

NO. 38961-4

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

SECURITY SERVICES NORTHWEST, INC.,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Jefferson County respectfully asks the Court of Appeals to affirm the summary judgment orders entered by the trial court herein, dismissing the civil rights claims and tortious interference claim by Security Services Northwest (SSNW) arising from Jefferson County's land use enforcement actions. The trial court's orders are supported by multiple legal grounds, the most obvious of which is collateral estoppel. Last year, this Court in the companion appeal under the Land Use Petition Act, RCW 36.70C, largely affirmed the trial court's LUPA decision and rejected SSNW's claims that the County's enforcement action was improper. Moreover, this Court unambiguously held that SSNW did not have any vested rights which had been violated by the County. Further, this Court awarded attorneys' fees in favor of Jefferson County as the substantially prevailing party at both the trial court level and the Court of Appeals. (See Appendix hereto). In view of these prior rulings, there is no basis for SSNW to recover damages against Jefferson County.

In addition to collateral estoppel, the trial court's summary judgment orders are also supported by waiver and by SSNW's failure to establish the necessary elements of its 42 U.S.C. § 1983 claims and its tortious interference claim.

When this Court issued its opinion in the LUPA action last year, SSNW should have voluntarily dismissed its damages lawsuit. Instead,

Jefferson County was compelled to file a second summary judgment motion to dismiss the remaining tortious interference claim. Judge Spearman properly granted that motion.

Unfortunately, SSNW continues to ignore the prior rulings in favor of Jefferson County, and has filed an appeal herein, even though its damages claims depend on facts which have been decided against SSNW by superior court Judge Jay Roof and by this Court.

In an attempt to justify pursuit of damages notwithstanding prior rulings against it, SSNW has created an elaborate fictional account of the proceedings below, implying that Hearing Examiner Berteig's original decision was based on inappropriate pressure from neighbors who opposed SSNW's unpermitted operation. Yet there is no credible evidence that the Examiner's decision was based on anything other than the voluminous administrative record and the testimony submitted in the three day hearing before the Examiner. Indeed, Jefferson County called no neighbors to testify at the hearing, and the Examiner's decision makes no reference to any neighbor testimony. The allegations of ex parte contact are preposterous.

Finally, to the extent that this Court ordered a limited remand to clarify the nature of SSNW's pre-1992 nonconforming use, and lawful intensification thereof, Hearing Examiner Stephen Causseaux has now conducted the remand hearing and issued his decision, which is in conformance with the Court of Appeals' instructions.

Jefferson County submits that SSNW's appeal is frivolous and advanced without good cause, and therefore requests imposition of sanctions under RAP 18.9(a).

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Jefferson County believes that the issues pertaining to the appellant's assignment of errors may best be stated as follows:

- A. Is a damages claim under 42 U.S.C. § 1983 barred by collateral estoppel where the factual issues upon which it is based have already been determined against the plaintiff in superior court and in the Court of Appeals?
- B. Is a claim under § 1983 alleging due process violations arising from a land use action properly dismissed where (1) plaintiff did not possess a constitutionally protected property interest; (2) the Court of Appeals has already determined that the plaintiff possessed no vested rights which were infringed; and (3) the decision was not arbitrary and invidious?
- C. Is a claim under § 1983 for equal protection violations properly dismissed where the courts have already affirmed the appropriateness of the County's action, and where the plaintiff has offered no evidence that it was treated differently than other similarly situated entities?
- D. Is a claim for tortious interference with business expectancy properly dismissed where the facts upon which the claim is based have been decided against the plaintiff in a previous lawsuit?

III. FACTUAL BACKGROUND

A. Factual Inaccuracies in Appellant's Opening Brief.

It is unfortunate that SSNW's statement of facts is replete with assertions and allegations which are not supported by the record and indeed which are contrary to factual determinations previously made by

this Court. Reading SSNW's brief, it is as if the multiple decisions already handed down in this controversy did not exist. SSNW's factual recitation reflects its attitude that it may ignore binding judicial decisions already made, and obtain a "do-over" in the form of a collateral lawsuit for damages. Jefferson County feels compelled to point out some of the more significant misstatements in SSNW's brief, below.

On page 1 of its Opening Brief, SSNW represents that the enforcement orders issued by Jefferson County "prohibited SSNW from engaging in any business activities, even activities outside the county, so long as SSNW based its business at its present location near Discovery Bay." A similar statement is made at page 18. These statements are untrue, as SSNW well knows. The County's Stop Work Orders did not prevent SSNW from continuing to operate those aspects of its business which were in existence prior to 1992 (dispatching armed guards, site security patrols, installing and monitoring alarms, and armored car deliveries). (CP 1119). Indeed, Joe D'Amico, the president of SSNW acknowledged in a sworn declaration that SSNW's business has continued to operate from its Discovery Bay location, uninterrupted since the time of the enforcement orders. (CP 1122).

At page 2 of its Brief, SSNW asserts that its use in 2005 ". . . as held by this Court . . . was legal although nonconforming." In reality, this Court held that "SSNW impermissibly expanded its pre-1992 uses of

the property,” and that third party training was properly excluded from the list of acceptable uses. (CP 959, 960; Appendix, pp. 13, 14).

At pages 5 and 7 of its Brief, SSNW asserts that its activities since 1988 included training law enforcement agencies and third parties. Yet Judge Roof specifically concluded that there was “little to no evidence in the record . . . to find that training of third parties took place on the property prior to January 1992.” (CP 933). The Court of Appeals affirmed on this issue, and held that the Examiner had properly excluded third party training and paramilitary activity from the list of acceptable nonconforming uses. (CP 960-961; Appendix p. 14-15).

At page 6, SSNW represents that SSNW’s pre-existing use covered 3,700 acres of property owned by the Gunstones. Yet this Court made clear in its prior opinion that SSNW’s nonconforming use was limited to approximately 20 acres. (CP 960; Appendix, p. 14).

At page 11 of its Brief, SSNW asserts that the County had no legal authority to regulate SSNW’s firearms training, because the County did not have a firearms ordinance which banned all discharge of firearms. But as this Court has previously held, a commercial weapons facility was incompatible with the Rural Residential zone in which SSNW’s business was located, and therefore shooting ranges and weapons training were properly proscribed. (CP 955, 956, 960; Appendix, pp. 9, 10, 14).

At page 13, SSNW asserts that County staff “refused to accept any application” from SSNW. Yet SSNW President Joe D’Amico has testified that he never presented any application for permits, and never even requested a pre-application meeting with the County. (CP 65-68).

At page 20, SSNW asserts that Jefferson County Administrator John Fishbach “discussed the SSNW matter with the County Examiner.” This statement is absolutely false. There is not a shred of evidence that Mr. Fishbach ever spoke to Mr. Berteig about the SSNW matter.¹ Indeed, in his deposition he denied any such contact. SSNW chose not to present that deposition testimony to Judge Spearman, because it refuted SSNW’s claims of ex parte contact. (TR 24, 54).

On pages 17-23 of its Opening Brief, SSNW seeks to create a fanciful scenario in which the Hearing Examiner’s decision was based on pressure asserted by two retired gentlemen, Sam Parker and Gabe Ornelas. Yet there is no evidence that citizen objections were the primary, or even a significant basis of the Hearing Examiner’s ruling, or of Judge Roof’s LUPA decision, or of the Court of Appeals Opinion. The following facts are not disputed: (a) no citizen complaint or testimony was mentioned in the Hearing Examiner’s 31-page decision (CP 398-428); (b) no citizen witness was mentioned in the trial court’s Memorandum Decision or its LUPA order (CP 71-84); (c) no citizen

¹ Mr. Fishbach was not even in the decision-making chain. The Code Administrator’s enforcement orders were appealed directly to Examiner Berteig. Fishbach was not even present at the hearing.

witness was mentioned in the Court of Appeals' unpublished Opinion (CP 947-966); and (d) Jefferson County did not call a single citizen witness to testify. The only citizen testimony at the hearing were brief comments at the end of the three day hearing, by proponents *and* opponents, which raised no new issues or evidence, and to which no attorney objected.

The allegedly improper "ex parte contacts" between citizen Sam Parker and the Examiner were brief telephone inquiries by Parker as to (a) whether witnesses would be allowed to make statements (Parker elected not to make a statement); and (b) when the decision from the Examiner could be expected. (CP 785). The Examiner advised Parker that he could not discuss any issue relative to the appeal, and Parker did not raise any such issue. Id.² There was no impropriety by Examiner Berteig.

At page 26 of its Brief, SSNW states that the LUPA decision by Judge Roof was a "clear victory by SSNW." This statement is belied by the fact that SSNW filed a Motion for Reconsideration, which was denied, and later filed an appeal with this Court, which was decided largely in favor of Jefferson County. Jefferson County was pleased with Judge Roof's decision, and did not appeal any portion of it, because it

² Mr. Parker was something of an "officious intermeddler," but his role in the SSNW hearing was negligible. Prior to the hearing, Mr. Parker was strongly opposed to SSNW's weapons training facility. But after the hearing he was befriended by Mr. D'Amico, and agreed to help SSNW. Still, he played no significant role in the hearing and, indeed, did not even offer a comment. (CP 781-82).

was consistent with the County's enforcement orders, which were directed at SSNW's unlawful and unpermitted operation of its massive weapons training facility in 2005. Jefferson County was later awarded attorneys fees under RCW 4.84.370(1), as the substantially prevailing party at both the trial court level and on appeal. (CP 965-66).

At page 31, SSNW states that Judge Spearman "specifically denied summary judgment on the merits of the § 1983 claims." This is inaccurate. Judge Spearman *granted* summary judgment. (CP 848-49; CP 1116). In so doing, he noted that he did need to decide the substantive merits of the claim, because those issues had already been decided, and his impressions were therefore moot. (RP 67).³

B. Counter-Statement of the Case.

This appeal is the latest in a series of lawsuits and appeals filed by SSNW arising from its illegal operation of a military training base ("Fort Discovery") on Rural Residential land above Discovery Bay, without obtaining any permits and in defiance of Jefferson County building and land use regulations.⁴

³ In any event, a judgment can of course be affirmed on any theory established in the pleadings and supported by proof. Wilson Court v. Tony Maroni's, Inc., 134 Wn.2d 692, 698, 952 P.2d 590 (1998).

⁴ SSNW complains that there is no basis for its operations in 2005 to be referred to as "military" or "paramilitary." This is curious, because the Court of Appeals confirmed that SSNW's operations in 2005 were military in nature, involving the training of special operations units and other groups of military personnel. (Appendix, pp. 13, 15). Indeed the Court of Appeals denied SSNW's motion to modify the Opinion to eliminate references to military or paramilitary training.

After Jefferson County became aware of SSNW's unlawful activities and unpermitted structures in June of 2005, it issued enforcement orders to prevent the continued use of the buildings and the operation of the weapons training facility. SSNW appealed the enforcement orders to the Jefferson County Hearing Examiner, arguing that all of its current uses of the property should be considered grandfathered as "nonconforming uses."

Unfortunately, even after the Stop Work Orders were issued, SSNW intentionally defied those orders, and continued to conduct military and counter-terrorism training operations on the property. (CP 949, 961; Appendix, pp. 3, 15). As the Court of Appeals has noted, up to 50,000 rounds of ammunition were being discharged during the course of 4-day training sessions for elements of the U.S. Military. (CP 949; Appendix p. 3).

As a result of SSNW's defiance of the Stop Work Orders, Jefferson County was compelled to file a legal action to obtain a temporary restraining order and preliminary injunction. (Jefferson County Superior Court, Cause No. 05-2-0282-3). The Honorable Craddock Verser of Jefferson County Superior Court issued a TRO on October 3, 2005 and a preliminary injunction on October 17, 2005. (CP 89-94). The orders, among other things, prohibited SSNW from training third parties or new employees onsite.

Unfortunately, even after the preliminary injunction was in place, forbidding the use of firearms for training of third-parties and new employees, SSNW admitted that it continued to train 37 new employees in November 2005, shortly before the hearing before Examiner Irv Berteig. (CP 69). Judge Verser therefore signed a more stringent injunction in December 2005, prohibiting any firearms use by SSNW on the property unless proof was first provided that the trainee was a current employee undergoing required firearm recertification.

In its appeal of the enforcement orders, SSNW argued that its weapons training facility should be considered a nonconforming use, because SSNW's predecessor in interest ("Joe D'Amico d/b/a Security Services") had operated a small security business from a residence on the property since 1988. Jefferson County's first zoning ordinance was enacted on January 6, 1992. The Examiner was therefore asked to determine whether SSNW had established a valid nonconforming use by that time and, if so, the nature and extent of any such nonconforming use. SSNW contended that its use in 2005 was essentially the same as in January 1992. SSNW asked Examiner Berteig to set aside the Stop Work Orders and to allow its operations, including third-party firearms training, to proceed without restriction.

After three days of testimony, hundreds of exhibits and substantial briefing by the parties, the Hearing Examiner issued his Findings, Conclusion and Judgment on January 10, 2006. The

Examiner upheld the County's Stop Work Orders. He further held that SSNW had not established a legal nonconforming use on the property before the enactment of the 1992 Zoning Code, due to building code violations. He also found that SSNW had unlawfully and dramatically altered and expanded its use of the property between January 1992 and 2005.

SSNW appealed the Hearing Examiner's decision under the Land Use Petition Act (RCW 36.70C) in Kitsap County Superior Court, Cause No. 06-2-00223-9. The Petition alleged that dozens of errors had been made by the Examiner. Most of SSNW's allegations of error were abandoned before the LUPA hearing.

The LUPA review came before the Honorable Jay Roof on August 16, 2006. Judge Roof issued an Order on November 1, 2006 which affirmed the Examiner's determination that the County's enforcement actions were valid. (CP 71-75). Most of SSNW's other challenges to the Examiner's decision were rejected by Judge Roof. (CP 73). However, Judge Roof did conclude that SSNW (through its predecessor Joe D'Amico d/b/a Security Services), had established a "limited" nonconforming use by 1992. He concluded that any "grandfathered" use should be measured by the nature and scope of its activities on the property in January 1992, when the Jefferson County Zoning Code came into effect. Judge Roof remanded the matter to

Examiner Berteig for further refinement of the nature and scope of SSNW's activities before January 1992, based on the existing record.

SSNW was dissatisfied with Judge Roof's decision, and brought a Motion for Reconsideration on several grounds, which was denied. (CP 952). SSNW then appealed Judge Roof's decision to the Washington State Court of Appeals, Division II (Case No. 35834-4-II).

In February 2007, SSNW brought the instant lawsuit (Kitsap County Cause No. 07-2-004328), seeking recovery of damages against Jefferson County under a Washington state statute, RCW 64.40; and also under the federal Civil Rights Statute, 42 U.S.C. § 1983. Even though Jefferson County had largely prevailed in the LUPA action, and Judge Roof had found that the County had acted appropriately, SSNW claimed that it should be awarded damages.

In October, 2007, Jefferson County filed a Motion for Summary Judgment, seeking dismissal of SSNW's damages action. The motion for summary judgment came before Kitsap County Superior Court Judge Theodore Spearman on December 7, 2007. After considering the evidence, the briefing of the parties and the argument of counsel, the Court granted Jefferson County's motion. (CP 848-49).

At the summary judgment hearing, SSNW presented a motion to amend its Complaint to add a new claim, for tortious interference with contractual relationships, based on the identical facts alleged in the

original Complaint. That motion was granted and therefore, tortious interference was the only remaining claim in the lawsuit. (CP 850).

On April 15, 2008, the Washington Court of Appeals handed down its opinion in SSNW's appeal of Judge Roof's LUPA decision (Case No. 35834-4-II). The Court of Appeals largely affirmed the trial court. Specifically, it upheld the determination that SSNW's nonconforming use prior to January 1992 was a limited one, which involved only three full-time employee equivalents and which did not involve the training of third parties or any of the military or paramilitary activities which were being carried on by SSNW in 2005. (CP 960-61; Appendix, pp. 14-15). The court specifically held that "SSNW has not lost any vested property right." (CP 963; Appendix, p. 17).

The Court of Appeals also awarded attorneys fees to Jefferson County, as the substantially prevailing party at the trial court level and on appeal. (CP 965-66; Appendix, pp. 19-20). The Court of Appeals did remand the matter to the Hearing Examiner for the limited purpose of clarifying the extent of SSNW's pre-1992 nonconforming use, and determining whether there was any lawful intensification of that use.

Notwithstanding the Court of Appeals' rulings, SSNW declined to dismiss its damages lawsuit. Therefore, on or about January 7, 2009, Jefferson County filed a second motion for summary judgment, seeking dismissal of SSNW's remaining claim for tortious interference, based on collateral estoppel and SSNW's failure to establish the key elements of a

tortious interference claim. Judge Spearman granted the County's motion on February 6, 2009. (CP 1116). This appeal followed.

Jefferson County's new Hearing Examiner Stephen Causseaux has recently issued his remand decision in the LUPA appeal, which confirms that SSNW's activities are properly limited to its pre-1992 nonconforming use, with modest intensification, and that no third-party training is permitted. (Appendix C to Appellant's Opening Brief).

IV. ARGUMENT

A. The Damages Claims are Barred by Collateral Estoppel.

The doctrine of collateral estoppel bars the relitigation of issues which have already been determined in a prior judicial or quasi-judicial forum. Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507, 754 P.2d 858 (1987). The doctrine was summarized by the U.S. Supreme Court in Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411 (1982):

Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue on a different cause of action involving a party to the first case.

449 U.S. 96. The courts have stressed the beneficial effects of collateral estoppel and res judicata, in avoiding repetitive and vexatious multiple lawsuits:

As this court and other courts have longed recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication.

Id. at 94. Importantly, collateral estoppel is a legal issue. It is for the court to determine whether collateral estoppel bars subsequent litigation of any claim or issue. Satsop Valley Homeowners v. N.W. Rock, 126 Wn. App. 538, 542, 108 P.3d 1247 (2005).

SSNW argues that collateral estoppel should not apply, because the decisions by the Examiner, Judge Roof and the Court of Appeals arose from a quasi-judicial challenge to the County's enforcement action, and not a lawsuit for damages. SSNW argues that because there may be a slight difference in the standard for review in a LUPA action, collateral estoppel cannot apply. No Washington court has so held.

First, identical standards of proof is not one of the required elements for application of collateral estoppel. Rather, the elements of collateral estoppel are as follows:

- (1) identical issues;
- (2) a final judgment on the merits;
- (3) the party against whom the plea is asserted must have been a party to the prior adjudication; and
- (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Malland v. Retirement Systems, 103 Wn.2d 484, 489, 694 P.2d 16 (1985). The specific procedures in the prior hearing and the standard of proof are simply matters that the court may consider in determining whether application of the doctrine would be "unjust." Importantly, subtle differences in civil standards of proof have *never* been held by the Washington courts to preclude application of collateral estoppel. Not surprisingly, the only Washington cases cited by SSNW (and virtually

the only Washington cases rejecting collateral estoppel based on different standards of proof) are those in which one of the hearings was a *criminal* trial, and the other did not involve a criminal standard of proof. (Standlee v. Smith, 83 Wn.2d 405 (1974); Beckett v. DSHS, 87 Wn.2d 184 (1976)).⁵

In contrast, the Washington courts have on numerous occasions held that findings made in quasi-judicial or administrative hearings are binding in subsequent civil actions. City of Bremerton v. Sesko, 100 Wn. App. 158, 163-64, 995 P.2d 1257 (2000), rev. denied, 141 Wn.2d 1031 (decision by local planning commission upholding enforcement action by city precluded subsequent litigation and damages lawsuit); Christensen v. Grant County Hospital, 152 Wn.2d 299, 321, 96 P.3d 957 (2004).

The Washington Supreme Court has expressly held that a damages claim under § 1983 should be dismissed where factual issues determined in a prior quasi-judicial proceeding were necessary to support the damages action, and where those issues have been decided against the plaintiff:

While the Commission could not have adjudicated the § 1983 claim, 28 U.S.C. § 1343, it may have decided an issue of fact that is common to both Shoemaker's position for reinstatement before the Commission and to his § 1983 claim. If it did, and if the adjudication was

⁵ The standard of proof in a due process claim under § 1983 is even *higher* than in a LUPA appeal, i.e., "arbitrary and irrational," or "shocking to the conscience." See Section B.7 herein.

adequate under the Restatement standards adopted here [regarding collateral estoppel] then the issue has been decided for all purposes.

Shoemaker, supra, 109 Wn.2d at 512. The Shoemaker court held that the Commission's finding was entitled to preclusive effect, barring a damages claim under § 1983.

Collateral estoppel also acts as a bar to SSNW's tortious interference claim. The Washington Supreme Court has specifically held that a tortious interference action is barred, when the facts upon which such a claim is based have been determined contrary to the plaintiff's position. In Reninger v. Dept. of Corrections, 134 Wn.2d 437, 951 P.2d 782 (1998), two corrections officers who were demoted for misconduct sued the state, alleging wrongful termination and tortious interference with contractual relations. Prior to commencing their lawsuit, the officers had litigated the disciplinary action against them administratively, through a Hearings Examiner proceeding and an appeal to the Personnel Appeals Board, which ultimately ruled against them. In the damages lawsuit, the jury returned a verdict in favor of the plaintiffs which was reversed by the Court of Appeals. The Washington Supreme Court affirmed the Court of Appeals decision, and ordered dismissal of the damages action.

In its opinion, the Supreme Court stressed that Reninger's tortious interference claim was barred by collateral estoppel because necessary elements of the claim had already been decided against him in

the administrative appeal procedures. The Supreme Court rejected the argument that collateral estoppel should not apply because the original hearing was not a full blown civil trial:

Disparity of relief between what one can recover in the first action compared to what one can recover in the second action is not the gravamen of the decision whether to apply collateral estoppel to the findings of an administrative board. Rather, courts look to disparity of relief to determine whether sufficient incentive exists for the concerned party to litigate vigorously in the administrative hearing.

134 Wn.2d at 453. The Reninger Court noted that the plaintiffs had a strong incentive to litigate in the administrative context and that therefore the determinations in that process were binding on them:

In the present case, Reninger and Cohen displayed no lack of incentive to litigate in the administrative arena. They vigorously opposed their demotions; they argued their case to a Hearing Examiner; they appealed the Hearing Examiner's findings against them to the PAB; and they attempted to appeal the PAB's findings to the superior court pursuant to RCW 41.64.130. It was only after their lack of success in the administrative arena that they relabeled their claims as wrongful discharge and tortious interference, and relitigated the identical issues before a jury in the civil trial. . . . Reninger and Cohen were entitled to one bite of the apple, and they took that bite. That should have been the end of it. The normal rules of collateral estoppel apply here to prevent excessive and vexatious litigation.

134 Wn.2d at 454.

Collateral estoppel applies with even greater force in this case, because this is a land use dispute governed by RCW 36.70C (LUPA). LUPA is the exclusive means of challenging land use decisions. RCW

36.70C.030. The Washington Supreme Court has confirmed that a party cannot challenge a quasi-judicial land use decision by means of a collateral attack (outside of an appeal under LUPA). Chelan County v. Nykreim, 146 Wn.2d 904, 925-26, 53 P.3d 1 (2002); James v. Kitsap County, 154 Wn.2d 574, 586, 115 P.2d 286 (2005). In such circumstances, collateral estoppel acts as a bar. Satsop Valley Homeowners v. N.W. Rock, *supra*, 126 Wn. App. at 543.

Moreover, collateral estoppel applies with special force in this case, because SSNW's appeal process included not only a hearing before the Examiner, but also a superior court review and an appeal to the Court of Appeals. Thus, SSNW has already had several "bites of the apple." At each level, the decision maker rejected SSNW's claims that it was mistreated and that its alleged right to operate a weapons training facility had been violated. As the Court of Appeals held in its unanimous decision, SSNW's nonconforming use did not include third party training, much less military or counter-terrorism training, but instead involved only limited uses by a small number of employees:

SSNW specifically objects to the trial court's (1) excluding third party training from the list of acceptable uses, (2) limiting SSNW's nonconforming use to two to three full-time equivalent employees, and (3) limiting SSNW's use of the land to the 20 acres covered by the lease.

These arguments are largely addressed above: SSNW's nonconforming use is properly limited to its pre-1992 activities, and neither the Hearing Examiner nor the trial court erred in concluding that SSNW's current activities

constituted an impermissible expansion of its pre-1992 uses.

(CP 960; Appendix, p. 14). The Court of Appeals also rejected SSNW's claim that the Hearing Examiner and/or the trial court had engaged in unlawful procedure; and specifically rejected SSNW's argument that the County had arbitrarily infringed upon its vested rights. In so doing, the Court of Appeals noted that SSNW was allowed to continue its pre-1992 uses during the appeal process and that it was not deprived of any protected rights:

SSNW also claims that it is entitled to relief under RCW 36.70C.130(1)(f), arguing that its nonconforming use was a vested property right and as such was protected from arbitrary actions. The right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a "protected" or "vested" right. [Citation omitted]. This right, however, refers only to the right not to have the use *immediately terminated* in the face of a zoning ordinance which prohibits the use. [Citation omitted] SSNW's right to continuous nonconforming use has not been immediately terminated; indeed, we find that SSNW has established a nonconforming use and we are remanding only to determine the boundaries of that use. SSNW has not lost any vested property right; this argument is therefore moot.

(CP 963; Appendix, p. 17). (Emphasis by Court). Based on the Court of Appeals' ruling, SSNW's civil rights claim and its tortious interference claim are barred by collateral estoppel.

It would be anomalous and contradictory for a jury to be allowed to find that Jefferson County had unlawfully interfered with a valid right held by SSNW to conduct third party weapons training on the property,

when the Examiner, the trial court and this Court have all determined that SSNW had no such right, and that the County's enforcement action was appropriate! The trial court properly granted Jefferson County's motions for summary judgment.

B. SSNW Cannot Satisfy the Strict Requirements for Liability Under 42 U.S.C. § 1983.

1. Section 1983 is Only Rarely Implicated in a Local Land Use Dispute.

SSNW sought recovery of damages under the federal Civil Rights Statute, 42 U.S.C. § 1983. SSNW alleges that the Hearing Examiner's decision upholding the issuance of stop work orders constituted a violation of SSNW's constitutional rights, i.e., due process and/or equal protection. The trial court properly dismissed the § 1983 claims.

Liability under § 1983 is ordinarily applied in the context of racial or sexual discrimination, and in the context of police misconduct. Section 1983 very rarely allows recovery of damages for a mistaken decision in a land use dispute. Indeed, only a handful of cases nationwide have imposed liability under § 1983 based on an erroneous land use decision. 42 U.S.C. § 1983 does not confer any substantive rights. Rather, it provides a remedy for violations of federal rights found elsewhere. Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807 (1994).

In the context of land use disputes, the courts have been properly reluctant to invoke the Federal Constitution, because regulation of land use is ordinarily a purely local concern:

The authority cited by CEI, as well as other cases, all suggest that the conventional planning dispute -- at least when not tainted with fundamental procedural irregularity, racial animas or the like -- which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the State and does not implicate the Constitution . . . Every appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or “distorted” its legal authority in some manner, often for some allegedly perverse (from the developer’s point of view) reason. It is not enough simply to give these state law claims constitutional labels such as “due process” or “equal protection” in order to raise a substantial federal question under § 1983.

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982), cert. den., 459 U.S. 989.

Moreover, to subject a municipality to § 1983 liability in the land use context, it must be shown that the allegedly wrongful action was undertaken by the person or board with “final policy making authority for the municipality.” Liability under § 1983 may not be based on respondeat superior. See, City of St. Louis v. Praprotnik, 108 S. Ct. 915, 926, 485 U.S. 112, 127 (1988); Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 123, 829 P.2d 746 (1992), cert denied, 113 S. Ct. 1044. Thus, SSNW’s unsupported allegations of misconduct by various County employees are irrelevant to its claims under § 1983. As

the Supreme Court explained in Praprotnik, liability under § 1983 may only arise from an unconstitutional county-wide *policy*. And while a single act may in some circumstances constitute county “policy,” it must be an action undertaken by the County’s highest policy maker in that field. Id. 108 S. Ct. at 926. Thus, the only potential basis for recovery under § 1983 would be the decision by the Jefferson County Hearing Examiner, upholding the County’s stop work orders. Lutheran Day Care, supra, 119 Wn.2d at 123-24.

In this dispute over a determination of nonconforming use, there is no basis to invoke the Due Process Clause or the Equal Protection Clause, and thus no basis for a damages claim under 42 U.S.C. § 1983.

2. SSNW’s Constitutional Claims are Barred by Waiver and Res Judicata.

In addition to the defense of collateral estoppel, SSNW’s due process and equal protection claims are also foreclosed by the doctrines of waiver and res judicata. SSNW waived its due process and equal protection claims by not raising them before the Examiner, and by abandoning any such claims on appeal.

In general, a party may not raise an issue on appeal, or in a collateral action, which was not raised in the original hearing. Ramsey v. Mading, 36 Wn.2d 303, 311, 217 P.2d 1041 (1950). If SSNW believed that the hearing before the Examiner was unfair it was incumbent upon SSNW to raise any procedural irregularities to the Examiner. Hogenson v. Service Armament Co., 77 Wn.2d 209, 216-

17, 461 P.2d 311 (1969). Yet it raised no challenges to any exhibits or witness testimony offered at the hearing, and alleged no procedural violations.

Moreover, SSNW waived any due process or other constitutional claim in its LUPA appeal. The Land Use Petition Act provides the exclusive means of reviewing a quasi judicial land use decision. RCW 36.70C.030. Significantly, the LUPA statute provides several grounds for seeking relief, including unlawful procedure and violation of constitutional rights:

. . . The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow prescribed process, unless the error was harmless.

* * *

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130. Thus, SSNW was entitled to, and was obliged to, raise any procedural or constitutional claims in the LUPA action before Judge Roof. Habitat Watch v. Skagit County, 155 Wn.2d 397, 407-408, 411, 120 P.3d 56 (2005). SSNW alleged numerous errors in its Land Use Petition. Yet it alleged no due process or equal protection violations. Therefore, any such claims were waived and cannot be

raised by means of collateral attack. Van Vonno v. Hertz Corporation, 120 Wn.2d 416, 426-27, 841 P.2d 1244 (1992).

Moreover, to the extent that SSNW raised procedural or constitutional claims in the LUPA case, those claims were rejected by Judge Roof and by the Court of Appeals, which found no such violations by the County:

SSNW claims that it is entitled to relief under RCW 36.70C.130(1)(a), but it fails to specify any unlawful procedure that it claims the Hearing Examiner or trial court followed. We will not review an argument that has been insufficiently briefed. RAP 10.3(a)(6).

SSNW also claims that it is entitled to relief under RCW 36.70C.130(1)(f), arguing that its nonconforming use was a vested property right and as such was protected from arbitrary actions. . . . SSNW's right to continue its nonconforming use has not been immediately terminated; indeed, we find that SSNW has established a nonconforming use and we are remanding only to determine the boundaries of that use. SSNW has not lost any vested property rights; this argument is therefore moot.

(CP 963; Appendix, p. 17). The Court of Appeals' decision constitutes binding judicial precedent which cannot be collaterally attacked.

Res judicata prevents the relitigation of claims in a subsequent action. The purpose of res judicata is to ensure finality of judgments and to avoid relitigation of claims or causes of action arising out of the same transactional nucleus of facts. Landry v. Luscher, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999). As the Washington Court of Appeals

stated in Cunningham v. State, 61 Wn. App. 562, 567, 811 P.2d 225 (1991):

. . . there has been an increasing judicial intolerance with efforts to avoid decisions made after fair consideration by shifting the scene to another court room.

Res judicata bars not only claims which were asserted in the prior action, but also those which “*could have and should have been determined in a prior action.*” Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 441, 423 P.2d 624 (1967). Rules of res judicata apply to federal civil rights actions brought after state court judgment. Migra v. Warren City School District, 465 U.S. 75, 81, 104 S. Ct. 892, 897-98 (1984). The courts have expressly held that a landowner or permit applicant is precluded by res judicata from raising civil rights claims in an action for damages, where he failed to include such claims in an earlier writ action challenging the governmental action. Jama Construction v. City of Los Angeles, 938 F.2d 1045, 1047, n.1 (9th Cir. 1991). In accord, Sanchez v. City of Santa Ana, 936 F.2d 1027, 1035 (9th Cir. 1991). The same result is mandated in this case.

SSNW’s attempt in this lawsuit to collaterally attack the Court of Appeals’ decision in the LUPA action and to relitigate issues decided against it, is foreclosed by waiver and res judicata, as well as estoppel.

3. SSNW Possessed No Constitutionally Protected Property Interest in the Determination of Nonconforming Use.

Even if a federal due process claim were not barred by waiver, res judicata and estoppel, SSNW could not satisfy the necessary

prerequisites for a due process claim. A party seeking monetary recovery based on a deprivation of due process in the context of land use regulation must first establish that he possessed a constitutionally protected “property interest” in the approval which he sought, and then he must demonstrate that the government acted in an arbitrary or irrational manner in depriving him of that property interest. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972); Crowley v. Courville, 76 F.3d 47, 52 (2nd Cir. 1996).

Such a property interest can only be present where an individual has a “reasonable expectation of entitlement created and defined by an independent source” such as federal or state law. Board of Regents v. Roth, supra. The mere subjective expectation on the part of a permit applicant does not constitute a “property interest” protected by the constitution. Clear Channel v. Seattle Monorail, 136 Wn. App. 781, 784, 150 P.3d 249 (2007). Generally, a first time applicant has no protected property interest in a permit or license. Kraft v. Jacka, 872 F.3d 862, 866-67 (9th Cir. 1989); Jacobsen v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980). In this case, SSNW possessed no “property interest” which was entitled to protection under the federal constitution.

SSNW was not the owner of the real property in question when any alleged application was filed.⁶ The property in question is owned by

⁶ As D’Amico’s President had admitted, SSNW did not in fact apply for any permit. (CP 65-68).

the ARK Group. (CP 59). SSNW was not even the owner of a valid leasehold interest. First, the only rental agreement relating to the property was held by Joe D'Amico d/b/a Security Services, and not by plaintiff SSNW. And the landlord on the rental agreement is Charles Gunstone, Jr., who is deceased and no longer owns the property. There was no assignment of the Landlord's right to the current owner, and no assignment of the tenant's rights to SSNW. (CP 60-61). Thus, there is no formal lease agreement between the current owner and SSNW.

Additionally, the D'Amico Rental Agreement did not contain a legal description of the real property in question, and certainly did not describe the property where SSNW's training activities were occurring. For a leasehold interest to be valid, there must be a proper legal description of the leased property. Bonded Adjustment Co. v. Edmunds, 28 Wn.2d 110, 182 P.2d 17 (1947). Here, the only description was the address of the house SSNW occupied. (3501 Old Gardiner Road). That address corresponds to Parcel No. 2363009, which consists only of the house and not to the land where the illegal buildings were constructed. (CP 59-60). Moreover, a legal description which contains only a street address is inadequate where it is not sufficiently definite to locate the property without resort to oral testimony. Bonded Adjustment Co., supra at page 111. At his deposition, Mr. D'Amico was unable to identify the specific property that SSNW was "leasing." (CP 59-60).

Furthermore, the rental agreement was not in the form of a deed and therefore did not convey an interest in real property to SSNW. In Washington, a real estate conveyance must be by deed. RCW 64.04.010. Absent execution and delivery of a deed, no real property interest is created. Erickson v. Wahlheim, 52 Wn.2d 15, 319 P.2d 1102 (1952); Kesinger v. Logan, 113 Wn.2d 320, 325-26, 779 P.2d 263 (1989). This rule applies to leases. A lease for a term more than a year must be in writing. RCW 59.04.010.

Even under the most generous construction, the Rental Agreement created a month-to-month tenancy. And the Washington courts have made clear that a tenant under a month-to-month tenancy does not possess a property interest entitling the tenant to recover statutory damages. Clear Channel v. Seattle Monorail, *supra*, 136 Wn. App. at 786-87 (2007).

In Scott v. City of Seattle, 99 F.Supp.2d 1263 (W.D. Wash. 1999) the owners of floating structures moored at a marina sued the city under § 1983, claiming that the improper enforcement of municipal code provisions resulted in termination of their leases. The Court rejected the claim that plaintiffs possessed a constitutionally protected “property interest” in the moorage lease agreements, where the owner could have cancelled such leases after giving 30 days notice. *Id.* at 1269.

Similarly, the Rental Agreement between Charles Gunstone and Joe D’Amico did not create a real property interest in SSNW for the

property SSNW allegedly intended to develop. Thus, SSNW did not possess a constitutionally protected real property interest which could support a due process claim under § 1983.

Moreover, even if SSNW had a valid leasehold interest, *it did not have a “property interest” in a building permit or in expanding its use beyond the pre-1992 nonconforming use.* As Mr. D’Amico admitted, he never applied for a building permit, and never even asked for a pre-application meeting with the Department of Community Development. (CP 65-68). SSNW clearly had no constitutionally protected property interest in occupying the structures which had been illegally built without permits.

Further, SSNW has failed to show that it possessed a constitutionally protected property interest in an after-the-fact determination of nonconforming use. Such a property interest can only be present where an individual has a “reasonable expectation of entitlement created and defined by an independent source” such as state or federal law. Board of Regents v. Roth, *supra*. The U.S. Supreme Court has emphasized that property interests arise only when the relevant state law provisions “truly make [the conferral of the benefit] mandatory.” Town of Castle Rock v. Gonzales, 545 U.S. 748, 760, 125 S. Ct. 2796 (2005). Although a nonconforming use may be considered a vested right, that does not mean it rises to the level of a constitutionally protected property interest for purposes of a claim under

§ 1983. No Washington court has recognized a nonconforming use as a “property interest” for due process purposes.

In addition, to the extent SSNW’s nonconforming use was afforded any constitutional protection, such protection was limited to the pre-1992 uses, which did not include the massive third party weapons training facility which SSNW was operating in 2005. As the Court of Appeals has held, “SSNW has not lost any vested property right.” (CP 963; Appendix, p. 17). Since SSNW was allowed to continue with its pre-1992 uses (dispatching security guards; site security; alarm installation and monitoring, etc.) it possessed no property interest which was affected by the Stop Work Orders and other enforcement orders.

In Tutor Saliba Corp. v. City of Hailey, 452 F.3d 1055 (9th Cir. 2006) a pilot who utilized a municipal airport to access his vacation home was held to have no constitutionally protected property interest which would support a § 1983 claim against the city for restricting the size of a plane which could be landed, because the plaintiff could still have utilized the airport in smaller aircraft:

Tutor was not deprived of a liberty or property interest because he was able to access his vacation home by use of another aircraft.

452 F.3d at 1061. Similarly, in this case SSNW was not deprived of all use of the property. It was simply restricted to the use found to be a valid nonconforming use.

Finally, to establish a constitutionally protected property interest in a land use permit, the plaintiff must show that, at the time the permit was denied, there was no uncertainty regarding his entitlement to it under applicable law:

Indeed, if uncertainty as to the law did not preclude recognition of a federally protected property interest, permit claimants would regularly be entitled to present to federal courts their disputes concerning the interpretation of local and state land use regulations. Just as federal courts are not to be turned into zoning boards of appeals, they are also not to be substituted for state courts as adjudicators of the meaning of zoning and other land use regulations.

Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2nd Cir. 1999).

The legal issues surrounding SSNW's claimed nonconforming use and the manner in which the language of the ordinance should be applied were the subject of complex legal argument and interpretation. This complexity, and the Examiner's discretion in determining issues of nonconforming use, forecloses any claim that SSNW possessed a constitutionally protected property interest which would support a due process claim under 42 U.S.C. § 1983.

4. Any Claim Based on an Alleged Failure to Issue a Building Permit is Not Ripe.

SSNW bases much of its due process argument on the unsupported allegation that the County refused to process a building permit application. There is no factual basis for such a claim and, even if there were, a claim under 42 U.S.C. § 1983 would not be ripe.

Mr. D'Amico admitted he has never applied for a building permit or even asked for a pre-application conference. Rather, he advised the County on July 29, 2005 that he "anticipated" submitting applications in the future, but he never did. (CP 67-68). Under these facts, any claim under 42 U.S.C. § 1983 is not ripe.

The courts have made clear that they will not recognize damages claims under 42 U.S.C. § 1983 involving restrictions on the use of property unless and until the local government has had an opportunity to make a final determination as to the potential use that the plaintiff may make of his property:

The Supreme Court has recognized that land use planning is not an all or nothing proposition. A government is not required to permit a land owner to develop property to the full extent it may desire. . . . The property owner, therefore, has a high burden of proving that a final decision has been reached by the agency before it may seek compensation or injunctive relief in federal court on constitutional grounds.

Hoehne v. County of San Benito, 870 F.2d 529, 532-33 (9th Cir. 1989).

In order to satisfy the ripeness requirement for a claim under § 1983, the plaintiff must have obtained a final decision on his permit application. Hacienda Valley Mobile Estates v. City of Morganhill, 353 F.3d 651, 657 (9th Cir. 2003), cert. dismissed, 543 U.S. 1041. The rule was clearly spelled out by the U.S. Supreme Court in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1985), where the plaintiff failed to seek a variance

that might have allowed it to develop the property. The Supreme Court held the plaintiff could not pursue a claim under § 1983, because the claim was not ripe:

Respondent asserts that it should not be required to seek variances from the regulation because its suit is predicated upon 42 U.S.C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. [Citation omitted]. The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable.

105 S. Ct. at 3119, 473 U.S. at 192. The same rule applies here. SSNW did not even apply for a building permit or a conditional use permit, much less go through the full permitting and review process. Therefore, any claim under 42 U.S.C. § 1983 was not ripe, and was properly dismissed.

5. SSNW's Procedural Due Process Argument is Groundless.

Even if SSNW possessed a constitutionally protected interest in a nonconforming use, and even if its claim were ripe, there would still be no basis to recover under § 1983 based on a procedural due process theory. SSNW's procedural due process claim is based on four allegations, none of which has any factual support and none of which could rise to the level of a procedural due process violation. SSNW states that its claim is based on (1) the County refusing to accept an after-the-fact building permit application; (2) ex parte contact with the Examiner; (3) the Examiner's use of the County's 1992 Administrative

Rules; and (4) that Examiner Berteig's remand decision was issued without notice to the parties. (See Appellant's Opening Brief, p. 40).

With respect to the first issue, D'Amico admitted that he never applied for a building permit, or even asked for a pre-application conference. (CP 65-68). The allegation of ex parte contact is preposterous. The only evidence of "ex parte" contact were two phone calls made to the Examiner by a non-County individual (Sam Parker) who asked in the first instance whether citizens would be allowed to make statements at the hearing, and in the second to ask when the Examiner's decision would be issued. Mr. Parker admitted that he was advised by the Examiner he could not discuss any substantive matter relating to the appeal and that no such discussion occurred. (CP 785).

With regard to the Examiner's use of the 1992 Jefferson County Administrative Rules, that same issue was presented in the LUPA case to this Court, which rejected it in no uncertain terms:

SSNW claims that the trial court erred by failing to invalidate the Hearing Examiner's use of the County's 1992 Administrative Rules, specifically asserting that the rules were never introduced into the record. The County correctly responds that the Hearing Examiner properly took judicial notice of the rules as part of the applicable law of the case. A court may take judicial notice of administrative rules. [Citations omitted]. Accordingly, this argument is without merit.

(CP 963-64; Appendix, p. 17-18).

Finally, SSNW's claim that the Examiner Berteig should have given notice to the parties before issuing his remand decision is a red

herring. After receipt of the remand decision, the parties stipulated to a stay until this Court issued its opinion. (CP 611-613). This Court later remanded the matter to the County's new Examiner (Mr. Casseaux). The remand decision by Mr. Berteig has never been implemented or applied to SSNW's operation and is wholly irrelevant to any issue in this case.

Moreover, even if there were minor evidentiary issues which were not decided correctly, that would not come close to establishing a violation of procedural due process. If a meaningful hearing and appropriate judicial appeals are available, there is no violation of due process actionable under § 1983. As the court held in Systems Amusements, Inc. v. State, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972):

Plaintiff misconstrues the basic nature of the due process clause. The clause is a protection against arbitrary action by the state; but if a person has his day in court, he has not been deprived of due process.

Accord, Bay Industries, Inc. v. Jefferson County, 33 Wn. App. 239, 242, 653 P.2d 1355 (1982). SSNW was given multiple hearings, before the Examiner, in Jefferson County Superior Court, in Kitsap County Superior Court, and in the Court of Appeals. The suggestion that adequate process was not provided is absurd.

In the land use context, if a permit applicant was afforded notice and an opportunity to present his position, and was given a subsequent

appeal process, his procedural due process rights have been satisfied. Licari v. Ferruzzi, 22 F.3d 344, 348 (1st Cir. 1984). Moreover, the entire spectrum of hearings must be found to have been inadequate, before damages may be recovered based on a violation of due process. Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir. 1995).

Dismissal of SSNW's procedural due process claim was warranted in this case. SSNW provided hundreds of pages of documents to the Department of Community Development, and had several meetings with DCD Director and Code Administrator Al Scalf. (CP 64-65). In September and October of 2005, SSNW presented its position to Jefferson County Superior Court Judge Verser. SSNW was then granted a 3-day hearing before the Examiner and subsequent appeals to Kitsap County Superior Court, and to this Court.

Furthermore, most of the Examiner's findings and conclusions were upheld by Judge Roof and by the Court of Appeals. And to the extent the Examiner's ruling was found to be partially incorrect, SSNW was afforded due process, including appeals, guaranteed by the Constitution. Sylvia, 48 F.3d at 827. Under these circumstances, there has been no violation of procedural due process.

6. The Allegations of Impropriety by the Hearing Examiner are Groundless.

As noted in Section 5 above, SSNW alleges that the hearing before Examiner Berteig was unlawfully tainted, because of alleged

undue pressure by a small group of retired citizens who were opposed to SSNW's operation. Yet there is no evidence that citizen objections played any role in the Hearing Examiner's ruling. Moreover, the objections of neighbors were contained in the written administrative record, and yet counsel for SSNW did not object to any exhibit. Nor did he object to any of the short comments by citizens at the end of the hearing. Thus, any such objections were waived.

It should first be noted that there is nothing inappropriate about an Examiner considering community sentiment and neighbor testimony in favor of or opposed to a permit application. Indeed, hearing examiners and boards of adjustment throughout the country routinely hear from affected neighbors and citizens as to whether a permit should be issued. Washington courts have held that the views of the community may be considered in a land use hearing, as long as they are not the sole reason for the decision. Parkridge v. Seattle, 89 Wn.2d 454, 462, 573 P.2d 359 (1978). Thus, so long as the decisionmaker does not base his decision solely or principally on community displeasure, there is nothing inappropriate about considering citizen input:

While the county did receive a number of negative comments on the proposed asphalt plant, the record does not demonstrate that the Board based its decision on these responses rather than on the facts and the applicable standards.

Kiewit Constr. Group v. Clark County, 83 Wn. App. 133, 143, 920 P.2d 1207 (1996). In this case, it is true that there were strong

community feelings with respect to the SSNW weapons training operation in 2005. But sentiment was strong on both sides, as is typical in appeals over land use permits. SSNW presented the testimony of many neighbors at the hearing and offered a petition of support signed by scores of supporters. The fact that other neighbors and citizens spoke against SSNW's appeal is neither surprising nor improper.

SSNW seems to be arguing that it is improper for citizens to express concerns about the use of a neighboring property. According to SSNW, only the landowner and his allies should be allowed to present their views in a land use enforcement action. SSNW implies that if a local government allows neighbors to express concerns, then it must suggest a nefarious conspiracy. SSNW's strained argument signals its acknowledgment that its damages claims are substantively groundless.

SSNW fails to offer any plausible explanation as to why Examiner Berteig or any other County official should have been intimidated by a small group of retired citizens opposing SSNW's expanded operation, and not by SSNW and the supporters and clients of its weapons training facility.

Most importantly, the Hearing Examiner's ruling, which is 31 pages in length, does not even mention a citizen's complaint or testimony, and no citizen witness was mentioned in Judge Roof's memorandum decision or his LUPA order. Nor was the input from the citizenry a basis for the Court of Appeals' Opinion. Rather, the decision

was based on the extensive administrative record, including SSNW's own documents and testimony, reflecting only a limited use in 1992.

Of course, if SSNW felt that the letters and comments from citizens were inappropriate, its attorney could have raised objections during the three day hearing. But not a single objection was raised as to the comments made at the end of the hearing, nor to any exhibit in the administrative record. Thus, any such objection was waived. Walling v. S. Birch & Sons Const. Co., 35 Wn.2d 435, 218 P.2d 478 (1950).

In reality, the input of the neighbors was largely immaterial, as the principal issue was whether SSNW had established a nonconforming use prior to 1992, and if so, the nature and scope of that early use. The determination of that issue was properly based on the record, which overwhelmingly showed that there was no third party training facility or paramilitary activity in 1992 (or prior to 2005, for that matter). (CP 960-61; Appendix, pp. 14-15).

In short, there is nothing about Examiner Berteig's decision which could come close to meeting the high standards for violation of due process. SSNW's due process claim was properly dismissed.

7. A Substantive Due Process Violation Will Not Be Found Absent Arbitrary and Irrational Action.

In addition to a claim for violation of procedural due process, SSNW also sought to ground its § 1983 claim in *substantive* due process. The substantive due process claim was properly dismissed. Not only was the claim barred by collateral estoppel, waiver and the absence of a

“property interest,” but also because any error in the Hearing Examiner’s decision cannot conceivably meet the high standard for liability in such cases. To find a violation of substantive due process in a § 1983 claim, the court must find that the government’s action was “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.” Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 121 (1926); Usury v. Turner Alcorn Mining Co., 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976). In recent years, the Supreme Court has clarified that this standard precludes liability unless the government’s decision “shocks the conscience.”

Contrary to SSNW’s argument, the determination of whether the government’s decision was “arbitrary and irrational” is commonly made by the Court through summary judgment. As the Ninth Circuit Court of Appeals held in Halvorson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994), there is a strong presumption that a rational basis existed for a municipality’s land use decision:

Thus, in choosing to base their claim for compensation on an alleged violation of due process, the plaintiffs shoulder a heavy burden. In order to survive the County’s summary judgment motion, the plaintiff must demonstrate the irrational nature of the County’s actions by showing that the County “could have had no legitimate reason for its decision.” Kawaoka, 17 F.3d at 1234. If it is “at least fairly debatable” that the County’s conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due process.

42 F.3d at 1262. (Emphasis by Ninth Circuit). Where a municipality's land use action was at least *arguably* related to a valid governmental interest, summary dismissal of the substantive due process claim is appropriate. *Id.*; Dodd v. Hood River, 59 F.3d 852, 864 (9th Cir. 1995).

In this case, it is beyond "fairly debatable" that the Hearing Examiner's decision on SSNW's appeal of the Stop Work Orders was based on rational grounds. Indeed, the trial court and the Court of Appeals affirmed that decision in large measure. To the extent the Examiner mistakenly concluded that SSNW had not established *any* legal nonconforming use (based on building permit violations), that conclusion was based on a rational interpretation of the facts and the law. The fact that a court ultimately concluded that one or two of the Examiner's findings and conclusions were erroneous does not suggest that his decision was "arbitrary and irrational."

In Brown v. City of Seattle, 117 Wn. App. 781, 72 P.3d 764 (2003), the Washington Court of Appeals affirmed dismissal of a substantive due process claim against the City of Seattle as a matter of law, even though the Court concluded that the City's interpretation of its land use code was legally incorrect:

The City's interpretation of its land use code and its actions were not unreasonable. While we agree with the trial court that the City did not have the authority to regulate Brown's use of the *Challenger*, that does not necessarily mean its actions were arbitrary and capricious.

As the trial court found: “The City was attempting to apply the logic of the shoreline management regulations and its understandings of what lodging was and did not have a lack of reasoning or standards in mind when it issued the notice of violation.”

117 Wn. App. at 796-97. The same result is appropriate here.

The U.S. Supreme Court and the Washington courts have signaled their reluctance to find substantive due process violations in this context except in the most extreme circumstances by clarifying that the applicable standard of proof is the “shocks the conscience” standard. The Supreme Court announced the rule in County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708 (1998):

In a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. . . . Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action.

523 U.S. at 847. The “shocks the conscience” standard has been held applicable in cases involving governmental decisions on land use permits. Licari v. Ferruzzi, *supra*, 22 F.3d at 349; Eichenlaub v. Township of Indiana, 385 F.3d 274 (3rd Cir. 2004); Mongeau v. City of Marlborough, 492 F.3d 14, 17 (1st Cir. 2007). This standard has been endorsed by the Washington courts in substantive due process claims. Estate of Lee v. Spokane, 101 Wn. App. 158, 170, 2 P.3d 979 (2000); State v. Hoisington, 123 Wn. App. 138, 146, 94 P.3d 318 (2004).

In each instance in which a violation of substantive due process has been found in the land use context by the Washington Supreme Court, there was undisputed proof that the governmental decision-maker had intentionally defied a court order or a prosecuting attorney's warning that the action he was taking was unlawful. See, Sintra, Inc. v. Seattle, 131 Wn.2d 640 (1997); Mission Springs v. City of Spokane, 134 Wn.2d 947 (1998). Clearly, no such circumstances are present in this case. The Examiner's decision was not "arbitrary and irrational" or "shocking to the conscience." Indeed, most of the decision was affirmed by Judge Roof and by the Court of Appeals, and Jefferson County was awarded attorneys fees! The substantive due process claim under § 1983 was properly dismissed.

8. The Equal Protection Claim is Groundless.

In addition to asserting violation of due process rights as a basis of recovery under § 1983, SSNW also alleged that its rights under the Equal Protection Clause may have been violated. Yet this argument suggests a misunderstanding of the nature and scope of equal protection rights in the land use permit context.

An equal protection action ordinarily requires proof that a statute or ordinance unconstitutionally discriminates against a protected class, such as a racial minority. Cosro v. Liquor Control Bd., 107 Wn.2d 754, 733 P.2d 539 (1987); Waples v. Yi, 146 Wn. App. 54, 59, 189 P.2d 813 (2008). In this case, SSNW does not even claim to be a

member of a suspect class which has been systematically discriminated against.

While there are rare cases where the courts have recognized discrimination against a “class of one,” a plaintiff in such a case must present compelling evidence showing an “extremely high degree of similarity” between himself and the persons to whom he is comparing himself. Clubsides, Inc. v. Valentin, 468 F.3d 144, 159 (2nd Cir. 2006). Before such a claim will even be considered, the plaintiff must present clear evidence of similarly situated individuals who were “identical to him in all relevant respects,” and who were treated differently based on arbitrary grounds. Where the plaintiff does not provide evidence of such similarly situated individuals, the equal protection claim should be dismissed. Sellers v. City of Gary, 453 F.3d 848, 850 (7th Cir. 2006); Hill v. Borough of Kutzdown, 455 F.3d 225, 239 (3rd Cir. 2006).

In this case, SSNW presented no evidence whatsoever of similarly situated persons or entities who were treated differently. Nor has it been shown the Examiner’s decision was arbitrary. SSNW’s equal protection claim was entirely groundless and was properly dismissed.

It should also be noted that land use decisions are very rarely successfully challenged on equal protection grounds. Where social or economic legislation is at issue, local governments are allowed wide latitude under the Equal Protection Clause. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-40, 105 S. Ct. 3249, 3254

(1985). There is a presumption of constitutionality unless a statute discriminates based on a suspect classification. City of New Orleans v. Dukes, 427 U.S. 297, 304, 96 S. Ct. 2513, 2517 (1976).

These rules apply in the area of land use regulation. Zoning ordinances do not implicate fundamental rights, and absent discriminatory language, the “rational relationship” test applies. Christensen v. Yolo County Board of Supervisors, 995 F.2d 161, 165 (9th Cir. 1993). The rational relationship inquiry under an equal protection analysis is a “very lenient one.” RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1156 (9th Cir. 2004).

SSNW is not a member of a protected class, and there is no evidence of discrimination by Jefferson County. The equal protection claim under § 1983 was properly dismissed.

C. SSNW Failed to Establish the Necessary Elements for a Tortious Interference Claim.

SSNW’s claim for tortious interference was also properly dismissed. That claim, as well as the federal civil rights claims, is barred by the doctrine of collateral estoppel, and by SSNW’s failure to satisfy the elements of such a claim.

In any tortious interference action, the plaintiff must prove (a) that it possessed a valid and lawful expectancy to engage in a specific commercial activity; and (b) that the defendant purposely and improperly interfered with that lawful expectancy. Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314

(1992). In this case, SSNW argued that it had a valid right to train third parties, including elements of the United States military, in the use of weaponry and explosives. Yet the Hearing Examiner, Judge Roof and the Court of Appeals have all held that no such right existed. (CP 963; Appendix, p. 17). The County at no time shut down SSNW's activities unrelated to weapons training and third party training on the Gunstone property. Therefore, there could not have been tortious interference with SSNW's valid expectancy, because the courts have held that SSNW possessed no such right. Tortious interference requires that the plaintiff have a legal right to that which he claims to have lost. Birkenwald Distributing Co. v. Heublein, 55 Wn. App. 1, 10, 776 P.2d 721 (1986).

Moreover, another element which must be shown by any plaintiff in a tortious interference case is that the defendant *unlawfully* interfered, or interfered for an improper purpose. Yet the Court of Appeals has held unambiguously that no such interference occurred with regard to the County's Stop Work Order for the weapons training facility:

Given the dearth of documentary evidence supporting D'Amico's testimony that SSNW participated in third-party training before 1992, compared with the relative abundance of evidence establishing third-party training after 1995, it is reasonable to infer that SSNW did not, in fact, train third-parties on the property before 1992. . . . Military or paramilitary training of third parties is quite different from training SSNW's employees to provide private security services. While the County cannot micro-manage SSNW's intensification of its pre-existing business, it may prevent SSNW from engaging in a substantially different kind of business with substantially different effects on the surrounding properties.

(CP 961-62; Appendix, pp. 15-16).

It is settled that exercising in good faith one's legal interest is not improper interference. Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Alleged interference is justified as a matter of law if the interferor has engaged in an exercise of its own legal right. Plumbers and Steamfitters v. WPPSS, 44 Wn. App. 906, 920, 724 P.2d 1030 (1986), rev. denied, 107 Wn.2d 1021. Thus, where a local government has authority to enforce ordinances under its police powers, exercise of that land use authority cannot be a basis for a claim of tortious interference with a business expectancy. Bakay v. Yarnes and Clallam County, 431 F. Supp. 2d 1103, 1113 (W.D. Wash. 2006).

Because the trial court and the Court of Appeals held that the County properly issued enforcement orders against SSNW's unpermitted third-party weapons training facility on the Gunstone property, that issue has been decided for all time, and cannot be relitigated in a tortious interference damages action.

Reninger v. Dept. of Corrections, supra, is controlling authority on the issue of whether a party who receives an unfavorable result in a quasi-judicial administrative process may nonetheless file a collateral tortious interference action seeking a contrary result and the recovery of damages. In Reninger, the Washington Supreme Court reversed a

verdict in favor of the plaintiff, holding that the tortious interference action should have been dismissed as a matter of law before trial, because the Examiner had previously determined that the state's action was not improper. 134 Wn.2d at 454.

The facts are even stronger from the defendant's position in this case, because SSNW has taken multiple "bites of the apple." After pursuing a three-day long hearing before the Examiner, SSNW received an unfavorable decision and appealed the Examiner's ruling to Kitsap County Superior Court. Unhappy with Judge Roof's decision, SSNW then appealed to the Court of Appeals. Unhappy with the Court of Appeals' decision, SSNW filed a Motion for Reconsideration, which was denied. SSNW has been given numerous opportunities to make the same arguments it makes in this appeal, and those arguments have been rejected.

SSNW now asks to be allowed to argue to a jury that it was improperly prevented from operating a weapons training facility, notwithstanding the determinations by the Examiner, Judge Roof and the Court of Appeals, that it had no valid right to engage in third-party training activities, and that its rights were not violated by the County. To allow relitigation of these issues would be wholly inconsistent with the judicial rulings previously made, and with the doctrine of collateral estoppel.

D. Attorneys Fees Should be Awarded Because SSNW's Appeal is Frivolous.

RAP 18.9(a) provides that the Court may impose sanctions against a party who files a frivolous appeal. In view of the factual and legal determinations previously made by this Court in Case No. 35834-4-II, this appeal is devoid of merit and there is no reasonable possibility of reversal. Childs v. Allen, 125 Wn. App. 50, 58, 105 P.3d 411 (2004), rev. den., 155 Wn.2d 1005. Jefferson County respectfully requests that the Court award attorneys' fees or other sanctions against SSNW.

V. CONCLUSION

For all of the above reasons, this Court should affirm the trial court's orders granting summary judgment.

DATED this 27th day of August, 2009.

KARR TUTTLE CAMPBELL

By:



Mark R. Johnsen, WSBA #11080
Attorneys for Respondent Jefferson
County

APPENDIX

Unpublished Opinion in Case No. 35834-4-II.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SECURITY SERVICES NORTHWEST, INC.,

No. 35834-4-II

Appellant,

v.

JEFFERSON COUNTY,

UNPUBLISHED OPINION

Respondent.

PENOYAR, J. — Jefferson County issued stop work orders to Securities Services Northwest, Inc. (SSNW) after receiving several noise complaints and learning that SSNW had constructed several unpermitted buildings and was conducting military special forces training on its property, which at the time was zoned as rural residential. SSNW appealed the orders to the County's hearing examiner, arguing that its activities were protected as a nonconforming use. The hearing examiner disagreed, and SSNW pursued its appeal in both the Kitsap County Superior Court and this court. Because SSNW had conducted limited commercial activities on the property prior to Jefferson County's enactment of zoning regulations in 1992, we affirm the trial court's finding of a limited nonconforming use. This use should properly be circumscribed by SSNW's pre-1992 activities, and because there is insufficient evidence in the record regarding those activities, we affirm in part, reverse in part, and remand with instructions that the hearing

examiner consider not only SSNW's non-conforming use but also any lawful intensification of that use occurred.

FACTS

In 1986, Joseph D'Amico purchased a security services business¹ in Port Townsend. Within a few years, the Gunstone family hired him to provide protection for their 3,700- acre property on Discovery Bay in Jefferson County. D'Amico moved the business to the property in 1988. He rented a residence on the property, and his lease covered approximately 22 acres.

Jefferson County's Interim Zoning Ordinance took effect on January 6, 1992. Under its terms, "[a]ny building, structure, or use, lawfully existing at the time of enactment of this ordinance, though not in compliance with the provisions herein, shall not be prohibited by this ordinance." Clerk's Papers (CP) at 37 (citing Jefferson County, Wash., Zoning Ordinance 1-0106-92 (Jan. 6, 1992), *amended by*, Zoning Ordinance 2-0127-92 (Feb. 27, 1992)). The Ordinance also stated that "[t]he expansion, alteration, or change in use of any existing conforming or non-conforming use is subject to the provisions of this ordinance." CP at 37 (citing Zoning Ordinance 1-0106-92, §12). At that time, the Gunstone property was designated as a General Use Zone.

Also at that time, in early 1992, SSNW had three employees (including D'Amico) who became certified security officers. A year later, D'Amico described SSNW's business activities as including armored car services; alarm installation, maintenance, and response; security

¹ The business would later become Securities Services Northwest, Inc.

patrols; and K-9 assistance. Specifically, a few years later, D'Amico described the business as: less than 10 percent K-9 activity, 30 percent alarm installation and monitoring, 25 percent site security patrol and armed guard service, and 35 percent armored car and courier service.

In 2001, according to a D'Amico's deposition, SSNW's business still consisted of site security, patrol services, alarm installation and monitoring, video installation, and sometimes surveillance. However, the company had grown to include approximately 82 employees. The business continued to grow, and by 2005, it was described by the *Port Townsend and Jefferson County Leader* as providing "private marine security services, armored transport and training for law enforcement officials. The company also recently began training elite U.S. military personnel." Administrative Records (AR), log item 187. Also in 2005, a firearms trainer and marshal arts instructor SSNW employed testified that he had conducted three training sessions with the Navy on the property, with approximately 48,000 rounds of ammunition fired in each 4-day session.

Starting in about 2001, the County received numerous complaints from neighbors regarding gunfire and noise on the property. Neighbors complained of living in a war zone and repeatedly requested that the County do something about it.

The County investigated the property and discovered that SSNW had constructed three buildings on the property—a training facility, a bathroom and shower facility, and a bunkhouse—without obtaining any required permits (including building and septic permits). SSNW had also developed several firing ranges throughout the property.

Jefferson County issued two stop work orders to SSNW (on July 8, 2005 and August 11, 2005) prohibiting the use of non-permitted buildings on the property. SSNW appealed the stop

work orders to the hearing examiner. Despite the orders, SSNW continued its business activities, apparently under the belief that the orders were illegal and unenforceable.²

In October 2005, while awaiting the hearing, the Jefferson County Superior Court granted the County's request for a temporary restraining order. The court ordered SSNW to comply with the County's stop work order but permitted SSNW to use one firing range for recertifying its employees. The court also granted the County's motion for a preliminary injunction against SSNW, concluding that the County had a "reasonable fear of imminent and ongoing invasion" of its enforcement rights. CP at 200. The injunction contained the same terms as the temporary restraining order.³

The hearing examiner held the hearing on SSNW's appeal in November 2005. Based on the record, the hearing examiner found that SSNW did not begin placing "significant effort into soliciting other organizations, including the Department of Defense, to provide training at the SSNW site" until 2001. CP at 39. The examiner also noted that SSNW's payroll levels increased substantially between 1992 and 2005. Noting the newer non-permitted buildings on the property, where the business activities were taking place, the hearing examiner found that SSNW failed to establish a lawful nonconforming use before January 1992. Furthermore, because SSNW never applied for prescriptive or conditional use permits, the hearing examiner held that those options were no longer available. CP at 52. Concluding that the County's

² Indeed, one driver on Highway 101 reported being affected by possible tear gas in the air in the area near the property on September 30, 2005.

³ Jefferson County Superior Court dissolved this preliminary injunction and dismissed the County's case in February 2006, finding that the Kitsap County Superior Court had jurisdiction to hear SSNW's appeal of the hearing examiner's decision "as well as any related matters." CP at 440.

decision to issue the stop work orders was not clearly erroneous, the hearing examiner affirmed the orders. The examiner's decision expressly prohibited all training activities and any use of firearms and weapons on the property.

SSNW filed a land use petition with Kitsap County Superior Court appealing the hearing examiner's decision, arguing that its operations constituted a legal nonconforming use because they predated Jefferson County's zoning ordinance. In total, SSNW alleged 48 errors on the part of the hearing examiner. SSNW also filed a motion to stay enforcement of the hearing examiner's decision, which the trial court denied.

The trial court, in a memorandum opinion, found: (1) no error with the hearing examiner's preference of documented evidence rather than testimony; (2) the hearing examiner properly considered all of SSNW's arguments; (3) there was substantial evidence in the record to support the hearing examiner's decision to uphold both stop work orders; (4) any error by the hearing examiner regarding its finding that the County received complaints about the property from 2001 until 2006 was harmless; (5) substantial evidence to support the hearing examiner's finding regarding whether work was performed on-site or off-site; (6) the hearing examiner's use of SSNW's pre-1992 payroll data to determine its number of employees was entirely appropriate; and (7) the hearing examiner erred by concluding that because SSNW's buildings were unpermitted, its activities were not lawful and could not establish a nonconforming use. Instead, the trial court concluded that although several structures on the property were illegally constructed and maintained, commercial use of the land was not entirely illegal. Therefore, the trial court found that because not all of SSNW's activities were illegal, and because SSNW presented sufficient evidence that its operations on the property began in 1988, a limited nonconforming use did exist that predated the 1992 zoning laws.

The trial court concluded, however, that SSNW's use of the property at the time of the appeal was inconsistent with its pre-1992 use of the property. It stated that the evidence "strongly suggest[ed]" that SSNW's pre-1992 activities "simply involved the installation and monitoring of security systems, armed transport, and limited firearms training of both its full- and part-time employees." CP at 364-65. It also found "little to no evidence in the record . . . to find that training of third-parties took place on the property prior to January 1992." CP at 365. The trial court noted that "the only credible evidence presented regarding the scope of the property used was the initial lease . . . of twenty acres of the farm." CP at 365.

Based on its findings and conclusions, the trial court remanded the matter to the hearing examiner "solely to determine the scope and nature of SSNW's nonconforming use as of January 6, 1992." CP at 365. In its order, the trial court specifically stated that "no additional evidentiary hearings are to be held to explore whether SSNW's nonconforming use was lawfully expanded after January 6, 1992." CP at 384. It also ordered that the "current terms" of the Jefferson County restraining order and preliminary injunction would remain in effect pending the hearing examiner's final decision. CP at 386. The trial court denied attorney fees to either party "given that each party prevailed on various arguments presented to the Court[.]" CP at 386. SSNW filed a motion for reconsideration, which the court denied, and this timely appeal followed.

ANALYSIS

I. STANDARD OF REVIEW UNDER LUPA

Judicial review of land use decisions proceeds under the Land Use Petition Act (LUPA). See RCW 36.70C.010, .030; *Chelan County v. Nykreim*, 146 Wn.2d 904, 916-17, 53 P.3d 1 (2002). A petition for review by the superior court constitutes appellate review on the

administrative record before the local jurisdiction's body or officer with the highest level of authority to make the final determination. *HJS Dev. Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003) (citing *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001); RCW 36.70C.130(1), .020(1)). LUPA permits relief where:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) 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;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Here, SSNW claims that it is entitled to relief under each of the above standards except (e).

SSNW additionally challenges this standard by claiming that the trial court's recognition of its nonconforming use "constitutes a paradigm shift in how the Court of Appeals must now view all of the evidence presented to the Hearing Examiner." Appellant's Br. at 23. However, the law is very clear on this point: "When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court." *HJS*, 148 Wn.2d at 468 (quoting *Citizens*, 106 Wn. App. at 470). Thus, we review administrative decisions on the record of the administrative tribunal, not of the superior court. *HJS*, 148 Wn.2d at 468 (citing *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993)). However, to the extent that the trial court's findings and conclusions modify or replace the hearing examiner's

findings of fact and conclusions of law, they are relevant on appeal. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995) (citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)). Thus, the trial court's finding that SSNW established a limited nonconforming use is not binding in any way on this court, but merely relevant. We review the record before the hearing examiner regardless of the trial court's findings, and we review questions of law de novo to determine whether the hearing examiner's land use decision was supported by fact and law.

II. INTERPRETATION OF THE LAW

SSNW assigns error to the trial court's limitation of its nonconforming use to activities undertaken before 1992. According to SSNW, a 1992 limit "would only be lawful if the 1992 Zoning Code prohibited all ongoing uses." Appellant's Br. at 25. For example, because the Code did not expressly prohibit outdoor shooting ranges until 2001, SSNW contends that its shooting ranges constituted a legal nonconforming use until 2001.

Statutory construction is a question of law reviewed de novo under the error of law standard. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002) (citing *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). Generally, when reviewing a land use decision, the agency charged with interpreting a statute—in this case, the hearing examiner charged with interpreting the Jefferson County Zoning Code—is accorded some deference. See *Pinecrest Homeowners Ass'n v. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

Under a de novo standard, we must first examine whether the record supports SSNW's establishment of a limited nonconforming use prior to Jefferson County's enactment of its first

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zoning code in 1992. If SSNW failed to establish such a use, we need not address SSNW's temporal argument.

Nonconforming uses are disfavored in Washington. *City of University Place v. McGuire*, 144 Wn.2d 640, 648-49, 30 P.3d 453 (2001) (citing *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998)). “Lawful nonconforming uses are allowed to continue for some period of time, though the local government may regulate or even terminate the nonconforming use, subject to constitutional limits.” *McGuire*, 144 Wn.2d at 648. A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. *Rhod-A-Zalea*, 136 Wn.2d at 6 (citing 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 6.01 (Kenneth H. Young ed., 4th ed. 1996)).

It is clear from the record that the latter two requirements are met here: SSNW is maintaining activities on the property that do not comply with its designation as a rural residential area. Commercial, professional services⁴ are not permitted in rural residential areas; neither are “unnamed commercial uses” and outdoor shooting ranges. Jefferson County Code (JCC) 18.15.040, table 3-1. Therefore, SSNW may only establish a legal nonconforming use if the record shows that their uses lawfully existed prior to the enactment of Jefferson County's zoning ordinance.

⁴ “‘Personal and professional services’ means for the purposes of this code, establishments primarily engaged in providing assistance, as opposed to products, to individuals, business, industry, government, and other enterprises. . . .” JCC 18.10.160.

Jefferson County originally enacted a zoning ordinance in 1989, which was later declared null and void by Clallam County Superior Court. AR, Jefferson County Development Code History, Zoning Ordinance 1-010609, finding 1 (Oct. 16, 1989). As a result, the Jefferson County Board of Commissioners enacted emergency zoning control on January 6, 1992. Zoning Ordinance 1-010609 § 19. The emergency ordinance created three mapped zones (general commercial zone, light industrial zone, and light industrial/commercial zone) and one unmapped zone (the general use zone). The Gunstone property was outside the mapped areas and thus classified as general use.

The ordinance permitted all uses and activities in the general use zone except those enumerated as commercial or light industrial uses or activities, which it specifically prohibited in the general use zone. Zoning Ordinance 1-010609 § 8. General commercial activities (prohibited in the general use zone) included “all activities involved in the retail or wholesale buying, selling, or distribution of goods or services.” Zoning Ordinance 1-010609 § 5(1). The ordinance only permitted general commercial development in the general use zone if the Board of Commissioners granted a conditional use permit. Zoning Ordinance 1-010609, § 8(4)(a), 9(3)(b).

SSNW’s activities fall within the ordinance’s broad definition of general commercial activities: as a security service business, all of its business-related activities involve selling its services. Because SSNW’s commercial activities on the Gunstone property were lawful prior to the enactment of the zoning law (as no zoning law previously existed in the county), whatever activities it maintained following the enactment of the zoning law became lawful nonconforming uses.

The record supports SSNW's establishment of a lawful nonconforming use prior to 1992 and possible lawful intensification of this use thereafter. However, SSNW's arguments that the trial court incorrectly limited its activities to those before 1992 and that intervening versions of the Jefferson County Code should instead govern its use are misplaced.⁵ The 1992 zoning enactment broadly prohibited all commercial activities in the general zone without a conditional use permit. Therefore, any subsequent, more specific limitations on commercial activity in the general zone are irrelevant. SSNW's lawful nonconforming use was correctly limited to whatever activities it can establish that it pursued prior to the effective date of the first zoning ordinance (January 6, 1992) or lawfully intensified thereafter.

Because the record before us is not sufficient to establish SSNW's uses of the Gunstone property prior to 1992 and any later lawful intensification of those uses, we affirm the trial court's remand of the matter to the hearing examiner for further factfinding.

⁵ SSNW also claims that the trial court impermissibly limited its use utilizing the standard found in current JCC 18.20.260 (defining nonconforming structures and uses). SSNW contends that any changes in its use between 1992 and 2001 should instead be governed by the standards in place at that time, not by current Code standards. This argument misconstrues the trial court's order, which must necessarily limit SSNW's activities into the future. The order stated:

The court finds that a limited nonconforming use existed prior to enactment of the January 6, 1992, zoning code. SSNW's legal use is restricted, however, to the nature and scope of the activities *at that time and cannot be changed or expanded outside what is permitted in Jefferson County Code 18.20.260.*

CP at 385 (emph. in original). The court was merely stating that, having established a nonconforming use, SSNW could not now violate the laws governing nonconforming uses in Jefferson County. Moreover, as stated above, the zoning standards enacted after 1992 have no bearing whatsoever on the scope of SSNW's preexisting nonconforming use.

III. APPLICATION OF THE LAW TO THE FACTS

SSNW argues that the growth of its business after 1992 was a permissible intensification of its use of the property, not an enlargement or expansion of the use. Where a party, as here, is arguing that the land use decision incorrectly applied the law to the facts of the case, we review using a clearly erroneous standard. RCW 36.70C.130 (1)(d); *Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn. App. 417, 428-29, 62 P.3d 912 (2003). When a decision is clearly erroneous, it leaves the reviewing court with “the definite and firm conviction that a mistake has been committed.” *Oyster Growers Ass'n*, 115 Wn. App. at 429 (quoting *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999)).

Washington law permits intensification, but not expansion, of nonconforming uses. *McGuire*, 144 Wn.2d at 649 (citing *Keller v. City of Bellingham*, 92 Wn.2d 726, 731-32, 600 P.2d 1276 (1979)). Intensification is permissible where the nature and character of the use is unchanged and substantially the same facilities are used. *Keller*, 92 Wn.2d at 731 (citing *Jahnigen v. Staley*, 245 Md. 130, 137, 225 A.2d 277 (1967)). The test is whether the intensified use is “different in kind” from the nonconforming use in existence when the zoning ordinance was adopted. *Keller*, 92 Wn.2d at 731 (quoting 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 60-1, § 1 (4th ed. Cum. Supp. 1979)).

Here, the hearing examiner found that virtually all of SSNW’s business activities prior to 1992 (except for its provision of security services to the Gunstone property itself) took place off-site—as security guards, the employees performed their duties at their clients’ sites. It also found that employee training and recertification took place on the Gunstone property, though the scope of this training and recertification was unclear from the record. Finally, it determined that SSNW employed fewer than three full-time equivalent employees at the end of 1991.

In comparison, the hearing examiner found that SSNW currently engaged in intensive training of third parties, in direct and dramatic contrast with its former periodic employee recertification. SSNW disputes these findings, and specifically disagrees with the hearing examiner's discounting of D'Amico's testimony. SSNW argues that the hearing examiner erred by requiring tangible evidence of its activities.

However, we defer to factual determinations by the highest forum below that exercised factfinding authority—in this case, the hearing examiner. *Schofield*, 96 Wn. App. at 586. We view the evidence and draw any reasonable inferences from it in the light most favorable to the party that prevailed before the hearing examiner (here, the County). *Davidson v. Kitsap County*, 86 Wn. App. 673, 680, 937 P.2d 1309 (1997). This process “necessarily” entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993) (citing *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, (1992)).

The hearing examiner specifically stated that it did not find D'Amico's testimony credible.⁶ Moreover, the evidence in the record, viewed in the light most favorable to the County, supports a conclusion that SSNW impermissibly expanded its pre-1992 uses of the property. At the very least, replacement (or new construction) of buildings on the property indicates that post-1992 activities did not take place in the same facilities, as *Keller* suggests. *Keller*, 92 Wn.2d at 731. Viewing the evidence in the light most favorable to the County, the

⁶ The hearing examiner stated, “I was left with the conclusion that much of [D'Amico's] testimony [was] not creditable,” but as he refers to the witnesses' “credibility” earlier in the paragraph, we believe that “creditable” is a typo, and he did intend to comment on D'Amico's credibility. CP at 51-52.

hearing examiner's conclusion that SSNW impermissibly expanded its nonconforming use seems far from "clearly erroneous." At the same time, the record reflects possible legal intensification, for instance, of SSNW's pre-1992 training of its own employees. Thus, the hearing examiner should consider additional evidence on intensification of pre-1992 uses consistent with this opinion.

IV. SUBSTANTIAL EVIDENCE

SSNW also asserts that substantial evidence does not support the trial court's limitation of either the scope or nature of its nonconforming use. It claims that the trial court erred by not including security patrol, site security, maritime security, or K-9 detection and tracking when it defined SSNW's use to include armed transport, installation and monitoring of security systems, and limited firearms training. SSNW specifically objects to the trial court's (1) excluding third-party training from the list of acceptable uses, (2) limiting SSNW's nonconforming use to two to three full time equivalent employees, and (3) limiting SSNW's use of the land to the 20 acres covered by the lease.

These arguments are largely addressed above: SSNW's nonconforming use is properly limited to its pre-1992 activities, and neither the hearing examiner nor the trial court erred in concluding that SSNW's current activities constituted an impermissible expansion of its pre-1992 uses. Regardless, even if these claims are examined separately, they fail.

As stated above, we review factual issues under a substantial evidence standard. *Freeburg*, 71 Wn App at 371. "Substantial evidence" is evidence that " 'would convince an unprejudiced, thinking mind of the truth of the declared premise.'" *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 486, 805 P.2d 800 (1991) (quoting *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 405, 680 P.2d 46 (1984)). This factual review is deferential, and it 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 exercising factfinding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *Wm. B. Dickson Co.*, 65 Wn. App. at 618. Here, the hearing examiner was the highest forum to exercise factfinding authority and thus our review is based on the record before the examiner; we view the evidence and draw inferences in light of the examiner's conclusion.

It was entirely within the hearing examiner's discretion to credit or disregard D'Amico's testimony based on his views of D'Amico's credibility. Given the dearth of documentary evidence supporting D'Amico's testimony that SSNW participated in third-party training before 1992, compared with the relative abundance of evidence establishing third-party training after 1995, it is reasonable to infer that SSNW did not, in fact, train third parties on the property before 1992. Drawing all inferences in the County's favor, substantial evidence supports this finding.

SSNW argues that the County cannot limit intensification of its non-conforming use in such a way that the County in effect is managing the details of SSNW's business. See *Woodinville Water Dist. v. King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001) ("a municipality may not impose conditions on land use permits that relate to the detailed conduct of the applicant's business rather than to zoning limitations on the use of the land"). However, military or para-military training of third parties is quite different from training SSNW's employees to provide private security services. While the County cannot micro-manage SSNW's intensification of its pre-existing business, it may prevent SSNW from engaging in a

substantially different kind of business with substantially different effects on the surrounding properties. Intensification, but not alteration, is permitted. *Keller*, 92 Wn.2d at 731.

Similarly, the record contains substantial evidence to support the finding that SSNW employed only two to three people (equivalent to full-time) before 1992—both the graph of SSNW's payroll hours and Jim Carver's testimony (who certified the employees as security guards) indicate that SSNW employed two people in addition to D'Amico at that time. D'Amico testified differently, but, again, we defer to the factfinder on matters of witness credibility. As we have noted elsewhere, whether this use was lawfully intensified is a matter for consideration by the hearing examiner on remand.

Finally, there is substantial evidence in the record to support limiting SSNW's use of the property to the 20 acres stated in the 1986 lease. While both D'Amico and Gunstone testified that they had come to an oral agreement that SSNW could use the entire property, D'Amico was unable to offer a date for that agreement. He also testified that the contract was likely with the Charles Gunstone estate, but D'Amico admitted that Charles Gunstone had passed away only a few years earlier. Drawing all inferences in the County's favor, substantial evidence supports the conclusion that, before 1992, SSNW was limited to the 20 acres of the property in the lease.

We are concerned that the trial court's remand to the hearing examiner was unduly restrictive. The record included evidence that SSNW engaged in some other low impact activities before 1992—specifically, security patrol, site security, maritime security, and K-9 detection and tracking. In addition, there is evidence in the record that could support a finding that SSNW changed its use of the property after 1992 in a way that would be considered a valid intensification of its nonconforming use. For instance, if SSNW simply hired more employees to

provide the same services and trained them on the property, this could be a valid intensification. Thus, the limitation to two to three employees in the remand order was not appropriate.

V. OTHER GROUNDS FOR RELIEF UNDER LUPA

SSNW claims that it is entitled to relief under RCW 36.70C.130(1)(a), but it fails to specify any unlawful procedure that it claims the hearing examiner or trial court followed. We will not review an argument that has been insufficiently briefed. RAP 10.3(a)(6).

SSNW also claims that it is entitled to relief under RCW 36.70C.130(1)(f), arguing that its nonconforming use was a vested property right and as such was protected from arbitrary actions. The right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a “protected” or “vested” right. *Rhod-A-Zalea*, 136 Wn.2d at 6 (citing *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993); *Martin v. Beehan*, 689 S.W.2d 29, 31 (Ky. Ct. App. 1985); 4 ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 51A.01 (Edward H. Ziegler ed., 1991)). This right, however, refers *only* to the right not to have the use *immediately terminated* in the face of a zoning ordinance which prohibits the use. *Rhod-A-Zalea*, 136 Wn.2d at 6 (citing 1 ANDERSON, AMERICAN LAW OF ZONING § 6.01; RICHARD L. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE § 2.7(d) (1983)) (emph. in original). SSNW’s right to continue its nonconforming use has not been immediately terminated; indeed, we find that SSNW has established a nonconforming use and we are remanding only to determine the boundaries of that use. SSNW has not lost any vested property right; this argument is therefore moot.

VI. HEARING RECORD

SSNW claims that the trial court erred by failing to invalidate the hearing examiner’s use of the County’s 1992 administrative rules, specifically asserting that the rules were never

introduced into the record. The County correctly responds that the hearing examiner properly took judicial notice of the rules as part of the applicable law of the case. A court may take judicial notice of administrative rules. *See Brooks v. City of Seattle*, 193 Wash. 253, 74 P.2d 1008 (1938) (the court took judicial notice of departmental regulations despite their absence in the record); *Keseleff v. Sunset Highway Motor Freight Co.*, 187 Wash. 642, 60 P.2d 720 (1936). Accordingly, this argument is without merit.

VII. TANGIBLE EVIDENCE

SSNW argues that the hearing examiner erred by requiring tangible evidence to justify the nonconforming use.⁷ SSNW further claims that the trial court erred in “accepting the Hearing Examiner’s stunted view of the record.” Appellant’s Br. at 39. In response, the County notes that the examiner took three days of testimony and argues that its decision was not based solely on documentary evidence.

While the examiner did include a statement in his findings that tangible evidence was necessary to justify a nonconforming use, this statement did not appear to play a part in his conclusions. Specifically, the hearing examiner stressed in his conclusions the conflicts between the oral testimony and documents in the record. He then explained that he found D’Amico’s testimony not credible and justified his decision based on his interpretation of the law and the documents entered into the record.

⁷ The hearing examiner included the following in its findings of fact:

Tangible evidence is necessary to justify a nonconforming use, typically in the form of customer acknowledgement of actual work, contracts, and receipts. Less tangible evidence, such as solicitations and bids, may indicate intent to do business—but not actual activity.

CP at 34. The examiner then went on to list the exhibits SSNW provided.

There is no rule in Washington that tangible or documentary evidence is *required* to establish a nonconforming use. To that extent, the hearing examiner's finding was in error. However, the ruling appears to have been based on an evaluation of *all* the evidence before the hearing examiner, not solely the documentary evidence. An error is not prejudicial unless, within reasonable probabilities, the outcome of the proceeding would have been materially affected had the error not occurred. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Here, nothing in the record indicates that the outcome would have differed had the hearing examiner not included the "tangible evidence" statement in his findings. Therefore, any error was likely harmless. CP at 34.

VIII. RESTRAINING ORDER

As stated above, Jefferson County Superior Court dissolved the County's temporary injunction before the trial in Kitsap County Superior Court, finding that the Kitsap County court had jurisdiction over the matter. Despite this, the Kitsap County court, in its ruling, stated that the terms of the October 2005 (Jefferson County) temporary restraining order would remain in effect on remand to the hearing examiner. SSNW contends that this was in error.

Again, this error was likely harmless. The earlier restraining order had not been dissolved for any substantive cause, and the outcome of the proceeding is not affected by the court incorrectly saying that the restraining order terms would "remain in effect" rather than "be reinstated." CP at 386. This error resulted in no prejudice to SSNW and does not merit reversal.

IX. ATTORNEY FEES

The County requests attorney fees under RCW 4.84.370(1), which states as follows:

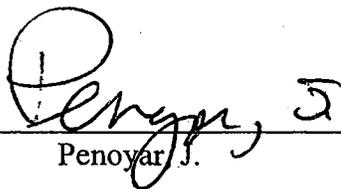
The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

- (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, ... and
- (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

Here, the County prevailed before the hearing examiner and substantially prevailed before the trial court. Because, under the above analysis, it also substantially prevails here, we grant its request for attorney fees.

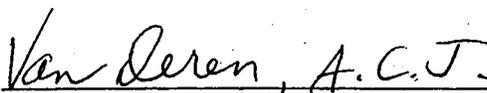
We affirm in part, reverse in part, and remand with instructions that the trial court amend its order remanding to the hearing officer for that officer to determine the full scope of SSNW's pre-January 6, 1992 nonconforming use and to determine if and to what extent SSNW had validly intensified that nonconforming use after January 6, 1992.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

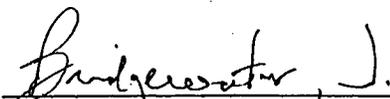


Penoyar J.

We concur:



Van Deren, A.C.J.



Bridgewater, J.

ment of Natural Resources is substantially justified in denying appeal to superior court action by Forest Practices Board (FPAB) that larger project proposed road in forest was and not have significant adverse mental impact, as would make act to review under State Equal Practices Act (SEPA) even was a Class III forest practice exempt from such review, so l of attorney fees to prevailing lowing judicial review of termination under Equal Access to Justice Act (EAJA) was barred. *W. Timber Co., L.P. v. Washington Forest Practices Appeals* 99 Wash.App. 579, 993 P.2d 215

Administrative appeals
 Access to Justice Act (EAJA), authorizes superior court to rney fees and costs to party ls in judicial review of Board al Insurance Appeals' detern an Industrial Safety and (ISHA) case. *Cobra Roofing c. v. Department of Labor & Industries* (2004) 122 Wash.App. 402, reconsideration denied, reed 154 Wash.2d 1001, 113 States 215

ccess to Justice Act (EAJA), uthorize Board of Industrial Appeals to award attorney sts to a prevailing party in al Safety and Health Act , as statutory award to party s in "judicial review of an on" is limited to review in urt, and does not encompass ve appeals before Board. *Ng Service, Inc. v. Depart- or & Industries* (2004) 122 02, 97 P.3d 17, reconsider- d, review granted 154 01, 113 P.3d 481. States

ate court reviews an award the trial court under the s to Justice Act (EAJA) for cretion. *Silverstreak, Inc. n State Dept. Of Labor And* (2005) 125 Wash.App. 202,

P.3d 699, review granted 155 h.2d 1001, 122 P.3d 185. Appeal Error 984(5)
 Appellate court reviews an award of under the Equal Access to Justice

Act (EAJA) for abuse of discretion. *Moen v. Spokane City Police Dept.* (2002) 110 Wash.App. 714, 42 P.3d 456. Appeal And Error 984(5)

4.84.360. Judicial review of agency action—Payment of fees and expenses—Report to office of financial management

Fees and other expenses awarded under RCW 4.84.340 and 4.84.350 shall be paid by the agency over which the party prevails from operating funds appropriated to the agency within sixty days. Agencies paying fees and other expenses pursuant to RCW 4.84.340 and 4.84.350 shall report all payments to the office of financial management within five days of paying the fees and other expenses. Fees and other expenses awarded by the court shall be subject to the provisions of chapter 39.76 RCW and shall be deemed payable on the date the court announces the award. [1995 c 403 § 904.]

Historical and Statutory Notes

Findings—1995 c 403: See note following RCW 4.84.340.
Findings—Short title—Intent—1995 c 403: See note following RCW 34.05.328.

Part headings not law—Severability—1995 c 403: See RCW 43.05.903 and 43.05.904.

Research References

Treatises and Practice Aids
 15A Wash. Prac. Series 4.84.340, Judicial Review of Agency Action—Definitions.

16 Wash. Prac. Series § 5.17, Attorney Fees—Grounds—Statutes.

4.84.370. Appeal of land use decisions—Fees and costs

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter

1501 Fourth Avenue
 Seattle, WA 98101-1688

NO. 38961-4

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

SECURITY SERVICES NORTHWEST, INC.,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2009, I caused to be served a copy of Brief of Respondent by Legal Messenger on the following:

Alan Middleton
Davis Wright Tremaine
1201 Third Avenue, Suite 2200
Seattle, WA 98101

BY _____
DEPUTY
STATE OF WASHINGTON
09 AUG 28 PM 1:36

COURT OF APPEALS
DIVISION II

Nancy Randall
Nancy Randall