

No. 50011-6-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Appellants,

and

IN THE MATTER OF NUISANCE AND UNPERMITTED
CONDITIONS LOCATED AT
One 72-acre parcel identified by Kitsap County Tax Parcel ID No.
362501-4-002-1006 with street address 4900 Seabeck Highway NW,
Bremerton Washington.

REPLY OF APPELLANT

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I. INTRODUCTION

In this appeal, Appellant Kitsap Rifle and Revolver Club (the “Club” or “KRRC”) petitions this Court to reverse the trial court’s *Order Granting Kitsap County’s Motion for Contempt with Findings of Fact and Conclusions of Law* dated December 2, 2016 (“Contempt Order”). The Club also requests that this Court (1) deny the County’s contempt motion that was the subject of the Contempt Order or (2) remand with an order for the trial court to deny the motion based on the undisputed facts in the record and the lack of substantial evidence of each essential element. Alternatively, the trial court should receive instructions to correctly apply the applicable laws so as to avoid repeating any of its errors on remand.

The first issue in this appeal is whether the trial court committed legal error by holding the Club in contempt without expressly finding that the Club had the ability to comply with both the Permitting Order of the Supplemental Judgment¹ and the purge condition of the Contempt Order.²

¹ On remand, the trial court issued an injunction as part of its *Order Supplementing Judgment on Remand* dated February 5, 2016 (hereafter, the “Supplemental Judgment”),

“requiring [the Club] to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment [i.e., the February 2012 trial decision]. Defendant’s application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.”

CP at 286 (hereafter “Permitting Order”).

² The purge condition states,

The controlling statute, RCW 7.21.030, and the applicable Washington case law required the trial court to make both of these findings before holding the Club in contempt, yet they are utterly absent from the Contempt Order. The trial court's failure to follow the law is a legal error and an abuse of discretion that requires reversal of the Contempt Order.

Because the uncontroverted evidence in the record unequivocally shows the Club was, at the time of the Contempt Order, unable to comply with the Permitting Order and purge condition, the trial court should also be instructed to deny the County's contempt motion. Alternatively, the trial court should receive appropriate instructions so that it does not repeat its legal errors on remand.

The second issue on appeal is whether the trial court erred in finding the Club's noncompliance with the Permitting Order was *intentional*, which is an essential element of contempt. The Club submitted an application for permitting to the County as required by the Permitting Order. The County deemed that application deficient in several respects and interpreted those deficiencies to constitute noncompliance with the Permitting Order. Even assuming those deficiencies existed and that they constituted

"The injunction will not be lifted until this Court so orders. When Defendant has obtained permitting, Defendant shall move for an order lifting the injunction."

CP at 414.

noncompliance, the record did not support the trial court's finding that the noncompliance was intentional. The record shows the Club wanted to comply with the Permitting Order and took substantial steps to do so but was unable because of its lack of financial means and the denial of coverage by its liability defense insurer. The record does not contain substantial evidence that the Club intended to disobey the Permitting Order and instead proves the opposite. Because the essential element of intent is lacking, the Club was not in contempt. The Contempt Order should be reversed and the contempt motion denied.

The third issue on appeal is whether the trial court misconstrued the Permitting Order to require the Club to submit a particular type of site development activity permit application containing none of the deficiencies alleged by the County. Washington law required the County and trial court to strictly construe the plain language of the Permitting Order in the Club's favor and prohibited the trial court from holding the Club in contempt unless the facts plainly showed a violation of the order. Under these standards, the trial court should have found that the Club was in compliance with the order because it had submitted a site development activity permitting application to the County. The trial court should have then held the Club was not in contempt. The trial court's error in finding noncompliance requires reversal of the Contempt Order.

The fourth issue on appeal is whether the trial court fashioned a remedial sanction that is impermissibly punitive because it fails to serve remedial ends and is not reasonably related to the cause or nature of the alleged noncompliance. This assignment of error assumes, for the sake of argument, that the trial court correctly held the Club in contempt. Even if that were the case, the trial court's decision to prohibit all firearm activities at the Club until it applies for *and obtains* site development activity permitting is impermissibly punitive and contrary to the remedial purpose for which the law authorizes contempt sanctions. To correct this legal error, the Contempt Order must be reversed with instructions for the trial court to refashion the contempt remedy.

II. ARGUMENT

A. The Challenges to Finding of Fact Four Are Perfectly Clear.

The County argues the Club's opening brief did not comply with RAP 10.3(g), thus rendering all of the trial court's findings of fact verities on appeal. Resp. at 17. The County alleges the Club failed to "identify any specific trial court findings or quote any of the trial court's findings verbatim." *Id.* The Club's opening brief, however, complies with RAP 10.3(g) and makes perfectly clear that it is challenging and assigning error to finding of fact (FOF) 4 in the Contempt Order.

RAP 10.3(g) provides that the Court will review a “claimed error” in a finding of fact if it is “included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” The cases cited by the County provide for review of a claimed error associated with a finding of fact if “briefing makes the nature of the challenge [to the finding of fact] perfectly clear.” Resp. at n.7 (citing *In re Disciplinary Proceeding Against Conteh*, 175 Wn.2d 134, 144, 284 P.3d 724 (2012) (quoting *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002))).

The Club’s first assignment of error relates to the trial court’s failure to make findings of fact regarding the Club’s ability to comply with the Permitting Order or purge condition. The Club’s fourth assignment of error challenges the contempt sanction as impermissibly punitive. Correcting these errors should not require the Court to reverse any findings of fact.

The Club’s second assignment of error is that “the trial court erred in finding the Club intentionally violated” the Contempt Order. Opening Br. at 5. The Club’s brief regarding this assignment of error cites the correct page in the record where the finding is found. *Id.* at 24 (citing CP at 412 (FOF 4)). It then argues the record lacks substantial evidence to support this finding. *Id.*

Similarly, the Club’s third assignment of error states the “trial court erred when it . . . found the Club had not complied with the order[.]”

Opening Br. at 5. This clearly referenced the trial court's finding that there was a "failure to comply" with the Permitting Order. CP at 412 (FOF 4). The brief argues this was error because "the Club submitted a site development activity permitting application as the order plainly required." Opening Br. at 31.

The Club's opening brief clearly assigned error to the trial court's findings of intentionality and failure to comply with the Permitting Order, which both appear in FOF 4. The brief also makes the nature of these assignments of error perfectly clear. The Court must reverse these findings because they are not supported by the evidence in the record.

B. The Trial Court Erred in Issuing the Contempt Order Without a Finding That the Club Had the Ability to Perform the Permitting Order or Purge Condition.

The County argues the Contempt Order's omission of a finding that the Club had the ability to perform the Permitting Order or purge condition is not an abuse of discretion because Washington law does not require those findings. Resp. at 18, 22. Yet the County provides no authority or argument that would excuse the trial court from the limit of contempt authority plainly expressed in RCW 7.21.030(2). That subsection provides that a trial court can hold a party in contempt "[i]f the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform." This subsection creates a condition precedent to a trial court's

decision to hold a party in contempt. If the law were to affirm a contempt order that did not include the finding required by RCW 7.21.030(2), it would deprive the statute of all meaning.

RCW 7.21.030(2) does not say a trial court can hold a party in contempt if that party fails to prove it lacked the ability to comply. It says a trial court can hold a party in contempt “[i]f the court finds that the person has failed or refused to perform an act that is yet within the person’s power to perform.” This statute obligates the trial court to make a finding that it failed to make before holding the Club in contempt. This was a legal error that requires reversal of the Contempt Order.

Contrary to the County’s arguments, this conclusion is consistent with *Britannia Holdings Ltd. v. Greer*. 127 Wn. App. 926, 933–34, 113 P.3d 1041 (2005). There, the court of appeals reversed a contempt order for failure to comply with RCW 7.21.030 because it lacked an express finding that the party held in contempt had the ability to comply with the underlying order. *Id.*

RCW 7.21.030(2) and *Britannia* are not at odds with *Moreman v. Butcher*, 126 Wn.2d 36, 891 P.2d 725 (1995). There, the Supreme Court did not analyze this particular issue, which shows the parties did not raise it. Presumably it was not an issue because the “trial court noted in its findings” that the non-movant had provided only inconsistent and incredible

statements in an attempt to prove he was unable to comply. In that case the moving party also testified that the non-movant said “he still had the cabinets and he was not going to give them back[,]” which was evidence that the non-movant had the ability to comply but was choosing not to. *Id.* at 41.

Unlike *Moreman*, there is no finding in this case that the Club’s evidence of its inability to comply was inconsistent or incredible. The evidence was that the Club did not have the funds or insurance coverage it needed to pay the \$158,000 its consultants had budgeted to successfully complete the permitting application. That evidence was credible and consistent with other evidence in the record, and there is no finding in the Contempt Order saying otherwise. Unlike *Moreman*, there is also no evidence in this case that the Club ever admitted it had the ability to comply with the Permitting Order.

The County argues adherence to *Britannia* would “nullify the legal presumption that all parties have the ability to comply with court orders.” Resp. at 22. RCW 7.21.030(2) and *Britannia*, however, do not nullify any legal presumption, which might be relevant in deciding whether a finding of ability to comply was properly made in a particular case. A presumption is merely a starting point. If a non-movant presents evidence to rebut that presumption and preserves the argument that the trial court must make an

express finding of inability to comply, the omission of any such finding in a contempt order is a reversible legal error.

The County argues *State v. Hobble* requires only a “bare minimum” of the trial court’s compliance with the contempt statutes. 126 Wn.2d 283, 892 P.2d 85 (1995). There, the non-movant argued the trial court failed to comply with RCW 7.21.050(1), which requires the judge to “certif[y] that he or she saw or heard the contempt . . . and recite the facts” in the contempt order. *Id.* at 295. The contempt order expressly stated that the contemnor “fail[ed] to respond to questions propounded during trial in this cause.” *Id.* The “only reasonable construction of this language” was that the judge saw or heard the contempt. *Id.* There is no equivalent finding here that could only be reasonably construed to find that the Club had the ability to comply with the Permitting Order or purge condition. There are no findings whatsoever related to the Club’s ability to comply.

When a trial court issues an order based on an “erroneous view of the law” or “an incorrect legal analysis,” the order necessarily constitutes an abuse of discretion that must be reversed. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007); *In re Marriage of James*, 79 Wn. App. 436, 440–41, 903 P.2d 470 (1995). The Contempt Order is based on the trial court’s incorrect legal analysis or erroneous view that the law did not require the court to expressly find that the Club lacked the ability to

comply with the Permitting Order before holding the Club in contempt. The trial court abused its discretion when it issued the Contempt Order without the required finding. The Contempt Order must be reversed.

For similar reasons, the purge condition is contrary to law and must be reversed. In *Brittania*, the appellate court reversed a contempt order because the trial court “made no finding that the [defendants] had the present ability to pay the purge amount.” 127 Wn. App. at 928. Here, the Contempt Order did not find that the Club had the present ability to purge the contempt sanction by applying for and obtaining the required permits. Therefore, the purge condition is erroneous and must be reversed.

C. There Is No Substantial Evidence in the Record to Support a Finding That the Club Had the Ability to Comply.

In addition to reversing the Contempt Order, this Court should order the trial court to deny the County’s motion for contempt. The record contains substantial evidence of the Club’s inability to comply with the Permitting Order and purge condition and absolutely no evidence that the Club had the ability to comply. It would have been error for the trial court to find, on this record, that the Club had the ability to comply. The County provided no evidence to support such a finding so its motion must be denied.

A contempt order is an abuse of discretion if it is “manifestly unreasonable, based on untenable grounds, or based on untenable reasons.”

Moreman, 126 Wn.2d at 40; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A contempt order is based on untenable grounds when the record does not contain the substantial evidence required to support it. *In re Marriage of James*, 79 Wn. App. at 440–41. A contempt order will be reversed on appeal if it is not supported by substantial evidence in the record. *In re of Rapid Settlements, Ltd's* (“*Rapid Settlements*”), 189 Wn. App. 584, 601, 359 P.3d 823 (2015).

Here, the law required the trial court to find the Club had the ability to comply with the Permitting Order and purge condition before issuing the Contempt Order. The County had every opportunity to present evidence that the Club had that ability. The County failed to admit any evidence into the record that would support such a finding. There is no point, therefore, in remanding the case with instructions for the trial court to make a finding as to whether the Club did or did not have the ability to comply with the Permitting Order and purge condition. For the trial court to find, on this record, that the Club had that ability would be an abuse of discretion. The only sound and lawful outcome is for the County’s motion to be denied.

The County argues the trial court implicitly determined that the Club’s evidence of its inability to comply lacked credibility. Resp. at 29. Thus, the County is arguing for an implied finding of ability to comply based on an implied finding that the Club’s evidence of its inability to

comply lacked credibility, even though there is no evidence in the record that the Club had the ability to comply. The County offers no authority to support such a tortured interpretation of the record. It also fails to cite to any evidence in the record from which it could be concluded that the Club's evidence of its inability to comply lacked credibility.

The declaration testimony of the Club's Executive Officer that the Club lacked the \$158,000 requested by its consultant for the permitting work is credible under the circumstances, which include the undisputed facts that the Club is a nonprofit without an endowment and has been dragged through multiple lawsuits by the County dating back to September 2010. The Club's evidence that its insurer denied coverage for the cost of the permitting work is also credible and clearly documented in the record by undisputed evidence, including the coverage denial letter itself. CP at 287–301. The Club's evidence that it lacked the ability to comply with the Permitting Order and purge condition is perfectly credible.

At the hearing, the Club's attorney offered to call the Club's Executive Officer to testify if there were some question of fact raised by his declaration, which would have included a question about its credibility. RP at 12:8–12. The trial court did not allow that testimony, which can only mean she did not consider a credibility determination necessary or appropriate in deciding the County's motion. This makes perfect sense

given that the County had not submitted any evidence to controvert the testimony that the Club was unable to pay for the permitting work.

What lacks credibility is the County's unsupported suggestion that the Club did have the \$158,000 it needed to hire its consultants to perform the permitting work. It would also strain credulity to conclude the Club had the ability to comply with the Permitting Order and purge condition but chose instead to be shut down and held in contempt. There is no evidence the Club had any motive or reason to do that.

The County cites two inapposite cases in which trial courts made express findings from which other findings could be inferred. In *Rapid Settlements*, the trial court's implied finding of intentionality was "unquestionably" supported by the record and could be inferred by "[a]ll of [the contemnors'] acts and omissions identified by the contempt order as violations." 189 Wn. App. at 602, 605. Thus, the implied finding of intent was supported by substantial evidence. *Id.* at 604–05. There is no substantial evidence in this case to support an implied finding that the Club had the ability to comply or that the Club's evidence lacked credibility.

Moreover, *Rapid Settlements* emphasized that "[n]othing in chapter 7.21 RCW requires that the court make a written finding of intentional conduct." *Id.* at 605 (emphasis in original). In contrast, RCW 7.21.030(2) expressly requires the trial court to find the non-movant had the ability to

comply. That condition precedent cannot be satisfied by implied findings or substantial evidence in the record. Even if it could be satisfied by substantial evidence in the record, there is no such evidence here.

In the absence of substantial evidence to support a finding that the Club had the ability to perform the Permitting Order and purge condition, the law requires denial of the County's motion for contempt. Alternatively, the Court should reverse and remand with instructions for the trial court to make express findings as to whether the Club had the ability to comply with the Permitting Order and purge condition.

D. The County's Argument That the Club Made "Minimal Effort to Comply" Is Inaccurate and Irrelevant.

The County argues the Contempt Order was "appropriate" and should be affirmed because the Club "made minimal effort to comply with the Supplemental Judgment." Resp. at 25. The trial court did not make this finding, nor could it have because the record contains unrebutted evidence that the Club made substantial efforts to comply with the Permitting Order. Those efforts included obtaining a detailed scope of work from its consultants at a cost of over \$8,000; multiple communications with its insurer requesting coverage for that scope of work; and, when that coverage was denied, preparing and submitting a permitting application to the County that the County nevertheless deemed deficient. CP at 217, 218, 221-37,

287–99, 330–31, 400–04. These efforts were not minimal; they were substantial.

Moreover, the argument that the Club made minimal efforts to comply is irrelevant and does not address the applicable legal standard, which is whether the Club had the ability to fully comply with both the Permitting Order and purge condition. If the County had found one or two minor deficiencies with the Club’s permitting application that the Club had the ability to correct, it would have. Instead, the County found numerous deficiencies that support the Club’s position that it will require the assistance of professional consultants and engineers performing work estimated to cost around \$158,000 in order to comply with the Permitting Order and an additional \$398,939 to comply with the purge condition. CP at 235 (scope of work). There is no evidence suggesting these estimate were incorrect or that the Club could come into compliance through some modest additional effort within its means.

E. There Is No Substantial Evidence That the Club’s Permitting Deficiencies Were Intentional.

The Club assigns error to the trial court’s findings that the Club intentionally disobeyed the Permitting Order. CP at 412 (FOF 4). There is no substantial evidence in the record to support this finding, which must be reversed. Without a finding of intentional disobedience, there is no basis to

hold the Club in contempt, providing additional grounds to reverse the Contempt Order.

Washington defines “contempt of court” to mean “intentional . . . disobedience” of a court order. RCW 7.21.010. Unintentional disobedience is not contemptuous.

In *Dept. of Ecology v. Tiger Oil Corp.*, a consent decree provided that “the Best Available Control Technology . . . shall be used” in the cleanup of a contaminated site. 166 Wn. App. 720, 765, 271 P.3d 331 (2012). The responsible party made no attempt to use that technology and argued it was not required by the consent decree. *Id.* There was no dispute about whether the responsible party had the ability to implement the best available control technology. The party had deliberately failed to perform an action within its means that was expressly required by the consent decree. Its disobedience was intentional. *Id.* at 772.

Here, the Club does not dispute that the Supplemental Judgment required it to submit a permitting application to the County. The Club made substantial efforts to comply with that order, but the County deemed those efforts deficient and the trial court found they were not in compliance. There is no evidence that the Club had the power to address all of the deficiencies identified by the County or that the Club deliberately failed to do so. The evidence shows that the Club would have addressed those

deficiencies by hiring its consultants to perform the work if it could have. There is no substantial evidence to support the trial court's finding that the Club's noncompliance with the Permitting Order was intentional.

The County relies on two cases (*Koome* and *Smaladino*, discussed below), in which a party took action prohibited by a court order after receiving actual or constructive knowledge of the prohibition. Resp. at 31. There was no question that the party in each case could have complied with the order simply by not taking action. In both cases, the party's disobedience was correctly deemed intentional and contemptuous. That is not the fact pattern here. Not taking action is almost always an option available to a party. Spending \$158,000 on permitting work was not an option available to the Club.

In re Koome ("Koome") involved a stay order that prohibited a physician from performing an abortion on a juvenile. 82 Wn.2d 816, 820–21, 514 P.2d 520 (1973). The trial court found the physician learned about the stay order through three telephone conversations with the attorneys representing the juvenile. *Id.* His subsequent performance of the abortion constituted intentional disobedience of the order. *Id.* There was no question that he could have complied with the order simply by not performing the abortion so he was properly held in contempt.

Similarly, *In re Estates of Smaldino* (“*Smaldino*”) involved a temporary restraining order (TRO) that prohibited an attorney from taking a property interest in his client’s property. 151 Wn. App. 356, 361, 212 P.3d 579 (2009). The attorney elected not to read the TRO, and then recorded a deed of trust on his client’s property. *Id.* When charged with contempt, he pleaded ignorance. *Id.* at 364–65. The court held he had imputed or constructive knowledge of the contents of the TRO pursuant to CR 65(d) because he had received actual notice of the TRO itself. *Id.* at 365. There was no question that he could have complied with the TRO simply by not doing what it prohibited. The trial court properly held the attorney in contempt. *See also, Rapid Settlements*, 189 Wn. App. at 600 (affirming contempt where attorneys violated an order they knew about that prohibited them from taking further action in a lawsuit).

Unlike *Koome* and *Smaldino*, this is not a case where the Club contends it lacked actual knowledge of an order it violated; nor is this a case where the Club took action prohibited by a court order. This is a case where the Club tried to perform an affirmative injunction but lacked the means to do so to the County’s satisfaction. This is not a case of intentional disobedience because any disobedience was unintentional, undesired, and in spite of the Club’s efforts to comply. In the absence of substantial evidence supporting the trial court’s finding that the Club intentionally

disobeyed the Permitting Order, that finding and the Contempt Order must be reversed. Correcting this error also requires this Court to deny the County's motion or instruct the trial court to do so because there is no substantial evidence from which intentional disobedience could be found.

F. There Was No Disobedience Because the Club Complied With the Plain Meaning of the Permitting Order, Which Must Be Construed in the Club's Favor.

The Club assigns error to the trial court's conclusion that the Club disobeyed the Permitting Order. CP at 412 (FOF 4). The record shows that the Club submitted a permitting application as required by the order, but the County rejected it as deficient. The Contempt Order found the application was "incomplete" (CP at 412 (FOF 3)), but the Permitting Order did not require the Club to submit a "complete" application, nor did it require the Club to submit an application that had none of the deficiencies identified by the County. The order only required the Club to submit a permitting application, which it did. Thus, the trial court's finding that the Club disobeyed the Permitting Order (FOF 4) was in error. That finding must be reversed. Without that finding or substantial evidence that the Club disobeyed the Permitting Order, the entire Contempt Order must be reversed and the County's motion must be denied.

For a contempt order to be affirmed, there must be substantial evidence in the record on which to find a plain violation of a court order.

See Tiger Oil, 166 Wn. App. at 768–69. Here, the County argues the Permitting Order’s requirement that the Club submit a permitting application is not ambiguous and is susceptible only to the County’s interpretation. Resp. at 34–35. The Permitting Order, however, is susceptible to more than one interpretation because an order for a party to “submit” a permitting application does not necessarily mean the application must be complete or without any deficiencies.

If the Club had failed to deliver any permitting application to the County, there would have been a plain violation of the Permitting Order. That is not what happened. The Club undisputedly delivered its permitting application to the County prior to the hearing at which the trial court issued the Contempt Order. The Club’s 29-page application consisted of a *Project Application* (four pages), *Supplemental Application* (two pages), *Construction Stormwater Pollution Prevention Plan* (four pages), *Notice of Decision* (one page), and *Site Plan* (seventeen pages). CP at 345–73. The Club prepared the application using the forms and instructions provided on the County’s website. CP at 330–31.

The Permitting Order required the Club to “submit” a site development permitting application. CP at 286. The Supplemental Judgment provides no definition of the term “submit” that would alter its plain meaning. *Id.* The plain meaning of “submit” is “to present or propose

to another for review, consideration, or decision.”³ The record shows the Club delivered its application to the County. CP at 330 (testimony regarding delivery of application to County). The County does not allege that it failed to receive or consider the application, but explains that it decided to reject the application for a variety of reasons. *Id.* at 400–04. Nevertheless, the submission occurred. The Club complied with the plain meaning of the Permitting Order, and there is no substantial evidence in the record contradicting that conclusion.

In *Tiger Oil*, the court of appeals reversed one of the trial court’s findings of contempt because the non-movant did not violate the plain terms of the court order. 166 Wn. App. at 771. The order required the party to install a particular remediation system at a contaminated site. *Id.* at 769. The party installed the system but did not operate it. *Id.* The trial court found the party’s failure to operate the system was in contempt of court. *Id.* On appeal, the court of appeals strictly construed the order in the party’s favor and concluded there was no “*plain violation*” of the order. *Id.* at 771 (emphasis in original). The order required installation, not operation of the system. *Id.* at 769. Because the non-movant did not plainly violate the order, the finding of contempt was reversed. *Id.* 770–71.

³ *Merriam-Webster Online* at <https://www.merriam-webster.com/dictionary/submit> (last visited April 13, 2017).

This case is very similar to *Tiger Oil*. Like the non-movant in *Tiger Oil*, the Club was under an order to take a particular action and did so. The trial court found disobedience with an interpretation of an order that deviated from the plain language of the order. The evidence shows the Club had complied with the plain language of the order. As in *Tiger Oil*, the finding of disobedience was in error. The contempt order must be reversed, and the County's motion should be denied or the trial court should be instructed to deny it.

G. The Contempt Sanction and Purge Condition Are Impermissibly Punitive and Not Remedial.

The Contempt Order effectively shuts the Club down until it applies for and obtains site development activity permitting. CP at 413. In Section B above, the Club explained that the purge condition is erroneous because there was no finding that the Club had the ability to comply with it. In addition, the purge condition and contempt sanction must be reversed because they are impermissibly punitive

The County argues the contempt sanction is remedial and not impermissibly punitive because it is imposed for an indeterminate amount of time and it contains a purge condition. Resp. at 42. The punitive nature of the sanction, however, is evident in the fact that satisfying the purge condition would require the Club to do more than correct the noncompliance

(failure to submit a complete permitting application) for which it was held in contempt. Likewise, there is no reasonable relationship between the Club's failure to submit a complete permitting application and the sanction of prohibiting all discharge of firearms at the Club.

The County argues the test articulated in *M.B.* applies only to purge conditions that require more than what was originally ordered. Resp. at 44 (citing *In re M.B.* ("*M.B.*"), 101 Wn. App. 425, 3 P.3d 780 (2000)). The Permitting Order required the Club to apply for and obtain permitting, argues the County, so the purge condition can require the same. The rule from *M.B.*, however, is not so limited.

To be coercive and not impermissibly punitive, a contempt sanction and purge condition must meet three requirements:

“First, it must be designed to serve remedial aims; that is, it must be directed at obtaining future compliance. Second, the condition must be within the power of the [contemnor] to fulfill. Third, the condition must be reasonably related to the cause or nature of the [contemnor's] contempt.”

M.B., 101 Wn. App. at 450. The County's argument is that the sanction and purge condition are directed at obtaining future compliance with the Permitting Order so they satisfy the first requirement of *M.B.* Failure to meet *any* of these three requirements, however, means a contempt remedy is impermissibly punitive. *See id.* at 448–50.

Here, the Club showed it lacked the power to address all of the deficiencies identified by the County related to the Club's application because the Club lacked the means of hiring its consultants to perform the \$158,000 worth of work this would require. The Club's consultants estimated it would cost an additional \$398,939 to satisfy all anticipated permitting conditions. CP at 235. The Club lacked the means of paying for this work so the purge condition violates the second requirement of *M.B.*

The sanction and purge condition also violate the third requirement of *M.B.* The Club was held in contempt for filing an incomplete permitting application that the County found deficient. The Permitting Order related to certain improvements at the Club — berms, backstops, cleared and graded areas, and culverts — that required development permits. An appropriate remedial sanction might have been to prohibit the Club from using those improvements until it had applied for the necessary permitting. The sanction in the Contempt Order goes well beyond that and punishes the Club by prohibiting all discharge of firearms at the Club's entire 72-acre property. The purge condition itself is also punitive. It requires the Club to do more than cure the permitting deficiencies for which it was held in contempt because it also requires the Club to obtain the necessary permits before the sanction will lift.

Trial courts must apply “great restraint” to any exercise of contempt power. *M.B.*, 101 Wn.App. at 439. The sanction and purge condition ordered by the trial court here do not show that restraint, but instead exhibit unbridled hostility and a will to punish the Club for its infraction. The sanction and purge condition are impermissibly punitive and an abuse of the trial court’s discretion that must be reversed even if all other aspects of the Contempt Order are affirmed. If this Court reverses the Contempt Order on some other grounds, it should also instruct the trial court on this issue so that it will not repeat the error on remand or in response to some future motion by the County.

III. CONCLUSION

For the foregoing reasons, the Contempt Order should be reversed and the trial court should be instructed to deny the County’s contempt motion. Alternatively, the Contempt Order should be reversed and the case

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should be remanded with clear instructions to the trial court regarding the applicable legal standards discussed above.

DATED: June 21, 2017

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CERTIFICATE OF SERVICE

I, Skylar Washabaugh, 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 Oregon, over the age of eighteen years, not a party to or interested in the above-titled action, and competent to be a witness herein.

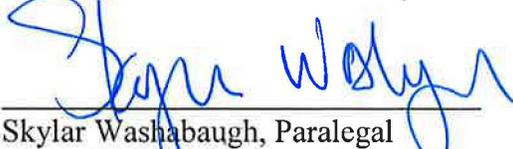
On the date given below, a copy of REPLY OF APPELLANT was served upon the following individuals by via email, pursuant to an e-service agreement between the parties, to the following:

Christine M. Palmer
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I filed the REPLY OF APPELLANT electronically with the Court of Appeals, Division II, through the Court's online e-filing system.

DATED: June 21, 2017

CHENOWETH LAW GROUP, PC



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