpreting the County's land use regulations. It is proper for the trial court and this Court to grant considerable deference to the interpretations made by Mr. Scalf and the Examiner's concurrence with those interpretations.

3. The "Clearly Erroneous" Standard.

RCW 36.70C.130(1)(d) provides that an agency's application of regulations to the facts may only be reversed if it was "clearly erroneous." Under the clearly erroneous standard of review, reversal is appropriate only when the Court is "firmly convinced that a mistake has been committed." Nisqually Delta Ass'n. v. City of Dupont, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985). In applying this standard, the Court should accord substantial weight to the agency's interpretation of the law. Id.; Heinmiller v. Dept. of Health, 127 Wn.2d 595, 601, 903 P.2d 433 (1995).

In this case, both Mr. Scalf and Mr. Berteig have substantial expertise with regard to the construction of Jefferson County Codes and related land use laws. To the extent they reached the same conclusion as to interpretation of the County's laws, substantial deference must be afforded to that consistent interpretation.

4. This Court May Affirm on Any Legal Basis Supported in the Record.

Finally, it is settled that when sitting in an appellate capacity, a court may affirm the decision of the lower court or quasi-judicial body on any legal basis which is supported in the record. LaMon v. Butler, 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989). This Court has held that this rule applies in appeals of quasi-judicial decisions. Whidbey Environmental Action v. Island County, 122 Wn. App. 156, 168, 93 P.3d 885 (2004), rev. denied, 153 Wn.2d 1025 (2005).

In other words, it is not necessary that this Court agree with each legal conclusion reached by the Examiner or by the trial court below. Rather, if there are any valid legal grounds to support the trial court's decision, this Court should affirm.

B. Nonconforming Uses are Limited to the Nature and Scope of Lawful Use Prior to Enactment of Zoning Regulations.

1. The Landowner Bears the Burden of Proving the Nature and Scope of a Nonconforming Use.

SSNW based its appeal on its contention that all of the structures and activities at its "Fort Discovery" facility should be viewed as lawful "nonconforming uses," which Jefferson County has no power to prohibit or regulate. SSNW contends that because Mr. D'Amico was providing limited security services from a residence before the enactment of the first Jefferson County Zoning Code in January 1992, all activities by SSNW at or near that residence must be considered legal nonconforming

uses. This argument runs counter to established caselaw pertaining to nonconforming uses.

In Washington, nonconforming uses are disfavored. Rhod-a-Zalea v. Snohomish County, 136 Wn.2d 1, 959 P.2d 1024 (1998); Open Door Baptist v. Clark County, 140 Wn.2d 143, 150, 995 P.2d 33 (2000). Such uses interfere with local government's ability to regulate land use activities in a uniform fashion, and to eliminate activities which are inappropriate to a given neighborhood or zone. Rhod-a-Zalea, 136 Wn.2d at 8. Therefore, it is the landowner's burden when confronted with an enforcement action to prove a lawful nonconforming use which existed prior to the adoption of the land use regulation. State v. County of Pierce, 65 Wn. App. 614, 623-24, 829 P.2d 217 (1992). Moreover, zoning ordinances restricting nonconforming uses should be liberally construed. Anderson, American Law of Zoning, Vol. 1, § 6.07 (Cum. Supp., Dec. 1994). In this case, SSNW failed to meet its heavy burden of proving its commercial weapons training and paramilitary training in 2005 constituted nonconforming uses.

In Appellant's Opening Brief, SSNW raises the red-herring argument that the burden of proof should shift to the County to prove the **discontinuance** of a nonconforming use. SSNW argues that the trial court's recognition of SSNW's legal nonconforming use "constitutes a paradigm shift in how the Court of Appeals must now view all of the

evidence.” (Brief, page 23.) The argument is nonsensical. Jefferson County has never argued, and the Examiner and trial court never determined, that SSNW had abandoned or discontinued any nonconforming use. Rather, the evidence showed, and the Examiner and the trial court found, that SSNW’s use of the property was narrow and restricted prior to 1992, with no onsite training of customers or clients and no paramilitary activity on the property.

In short, the burden remained with SSNW to establish the existence, nature and scope of any nonconforming use:

Any nonconforming use is defined in terms of the property’s lawful use established and maintained *at the time the zoning was imposed*.

Miller v. City of Bainbridge, *supra*, 111 Wn. App. at 164 (emphasis by Court of Appeals). Substantial evidence supported the decision of the Examiner and the trial court that any nonconforming use by SSNW was limited.

2. Under the Nonconforming Use Rule, the Nature and Scope of the Activity May Not be Changed or Enlarged.

While the trial court concluded that SSNW had shown some limited use of the property (for dispatching its own security guards and installing and monitoring alarms) prior to adoption of Jefferson County’s Zoning Code, he properly held that this would not allow SSNW to have new, different or expanded uses and activities treated as nonconforming uses. When a nonconforming use is in existence at the time a zoning

ordinance is enacted, it cannot be changed into some other nonconforming use. Open Door Baptist Church v. Clark County, *supra*, 140 Wn.2d 143; Coleman v. City of Walla Walla, 44 Wn.2d 296, 301, 266 P.2d 1934 (1954) (rooming house could not be changed to fraternity house); Shields v. Spokane School Dist., 31 Wn.2d 247, 255, 196 P.2d 352 (1948) (elementary school could not be changed to trade school).

Nonconforming use ordinances do not grant a landowner the right to significantly change, extend or enlarge the existing land use. State ex rel Miller v. Cain, 40 Wn.2d 216, 219, 242 P.2d 505 (1952). A substantial increase in the scope of activity is a prohibited enlargement of a nonconforming use. Meridian Minerals v. King County, 61 Wn. App. 195, 210, 810 P.2d 31 (1991).

In addition, a nonconforming use is generally restricted to the area that was nonconforming at the time the restrictive ordinance was enacted. Norton Shores v. Carr, 265 N.W.2d 802 (Mich. App. 1978). The right to maintain a nonconforming use in a building does not include the right to maintain it in another building on the property. JCC § 18.20.260(2)(a). Similarly, the enlargement of an existing building destroys its nonconforming use status. State ex rel. Miller v. Cain, *supra*, 40 Wn.2d at 219. Expansion of a business to the second floor of a building destroys nonconforming use status. Condor, Inc. v. North Charleston, 380 S.E.2d 628 (S.C. 1989).

The construction of a new building on the property usually is considered an unlawful extension of a nonconforming use:

A nonconforming use is frequently considered unlawfully extended when an old building is replaced, particularly when it is replaced by: (1) a larger building; (2) a more modern building; or (3) a building on a different portion of the lot.

Anderson, American Law of Zoning, Vol. 1, § 6.46.

Nor may a landowner add a new product or service and have it considered a part of a nonconforming use. Town of Guilford v. London, 148 A.2d 551 (Conn. 1959); Baxter v. Preston, 768 P.2d 1340, 1343 (Ida. 1989).

In addition, to constitute a lawful nonconforming use, the land use activity must have been more than intermittent or occasional prior to enactment of the new law. Meridian Minerals Co. v. King County, supra, 61 Wn. App. at 208.

In this case, there is substantial evidence to support the Examiner's denial of nonconforming use status to SSNW's commercial weapons training, explosives training, counter-assault team training, military activities, shoreline activities and use of new and remodeled buildings. Such activities were not lawfully established by SSNW prior to January 1992 or, for that matter, prior to September 2001. Indeed, in the Administrative Record, there are numerous documents supplied by Mr. D'Amico, SSNW President and CEO, in which he described the

scope of his business's activities prior to 2001. In all of those contemporaneous descriptions, there is **no reference whatsoever** to counter-assault training, paramilitary or military activities, or even of firearms training. The consistency of D'Amico's pre-2001 descriptions is compelling. For example, in a letter dated October 19, 1993 to the Washington State Ferries, Mr. D'Amico described his business's activities as follows:

As well as armored car services, we provide alarm installation, maintenance and response, security patrols and K-9 assistance.

(Log 98, p. 46). A similar description was given by Mr. D'Amico in an article from September 1995, which included the following description of Security Services' activities:

Security Services' K-9 activity is less than 10 percent of their business. Alarm installation and monitoring make up about another 30 percent, and 25 percent is site security patrol and armed guard service. The armored car and courier service makes up the balance. They also maintain a central station for 24 hour monitoring of the alarm systems they install.

(Log 98, p. 60). In other words, by D'Amico's own description, none of SSNW's work in 1995 involved third party training, weapons use or military or paramilitary activities. Similarly, in an announcement posted in the Port Townsend Leader on December 9, 1998, SSNW's business was described by Mr. D'Amico as follows:

Security Services Northwest, Inc. is a full-service security company and one of the larger employers on the Olympic

Peninsula, with more than 55 full and part-time employees. Services include alarm installation and monitoring, armored car service, patrols, site security and K-9 services.

(Log 98, p. 66).

The same limited nature of SSNW's business was confirmed in an October 13, 2000 article in the *Puget Sound Business Journal*, which made no reference to any commercial training or military activities in the year 2000. Rather, Mr. D'Amico described his company's services in 2000 as ranging from "patrolling to armored car delivery to alarm installation and monitoring," as well as providing "security guards, ATM servicing, private vault storage and dog patrol services." There was no reference in that October 2000 article to weapons training, counter-assault training or any training of customers or clients.

(Log 213).

Similarly, in a sworn January 23, 2001 deposition, SSNW president Joe D'Amico gave the following description of his company's business at that time, which made no reference to firearms training, counter-assault training, military activities, or third party training of any kind:

Q: Tell me a little bit about the business. What do you do?

A: We do site security, we do armored car service, we do patrol services, alarm installation and monitoring, video installation. And occasionally, if someone has got a problem, we'll do

surveillance, but it's not very often. We're not in the surveillance business.

(Log 211). SSNW is bound by this sworn admission of its President and CEO as to its pre-2001 uses and activities.

In short, SSNW dramatically expanded and altered its use of the property after the enactment of the 1992 Zoning Code and, indeed, well after the enactment of the current 2001 Development Regulations went into effect. One of the most significant changes which occurred in 2004/2005 was the use of the SSNW facility for training of military forces, including units of the U.S. Army, Navy and Coast Guard, as well as local agencies and other third parties.⁹ The first weapons training for the Department of Defense (DOD) occurred in December 2004. (IV VRP, pp. 25-28). Thereafter, D'Amico obtained contracts with DOD for "pre-deployment" training of military units from Guam and elsewhere. (IX VRP, p. 53). In the summer of 2005, various elements of the U.S. Navy trained on the property extensively, as did elements of Special Operations Forces. (Log Items 11, 22, 155). These exercises involved the discharge of upwards of 70,000 rounds of

⁹ SSNW has made strained efforts since its unlawful operations were discovered to suggest that it was not engaged in military training. Thus, it attempted to persuade the court that the name change to "Fort Discovery" does not have a military connotation and that the recent wearing of military uniforms and helmets should not be seen as military in nature. It also sought to downplay its massive use of semi-automatic weapons and its bomb training. But it cannot refute the written documentation of extensive commercial use of the property by units of the U.S. military.

ammunition over each four day session. (VII VRP, p. 17; IX VRP, p. 53).

There was no credible evidence of commercial training of clients or customers before 2004. It may be true that Joe D'Amico's **employees** periodically obtained handgun certification training on the property starting in 1992 (even this commenced after January, 1992). But SSNW also claimed, without evidence, that the business was engaged in commercial training of third parties before 2001. Joe D'Amico specifically alleged that SSNW facilities were used by the Sequim Police Department starting in the spring of 1992. (Log 98, p. 7).¹⁰ The evidence shows otherwise. (Log 206). The City of Sequim's certified records show **no training** of its officers on the property at any time prior to 2005. (Log 206, pp. 3-4, 18, 29-30). Mr. D'Amico produced no contemporaneous contracts, firearm certification forms or other documents showing such training by cities, counties or the military prior to 2004. D'Amico reluctantly admitted as much at the hearing. (IV VRP, pp. 51, 56; V VRP, p. 72).

It is significant that the records produced by SSNW in the period before 2001 contain numerous letters of commendations and other correspondence from customers who had utilized SSNW's security guards and armored car deliveries. (See, e.g., Log 98, pp. 21-24).

¹⁰ Even if it were true, this was still after the January 6, 1992 Zoning Code went into effect.

Mr. D'Amico testified that the company had a policy of retaining all such letters for its files. But there are no similar contemporaneous documents referring to weapons training, paramilitary activity or third party training of any kind. (IV VRP, pp. 44-45). The reason is easy to discern: no such activities occurred prior to 2001. Simply stated, SSNW was not in the business of training customers, clients or third parties, in firearms use – or anything else – prior to December 2004.

In short, substantial evidence establishes that SSNW made a dramatic change and expansion of its operation when it created “Fort Discovery” after September 11, 2001, and especially in 2005, without obtaining building permits, conditional use permits, septic permits or other required approvals. The Hearing Examiner and the trial court correctly determined that these unlawful activities, as well as the unpermitted structures, cannot be allowed to continue under the guise of a nonconforming use.

3. The Illegal Structures Were Not “Replacements” of Existing Buildings.

SSNW acknowledged that it constructed numerous buildings in 2004 and 2005 without permits, but argued that it had merely replaced old buildings with new ones. The evidence shows otherwise. All witnesses confirmed that there was no classroom training building prior to the erection of the structure in 2005. (IV VRP, pp. 78-79). And the new four-toilet and four-shower bathroom facility was not a

replacement, because all that preceded it was a dilapidated, abandoned wooden outhouse. (III VRP, pp. 15-16; IV VRP, p. 81).

Moreover, the new bunkhouse was not a replacement but an additional bunkhouse structure built in 2004. (III VRP, pp. 14-15). Mr. D'Amico testified that in the early 1990s, part of the old bunkhouse on the property was destroyed and the rest was moved to its current location. (III VRP, pp. 6-8). The saved portion of the bunkhouse continued to be used in 2005 (Log 98, p. 16), so it was not "replaced" by anything. And with regard to the portion of the old bunkhouse which was destroyed, it cannot be considered as the basis for a "replacement" because that structure was destroyed and therefore "abandoned" many years before the new bunkhouse was erected in 2005. A structure abandoned for two years cannot establish a nonconforming use. (See JCC § 18.20.260(9)).

In addition, virtually all of the shooting ranges are illegal and thus cannot be nonconforming uses. Former SSNW employee Bob Grewell testified that the only shooting range on the property when he started work in March 1992 was behind the old residence. He denied that any of the current shooting ranges identified by Mr. D'Amico were present. (V VRP, pp. 46-48). In short, not only SSNW's training and paramilitary activities, but also its structures are illegal, and not entitled to be treated as legal nonconforming structures.

4. Even if SSNW Had a Partial Nonconforming Use, Its Alterations of the Use Violated the Jefferson County Code.

In order for SSNW to have lawfully expanded or altered its use of the property, it would have had to follow Jefferson County regulations with respect to alteration or replacement of non-conforming structures and uses. JCC 18.20.260(1) provides clear restrictions on any alteration or replacement of a non-conforming use in a Rural Residential zone:

The following standards apply to all legal nonconforming structures and uses:

- (1) Alteration or replacement of a nonresidential nonconforming use in Rural Residential districts is allowed subject to a conditional use permit, provided:
 - (a) The use is compatible with surrounding rural uses;
 - (b) The activity does not require additional urban levels of government service;
 - (c) The proposal shall comply with the standards of this code to the maximum extent feasible; and
 - (d) The proposal shall not have an adverse impact on an environmentally sensitive area or the immediate neighborhood.

(Emphasis added).

SSNW argued that it could expand its operations indefinitely without approvals, pointing to the language of the JCC 18.20.260(1),

which strictly limits “alteration or replacement” of a nonconforming use, but does not specifically refer to “expansion.” But in so arguing, SSNW ignored the clear definition of alteration of a nonconforming use in the Jefferson County Code, which specifically includes “expansion” and “intensification” within its scope:

“Alteration, nonconforming use” means the expansion, modification or intensification of a use that does not conform to the land use regulations of the UDC.

JCC 18.10.010.

Similar regulations were applicable as far back as 1992. As the Examiner noted, after enactment of the Zoning Code in 1992, a property owner or tenant wishing to expand or alter a nonconforming use was required to submit an application for review by the Hearing Examiner. 1992 Administrative Rule IX, Ordinance 2-0127-92. (CP 36, CP 333-337). Similarly, the 1994 Zoning Code provided that nonconforming uses could not be changed to a “less restrictive” i.e., more expansive use. 1994 Jefferson County Zoning Code § 10.30 (Ordinance No. 09-0801-94). SSNW never applied for permission to alter or expand its activities, at any time after 1992.

The Jefferson County Code provisions are consistent with Washington law applicable to nonconforming use alterations and expansions. The courts have consistently held that where an increase of activities on the property has become substantial, it is deemed a change

or alteration in use which destroys nonconforming status.¹¹ Thus, in Meridian Minerals v. King County, *supra*, the court found that an increase of three times the amount of materials removed from a quarry site constituted an impermissible change in use. 61 Wn. App. at 210. The court recited the same principal in Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979):

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.

The same principle applies in this case, but with much greater force, due to the extreme nature of the alteration and expansion of uses by SSNW.

The Washington courts have granted hearing examiners considerable discretion to determine the scale and scope of a nonconforming use at the time the zoning ordinance went into effect. Thus, in Woodinville v. King County, 105 Wn. App. 897, 907, 21 P.3d 309 (2001) the Court of Appeals held that the examiner could properly limit the number of employees the landowner could employ on site (without application for a Conditional Use Permit) based on the scale of the use at the time the ordinance became effective.

¹¹ SSNW cites Keller v. City of Bellingham, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979) to support its argument that a use may be expanded without destroying nonconforming use status. Significantly, Keller involved an increase in electrolytic cells from 26 to 32, an increase of less than 25%. In contrast, the SSNW firearms use was 10,000 times greater in 2005 than in 1991 (a 1 million percent increase)! (See chart on p. 8, *supra*).

Thus, even if SSNW had an arguable right to pursue an alteration or replacement of a non-conforming use or structure, it was required to seek a conditional use permit and establish that the proposed altered use was compatible with surrounding rural uses, that it was compliant with current standards, and that it would not have an adverse impact on the neighborhood. SSNW failed to make such a showing and indeed, never applied for a conditional use permit or other approval. All of SSNW's alterations and expansions were unlawful. Under these facts, the trial court was correct to strictly limit the scope and nature of the nonconforming use to that existing in January 1992.

C. SSNW Did Not Establish that It Had Obtained Permission to Expand and Change Its Use After 1992.

1. SSNW Waived Its Right to Argue Lawful Alteration and Expansion of its Use.

In its briefing following Judge Roof's Memorandum Opinion below, SSNW for the first time argued that on remand, the Examiner should reopen the hearing to take evidence as to each alleged expansion and alteration which SSNW made between 1992 and 2001. (CP 378). Yet SSNW could not raise new issues and arguments which had not been presented to the Examiner nor included in its LUPA petition.

From the very first briefs submitted to the Hearing Examiner, SSNW emphasized that there had been no significant change in its activities since 1992. In his Opening Statement to the Examiner,

counsel for SSNW stressed that SSNW's use was fully established before 1992 and has not changed since that time:

Although Security Services has evolved over the years as every one of our businesses have, there has been no change in the land use activity from the day he began operating there.

(I VRP, page 7). The same argument was made in Appellant's Post-Hearing Brief, where SSNW represented that its business operations and security training were not appreciably different from what they were prior to 1992.

The thrust of SSNW's argument remained the same on appeal to the trial court, i.e., that there had been no change in SSNW's use after 1992. In the Opening Brief of Petitioner in the LUPA action, SSNW represented as follows:

SSNW's security business operations at the property are not radically different than they were prior to 1992.

(CP 283).

SSNW's efforts to now reverse field, by arguing that it had lawfully expanded and altered its uses between 1992 and 2001, is improper. Generally, new issues may not be raised on appeal. Bellevue School District No. 105 v. Lee, 70 Wn.2d 947, 425 P.2d 902 (1963). This rule has been consistently applied in the context of review of administrative decisions. It is inappropriate to consider issues not raised in the original administrative proceeding. Kitsap County v. Natural

Resources, 99 Wn.2d 386, 393, 662 P.2d 381 (1983). Moreover, to preserve an issue for judicial review, there must be more than simply a hint or slight reference to the issue in the administrative record. Boehm v. City of Vancouver, 111 Wn. App. 711, 722, 47 P.3d 137 (2002).

The rule applies with even greater force in this case, because this is not a question of SSNW's mere failure to raise a legal argument. SSNW did not even present evidence that there had been "permissive alterations" of its operations between 1992 and 2001. SSNW conceded as much in its Memorandum in Support of (Proposed) Judgment where it asked Judge Roof to order a new hearing before the Examiner to allow introduction of such new evidence. (CP 378-379). The trial court properly denied SSNW's untimely request. Judicial review of the factual issues under LUPA is limited to the record created by the quasi-judicial body. RCW 36.70C.120(1). The rule precluding consideration of new issues and evidence on appeal applies with even greater force when a party attempts to raise an issue following trial. Go 2 Net v. CI Host, 115 Wn.App 73, 90-91, 60 P.3d 1245 (2003).

Because SSNW did not present evidence or argument as to "lawful alteration" to the Examiner, and further did not raise the issue in its LUPA Petition or at the LUPA hearing, it was foreclosed from first making this new argument in a post-trial motion in its LUPA appeal.

2. The Record Reflects No Application for Conditional Use Permits or Any Other Approvals to Alter or Expand Between 1992 and 2001.

Even if the issue of “permissive” post-1992 alterations and expansions had been properly presented to the Hearing Examiner, there would be no reason for the trial court’s order to be changed, because SSNW never sought approvals for expansions or alterations between January 1992 and the enactment of the Unified Development Code in January 2001. Therefore, there is no basis for SSNW to argue that it lawfully altered and expanded its uses during that time period. The record unambiguously shows that SSNW sought no permits of any kind between 1988 and 2005. The suggestion that it “permissibly expanded” its nonconforming use under the terms of the 1992 or 1994 Zoning Codes is therefore unsupported.

Moreover, the 1992 Code included Administrative Rules which mandated that changes and expansions in nonconforming uses be processed through County agencies, including the Hearing Examiner. (CP 36, CP 333-337).¹² Likewise, the 1994 Zoning Code provided unambiguously that “A nonconforming use shall not hereafter be changed to a less restrictive use.” 1994 Zoning Code, page 43, § 10.30. In addition, Section 10.40 of the 1994 Code provided that changes involving conditional use approval had to first go through the conditional

use permit process. Yet no permitting action was undertaken by SSNW prior to issuance of the stop work orders in 2005.

Because SSNW never applied for a Conditional Use Permit or other permission to expand or alter its limited security business on the property, the trial court properly limited the nature and scope of the nonconforming use to those activities which were established before enactment of the Jefferson County Zoning Code in January 1992.

3. The 1992 Zoning Code Made New Commercial Uses Unlawful on the Subject Property.

A further reason why SSNW's argument regarding "permissible alteration" is unsupported is the fact that the 1992 Code and the 1994 Code specifically prohibited new commercial uses in General Use zones. SSNW argues that the 1992 Zoning Ordinance did not specifically prohibit shooting ranges in General Use zones. But SSNW fails to note that the 1992 Zoning Ordinance expressly prohibited all uses in the General Use zone which were allowed in the General Commercial zone:

It is the purpose of this section to establish permitted uses for the General Use zone. All uses and activities except those enumerated in **Section 5 – General Commercial Zone**, **Section 6 – Light Industrial Zone** or **Section 7 – Light Industrial/Commercial Zone** hereinabove, shall be permitted or conditional uses within the General Use Zone.

¹² SSNW's complaint that the 1992 Administrative Rules were not produced as an "exhibit" misses the point. The Examiner properly took notice of the Rules as part of the applicable law.

Ordinance No. 01-0106-92 Section 8, page 17. (Emphasis in Ordinance).

Thus, commercial use of a General Use property for firing ranges, paramilitary training, etc. – or any commercial activity for that matter – was prohibited by the 1992 Zoning Code on the property where SSNW’s headquarters was located. The uses which were permitted in the General Commercial zone (and therefore not permitted in the General Use zone) were broadly and clearly defined to include all business activities:

All uses and activities involved in the retail or wholesale buying, selling, or distribution of goods or services shall be permitted within the General Commercial zone.

1992 Zoning Code, Section 5.2. The fact that “shooting ranges” were not specifically called out as a specific type of “commercial activity” allowed in the General Commercial zone (and therefore disallowed in the General Use Zone) does not mean, of course, that such commercial activities were allowed anywhere in all zones! Because the operation of commercial shooting ranges and paramilitary training facilities are commercial activities, they were restricted to General Commercial zones in the 1992 Zoning Code. SSNW could not change its activities to such new commercial uses.

Similarly, the Table of Permitted Uses under the Jefferson County 1994 Zoning Code did not include commercial shooting ranges,

military or paramilitary training facilities or any similar commercial uses within the G-1 (General Use) zones. Jefferson County Ordinance #09-0801-94, pages 20-24. Therefore, SSNW could not have lawfully engaged in such activities, even if it had applied for permits to do so.

This Court should carefully note that SSNW's current argument – that commercial uses such as security services, training and commercial firearms use were legal under applicable zoning codes – is contradicted by the very arguments and representations which SSNW's counsel made to Judge Roof in its opening LUPA brief. In that brief, counsel for SSNW accurately represented that commercial uses, including SSNW's business activities -- were **prohibited** by the January 1992 Zoning Code and subsequent codes:

In January 1992, almost four years after SSNW had established its business on the property, Jefferson County enacted an interim zoning ordinance. Notwithstanding the decades-old businesses conducted by the Gunstones on the property and the more recent use of the property by SSNW, the County place a Rural Residential zoning designation on the property, which prohibited most commercial uses. SSNW's use of the land did not conform to the county zoning designation, but since it had been legally established prior to the zoning enactment, it became a legal nonconforming use under Washington law.

(CP 258, Emphasis added). SSNW's current position contradicts its own representations to the trial court and the language of the '92 and '94 Jefferson County Zoning Codes.

The trial court was correct in concluding that SSNW's limited legal use cannot be changed or expanded, except in compliance with the current Jefferson County Development Code. JCC 18.20.260.

D. The Factual Quibbles Raised by SSNW Are Unfounded and Trivial.

As explained in Section A, supra, in order for this Court to affirm, it is not necessary that it agree entirely with every factual finding and every statement made by the Examiner in his written decision. To the contrary, the trial court properly affirmed the Examiner's decision in large part because SSNW did not sustain its burden of proving that there is "no substantial evidence" to support the Examiner's critical factual determinations; or that the Examiner's application of the law to the facts of this case was "clearly erroneous." The "no substantial evidence" standard must be applied in the context of the entire record, and not an isolated portion of that record. RCW 36.70C.130(1)(c). Moreover, in evaluating the Examiner's decision, the court must grant considerable deference to the Examiner's determinations as to the evidence, competing inferences therefrom and the credibility of witnesses.

Thus, even if SSNW can identify factual statements about which there is a dispute, that is insufficient to warrant reversal. In its Opening Brief, SSNW has listed a number of disagreements with statements made by the Examiner. But, as shown below, SSNW's criticisms are unfounded, trivial or both.

1. The Examiner's Reference to "Tangible Evidence" is Not Error.

SSNW complains that the Examiner should not have used the word "tangible evidence" in characterizing the requirements for showing nonconforming use. Yet that statement is not inconsistent with applicable caselaw and surely does not constitute error. As noted above, the law strongly disfavors nonconforming uses. Therefore, when considering a claim by a landowner of prior lawful use, the court or agency may properly require that allegations of prior use be supported by objective, credible evidence. Thus, it is frequently stated that the denial of nonconforming use rights will be sustained when the evidence of the prior use is "insufficient" or "contradictory." Anderson, American Law of Zoning, Vol. 1, § 6.09. The evidence supporting nonconforming use should be "objective evidence." Overstreet v. Zoning Hearings Board, 412 A.2d 169 (Pa. 1980).

Contrary to SSNW's argument, the Examiner did not base his decision entirely on documentary evidence. He took three full days of testimony and his decision, as well as Judge Roof's appeal order, cite to testimony in the record. But Examiner Berteig and Judge Roof of course compared and contrasted Mr. D'Amico's testimony regarding past use with contemporaneous documentary evidence. Where statements by D'Amico were contradicted by contemporaneous documents describing SSNW's business (including D'Amico's prior

descriptions), the Examiner was entitled to place greater weight on the contemporaneous evidence.

If mere statements by a landowner, even though contradicted by business records and other reliable contemporaneous evidence were sufficient, there would be no way to deny an illegal nonconforming use. Needless to say, Joe D'Amico and his landowner Reed Gunstone were not impartial witnesses. To the contrary, they had a strong incentive to exaggerate uses of the property prior to the enactment of Jefferson County's Zoning Code. Thus, it was reasonable for the Examiner to look to objective, contemporaneous documents to support SSNW's current claims. As noted above, the records produced by SSNW included five contemporaneous descriptions by D'Amico as to the nature of SSNW's activities before 2001. The descriptions are consistent, and directly contradict D'Amico's current claims. (Log 98, pp. 46, 60, 66; Log Items 211, 213.) The contemporaneous descriptions from 1993, 1995, 1998, 2000 and 2001 include no reference to firearms use, firearms training or indeed any training of customers or clients on the property.

As Judge Roof noted, the Hearing Examiner appropriately gave this objective, documentary evidence more weight than unsupported and contradictory current testimony by the two individuals with a strong

incentive to prove a nonconforming use, i.e., the business owner (D'Amico) and the land owner (Gunstone):

First, SSNW assigns error to the HE's insistence on "tangible" evidence to support a nonconforming use. While the HE's word choice was perhaps inartful, it is clear that the HE preferred documentation over recollection, and this preference was the result of an appropriate weighing of the evidence. The HE does have the authority to find some evidence more credible than other evidence. Therefore, it was not error for the HE to give documentary evidence more weight than the testimony of interested parties or the testimony of others not testifying contemporaneously to the events in question, particularly when the documentary evidence is inconsistent with the memories of some of the witnesses.

(CP 360).

Moreover, the record shows that D'Amico has been consistently deceptive in his dealings with the County and the courts since opening his business. (III VRP, pp. 59-61). Prior to the Stop Work Orders, D'Amico had never applied for a permit, despite the construction of numerous buildings over a period of several years and extensive activities which clearly required application for Conditional Use Permits. His clandestine expansion and alteration of activities, including unpermitted buildings and quasi-military activities on the property without permits was flagrant and deliberate. (III VRP, pp. 59-61). Even after his unlawful activities were disclosed, D'Amico intentionally defied the Stop Work Orders issued by Jefferson County, requiring the intervention of the court to issue a temporary restraining order and

preliminary injunction. (CP 192-202). Moreover, during the course of the hearing, D'Amico admitted that he had effectively defied Judge Verser's preliminary injunction by training 37 new employees in CAT training over the previous six weeks. (VI VRP, page 20).

The Examiner properly determined that many of D'Amico's unsupported assertions regarding prior use were not credible. (CP 41). It is within the Examiner's discretion to place greater weight on certain evidence as more credible, notwithstanding conflicting evidence from the other side. State v. County of Pierce, 65 Wn. App. 614, 624, 829 P.2d 217 (1992). An appellate court reviewing a land use decision that a superior court has reviewed should defer to the administrative fact finder's evaluation of the weight and credibility of the evidence. Cingular Wireless v. Thurston County, 131 Wn. App. 756, 783, 139 P.2d 300 (2006).

Moreover, D'Amico was in the best position to produce business records and other tangible evidence showing any nonconforming use by his own business. It was reasonable, therefore, for Examiner Berteig to look to contemporaneous business records to determine the nature and extent of SSNW's activities pre-1992 (and, indeed, pre-2001). The total lack of any objective reference to third party training, commercial weapons use or paramilitary activities in SSNW documents was

powerful evidence that SSNW was not entitled to nonconforming use status as to such uses.

2. There Was Substantial Evidence Supporting the Limited Nature and Scope of SSNW's Prior Use.

At page 48 of its Opening Brief, SSNW makes the startling statement that “on the issue of the scope and nature of SSNW’s legal nonconforming use, the County offered no probative evidence and, in fact, largely deferred to the credibility of SSNW’s testimony.” This statement is curious in view of the fact that the administrative record consisted of approximately 300 exhibits, many of which directly contradicted Mr. D’Amico’s testimony. Moreover, the County cross-examined every witness called by SSNW, and called several witnesses of its own. The evidence developed through cross-examination directly refuted D’Amico’s current claim of expansive use prior to January 1992.¹³

As noted above, the administrative record is replete with evidence showing that there was no commercial firearms training, paramilitary activity or indeed any training of customers or clients on the property prior to 2004 and certainly none prior to 1992. There were five exhibits in which SSNW had described the nature and scope of its operations in 1993, 1995, 1998, 2000 and 2001. Those exhibits were

¹³ SSNW’s current counsel was not involved at the time of the hearing before the Examiner, but even a cursory review of the record shows overwhelming evidence that SSNW’s use in 1992 was very limited.

entirely consistent, and refute any notion of third party training or extensive use of weaponry on the property. (Log 98, pp. 46, 60, 66; Log Items 211, 213).

The record further demonstrates that there were only two to three full-time employee equivalents working for SSNW in early 1992. (Log 227; CP 41). The testimony of Robert Grewell was particularly instructive, in that he was hired in March 1992, shortly after the January 6, 1992 Zoning Code went into effect. Mr. Grewell testified on cross-examination that there were only two armed employees working for SSNW prior to his hire. (V VRP 34-42). When Grewell was hired, he was designated employee "K-3" (the third armed guard for SSNW). (Appellant's Exhibit 26).

Jefferson County also demonstrated that there had been no commercial use of the property for firearms training by any third party prior to December 2004. Mr. D'Amico had testified that the City of Sequim had engaged in commercial firearm activity on the property starting around 1992. However, records from the City of Sequim were obtained and entered into the record, showing that the city had never entered into any contract, agreement or transaction involving training of city employees on the SSNW site prior to June 2005. (Log 206, pp. 18-30). Reluctantly, Mr. D'Amico was forced to admit at the hearing that he had no record of any training by any government entity, and that

SSNW never provided any commercial training of third parties on the property prior to December 2004. (IV VRP, p. 56; V VRP, p. 72).

In short, there was substantial evidence supporting the findings of the Hearing Examiner, as confirmed by the trial court, that SSNW's use of the property prior to January 1992 was "limited" and bore no resemblance to the expansive paramilitary training base ("Fort Discovery") which was in operation in 2005.

3. The Trial Court Correctly Determined That SSNW's Prior Lawful Use Was Limited to 20 Acres Surrounding the Residence.

The trial court correctly limited the geographic scope of SSNW's nonconforming use to 20 acres immediately surrounding the residence which Security Services rented in 1988. Substantial evidence supported the conclusion that the use was limited at most to this 20 acre area.

The only agreement describing SSNW's legal use of the property was a 1988 rental agreement between Joe D'Amico and the former property owner Charles Gunstone. (Log 98, pp. 18-19). That agreement rented only the residence (3501 Old Gardiner Road) and the driveways leading to the residence. The rental agreement was never amended or modified.

On the witness stand, Mr. D'Amico attempted to argue that there had been an oral agreement expanding SSNW's operations. However, on cross-examination he was unable to identify (a) the parties to the

agreement; (b) the date of the agreement; or (c) any important terms or provisions of the alleged agreement:

Q. Tell us when this oral agreement was entered into.

A. I believe it was when his – I’m not exactly sure when it was, actually. I believe it was when his father passed away because his father had signed our original agreement.

Q. Does Reed – are you talking about Reed Gunstone? It’s an oral contract with him?

A. Yes.

Q. Okay. Does he own – is he the owner of all the property that you operate on individually?

A. He’s the owner of – he has partial ownership and then he has – I don’t know exactly the ownership, how that works, but he does have what do you call it? Percentage of ownership on some properties and he owns 100% of other parties.

Q. So this oral agreement is an oral agreement with what legal entities?

A. I would say that would probably be the Charles Gunstone estate since he’s passed away, and he’s just passed away here a couple years ago.

Q. Let me ask you about that. So the oral agreement was formed a couple years ago?

A. I don’t know, sir, on that. I don’t know.

(VI VRP, pp. 9-10).

In any event, even if such an oral agreement were entered into, it is clear that it was entered into only “a couple years ago” (after 2001 and more than a decade after enactment of the 1992 Zoning Code).

Therefore it could not establish any nonconforming use of property other than the residence which was the subject of the 1988 rental agreement.

In short, there was substantial evidence to support the trial court's determination that the nonconforming use established before January 1992 was restricted to the 20 acres surrounding the residence.

4. The Trial Court's Reference to the Preliminary Injunction Was Harmless.

In its Opening Brief, SSNW seeks to attach significance to Judge Roof's comments that the Preliminary Injunction entered on December 21, 2005 by Judge Verser "shall remain in effect" pending the Hearing Examiner's decision on remand. SSNW correctly notes that the preliminary injunction had been previously dissolved. But SSNW also implies that somehow the court has imposed additional unfair restrictions on SSNW.

What SSNW fails to advise this Court, however, is that the preliminary injunction was lifted, not because SSNW had prevailed on any substantive issue, but rather because SSNW had elected to file its LUPA challenge in Kitsap County Superior Court, and Jefferson County Superior Court Judge Verser agreed that all matters relating to the controversy should be transferred to Kitsap County. Moreover, and importantly, the preliminary injunction (which severely restricted SSNW's firearms use) was lifted based on the Declaration of Joseph D'Amico, in which he promised that SSNW would comply with the Stop

Work Orders, and not conduct firearms activity unless and until Judge Roof relieved SSNW from the Examiner's decision:

Until SSNW receives a stay or other ruling from the Kitsap County Superior Court or another judicial body relieving SSNW from the Hearing Examiner's decision affirming the County's three orders, in whole or in part, SSNW intends to comply with the County's three orders (the July 8, 2005 Stop Work Order and August 11, 2005 Notice and Order and Stop Work Order). . . . SSNW will not . . . conduct activities prohibited by the County's three orders until the stay issue has been resolved.

See, Declaration of Joseph N. D'Amico in Support of Motion to Dismiss.¹⁴ Significantly, after the matter was transferred to Kitsap County Superior Court, SSNW filed a Motion to Stay Enforcement of the Examiner's decision pending review. Judge Roof denied the Motion to Stay. (CP 254).

Thus, the trial court's comment that SSNW must still comply with the terms of the preliminary injunction, while technically incorrect, was surely harmless. The spirit of his order, i.e., that SSNW must comply with the Hearing Examiner's substantial limitations on use, remains in force. Indeed, the Hearing Examiner's decision was even more stringent than the restrictions of the preliminary injunction.

¹⁴ Jefferson County is submitting herewith a Motion to Supplement the Record to include the Declaration of Joseph D'Amico.

E. Jefferson County Should Be Awarded Its Attorney Fees Pursuant to RCW 4.84.370.

Jefferson County asks this court to award attorneys' fees to the County on appeal, pursuant to RCW 4.84.370. The statute allows recovery of attorneys' fees on appeal from a land use decision, where a county has substantially prevailed in Superior Court and at the Court of Appeals. Storedahl & Sons v. Cowlitz County, 125 Wn.2d 1, 103 P.3d 802 (2004).

Here, SSNW appealed the County's issuance of enforcement orders and its determination that SSNW's paramilitary training facility (Fort Discovery) was not grandfathered. The County prevailed before the Hearing Examiner and substantially prevailed at the trial court level.¹⁵ SSNW's appeal of the trial court decision confirms that the County was the substantially prevailing party at the trial court level. If the County also prevails in this appeal, it will have met the criteria for recovery of fees under RCW 4.84.370(1) and (2).

F. CONCLUSION.

For all of the above reasons, this Court should affirm the decision of the trial court below.

¹⁵ The Hearing Examiner arguably went further than the County had requested and found that not even a limited nonconforming use had been established. The trial court corrected the Hearing Examiner on this issue, but affirmed the disallowance of the training facility and extensive firearms use.

DATED this 31st day of July, 2007.

KARR TUTTLE CAMPBELL

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DIVISION II

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NO. 35834-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SECURITY SERVICES)
NORTHWEST, INC.,)
) CERTIFICATE OF SERVICE
Appellant,)
)
v.)
)
JEFFERSON COUNTY,)
)
Respondent.)
_____)

I hereby certify that on July 31, 2007, I caused to be served a copy of Brief of Respondent Papers by Legal Messenger on the following:

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