

CASE NO. 49130-3-II

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

KITSAP COUNTY,

Respondent,

vs.

KITSAP RIFLE AND REVOLVER CLUB,

Appellant.

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

RESPONSE BRIEF OF RESPONDENT KITSAP COUNTY

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I. INTRODUCTION

This case is about whether the Kitsap Rifle and Revolver Club (“the Club”), a shooting range, is required to comply with Article 2, Chapter 10.25 of the Kitsap County Code (“Chapter 10.25”), an ordinance enacted in 2014 to ensure the safe operation of shooting facilities in Kitsap County. The Club attempts to attack the constitutionality of Chapter 10.25 on its face and as-applied to the Club. The Club’s arguments on appeal mimic its arguments at the trial court level in that the Club makes bald-faced assertions without leading the court through a proper legal analysis and by misinterpreting the authority upon which it relies, essentially throwing “naked castings into the constitutional sea.”

Ultimately, the Club’s appeal must fail because Chapter 10.25 is a health and safety regulation primarily enacted to prevent the risk of property damage, bodily injury, and death that might result from errant or negligently discharged bullets at shooting ranges. Chapter 10.25 does not impermissibly burden any constitutional right and is not preempted by state statute. The Club has no valid defense for its noncompliance.

The Club asks this Court to view Chapter 10.25 in a vacuum, separate from its legislative history, of which the Club was a part, and without the context of recent litigation, in which the Club was a party. Most critically, the Club ignores that it was found to be a public safety

nuisance as recently as 2012 in the case of *Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 272-274, 337 P.3d 328 (2014), hereinafter “*Kitsap Rifle*” (currently on appeal regarding remand proceedings). In *Kitsap Rifle*, the appellate court affirmed that the Club constituted a public safety nuisance and affirmed the findings that more likely than not bullets had and would continue to leave the shooting areas, that bullets will possibly strike persons or damage property, and that the Club’s existing range facilities were inadequate to contain bullets “notwithstanding existing safety protocols and enforcement.”

The County’s public nuisance lawsuit with the Club raised concerns regarding the safety of all shooting ranges in Kitsap County. As a direct response to these concerns, Kitsap County sought to enact legislation requiring shooting ranges to identify their activities to the public and demonstrate how they are working to ensure public safety. Article 2 of Chapter 10.25 is the result of this effort.¹

Chapter 10.25 is a health and safety ordinance that requires shooting facilities to obtain an operating permit. A shooting facility will only be granted an operating permit after demonstrating safe practices and sufficient physical and institutional controls to prevent bullets from

¹ Chapter 10.25 contains two articles. Article 2 is the subject of this lawsuit which the Club challenges as unconstitutional. Article 1 regulates where firearms can be discharged within Kitsap County. Except where otherwise indicated, all references to Chapter 10.25 refer specifically to Article 2 and not Article 1.

leaving shooting range property. Chapter 10.25 regulates the ability of a shooting facility to operate but otherwise does not prohibit any firearm or shooting activity. One might argue that Chapter 10.25 restricts an individual's ability to discharge a firearm at a shooting facility that does not have an operating permit. However, that is not an impermissible burden in light of Chapter 10.25's strong public safety purpose. Chapter 10.25 is validly enacted, constitutional, and applies to the Club.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court err in holding that Chapter 10.25 is not an unconstitutional violation of the right to bear arms when Chapter 10.25 only regulates the operation of a shooting facility and does not prohibit any firearm or shooting activity? (Assignments of Error 1, 6, and 13).

2. Did the trial court err in holding that Chapter 10.25 is not preempted by RCW 9.41.290 because it does not regulate firearms and, alternatively, is exempted where there is reasonable likelihood that humans, domestic animals or property will be jeopardized? (Assignments of Error 2, 3, 4, and 13).

3. Did the trial court err in holding that Chapter 10.25 is not unconstitutionally vague and overbroad when the Club failed to meet its burden on this issue? (Assignment of Error 10, 11, and 13).

4. Did the trial court err in holding that the Club is required to

comply with Chapter 10.25 despite its nonconforming use status and the terms of the Bargain and Sale Deed? (Assignment of Error 5, 9, 12 and 13).

5. Did the trial court violate the Club's due process rights when it discerned the legislative intent behind Chapter 10.25 and in declining to conduct a substantive due process analysis where the Club failed to raise the issue? (Assignment of Error 7 and 13).

6. Did the trial court err in summarizing the facts in its memorandum opinion and order dated May 31, 2016? (Assignment of Error 8).

III. STATEMENT OF THE CASE

A. Procedural History

On March 31, 2015, Kitsap County filed a complaint against the Club seeking a declaration that the Club is in violation of Chapter 10.25 and an injunction enjoining the Club's operation of a shooting facility until it comes into compliance. CP 7-13. The Club filed an answer on June 19, 2015, asserting multiple counterclaims. CP 244-266.

On Kitsap County's motion, the trial court entered a preliminary injunction against the Club on April 24, 2015 prohibiting the Club from operating a shooting facility until it submitted an application for an operating permit. CP 130-136. While the Club raised a right to bear arms

defense in its opposition to the preliminary injunction, it failed to provide any legal analysis on the issue. CP 89.

On May 4, 2015, Kitsap County filed a Motion for Summary Judgment seeking declaratory relief and permanent injunction. CP 140-53. The Club filed an opposition on June 11, 2015 (CP 154-182), a supplemental opposition on November 5, 2015 (CP 296-303), and a citation of additional case authority on April 15, 2015 (CP 469-474). The Club once again failed to provide sufficient legal analysis on its right to bear arms defense. CP 175-176; CP 474. The Club's briefing also did not assert or provide legal analysis regarding any alleged procedural or due process violations.

The hearing on Kitsap County's Motion for Summary Judgment was continued several times. On March 17, 2016, the Club submitted an application for an operating permit pursuant to Chapter 10.25. CP 605 (lines 21-27). As a result, the County withdrew its request for permanent injunction and instead sought only declaratory relief. CP 606 (lines 1-5). On May 31, 2016, the trial court issued a memorandum opinion and order granting Kitsap County's summary judgment motion for declaratory relief. CP 603-610. The trial court did not enter findings of fact. Id.

On June 24, 2016, the Club sought voluntary dismissal of its counterclaims against the County. An agreed order dismissing the Club's counterclaims was entered on June 28, 2016. CP 638.

B. Statement of Facts

1. Kitsap Rifle and Revolver Club

The Club is a nonprofit organization which operates a shooting facility in Kitsap County, Washington. CP 650; CP 652. The Club is the owner of record of the property on which the facility operates (Kitsap County Tax Parcel ID No. 362501-4-002-1006), hereinafter, "the Property." CP 655. The Club's facilities include a number of shooting bays and a 360 degree range which can be "configured for a variety of purposes." CP 652. While the Club is a private club, it regularly opens its ranges to the public. CP 652.

C. The 2009 Bargain and Sale Deed

The Club became the owner of the Property in 2009. CP 194-201. That year Kitsap County deeded the Property to the Club pursuant to a Bargain and Sale Deed. Id. The Bargain and Sale Deed contains restrictive covenants and conditions which burden the Club. CP 196-198.

The Bargain and Sale Deed was the subject of prior litigation between Kitsap County and the Club regarding the Club's violations of zoning and land use laws. See *Kitsap Rifle*, 184 Wn. App. 252. During that

litigation, the trial court determined that the Deed was nothing more than a contract transferring the Property to the Club, did not release the Club from future actions for county code violations, and did not prohibit Kitsap County from enforcing its ordinances. CP 667-68 (FOF 26-28); CP 692 (COL 36). These findings and conclusions were affirmed on appeal. *Kitsap Rifle*, 184 Wn. App. at 290-293.

D. The Club Was Found to Be a Public Safety Nuisance

In 2012, as a result of a lawsuit brought by Kitsap County, the Club was found to constitute a public nuisance with regard to safety issues. See *Kitsap Rifle*, 184 Wn. App. at 288. The Club appealed this ruling, among others. Critically, with regard to safety nuisance conditions, the trial court found as follows:

67. [...] The Property is a “blue sky” range, with no overhead baffles to stop the flight of accidentally or negligently discharged bullets. [...] The Court considered the allegations of bullet impacts to nearby residential developments, some of which could be forensically investigated, and several of which are within five degrees of the center line of the KRRC Rifle Line.

68. The County produced evidence that bullets left the range based on bullets lodged in trees above berms. [...] more likely than not, bullets escaped from the Property’s shooting areas and that more likely than not, bullets will escape the Property’s shooting areas and will possibly strike persons or damage property in the future.

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

CP 679. The appellate affirmed the Club as a public nuisance and did not overturn these findings of fact. *Kitsap Rifle* at 276.

E. Development of Kitsap County's Shooting Range Ordinance

1. "Review Committee" & Public Input

In 2011, the Kitsap County Board of County Commissioners (the "Board") initiated a process to evaluate whether stricter local regulations of shooting facilities was warranted. CP 44, ¶3. The Board initiated a "Review Committee" comprised of members from three local shooting facilities, including the Club, and three citizens. *Id.* During a twenty-two month period, the Review Committee convened and held fifteen meetings regarding a proposed operating permit ordinance. CP 44, ¶4. Ultimately, a majority of the committee members voted to recommend the ordinance to the Board. *Id.* The Board provided the public the opportunity to comment on the proposed ordinance through public hearings and the taking of written testimony. *Id.*

2. Adoption of the Ordinance

After receiving public input regarding the proposed ordinance, the Board modified the ordinance to address additional concerns raised during the public hearings. CP 44, ¶5. The final ordinance, Kitsap County

Ordinance 515-2014, was adopted on September 22, 2014 (codified as Chapter 10.25). Id. It became effective on December 22, 2014. Id.

The Ordinance contains the following pre-amble:

WHEREAS, RCW 9.41.300(2) provides that a county may also, by ordinance, restrict the discharge of firearms in any portion of its jurisdiction where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized so long as such ordinance shall not abridge the right of the individual guaranteed by Article 1, section 24 of the state Constitution to bear arms in defense of self or others; and

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

CP 48.

While Article 2 of Chapter 10.25 regulates the operations of a shooting facility, Article 1 (not the subject of this lawsuit) regulates where firearms may be discharged throughout Kitsap County. CP 49-53. Generally, Article 1 allows the discharge of firearms on any 5 acre parcel that is not within a “no-shooting zone,” is not within five hundred yards of a shoreline or lake, and so long as shooting is not towards any buildings occupied by people. CP 50-51; KCC §10.25.020.

F. Requirements of Shooting Range Ordinance

Article 2 of Chapter 10.25 establishes permitting procedures and rules for the development and operation of shooting facilities. It requires that all new and existing shooting facilities apply for an operating permit within 90 days of the Ordinance's effective date.² KCC §10.25.090(2). It provides that failure to obtain a range operational permit will result in closure of the range until such time a permit is obtained and sets forth injunctive relief as a remedy for violations. CP 56; KCC §10.25.090(1).

An operating permit will be issued when a shooting facility demonstrates that it can meet the standards set forth in KCC §10.25.090(4), which include the requirement that each range be designed to contain bullets, a Safety Plan, safety procedures evaluated by an NRA Range Technical Team Advisor or qualified professional engineer, the presence of safety officers, identification of military training activities, designation of days for the use of exploding targets, etc. CP 57-59.

G. The Club Failed To Submit Permit Application

On December 19, 2014, DCD Director Larry Keeton sent a letter to the Club notifying it of the requirement to obtain an operating permit and of the ninety day deadline to submit an application. CP 45, ¶7; CP 66-67. The Club did not submit an application by the March 23, 2015

² "Shooting facility" is defined by KCC §10.25.070(21) as "an entity with a site having one or more shooting ranges, but does not include residential property." CP 56.

deadline. CP 45, ¶8. When notified of its non-compliance, the Club sent a letter indicating that it had no intention to submit an application. CP 45, ¶9; CP 71-73.

IV. ARGUMENT

A. Standard of Review

The customary principles of appellate review apply to an appeal of a declaratory judgment. *City of Longview v. Wallin*, 174 Wn. App. 763, 776, 301 P.3d 45 (2013). An order of summary judgment in a declaratory action is reviewed *de novo*. *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 222, 232 P.3d 1147 (2010). With regard to facts, the appellate court must engage in the same inquiry as the trial court and review the evidence *de novo*. *Lilly v. Lynch*, 88 Wn. App. 306, 311–12, 945 P.2d 727 (1997). Questions of statutory construction are also reviewed *de novo*. *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 934–35, 121 P.3d 95 (2005).

The Club’s opening brief challenges only the trial court’s May 31, 2016 order granting Kitsap County summary judgment for declaratory relief. While the Club appears to challenge the sufficiency of “findings of

fact,” the trial court made no findings of fact.³ It granted Kitsap County’s summary judgment motion for declaratory judgment and ruled that the Club is required to comply with Chapter 10.25. This Court must review the evidence and consider all questions of law *de novo*.

B. Statement of Law

1. Summary Judgment

An order granting summary judgment is appropriate if “the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party” demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Weden v. San Juan Cty.*, 135 Wn. 2d 678, 689–90, 958 P.2d 273 (1998).

2. Declaratory Judgment

Courts have the power to “declare rights, status and other legal relations” by declaratory judgment, which has the same force and effect of a final judgment or decree. RCW 7.24.010-20. A trial court may make a declaratory judgment under the Uniform Declaratory Judgment Act

³ The trial court issued a memorandum opinion and an order. CP 603-610. The memorandum opinion does not contain formal findings of fact which were unnecessary in light of the County’s request for declaratory judgment in this case. A memorandum opinion does not equate to a formal finding of fact. *Grp. Health Co-op. of Puget Sound v. King Cty. Med. Soc.*, 39 Wn. 2d 586, 595–96, 237 P.2d 737 (1951) (disapproving the practice of enlarging formal findings of fact by reference to memorandum decisions).

(“UDJA”) when there is a justiciable controversy or an issue of major public importance. *Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005).

3. Burden on Party Challenging Regulation

The Club incorrectly asserts that Kitsap County has the burden to establish the constitutionality of Chapter 10.25. However, with regard to right to bear arms challenges, the Washington Supreme Court has held that “a legislative enactment is presumed constitutional, and the parties challenging it must prove it violates the Constitution beyond a reasonable doubt.” *City of Seattle v. Montana*, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996). This is a “heavy burden.” *Id.* Furthermore, every presumption will be in favor of constitutionality. *State v. Conifer Enterprises, Inc.*, 82 Wn.2d 94, 97, 508 P.2d 149 (1973).

C. The Trial Court Did Not Err In Granting Summary Judgment and Declaring that the Club Is Required to Comply with Chapter 10.25 Because Chapter 10.25 Does Not Impermissibly Infringe Upon the Right to Bear Arms.

The trial court properly granted summary judgment and declared that the Club is required to comply with Chapter 10.25 because the ordinance does not impermissibly infringe upon the right to bear arms as recognized by the federal or state constitutions. While the Club asserts it was error for the trial court not to engage in a detailed Second Amendment

analysis and claims the trial court improperly placed the burden of proof on the Club, it was the Club that failed to advance any valid argument or analysis on this issue.⁴ As a result, the trial court found the Club's unsupported assertions were "without merit." CP 607.

The Club has adopted a similar tactic in this appeal. The Club's opening brief fails to conduct the detailed analysis that it faults the trial court for not undertaking and instead relies upon sweeping and generalized statements regarding the scope of the right to bear arms. The Club also inaccurately advocates for a more stringent standard of review. Appellant's Opening Brief, page 43-44. As explained below, Chapter 10.25 does not impermissibly infringe upon the right to bear arms and easily survives any level of judicial scrutiny which might apply.

1. Analysis Under Federal Constitution

The Club's analysis of Second Amendment issues in this case relies almost exclusively on *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), a case from the Seventh Circuit that is easily distinguishable on its facts. The Club fails to address the two leading Ninth Circuit cases on

⁴ In its summary judgment briefings, the Club devoted less than two pages to this subject. These two pages were used to provide general statements regarding the right to bear arms and contained no analysis specific to Chapter 10.25. CP 175-76. The Club's only argument regarding Chapter 10.25 infringing upon the second amendment was limited to its assertion that the ordinance is pre-empted by state law. *Id.* The club also provided the trial court with a copy of the ruling in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) but offered no analysis. CP 474.

Second Amendment issues: *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (upholding handgun ordinance regulating the storage of handguns and the sale of ammunition) and *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) (upholding regulation which prohibits domestic violence convicts from possessing firearms).

Following the U.S. Supreme Court's precedent in *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (overturning regulation banning handgun possession in the home), the Ninth Circuit employs a two-prong test in analyzing regulation subject to a Second Amendment challenge. First, the court must ask whether the challenged regulation "burdens conduct protected by the Second Amendment." *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016) (quoting *Chovan*, 735 F.3d at 1136). If so, the court must then apply an appropriate level of scrutiny. *Id.*

a. Chapter 10.25 Does Not Burden Conduct Protected By the Second Amendment

To determine whether conduct is protected by the Second Amendment, the Court must understand the scope of the Second Amendment's protection based upon a historic understanding of the right. *Silvester*, 843 F.3d at 821. The Club fails to provide this analysis with respect to the conduct at issue—the operation of shooting facilities.

From other cases, we know that the Second Amendment confers “an individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. However, this right is not unlimited. *Id.* The Second Amendment does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose” but extends only to weapons in common use at the time. *Id.* at 626-27.

The United States Supreme Court has further recognized that constitutional rights implicitly protect conduct closely related to the exercise of those rights where, without such protection, the right would be “toothless.” *Luis v. United States*, 136 S. Ct. 1083, 1097–98, 194 L. Ed. 2d 256 (2016). On this rationale, the right to bear arms has been held to imply a right to obtain bullets. *Luis* at 1097 (citing *Jackson*, 746 F.3d at 967). The Seventh Circuit has held that the Second Amendment also implies the right to acquire and maintain proficiency in the use of arms. *Id.* citing *Ezell v. Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). However, at least one federal circuit court was “not convinced that the Second Amendment extends to the right to operate a gun range.” *Sundowner Ass’n v. Wood Cnty. Commission*, 2014 WL 3962495 (S.D.W. Va. Aug. 13, 2014).⁵

Kitsap County maintains that Chapter 10.25 regulates only the

⁵ Citation to unpublished opinion permitted pursuant to Washington GR 14.1(b) and United States Court of Appeals for the Fourth Circuit LCR. 32.1.

operation of shooting facilities which is conduct that falls outside the scope of the Second Amendment. However, Kitsap County declines to conduct the thorough historical analysis that the Club has failed to offer because Chapter 10.25 easily survives the intermediate level scrutiny that has been applied to more restrictive legislation, as discussed below.

b. Chapter 10.25 Survives Intermediate Scrutiny

If a regulation burdens conduct that falls within the historical scope of the Second Amendment, the next step is to determine the appropriate level of scrutiny to apply. *Jackson*, 746 F.3d at 960–61 (citing *Chovan*, 735 F.3d at 1136). In this analysis the court must consider how close the regulation comes to the core of the Second Amendment right and the severity of the burden imposed. *Id.* at 960-61 (quoting *Chovan*, 735 F.3d at 1138). A core right of the Second Amendment is the right of law-abiding citizens to use arms in defense of “hearth and home.” *Id.* at 961 (quoting *Chovan*, 735 F.3d at 1138).

A law that regulates only the manner in which a person may exercise their Second Amendment rights is less burdensome than a ban or prohibition. *Id.* at 961. Similarly, a regulation which leaves “open alternative channels” for self-defense is less likely to place a severe burden on the Second Amendment right. *Id.* A “blanket prohibition” likely requires a level of scrutiny greater than intermediate. *Id.* at 964. However,

“if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right,” courts may apply intermediate scrutiny. *Id.* at 961.

In this case, if Chapter 10.25 is seen as burdening conduct protected by the Second Amendment, it merely regulates on a very periphery level the manner in which an individual may exercise his or her right to bear arms. Chapter 10.25 regulates an individual or entity’s ability to operate a shooting facility and only imposes upon an individual’s right to the extent it restricts the discharge of a firearm at an unpermitted shooting facility.

Chapter 10.25 requires all shooting facilities to obtain an operating permit. KCC §10.25.090. In order to obtain an operating permit, shooting facilities must meet the standards set out in KCC §10.25.090(4) which requires that ranges be designed to contain bullets pursuant to the standards set forth in the NRA Range Source Book, provide a safety plan, prepare safety procedures, appoint safety officers to be present whenever the public is allowed on the range, and “identify” any military training activities allowed at the range, among other things.

While Chapter 10.25 regulates the operation of a shooting facility, it does not prohibit any firearm, ammunition, or shooting activities. It does not impact an individual’s ability to possess, carry, or sell firearms.

Chapter 10.25 leaves open alternative channels for individuals to become proficient in the use of firearms. For example, individuals can discharge firearms at Poulsbo Sportsman Club, the other shooting facility subject to Chapter 10.25 which has applied for and received its operating permit. CP 511 (lines 24-26); CP 512 (lines 1-2). Article 2 does not restrict an individual's ability to discharge a firearm at non-shooting facility locations, which is governed by Article 1.

The intermediate level of scrutiny analysis requires that (1) the government's stated objective be significant, substantial, or important and (2) a reasonable fit between the challenged regulation and the asserted objective. *Jackson*, 746 F.3d at 965 (citing *Chovan*, 735 F.3d at 1139). Here Chapter 10.25 expressly states the following purpose is to "provide for and promote the safety of the general public by establishing a permitting procedure and rules for the development and operation of shooting range facilities." KCC §10.25.060.

Public safety is as an important government interest. *Jackson*, 746 F.3d at 965. Chapter 10.25 is substantially related to this stated purpose. KCC §10.25.090(4)(a) requires that each shooting range "be designed, constructed, operated and maintained to contain bullets, shot or other discharged projectiles within the facility property." The requirements of Chapter 10.25 are tailored to ensure the safe operation of shooting

facilities and are substantially related to public safety objectives.

The Club advocates that Chapter 10.25 should be treated the same as legislation which constitutes a complete ban on protected conduct. This argument is based solely on the terms of the trial court's preliminary injunction (unchallenged in this appeal) which prohibited the Club from operating a shooting facility until it submitted a permit application.⁶ The preliminary injunction was lifted after the Club submitted its application. CP 606. The Club offers no legal authority to support its position that an ordinance is subject to strict scrutiny merely because it proscribes an injunction as a remedy for violations. The Club's argument fails.

2. Analysis Under State Constitution

The Club asserts that Chapter 10.25 also violates article 1, §24 of the Washington State Constitution. The Club fails to provide sufficient legal analysis on this issue and fails to discuss whether this provision provides greater protection than its federal counterpart, the Second Amendment. Such an inquiry would require an analysis of the factors forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). The Club appears satisfied with relying exclusively upon a Second Amendment analysis. This is improper.

⁶ The Club appealed the preliminary injunction in its second amended notice of appeal. However, it did not assign any errors regarding the preliminary injunction and abandoned its appeal.

In 2013, the Washington Supreme Court held that state and federal rights to bear arms have “different contours and mandate separate interpretation.” *State v. Jorgenson*, 179 Wn.2d 145, 152, 312 P.3d 960, 963 (2013). In *Jorgenson*, the court recognized that firearm rights guaranteed by the state constitution are subject to reasonable police power regulation. *State v. Jorgenson*, 179 Wn.2d 145, 155, 312 P.3d 960, 964 (2013). A constitutionally reasonable regulation is one that is “reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.” *Id.* at 156 (quoting *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996)). The analysis for questions of constitutionality under article 1, §24 requires courts to balance the public benefit offered by the regulation against the degree to which it frustrates the purpose of the constitutional provision. *Id.* at 156-57.

Chapter 10.25 provides the public benefit of ensuring that shooting ranges in the community (which may be located near residential developments), adopt safe practices and are constructed and operated in such a way as to minimize the risk that projectiles will leave shooting range property. Chapter 10.25 was adopted in the wake of *Kitsap Rifle* in which the trial court deemed the Club a public safety nuisance and found that it did not have sufficient safety protocols to ensure public safety. This

lawsuit put Kitsap County on notice that shooting facilities in its jurisdiction could pose a safety risk to the public and it acted accordingly.

This important public interest is far outweighed by the limited burden imposed by Chapter 10.25. An individual's right to keep and bear arms, if burdened at all under Chapter 10.25, is only burdened in an indirect and periphery manner with regard to an individual's ability to discharge a firearm at an unpermitted shooting range.

3. Distinguishable From *Ezell*

The Club relies almost exclusively on the case of *Ezell* in support of its argument that Chapter 10.25 is unconstitutional. The facts in *Ezell* are starkly distinct from the facts of the present case and the Club's reliance on *Ezell* is misplaced.⁷ The ordinance at issue in *Ezell* prohibited the possession and use of handguns outside the home and prohibited the possession of a firearm without a city firearm permit. It then conditioned the granting of the permit upon one hour of firing range training yet completely banned all firing ranges within the city.

In *Ezell*, the Court recognized a distinction between "merely regulatory measures" and an "absolute prohibition." *Id.* at 705. The

⁷ The Seventh Circuit has recently issued a ruling in *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017), "*Ezell II*." *Ezell II* is distinguishable from the present case because the regulations at issue prohibited anyone under 18 from entering a shooting range and the restrictive zoning code (limiting shooting ranges to 2.2% of the city's total acreage), in effect, banned all shooting ranges from the city.

legislation at issue in *Ezell* was the latter—an absolute prohibition on firing ranges. The court in *Ezell* applied a rigorous level of scrutiny, requiring a “close fit” between the range ban and the public interest it was intended to serve. *Id.* at 708. Instead of a ban on firing ranges, the Court suggested that the city address safety concerns through “sensible zoning and other appropriately tailored regulations.” *Id.*⁸

Chapter 10.25 is an example of the sensible regulatory measures suggested by the *Ezell* court. It is merely regulatory and not an absolute prohibition on firing ranges (or any conduct for that matter). The level of scrutiny in this case should be significantly less than the scrutiny applied in *Ezell*. The holding in *Ezell* is not persuasive or instructive.

D. The Trial Court Did Not Err in Granting Summary Judgment and Declaring that the Club Is Required to Comply with Chapter 10.25 Because Chapter 10.25 is not Pre-Empted by State Law.

The trial court did not err in granting summary judgment and declaring that the Club is required to comply with Chapter 10.25 because Chapter 10.25 is not pre-empted by state law. The Club’s arguments inaccurately summarize the applicable legal authority on this issue. Furthermore, the Club challenges findings of fact that do not exist and

⁸ As an example, the Court provided a list of jurisdictions that regulate range safety using the standards in the NRA Range Sourcebook, the same standards that Kitsap County references in Chapter 10.25. *Ezell*, 651 F.3d at 710.

advocates for the incorrect burden of proof. While the County may carry the burden with respect to the whether an exception applies, it is the Club that carries the initial burden of establishing invalidation of the regulation. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 759, 49 P.3d 867 (2002).

1. Chapter 9.41 RCW Only Applies To Regulations Imposing Criminal Penalties

RCW 9.41.290 only applies to regulations imposing criminal penalties. Chapter 9.41 outlines the criminal restrictions and punishment regarding “Firearms and Dangerous Weapons.” It exists within the statutory scheme of Title 9 RCW, titled “Crimes and Punishments,” which contains criminal regulations. The purpose and focus of this statute is to “eliminate conflicting municipal criminal codes” and to “advance uniformity in criminal firearms regulations.” *Pacific Northwest Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 356-57, 144 P.3d 276 (2006) citing *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 801, 808 P.2d 746 (1991). Thus, RCW 9.41.290 is intended to preclude regulations which criminalize the use and possession of firearms.

While no court has conclusively decided the issue of whether this statute precludes civil regulations, Washington Courts have held that the penal nature of the Chapter 9.41 RCW to be “particularly significant.”

Pacific Northwest Shooting Park Ass'n, 158 Wn.2d at 356. Washington courts have also noted the placement of the preemption clause in the criminal code rather than in Title 35, pertaining to cities, or Title 36 pertaining to counties. *Id.* at 356 n.6.

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

Chapter 10.25 regulates a shooting facility's right to operate a shooting range. Chapter 10.25 only indirectly regulates firearms in the same way that zoning laws, local tax codes, and business licensing requirements regulate firearms. Because Chapter 10.25 does not regulate firearms and imposes no criminal penalty, it is not preempted by state law.

2. The BOCC Found A Sufficient Likelihood of Jeopardy Pursuant to RCW 9.41.300(2)(a)

Even if RCW 9.41.290 applied to civil code enforcement regulations (which is not the case), Chapter 10.25 expressly falls within the exception to state preemption provided in RCW 9.41.300(2).

RCW 9.41.300(2)(a) provides that counties may enact laws and ordinances restricting the discharge of firearms where "there is a

reasonable likelihood that humans, domestic animals, or property will be jeopardized.” The state legislature's purpose in creating RCW 9.41.300(2)(a) was to allow local governments “relatively *unlimited* authority in one specific area – *i.e.*, the discharge of firearms in areas where people, domestic animals, or property would be endangered.” *City of Seattle v. Ballsmider*, 71 Wn. App. 159, 163, 856 P.2d 1113 (1993).

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

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

CP 48. In addition, KCC §10.25.060 expressly states its purpose as follows:

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

Accordingly, Chapter 10.25 falls squarely within the exception outlined in RCW 9.41.300(2)(a) which allows counties to enact ordinances restricting the discharge of firearms where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized.

The Club argues that these legislative declarations are insufficient for many reasons which are not adequately supported by, and in fact contradict, the relevant legal authority. The Club incorrectly asserts that the legislative findings necessary for the adoption of a regulation pursuant to RCW 9.41.300(2)(a) must meet the standards applicable to evidentiary findings in legal proceedings. The Club has offered no valid legal authority for this position and its reliance on *State v. Thein*, 138 Wash. 2d 133, 977 P.2d 582 (1999), *State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall*, 42 Wn.2d 885, 259 P.2d 838 (1953), and *Johnson v. Aluminum Precision Prod., Inc.*, 135 Wn. App. 204, 143 P.3d 876 (2006), all of which deal with evidentiary findings, is thus misplaced.

The Club incorrectly attacks Chapter 10.25 on the basis that the legislative findings do not prove, on an evidentiary standard basis, any “real or potential harm.”⁹ Under Washington law, legislative declarations of fact are deemed conclusive unless they are patently false. *Clean v. State*, 130 Wn.2d 782, 807-08, 928 P.2d 1054 (1996). In granting deference to legislative findings, courts are not required to inquire into the “degree of scientific rigor underlying the findings at issue.” *State v.*

⁹ The Club attacks the issuance of the preliminary injunction, which is not overtly challenged in this appeal, on the basis that the County did not show actual injury. The Club ignores the Washington case law fully briefed by Kitsap County at the trial court level. CP 151. *King County ex rel. Sowers v. Chisman*, 33 Wn. App. 809, 818-19, 658 P.2d 1256 (1983) (where ordinance provides for injunction against violation, the legislative body has established “the violation itself is an injury to the community.”).

McCustion, 174 Wn.2d 369, 275 P.3d 1092 (2012); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 270-71, 534 P.2d 114 (1975) (“Legislatures must necessarily make inquiries and factual determinations as an incident to the process of making law, and courts ordinarily will not controvert or even question legislative findings of facts.”); *Clean v. City of Spokane*, 133 Wn.2d 455, 477, 947 P.2d 1169 (1997) (courts “no longer conduct[] an independent analysis of whether a law is necessary for the immediate preservation of the public peace, health, or safety.”). Rather, if there are any set of facts to justify legislation, courts will presume those facts were before the law maker while enacting the legislation:

The county commissioners must be presumed to be in touch with the conditions in King County. They were elected upon local platforms and are constantly dealing with local problems. There is no constitutional rule which requires that they conduct a special investigation or make formal findings before they exercise their police power. [...] We have followed the same principle. If a state of facts which would justify the legislation can reasonably be conceived to exist, courts must presume it did exist and the legislation was passed for that purpose. There is no requirement that the court find facts justifying the legislation.

Petstel, Inc. v. King Cty., 77 Wn.2d 144, 151-52, 459 P.2d 937 (1969)

(internal citations omitted).

Given the deferential review of legislative findings, Chapter 10.25 clearly passes muster. There is no doubt that when the Kitsap County

Board of County Commissioners adopted Chapter 10.25 in September 2014 it was aware of the Court of Appeal decision issued one month earlier in *Kitsap Rifle*. In *Kitsap Rifle*, the Club was found to constitute a public nuisance because it was a “blue sky” range, with no overhead baffles to stop accidentally or negligently discharged bullets. *Kitsap Rifle*, 184 Wn. App. at 283. It was determined that more likely than not, bullets would escape the shooting areas and possibly will strike persons or property in the future. *Id.* It was also determined that the Club's range facilities, including safety protocols, were inadequate to prevent bullets from leaving the property. *Id.* These facts were before the county commissioners at the time Chapter 10.25 was adopted and it must be presumed that these facts were considered.

The Club also incorrectly asserts that Kitsap County is required to show that Chapter 10.25 is “necessary to prevent violence.” This assertion is without any legal support. RCW 9.41.300(2)(a) does not mention the word “violence.” It generally discusses jeopardy to humans, domestic animals, and property and is not limited to jeopardy caused by violence, as opposed to some other negligent cause.

The Club argues that the County is not acting within its police power when enacting legislation pursuant to a preemption exception and, therefore legislative findings must be strictly construed. The Club has

failed to provide any support for this position. The County acted pursuant to its broad authority to regulate under its plenary police power. *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 225-226, 351 P.3d 151 (2015). Accordingly, there is no reason to depart from the general standards regarding legislative findings.

The Club also incorrectly states that Kitsap County is required to prove the requisite harm exists “throughout” the County because the ordinance applies “county-wide.” The Club offers no legal authority to support this position. The language of RCW 4.91.300(2) is not so exacting and contains no such requirement.

The Club erroneously argues that if the exception in RCW 9.41.300(2)(a) applies, the exception limits the County to regulating only the *discharge* of firearms and prohibits the County from regulating operating hours, building locations, the holding of events, etc. The Club mistakenly construes an exception to a preemption as a mandatory requirement for all regulation, even regulation falling outside the scope of the preemption. The Club ignores that RCW 9.41.290 only preempts firearm regulations. It does not preclude a county from regulating any other conduct. If this were the case, counties would not be able to apply zoning or business licensing laws to shooting ranges without first showing that the law is necessary to prevent jeopardy. To the extent Chapter 10.25

regulates conduct other than the discharge of firearms, it is not preempted.

3. The Trial Court Did Not Create New Legislative Findings

The Club erroneously claims that the trial court supplemented legislative findings to support Chapter 10.25 when it granted Kitsap County's summary judgment motion. The trial court did not "supplement" or "create" new legislative findings. It properly considered the facts available to the Board of County Commissioners at the time Chapter 10.25 was enacted as appropriate under Washington law to discern legislative intent. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 602, 94 P.3d 961 (2004) (facts justifying an ordinance are presumed to exist and the ordinance is presumed to be passed in conformity with those facts). Citing a published court of appeals decision to provide background is not creating legislative findings.

Similarly, the trial court is not barred by the doctrine of *res judicata* from considering facts before the legislative body (such as the facts from *Kitsap Rifle*) when discerning legislative findings. As stated above, this is permitted by Washington law.

E. The Trial Court Did Not Err in Dismissing the Club's Claims that Chapter 10.25 is Unconstitutionally Vague and Overbroad

The trial court did not err in dismissing the Club's claims that Chapter 10.25 is unconstitutionally vague and overbroad because the Club

failed to establish any due process violation.

1. The Club did Not Meet its Burden in Bringing a State Due Process Challenge

The Club alleges both federal and state constitutional due process claims without conducting a *Gunwall* analysis to determine if they require separate legal analysis, or offering any separate analysis of its state constitution claim as required by Washington law. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 711, 257 P.3d 570 (2011) (due process claims under the art. 1, § 3 require a case-specific *Gunwall* analysis); *City of Spokane v. Douglass*, 115 Wn.2d 171, 176-177, 795 P.2d 693 (1990). Because the Club fails to cite to any authority supporting its state constitutional claim and failed to do a *Gunwall* analysis, the Club's claim should be rejected. *Kitsap Cty. Consol. Hous. Auth. v. Henry-Levingston*, 196 Wn. App. 688, 707, 385 P.3d 188 (2016) (appellate courts do not consider arguments without sufficient legal citation).

2. The Club Did Not Meet its Burden Under the Fourteenth Amendment

Local ordinances are presumed constitutional and the challenging party has the "heavy burden" to prove beyond a reasonable doubt that the ordinance is so vague as to be unconstitutional. *City of Spokane*, 115 Wn.2d at 177. An ordinance is constitutional if it provides adequate notice and provides standards to prevent arbitrary enforcement. *Heesan Corp. v.*

City of Lakewood, 118 Wn. App. 341, 352, 75 P.3d 1003 (2003). An ordinance is not unconstitutionally vague solely because of potential disagreement regarding its application. *Id.* “The vagueness test does not require a statute to meet impossible standards of specificity.” *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, 851 P.2d 744 (1993).

The examples provided by the Club do not meet the constitutional test for vagueness. The Club picks and chooses specific excerpts from the code and does not look at them in context. Chapter 10.25 clearly provides adequate notice of the prohibited conduct—operating a shooting facility without an operating permit. KCC §10.25.090(1)-(2). Chapter 10.25 requires the Department of Community Development (“DCD”) to review permit applications in accordance with the standards in the NRA Range Source Book.¹⁰ KCC §10.25.090(3). The code specifically lists the requirements that shooting facilities must meet in order to obtain a permit and includes specific standards. KCC §10.25.090(4). Kitsap County does not have unconstrained authority in its review and Chapter 10.25 is not vague or allow for arbitrary enforcement.

The Club also incorrectly alleges that terms in KCC §10.25.090(4)(i) are undefined and therefore ambiguous. The meaning of

¹⁰ A shooting facility shall use the NRA Range Source Book, or other engineered specifications that meet or exceed the standards established by the Source Book, as a minimum to develop and implement institutional and facility controls for the safe operation, improvement and construction of shooting ranges. KCC §10.25.090(4)(a).

the phrase “readily contact emergency services” is clear in its context. If every single term or phrase in the ordinance had to be defined to the level argued by the Club, it would allow for zero flexibility in application and would create impossible standards to meet. That is not the standard required by either the Fourteenth Amendment or Washington Courts.

Similarly, the Club’s interpretation of KCC §10.25.090(4)(k)¹¹ is unreasonable. KCC §10.25.090(4)(k) states that firing lines may not be located toward “any structures housing people or domestic animals located within 500 yards of the point of discharge.” The Club unreasonably interprets this as requiring firing lines to be oriented away from all *people* and *domestic animals* which may move at will. The Club ignores the qualifier “any structures.” The Club’s interpretation fails to account for all words in the sentence as required. *Five Corners Family Farmers v. State*, 173 Wn. 2d 296, 312, 268 P.3d 892 (2011) (Reasonable interpretations must account for all the words in an ordinance).

The code is clear as to the prohibited conduct and does not allow arbitrary enforcement. The Club did not meet its burden for its facial challenge of Chapter 10.25.

¹¹ The Club cites KCC 10.25.090(4)(j) but quotes KCC 10.25.090(4)(k).

3. The Club Cannot Show that Chapter 10.25 is Unconstitutional as Applied

The only evidence the Club offers in support of its as-applied challenge of Chapter 10.25 is Mr. Carter's self-serving and conclusory declaration. Appellant Brief, pg. 48; CP 189.¹² In challenging a summary judgment motion, "the nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value." *Carrillo*, 122 Wn. App. at 601.

The Club asserts that unnamed Kitsap County "officials" informed Mr. Carter that Chapter 10.25 requires the Club to prove no projectile has ever left the range. There is no evidence in the record as to who these officials are, when the statement was made, or whether it is reasonable for the Club to rely on the statement. There is also no evidence that DCD applies this standard, which is not expressed anywhere in Chapter 10.25. The Club cannot invalidate an ordinance simply on the suspicion that an incorrect standard of review might be applied, especially when an appeal process is available to correct improper interpretations or applications. *See*

¹² The Club does not provide a clerk's papers page number for reference or a date for Mr. Carter's declaration. Because Mr. Carter submitted numerous declarations to the trial court, Kitsap County assumes this is the proper citation and leaves it for the Club to correct on reply if necessary.

Heesan Corp., 118 Wn. App. at 353; KCC §10.25.090(10) (applications are processed, reviewed, and appealable under Title 21 KCC).

F. The Court Did Not Err in Holding That the Club's Nonconforming Use Status Or Bargain and Sale Deed Did Not Exempt It From Compliance.

The trial court did not err when it ruled that the Club is required to comply with Chapter 10.25 despite its nonconforming use status and the terms of the Bargain and Sale Deed.

1. Chapter 10.25 Is Not a Land Use Regulation and Does Not Impact Legal Nonconforming Uses Under the Zoning Code

The Club is incorrect in asserting that Chapter 10.25 is a land use regulation. Chapter 10.25 is a police power regulation designed to ensure the safe operation of existing and new shooting facilities through the grant of an operating permit. Operating permits are not land use regulations. See *Woodinville Water Dist. v. King Cnty.*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001). Furthermore, an operating permit is not deemed a land use regulation merely because it requires the submittal of a site plan. According to this logic, state nursing home licenses would be land use regulations because they require an applicant to provide information regarding their facilities. See Chapter 388-97 WAC. The Club has offered no valid legal authority to support its position that Chapter 10.25 is a land use regulation.

Chapter 10.25 does not “moot” nonconforming uses. KCC §10.25.090(1) expressly states it does not affect existing nonconforming use status. Accordingly, the Club’s nonconforming use status under the zoning code (Title 17 KCC) is not changed by Chapter 10.25.

2. The Club’s Legal Nonconforming Use Status Does Not Exempt It from Compliance with Chapter 10.25

The Club claims that it is exempt from the requirements of Chapter 10.25 due to its status as a legal nonconforming use. A nonconforming use is a continuous and uninterrupted use of a property established prior to later-enacted zoning regulations which prohibit that use. *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn. App. 606, 614, 191 P.3d 928 (2008); KCC §17.570.010. A legal nonconforming use status only protects the property owner against changes in a zoning code:

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 & 35th Inc. v. Snohomish County, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) (emphasis added) (citing Robert M. Anderson, *American Law of Zoning*, § 6.01 (Kenneth H. Young ed., 4th ed. 1996)). Furthermore, KCC §17.110.510 specifically defines a nonconforming use as a use of land that was lawfully established but which no longer conforms to the

regulations established by “this title” (i.e., Title 17, the zoning ordinance). Nonconforming uses have no meaning outside the zoning code.

Whether the Club has a legal nonconforming “shooting range,” *for the purposes of zoning regulation*, is irrelevant. Under Washington law, one’s status as a nonconforming use does not apply to other forms of non-zoning police power regulation. *Rhod-A-Zalea*, 136 Wn.2d at 8-12. In *Rhod-A-Zalea*, the Washington Supreme Court held that a peat mine operation’s status as a legal nonconforming use with regarding to zoning regulation did not exempt it from *all* police power regulations, including health and safety regulations, enacted after it began its operations. *Id.* at 8. Pursuant to the holding in *Rhod-A-Zalea*, even if the Club enjoys status as a nonconforming use for land use purposes, it must still comply with non-zoning health and safety regulations, i.e. Chapter 10.25.

The Club argues that *Rhod-A-Zalea* does not apply because Chapter 10.25 impacts a fundamental constitutional right. Appellant’s Opening Brief, page 37. The Club provides no valid legal authority to support this position which is contrary to well-established principles of Washington law. Washington courts have expressly held that uses protected under the First Amendment can be subject to health and safety local ordinances. *City of Pasco v. Rhine*, 51 Wn. App. 354, 753 P.2d 993(1988) (Nonconforming adult theater subject to restrictions on

advertising); *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 103 P.3d 1265 (2005) (City Ordinance terminating nonconforming use of three adult book stores valid regulation under the First Amendment and article I, section 5 of the Washington State Constitution).

The Club also incorrectly argues that the County's insistence that shooting facilities obtain permits is a denial of its due process rights. Appellant's Opening Brief at 17. The only legal citation the Club provides to support this contention is a North Carolina case assessing the validity of a *residential zoning code* as applied to a private shooting range claiming legal nonconforming use status. *Land v. Village of Wesley Chapel*, 206 N.C.App. 123, 126-127, 697 S.E.2d 458 (2010). The North Carolina court focused on (1) whether the nonconforming use was allowed prior to the zoning change and (2) whether the nonconforming was continuous and materially unchanged after the zoning code was adopted. *Id.* at 129-135. None of the court's analysis related to whether the shooting range could be regulated under non-zoning regulation.

Washington law does not support the Club's position and the trial court's grant of declaratory judgment should be upheld.

3. The Bargain and Sale Deed Does Not Exempt the Club from Compliance with Chapter 10.25

The Club incorrectly argues that the Bargain and Sale Deed, which contains covenants that restrict and burden only the Club, exempts the Club from complying with health and safety regulations. The Club's argument fails because the Court of Appeals already determined the intent of the parties with regard to the Bargain and Sale Deed in *Kitsap Rifle*, equitable servitudes do not apply in this situation, and the operating permit requirement does not interfere with the Deed's covenants.

a. *Issue Preclusion Bars Relitigation of the Effect of the Bargain and Sale Deed on Permitting Requirements*

Contrary to the Club's unsupported argument, the trial court properly applied the doctrine of issue preclusion to bar the Club from re-litigating the intent behind, and construction of, the Deed.¹³ CP 608. Issue preclusion bars re-litigation of an issue in a subsequent proceeding involving the same parties. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004). The purpose of issue preclusion is to promote judicial efficiency, prevent repetitive litigation, and ensure finality of judicial decisions. *Id.* A party invoking this doctrine must establish the following: (1) the issue decided in the earlier

¹³ The Club does not provide a single legal citation for its argument. Therefore, the Court may dismiss this issue without consideration. *Kitsap Cty. Consol. Hous. Auth. v. Henry-Levingston*, 196 Wn. App. 688, 707, 385 P.3d 188 (2016).

proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom preclusion is asserted was a party to the earlier proceeding, and (4) application of issue preclusion does not work an injustice on the party against whom it is applied. *Id.* at 307.

All four elements are met here. The Club's arguments below and on appeal in this case hinge on the effect of the Deed's restrictive covenants on Kitsap County's ability to regulate the Club. CP 166-167. In *Kitsap Rifle*, the Court held that the covenants do not restrict Kitsap County's ability to regulate the Club's facilities and operations; "[t]he County's sale of the land even for the purpose of facilitating the Club's continued existence does not prevent the County from insisting that it be operated in a manner consistent with the law." *Kitsap Rifle*, 184 Wn.2d at 293. Neither the Deed language, nor a "claimed implied duty to allow the Club to perform the deed's public access clause," nor "extrinsic evidence that allegedly confirms the Club's interpretation of the parties' intent" warranted interpreting the Deed to imply a promise from Kitsap County to allow the Club to continue use of the shooting range without being subject to local ordinances. *Id.* at 290-295. Whether or not Chapter 10.25 was enacted at the time of the Court of Appeals decision in *Kitsap Rifle* is immaterial to a finding of issue preclusion. The issues are the same.

With respect to the other elements, the prior ruling in *Kitsap Rifle* resulted in judgment on the merits, the parties are the same, and it would be an injustice to allow the Club to re-litigate the construction of the Deed each time it fails to comply with a local ordinance.

b. *The Club Cannot Show That the Deed Constitutes an Equitable Servitude*

The Club incorrectly claims that the concept of equitable servitude prevents the enforcement of Chapter 10.25. The Club is merely grasping at straws. “An equitable servitude is a restriction on property that runs with the land.” *Riverview Community Group v. Spencer & Livingston*, 181 Wn.2d 888, 913, 337 P.3d 1076 (2014); *Brown v. Charlton*, 90 Wn.2d 362, 368, 583 P.2d 1188 (1978) (The equitable servitude’s burden is on the owner of the burdened property). Even if an equitable servitude were created by the Deed (which is not the case), it cannot be enforced against Kitsap County which has no ownership interest in the Club’s property.

The equitable servitude cases cited by the Club are all distinguishable in that they deal with equitable servitudes in the context of a subdivision and result in enforcement of an equitable servitude against

the landowner to restrict a property right tied to the owner's land.¹⁴ In *Riverview*, 181 Wn.2d 888, the Court recognized and enforced an equitable servitude against a developer/landowner to prevent the sale of a golf course as single family homes. In *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 84 P.3d 295 (2004), the Court recognized an implied contract between a homeowners association and a homeowner which required the homeowner to pay dues to the association. Unlike the cases cited by the Club, Kitsap County has no ownership right or obligation in the Club's property. Further, the cases all involve the rights of a neighboring plat owner or a homeowners association to enforce a servitude on the land of another. Equitable servitude principles simply do not apply in the present context.

The cases relied upon by the Club in support of its equitable servitude argument can be distinguished on another basis – they all involve private parties.¹⁵ This is critical because the formation of contracts

¹⁴ The Club also cites to two cases regarding easements which do not involve equitable servitudes and are irrelevant to its argument. See *Crisp v. VanLaecken*, 130 Wn. App. 320, 122 P.3d 926 (2005) (whether Washington Courts will allow relocation of recorded easements); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 753 P.2d 555 (1988) (whether a prescriptive or implied easement granted access and use rights to a well on a nearby property).

¹⁵ The Club's only citation regarding a government entity is a law review article theorizing that governments may use equitable servitudes to enforce permitting decisions against a subsequent property owner. The article does not address the issue here, when a government conveys a property as part of its proprietary function. Stephen Phillabaum, *Enforceability of Land Use Servitudes Benefiting Local Government in Washington*, 3 Univ. Puget Sound L. Rev. 216 (1979).

with respect to a governmental entity involves additional considerations and policy concerns. Washington Courts refuse to apply equitable doctrines, such as the doctrine of equitable estoppel, against a county when doing so would conflict with a county's essential permitting function. *ABC Holdings, Inc. v. Kittitas Cnty.*, 187 Wn. App. 275, 285, 348 P.3d 1222, 1228 (2015) (estoppel cannot be applied when it impairs a governmental function, such as permitting). Pursuant to *ABC Holding*, the Court cannot enforce an equitable servitude to prohibit Kitsap County from imposing or enforcing future regulations. Accordingly, the doctrine of equitable servitude cannot be applied to impair Kitsap County's critical permitting and regulating functions.

The Club requests this Court to find the benefit of the servitude to be "a private alternative to zoning or other regulation such as special permit approval." Appellant Opening Brief, page 19. This is contrary to Washington law.¹⁶ An agreement which limits a legislative body's authority and power to regulate is void as ultra vires and contrary to public policy. *Finch v. Matthews*, 74 Wn.2d 161, 169-70, 443 P.2d 833 (1968); 10 Eugene Mcquillin, *The Law Of Municipal Corporations* §29.07 (3d ed.1999) ("The established rule is that municipal corporations have no

¹⁶ Not only would this be an issue because it would restrain governmental function, it would also potentially allow for illegal spot zoning not in conformance with surrounding zoning or a County's comprehensive plan. See *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 875-876, 947 P.2d 1208 (1997).

power to make contracts which will or control them [sic] in the performance of their legislative powers and duties.”); *State ex rel. Schlarb v. Smith*, 19 Wn.2d 109, 112-13, 141 P.2d 651 (1943) (a contract that binds future board of county commissioners is against public policy unless entered into under specific statutory authority). Any agreement not to regulate the Club’s use of the shooting facility in the future is thus void.

c. *KCC 10.25 Does Not Interfere with Restrictive covenants*

The Club argues that the Deed’s restrictive covenants prevent Kitsap County from enforcing Chapter 10.25. Even if not barred by issue preclusion, it is clear from the requirements of KCC §§10.25.090 and .110 that requiring the Club to obtain a permit does not interfere with its ability to also comply with the covenants in the Deed. CP 197-198. The Deed does not preclude Kitsap County from enforcing Chapter 10.25 and requiring the Club to obtain an operating permit.

G. **The Trial Court Did Not Violate the Club’s Due Process Rights When It Discerned the Legislative Intent Behind Chapter 10.25 and Declined To Conduct a Substantive Due Process Analysis When Tthe Club Failed to Raise the Issue**

1. **Trial Court Did Not Adopt Legislative Findings and Did Not Violate the Separation of Powers Doctrine**

Contrary to the Club’s assertions, the trial court did not violate the separation of powers doctrine by adopting legislative findings in its memorandum opinion. Instead, the trial court merely provided the legal

analysis behind its decision, which required a review of the legislative history of the ordinance. CP 609-610. A court's fundamental objective when interpreting a statute or ordinance is to discern and implement legislative intent. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). The trial court cited *Kitsap Rifle* for this very purpose to aid in its decision. CP 609-610. Quoting a published court of appeals decision in a memorandum opinion is not tantamount to adopting legislative findings.

The Club fails to inform the Court that its reliance on *CLEAN v. State*, 130 Wn.2d 782, 834, 928 P.2d 1054 (1996), is to the dissenting opinion in that case. Appellant Opening Brief, page 35. The majority opinion in *CLEAN* held that even if the legislative findings on their face are sparse, courts may take judicial notice of facts in the record which indicate why legislative action was taken. *Id.* at 809. Here, the trial court noted that the legislative body of Kitsap County was likely aware of the *Kitsap Rifle* ruling, a case to which it was a party, which put the County on notice of potential public safety risks related to local shooting facilities. The trial court did not step into the shoes of the county commissioners but rather interpreted their intent based upon the facts before them.

The Club also relies on *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 399 P.2d 8 (1965), a case regarding an inadvertent

legislative mistake where two different amendments to the minimum wage law were passed during the same session and cross references contained in those amendments changed the intended meaning of the amendments. *Id.* at 575. The facts in *Hagan* are distinguishable and, therefore, its holding is unpersuasive.

2. Trial Court Did Not Violate the Club's Procedural or Substantive Due Process

The Club suggests that the trial court violated the Club's due process by citing a published court of appeals decision, *Kitsap Rifle*, in its summary judgment memorandum opinion and order. CP 609-610. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). The Club had a full court process prior to summary judgment being entered. It was allowed to file briefings, conduct discovery, and otherwise present its case. The Club cannot show that its due process rights were violated by the trial court.

The Club also asserts that the trial court committed error by not analyzing Chapter 10.25 under an as-applied substantive due process test. However, the Club did not raise a due process argument during summary

judgment proceedings.¹⁷ The party raising a substantive due process challenge has the burden of proof. *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 659-660, 946 P.2d 768 (1997). Because it did not raise the issue, the Club could not have met its burden of proof.

The Court may only review constitutional issues first raised on appeal if they reflect a manifest error affecting a constitutional right and where there is a sufficient record. RAP 2.5(a); *In re Disability Proceeding Against Diamondstone*, 153 Wn.2d 430, 443, 105 P.3d 1 (2005). The Club must also show a “concrete detriment” to its constitutional rights “such that actual prejudice has resulted.” *Id.* To meet this test, the Club has to show that its claim would have succeeded below. *Id.* The Club has not and cannot meet this high burden.

H. The Trial Court Did Not Err in Summarizing Facts in Its Memorandum Opinion and Order

The Club assigns error to the factual statement in the trial court’s memorandum opinion which states that the Club is open to the public for certain instructional classes. The Club appears to take on the position that this factual summary has the same legal affect as a formal finding of fact and is reviewable under a finding of fact standard. In granting Kitsap County’s motion for summary judgment, the trial court did not enter any

¹⁷ The Club only raised a due process argument in its responsive briefing for the preliminary injunction. However, the Club did not appeal the preliminary injunction and it is not properly before this Court.

formal findings of fact. Not only is a memorandum opinion is not akin to a finding of fact, but the particular “finding” at issue appears to have no relevance to the trial court’s grant of summary judgment in this case. The Club’s appeal on this issue should be denied.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court’s grant of summary judgment declaratory relief.

VI. NOTIFICATION OF ADDITIONAL CASES

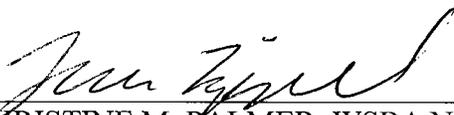
For informational purposes only, Kitsap County hereby notifies the Court of the existence of following additional cases between the parties:

COA Cause No.: 48781-1-II

COA Cause No.: 50011-6-II

Respectfully submitted this 31st day of March, 2017

TINA ROBINSON
Prosecuting Attorney


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CERTIFICATE OF SERVICE

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

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

Bruce Danielson
Danielson Law Office PS
1001 4th Ave Ste 3200
Seattle, WA 98154-1003

Via U.S. Mail; and
 Via Fax:
 Via Email:
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Dennis D. Reynolds
Dennis D Reynolds Law Office
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Bainbridge Island, WA 98110

Via U.S. Mail; and
 Via Fax:
 Via Email:
 Via Hand Delivery

SIGNED in Port Orchard, Washington this 31st day of March,
2017.



BATRICE FREDSTI, Legal Assistant
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KITSAP COUNTY PROSECUTOR
March 31, 2017 - 3:17 PM
Transmittal Letter

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Case Name: Kitsap County v. Kitsap Rifle and Revolver Club

Court of Appeals Case Number: 49130-3

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Personal Restraint Petition (PRP)

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Petition for Review (PRV)

Other: _____

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Response Brief of Respondent Kitsap County

Sender Name: Batrice K Fredsti - Email: bfredsti@co.kitsap.wa.us