

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,

vs.

KITSAP RIFLE AND REVOLVER CLUB, et al.

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

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR PIERCE COUNTY

---

RESPONSE BRIEF OF APPELLEE/RESPONDENT KITSAP COUNTY

---

TINA ROBINSON  
Prosecuting Attorney

CHRISTINE M. PALMER, WSBA NO. 42560  
LAURA F. ZIPPEL, WSBA NO. 47978  
Deputy Prosecuting Attorneys  
614 Division Street, MS 35A  
Port Orchard, WA 98366  
(360) 337-4992

TABLE OF CONTENTS

I. INTRODUCTION .....1

II. COUNTERSTATEMENT OF THE ISSUES.....4

III. NOTICE OF RELATED CASES .....5

IV. STATEMENT OF THE CASE.....5

    A. The Club’s Unpermitted Site Development Activities.....5

    B. The Club’s Unpermitted Site Development Activity  
        Is Affirmed Unlawful.....7

    C. The Trial Court’s Order On Remand Required The Club  
        to Submit Permit Application By August 3, 2016.....8

        1. Trial Court’s Supplemental Order .....11

    D. The Club’s Minimal Efforts to Comply With  
        Supplemental Judgment Before the 180 Day Deadline....12

    E. Kitsap County’s Motion For Contempt Sanctions.....13

    F. The Club’s Minimal Efforts To Comply During The  
        Three Month Continuance.....13

    G. Payment of Application Fee Is Basic Submittal  
        Requirement.....15

    H. The Trial Court’s Order For Contempt Sanction.....16

V. ARGUMENT .....17

    A. The Club’s Attempted Challenges to Findings of Fact  
        Fail Because They Do Not Comply With RAP 10.3(g)...17

    B. The Trial Court Did Not Abuse Its Discretion in Holding  
        the Club in Contempt And Entering An Injunction As A

Remedial Contempt Sanction Because The Club Failed to Establish It Lacked The Ability to Comply And Failed To Make A Meaningful Attempt To Do So (Assignment of Error No. 1).....18

1. The Club Failed To Meet Its Burden of Proof.....18
  - a. The Club Failed to Present Sufficient Credible Evidence Regarding Inability to Comply.....19
  - b. The Britannia Case Is Distinguishable And Does Not Govern This Matter.....21
2. The Trial Court Had Proper Basis To Find Contempt And Issue Contempt Sanctions.....23
  - a. Discretionary Standard For Determining Whether Contempt Is Appropriate.....23
  - b. Record Supports Contempt Where The Trial Court Was Unsatisfied By Minimal Effort to Comply...24
  - c. This Case is Distinguishable from Cases Cited By the Club.....26
3. Washington Law Does Not Require Formal Finding As to A Party’s Ability To Comply .....28
  - a. Washington Courts Uphold Contempt Sanctions Despite Lack of Formal Findings.....28
  - b. Finding of Ability to Comply Is Implicit In Court’s Finding of Contempt.....29

C. The Trial Court Did Not Err In Finding the Club Intentionally Violated the Trial Court’s Order Because The Club Knowingly Violated the Order Despite Its Claimed Subjective Desire to Comply (Assignment of Error No. 2).....30

D. The Trial Court Did Not Err When It Found the Club in Contempt of the Supplemental Judgment Because The Club Failed to Submit Permitting Application As Required By the Supplemental Judgment (Assignment of Error No. 3).....33

1. When The Permitting Injunction Is Read As A Whole, It Plainly Requires The Club To Submit An Application That Complies With Kitsap County Code.....	34
2. The Club’s Interpretation of the Injunction Ignores the Purpose And Context of the Litigation.....	35
3. The Club’s Attempted Application Does Not Comply With the Code’s Permit Submission Requirements.	36
a. The Club Had Notice As To What A Permit Application Would Require.....	37
b. The Club Did Not “Submit” a Permit Application In Compliance with Kitsap County Code .....	38
4. The Club’s Interpretation of the Supplemental Judgment Leads to an Absurd Result .....	39
5. A Potential Warrant of Abatement Remedy Is Immaterial to a Contempt Finding .....	40
E. The Trial Court Did Not Err in Using its Discretion to Craft a Contempt Sanction Designed to Coerce Compliance With the Supplemental Judgment.....	40
1. The Sanction Is Properly Coercive .....	42
2. The Purge Condition Is Properly Coercive and Meets the Standard Set Forth In In re M.B. ....	44
VI. CONCLUSION.....	47

## TABLE OF AUTHORITIES

### CASES

<i>Britannia Holdings Ltd. v. Greer</i> , 127 Wn. App. 926, 113 P.3d 1041 (2005).....	21, 22, 23
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	17
<i>Daughtry v. Jet Aeration Co.</i> , 91 Wn.2d 704, 592 P.2d 631 (1979) .....	17
<i>Graves v. Duerden</i> , 51 Wn. App. 642, 754 P.2d 1027 (1988);.....	33
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 172 P.3d 688, 695 (2007).....	30
<i>In re Dependency of A.K.</i> , 162 Wn.2d 632, 174 P.3d 11 (2007) .....	41
<i>In re Disciplinary Proceeding Against Conteh</i> , 175 Wn.2d 134, 284 P.3d 724 (2012).....	17
<i>In re Estates of Smaldino</i> , 151 Wn. App. 356, 212 P.3d 579 (2009)..	31, 41
<i>In re Koome</i> , 82 Wn.2d 816, 514 P.2d 520 (1973).....	31
<i>In re M.B.</i> , 101 Wn. App. 425, 3 P.3d 780 (2000).....	44, 45
<i>In re Marriage of Eklund</i> , 143 Wn. App. 207, 212, 177 P.3d 189, 192 (2008).....	20
<i>In re Marriage of Rideout</i> , 150 Wn. 2d 337, 77 P.3d 1174 (2003) .....	20
<i>In re Mowery</i> , 141 Wn. App. 263, 169 P.3d 835 (2007) .....	41
<i>In re of Rapid Settlements, Ltd's</i> , 189 Wn. App. 584, 359 P.3d 823 (2015).....	28, 29
<i>In re the Interest of J.L.</i> , 140 Wn. App. 438, 166 P.3d 776 (2007) ....	26, 27
<i>In re the Interest of N.M.</i> , 102 Wn. App. 537, 7 P.3d 878, 882 (2000).....	26, 27
<i>In State v. Hobble</i> , 126 Wn.2d 283, 892 P.2d 85, (1995).....	28
<i>Johnston v. Beneficial Mgt. Corp. of Am.</i> , 96 Wn.2d 708, 638 P.2d 1201 (1982).....	33, 35
<i>JZK, Inc. v. Coverdale</i> , 192 Wn. App. 1022 (2016).....	32, 33
<i>King v. Dep't of Soc. &amp; Health Servs.</i> , 110 Wn.2d 793, 756 P.2d 1303 (1988).....	19, 24, 29, 41
<i>Kitsap County v. Kitsap Rifle &amp; Revolver Club</i> , 184 Wn. App. 252, 337 P.3d 328 (2014)) .....	1, 7, 8
<i>Moreman v. Butcher</i> , 126 Wn.2d 36, 891 P.2d 725 (1995)...	19, 20, 21, 22, 41
<i>Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n</i> , 173 Wn. App. 778, 295 P.3d 314, 320 (Div. 2, 2013) .....	17

<i>Ortega v. Nw. Tr. Servs., Inc.</i> , 179 Wn. App. 1033 (2014) .....	23
<i>R/L Assocs., Inc. v. City of Seattle</i> , 113 Wn.2d 402, 780 P.2d 838 (1989).....	33
<i>Rainier Nat. Bank v. McCracken</i> , 26 Wn. App. 498, 615 P.2d 469 (1980).....	1
<i>Rhinevault v. Rhinevault</i> , 91 Wn. App. 688, 959 P.2d 687 (1998).....	42, 43
<i>State v. Berty</i> , 136 Wn. App. 74, 147 P.3d 1004 (2006).....	18, 33
<i>State v. Boatman</i> , 104 Wn.2d 44, 700 P.2d 1152 (1985).....	18, 23
<i>State v. Neeley</i> , 113 Wn.App. 100, 52 P.3d 539 (2002) .....	17
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012).....	30
<i>State, Dep't of Ecology v. Tiger Oil Corp.</i> , 166 Wn. App. 720, 271 P.3d 331, 354 (2012).....	32
<i>Stella Sales, Inc. v. Johnson</i> , 97 Wn. App. 11, 985 P.2d 391, 398 (1999) .....	18, 23
<i>Weiss v. Lonquist</i> , 173 Wn. App. 344, 293 P.3d 1264 (2013).....	29
<i>Yamaha Motor Corp., U. S. A. v. Harris</i> , 29 Wn. App. 859, 631 P.2d 423 (1981).....	41

## **STATUTES**

Revised Code of Washington 7.21.....	31
Revised Code of Washington 7.21.010.....	40, 41
Revised Code of Washington 7.21.010(1)(b) .....	23
Revised Code of Washington 7.21.010(b).....	31
Revised Code of Washington 7.21.030.....	42
Revised Code of Washington 7.21.030(2).....	24
Revised Code of Washington 7.21.110(3).....	41

## **OTHER AUTHORITIES**

Kitsap County Code 12.10.050(2) .....	38
Kitsap County Code 17.530.030.....	7
Kitsap County Code 21.04.020.....	38
Kitsap County Code 21.04.030(B)(2).....	38, 39
Kitsap County Code 21.04.050.....	46
Kitsap County Code 21.04.100.....	45
Kitsap County Code 21.04.120.....	37
Kitsap County Code 21.04.150.....	39
Kitsap County Code 21.04.160(A) .....	39
Kitsap County Code 21.04.160(B).....	39

Kitsap County Code 21.04.160(B)(5).....	39
Kitsap County Code 21.10.010.....	15, 38
Kitsap County Code Chapter 21.04 .....	38, 39
Kitsap County Code Title 12 .....	11, 34, 35, 38, 44
Kitsap County Code Title 19 .....	11, 34, 35, 38, 44
Kitsap County Code Title 21 .....	37

**RULES**

General Rules 14.1.....	23, 32
Rules of Appellate Procedure 9.2(f)(2).....	9
Rules of Appellate Procedure 1.2(a).....	17
Rules of Appellate Procedure 10.3(g).....	17

## I. INTRODUCTION

One of the foundations on which this nation is built is that no person is above the law. *Rainier Nat. Bank v. McCracken*, 26 Wn. App. 498, 516, 615 P.2d 469 (1980).

The Kitsap Rifle and Revolver Club (“the Club”) spent over a decade engaging in unlawful site development work on its Property. It clear-cut 2.85 acres of trees. It cut steep slopes into hill sides. It disregarded wetlands. It excavated and graded a significant amount of soil to create several new shooting bays. Contrary to Kitsap County Code (“Code”), it did not apply for a single permit.

After more than six years of litigation (including an appeal which resulted in this Court’s opinion in *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014)), the trial court ordered the Club to apply for site development activity permit to cure its numerous permitting violations, and to do so within 180 days. The Club disregarded this order. The Club allowed the 180-day deadline to pass without requesting an extension or making any meaningful effort towards compliance. As a result, the trial court entered a remedial contempt sanction prohibiting the Club from operating a shooting facility until it brings its Property into compliance with the court’s order and the Kitsap

County Code.

The Club challenges the contempt order on many bases, however, the issue at the heart of this appeal is whether a party who violates a court's judgment can avoid contempt sanctions by merely asserting it lacks the ability to do so without making a meaningful effort to comply. The answer is "no."

Washington law presumes that all parties possess the ability to comply with a court order and places the burden on the violating party to establish that it lacks the ability to do so. The Club asserts that it cannot comply with the trial court's orders due to financial reasons. During the trial court proceedings, however, the Club failed to meet its burden on this affirmative defense for two reasons: (1) it failed to provide any documentation of its current resources or financial status and (2) it made no showing of a meaningful effort to obtain funds and instead relied exclusively on the fact that its insurer has denied coverage.

The record shows that the Club made minimal efforts to comply with the trial court's order. When its insurance company denied coverage for the costs associated with preparing and submitting a permit application, the Club made no attempt to obtain the funds on its own accord and failed to provide sufficient evidence regarding its financial status, resources, liabilities, or assets.

After the trial court granted a 90-day continuance of the hearing on Kitsap County's motion for contempt, the Club attempted to submit a permit application which fell far below submittal requirements. The Club's application was rejected by Kitsap County because the Club intentionally failed to pay the required application fee. The Club's conduct during contempt proceedings clearly communicated that it would make no serious attempt to comply with the court order or to cure its unlawful conduct so long as its insurer denied coverage.

In issuing a contempt order, the trial court acknowledged the unfortunate reality of the situation before it. If the Club were allowed to continue to operate as if it were not in contempt, it would continue to reap the benefit of its unlawful site development activities. There would be no incentive for the Club to comply and its compliance would indefinitely hinge upon a coverage decision made by a third party. The insurer's denial of coverage would become an indefinite crutch.

The Club claims its noncompliance should be excused because compliance will require the expenditure of a significant amount of funds. This is precisely why the trial court's contempt sanction should be affirmed. If the Club's noncompliance is excused based upon an unsupported claim that it lacks the ability to comply, there would be no incentive for the Club to acquire the means to comply. This would create a

reality in which noncompliance without consequences is far more attractive than the burdens of having to comply. In this reality, noncompliance would likely continue indefinitely, especially where the determination of whether the Club has the “ability” to comply relies exclusively on the Club’s subjective opinions on the matter (a “fox guarding the hen house” scenario).

For these reasons, the trial court’s contempt order is a necessary coercion. It incentivizes compliance and creates accountability where none would otherwise exist. The trial court properly exercised its discretion and its contempt order should be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Did the trial court abuse its discretion in issuing a remedial contempt sanction when the Club failed to meet its burden of proof in establishing that it lacked the ability to comply with the trial court’s order and when the Club has made no meaningful effort to comply?

2. Did the trial court err in finding that the Club’s violation of the trial court’s order was intentional when the Club had knowledge of the order and its requirements?

3. Did the trial court improperly hold that the Club violated the trial court order when the Club’s attempted permit application did not meet the mandatory submittal requirements governed by the Kitsap

County Code?

4. Did the trial court abuse its discretion in crafting a remedial contempt sanction that restores the status quo and prohibits the Club from reaping the benefits of its unlawful conduct until it complies with Kitsap County Code?

### **III. NOTICE OF RELATED CASES**

For informational purposes only, Kitsap County hereby notified the Court of the existence of the following additional cases between the parties which are currently on appeal before this Court:

COA Cause No: 48781-1-II (appeal of judgment entered during remand proceedings in Pierce County Superior Court Cause No. 10-2-12913-3); and

COA Cause No.: 49130-3-II (appeal of declaratory judgment entered in Kitsap County Superior Court Cause No. 15-2-00626-8).

### **IV. STATEMENT OF THE CASE**

#### **A. The Club's Unpermitted Site Development Activities**

The Kitsap Rifle and Revolver Club (“the Club”) is a Washington non-profit corporation that engages in shooting range activities. CP 244 (Finding of Fact (“FOF”) 6). The Club’s Property consists of 72 acres, including eight acres of active use with the remaining acreage consisting of timberlands and wetlands CP 244-45 (FOF 8). The wetlands on the

Property are connected to a larger system of wetlands and have high ecological value. CP 258 (FOF 60).

Prior to 1993, the Club's Property consisted of one rifle range and one pistol range. CP 249 (FOF 29). From approximately 1996 forward, the Club began developing portions of its property by clearing, grading, and excavating wooded or semi-wooded areas to create several new "shooting bays." CP 250 (Conclusion of Law ("COL") 33). By 2007, the Club had also extended its rifle range by clearing, grading, and excavating into a hillside. CP 251 (COL 33). By 2010, the Club had created eleven new shooting bays on its Property. CP 250 (COL 33); CP 251 (COL 33); CP 251 (COL 33).

In addition to the creation of several new bays, the Club also engaged in clearing and large scale earthwork over a span of 2.85 acres to create a new proposed 300-meter range. CP 253 (FOF 41). The Club also installed a pair of 475-foot long 24-inch diameter culverts to redirect the flow and drainage of storm water on the property. CP 256 (FOF 54). The Club's development work also encroached a protected wetland buffer on the Property. CP 251 (FOF 62 and 64).

The Club did not apply for any site development activity permits. CP 250 (FOF 32); CP 255 (FOF 51); CP 257 (FOF 56).

**B. The Club's Unpermitted Site Development Activity Is Affirmed Unlawful**

In 2012, the Pierce County Superior Court ruled that the Club's unpermitted site development activities were unlawful and contrary to Kitsap County Code. CP 271 (COL 27-31). This ruling was made following a lengthy bench trial in 2011, which resulted in the entry of findings of fact, conclusions of law and final orders on February 9, 2012.<sup>1</sup> CP 242-276.

In 2014, the Court of Appeals affirmed that the Club's unpermitted development work was unlawful.<sup>2</sup> *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 337 P.3d 328 (2014). In its opinion, the Court of Appeals stated as follows:

The Club does not deny that it violated certain Code provisions for unpermitted work, nor does it claim that it ordinarily would not be subject to the permitting requirements, [...] KCC 17.530.030 states that any use in violation of Code provisions is unlawful. Accordingly, there is no dispute that the Club's unpermitted development work on the property constituted unlawful uses.

---

<sup>1</sup> The trial court also ruled that the Club's Property constituted a public safety and noise nuisance and that the Club had expanded beyond its nonconforming use. These issues are unrelated to the pending appeal and, therefore, are not discussed in this brief.

<sup>2</sup> The court of appeals also made several rulings regarding the issues of the Club's public nuisance conditions and unlawfully expanded uses. Again, these issues are unrelated to the present appeal and are not discussed in this brief.

*Kitsap Rifle*, 184 Wn. App. at 275 (internal citations omitted). The case was remanded back to the trial court to fashion an appropriate remedy for the Club's permitting violations.

**C. The Trial Court's Order On Remand Required The Club to Submit Permit Application By August 3, 2016**

During remand proceedings, each party submitted a proposed remedy to address the Club's violations. CP 944-1008 (2016)<sup>3</sup> (County's proposed remedy); CP 912-937 (2016) (Club's proposed remedy).

The Club agreed that the appropriate remedy would be for it to submit after-the-fact site development activity permits in compliance with Kitsap County Code. CP 924-927 (2016). In preparing its proposed remedy, the Club consulted with Jeremy Downs, a "Principal Scientist and Environmental Planner" with Soundview Consultants, Inc. who was retained by the Club to address the Club's permitting needs. CP 938-940 (2016). Mr. Downs estimated that 270 days would be a reasonable amount of time for the Club to prepare and apply for the required permits. CP 939 (2016). This estimated timeframe took into account the need for "numerous site assessments, scheduling of contractors, preapplication meetings, coordination and communication with Kitsap County officials,

---

<sup>3</sup> To distinguish citations to the Clerks Papers regarding the remand proceedings (which are the subject of COA Cause No. 48781-1-II), from the Clerks Papers regarding the contempt proceedings, the Clerks Papers regarding the remand proceeding are identified by the year "2016" in parenthesis.

and the internal drafting and review by all interested parties.” CP 926 (2016).

Kitsap County’s proposed remedy included a proposed injunction prohibiting the Club from using its Property (other than its traditional pistol and rifle ranges) until it submitted a site development activity permit. CP 963-964 (2016). The County’s proposed remedy attempted to identify the numerous site development and environmental issues that the Club would have to address in its application (including a geo-technical report, a hydro-geological study, a drainage analysis, etc.). CP 964 (2016).

The Club objected to the County’s proposed remedy, specifically taking issue to the fact that the County’s proposed order set forth the “specific terms of the permit application.” CP 1042 (2016). The Club stated that the Kitsap County Code provides the appropriate remedies for the Club’s permitting violations. CP 1041 (2016).

The parties’ proposed remedies were discussed during a hearing on December 11, 2015 in which the trial court rendered its oral ruling. RP (December 11, 2015), 29-36.<sup>4</sup> During that hearing, the trial court clearly established that the trial court’s order was not meant to supplant the Kitsap

---

<sup>4</sup> It appears that the verbatim report of the remand proceedings and the contempt proceedings are not numbered pursuant to the procedure set forth in RAP 9.2(f)(2). For consistency and clarity, Kitsap County will reference the verbatim report of proceedings for both the contempt proceedings and the remand proceedings by indicating the date of the proceeding being cited.

County Code requirements or permit process, and the Club expressly agreed. Id. Relevant excerpts from the verbatim report of proceedings are as follows:

THE COURT: Permitting violations are controlled by the Kitsap County Code [...] and therefore any remedies must come from the code provisions themselves.” RP (December 11, 2015), 14.

[...]

Mr. FOSTER: Your Honor [...] quoted a specific section that I thought was also right on point, where the Court said **the remedy for that is based on the code. It's basically common compliance with the code.** And it didn't say you need to fashion the terms of the permit application, so I completely agree with you there. Id. at 29.

[...]

MR. FOSTER: As long as the specific violations identified by this Court are the subject of that permit application, that remedy should be satisfied.” Id. at 31.

[...]

THE COURT: I found a violation, the County can look at what those violations are and then if they can be remedied with permits in hindsight then so be it. [...] But I don't think I sit in the position of being the permitting authority.” Id. at 32.

[...]

MR. FOSTER: You know, we don't need to rewrite the code for permitting, okay, we just need to

send everybody into that code, right? You just send us into that –

THE COURT: That's what I'm hoping.

MR. FOSTER: I completely agree with that approach. Id. at 35.

### **1. Trial Court's Supplemental Order**

On February 5, 2016, the trial court issued an Order Supplementing Judgment On Remand (“Supplemental Judgment”) (referred to as “Permitting Order” in the Club’s appellate brief). CP 283-286. Counsel for both parties were present at the hearing where the Supplemental Judgment was entered. CP 185 (¶3).

The Supplemental Judgment states, in pertinent part, as follows:

A permanent, mandatory injunction is hereby issued further requiring Defendant 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. Defendant’s application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.

CP 286.

The 180-day deadline for KRRC to apply for permitting was August 3, 2016. CP 186 (¶4).

The Club appealed the Supplemental Judgment and obtained a stay of certain portions of its orders. CP 193-194. The Club did not obtain a

stay regarding the requirement to submit site development activity permitting within 180 days.<sup>5</sup>

**D. The Club's Minimal Efforts to Comply With Supplemental Judgment Before the 180 Day Deadline**

The Club's efforts to comply with the 180-day deadline were minimal. The Club obtained a "scope of work" from Soundview Consultants, Inc. CP 217 (¶4). The Club's attorneys forwarded the scope of work to its liability insurer, requesting that it provide insurance coverage for the costs of preparing a permit and performing remedial development work. CP 218 (¶5). The Club claimed vaguely that it was making efforts to comply but never described what those efforts were. CP 218 (¶8).

When the insurer denied coverage, the Club's attorneys spent over 40 attorney hours addressing the coverage issues. CP 241 (¶8). The Club did not communicate with Kitsap County's Department of Community Development ("DCD") regarding a permit application. CP 195 (¶4). The Club did not request an extension from the trial court. RP (August 26, 2016), 4. The Club failed to submit an application with the 180-day deadline. CP 195 (¶4).

---

<sup>5</sup> The Club's appeal of the Supplemental Judgment does not challenge or assign error to the requirement that it apply for and obtain site development activity permitting.

**E. Kitsap County's Motion For Contempt Sanctions**

Kitsap County filed a Motion for Contempt on August 18, 2016. CP 170. The Club prepared a response brief which was filed with the trial court on August 24, 2016. CP 201-213. In its brief, the Club asserted that it lacked the ability to comply with the Supplemental Judgment because its insurer was refusing to provide coverage. CP 201-213.

The Club submitted a declaration from its Executive Officer, Marcus Carter. CP 216-220. Mr. Carter testified to the Club's limited end-of-month operating account balances. CP 217 (§5). Mr. Carter provided no documentary evidence regarding the Club's financial status, its liabilities and assets, or its funds and resources. CP 216-220.

At the August 26, 2016 hearing on the County's motion, the trial ordered that the matter be continued until December 2, 2016. CP 319-320. The trial court ordered the parties to submit written status reports with the Court seven days prior to the new hearing. CP 320.

**F. The Club's Minimal Efforts To Comply During The Three Month Continuance**

During the three-month continuance, the Club's counsel sent the County's counsel a letter asking for a meeting to discuss the scope of work for the permitting application. CP 332. The Club's counsel also asked the County to participate in mediation. CP 333.

On September 14, 2016, the County declined the request for mediation and outlined the Club's three different options for meeting with DCD staff and the costs associated with each option (which ranged from \$130 to \$2,340). CP 334-335.

On November 25, 2016, the Club's counsel asked the County to reconsider its position regarding mediation and declined all three meeting options. CP 336. On November 28, 2016, the Club asked its insurer to reconsider its position of no coverage. CP 339-344.

On November 28, 2016, the County's counsel responded to the Club's November 25, 2016 letter and explained why DCD's fees could not be waived. CP 394-395.

On November 28, 2016, just four days before the December 2, 2016 hearing, Mr. Carter visited the DCD office and attempted to submit an application for a site development activity permit. CP 400. Mr. Carter did not submit payment for the required filing fee. CP 400 (¶3). DCD's Deputy Director, Jeffrey Rowe, informed Mr. Carter that DCD could not accept a permit application without payment of the required fee because fees are "part of a complete application submittal." CP 400-401. The application form the Club attempted to submit included a "Submittal Checklist" which clearly stated that "fees are due at the time of submittal." CP 345. DCD did not accept the application. CP 401 (¶4). Mr. Carter took

the application and left. CP 401 (¶4).

Mr. Rowe later had an opportunity to review the Club's attempted permit application during contempt proceedings. CP 401 (¶6). Mr. Rowe determined that the Club's attempted application did not meet the submittal requirements and that DCD would have been unable to accept the application even if the Club had paid the fee. CP 401 (¶6). Most critically, the Club had submitted the wrong permit application (the Club attempted to submit an SDAP-Grading 1 permit instead of the SDAP-Grading 3 permit that applied to its major development work) and failed to submit any required technical reports. CP 402 (¶8); CP 403 (¶10). The Club had been informed of the requirement for multiple technical reports in November of 2015. CP 402-403 (¶9).

**G. Payment of Application Fee Is Basic Submittal Requirement**

The Kitsap County Code provides that “[a]ll applications for permits or actions by the county shall be accompanied by a filing fee in an amount established by county resolution.” Kitsap County Code (“KCC”) §21.10.010.<sup>6</sup> DCD does not waive fees for any applicant (including internal Kitsap County agencies or divisions, churches, non-profit organizations, or indigent individuals). CP 404. Doing so would result in an unlawful gift of public funds. CP 404.

---

<sup>6</sup> The code is available online at <http://www.codepublishing.com/WA/KitsapCounty>.

The fees required for an SDAP-Grading 3 permit application total \$3,612.80. CP 404 (¶14); CP 407. The fees required for the SDAP-Grading 1 permit application that the Club attempted to submit total \$1,512. CP 407.

**H. The Trial Court's Order For Contempt Sanction**

The parties appeared before the trial court on December 2, 2016 on Kitsap County's Motion for Contempt. Once again, the Club argued that it didn't have access to the professional and engineering services or funds to cover the costs necessary to submit a permitting application. RP (December 2, 2016), 11. The Club's assertion was based solely on Mr. Carter's self-serving declaration testimony regarding the Club's typical end of month account balances for the year 2016. Id. at 12. The Club provided no documentary evidence regarding its financial status or resources. The Club did not describe any effort it made to obtain funds during the three-month extension. The record contains no evidence that the Club attempted any fundraising efforts or applied for any loans or lines of credit.

The trial court granted Kitsap County's motion and entered a contempt order on December 2, 2016. CP 418-423. In rendering its ruling, the trial court specifically noted that the appellate court had affirmed the Club's development activities were unlawful two years earlier and that the

Club had been on notice it would have to bring its Property into compliance. RP (December 2, 2016), 18.

## V. ARGUMENT

### A. The Club's Attempted Challenges to Findings of Fact Fail Because They Do Not Comply With RAP 10.3(g)

The Club has failed to properly assign error to any of the trial court's findings of fact and, as a result, these findings of fact are verities on appeal. RAP 10.3(g) requires an appellant to include a separate assignment of error for each challenged finding of fact with reference to the finding by number.<sup>7</sup> The Club's appellate brief identifies four assignments of error. See pages 4-5 of the Club's appellate brief. None of the Club's assignments of error identify any specific trial court findings or quote any of the trial court's findings verbatim. As the Club has failed to properly challenge any finding of fact, the trial court's findings are verities on appeal.<sup>8</sup>

---

<sup>7</sup> See *In re Disciplinary Proceeding Against Conteh*, 175 Wn.2d 134, 144, 284 P.3d 724 (2012) (citing *State v. Neeley*, 113 Wn.App. 100, 105, 52 P.3d 539 (2002)) (Appellate court may waive RAP 10.3(g) violation if "briefing makes the nature of the challenge perfectly clear, particularly where the challenged finding can be found in the text of the brief.") (citing *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10, 592 P.2d 631 (1979)); RAP 1.2(a)).

<sup>8</sup> *Northwest Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n*, 173 Wn. App. 778, 295 P.3d 314, 320 (Div. 2, 2013), citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

**B. The Trial Court Did Not Abuse Its Discretion in Holding the Club in Contempt And Entering An Injunction As A Remedial Contempt Sanction Because The Club Failed to Establish It Lacked The Ability to Comply And Failed To Make A Meaningful Attempt To Do So (Assignment of Error No. 1)**

A finding of contempt and contempt sanctions are reviewed for abuse of discretion and should not be disturbed unless they are manifestly unreasonable or based on untenable grounds. *State v. Berty*, 136 Wn. App. 74, 83, 147 P.3d 1004 (2006). To succeed on appeal and overturn the trial court's ruling, the Club must show that there is no proper basis for the trial court's contempt finding. *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 20, 985 P.2d 391, 398 (1999) quoting *State v. Boatman*, 104 Wn.2d 44, 46, 700 P.2d 1152 (1985).

The trial court did not abuse its discretion in entering an injunction as a remedial contempt sanction for the Club's violations of the Supplemental Judgment because (1) the Club failed to meet its burden of proof regarding its affirmative defense that it lacked the ability to comply with the trial court's order, (2) there is a proper basis for the trial court's injunction sanction where the record reveals that the Club has made minimal effort to comply, and (3) formal findings regarding the Club's ability are not required under Washington law.

**1. The Club Failed To Meet Its Burden of Proof**

The Club asserts that the trial court committed legal error and

failed to apply the correct legal analysis when it issued a contempt sanction without first making a finding as to the Club's ability to comply. The Club's argument fails because the ability to comply with a court order is a legal presumption and the inability to comply is an affirmative defense that must be proven by the Club.

*a. The Club Failed to Present Sufficient Credible Evidence Regarding Inability to Comply*

The Washington State Supreme Court has definitively held that the party claiming inability to comply with a court order carries the burden of proof on that issue. *Moreman v. Butcher*, 126 Wn.2d 36, 891 P.2d 725 (1995); *King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988). Specifically, in the "context of civil contempt, the law presumes that one is capable of performing those actions required by the court ... [and the] inability to comply is an affirmative defense." *Moreman*, 126 Wn.2d at 40 (quoting *King Health Servs.*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988)).

At a contempt hearing, the party claiming inability to comply has both the burden of persuasion and the burden of proof on that issue. *Id.* To meet this burden, the contemnor must "offer evidence as to his inability to comply and the evidence must be of a kind the court finds credible." *Moreman*, 126 Wn.2d at 41, quoting *King v. Dep't of Soc. & Health*

*Servs.*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1988). The trial court's credibility determinations, even of written declarations, are not reviewed on appeal. *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189, 192 (2008) (citing *In re Marriage of Rideout*, 150 Wn. 2d 337, 352, 77 P.3d 1174 (2003)).

In the present case, the Club failed to meet its burdens of persuasion and proof. In support of its claim that it lacks the ability to pay the costs associated with submitting a permit application, the Club offered only the unsupported, self-serving statements of its Executive Officer, Marcus Carter. The Club provided no documentary evidence relevant to its defense. The Club provided no documents to describe its financial status, did not disclose any financial resources, tax documentation, asset and liability reports, or otherwise describe its sources of funding. The Club never submitted any evidence or testimony that it tried to obtain funds or resources from any other source besides its liability insurance. The Club merely asked the trial court to take it at its word that it lacked the resources and ability to prepare and submit a permit application.

The Club attempts to distinguish this case from the *Moreman* case when the two cases are similar. The Club's evidence regarding its claimed inability to comply is no greater than the evidence presented and rejected by the trial court in *Moreman*. The contemnor in *Moreman* was ordered to

return cabinets to another party. When an insurance adjuster went to view the cabinets and did not find them, the contemnor stated that he had removed them just before the adjuster's visit. *Moreman*, 126 Wn.2d at 41. A month later, the contemnor alleged for the first time that the cabinets were stolen and that he was therefore unable to comply with the court order. *Id.* The trial court did not find the contemnor's story credible and found him in contempt. *Id.* The Washington State Supreme court agreed that the contemnor had failed to meet his burdens of proof and persuasion. *Id.* at 40-41.

In the present case, the trial court was similarly unsatisfied with the Club's "inability to comply" defense. Just as the contemnor in *Moreman* offered only unsupported and self-serving testimony to support his claim that the cabinets were stolen, the Club has offered nothing more than unsupported, self-serving testimony to support its claim that it lacks the ability to comply despite the fact it had two years to prepare. The trial court properly rejected the Club's argument because the Club failed to meet its burdens of proof and persuasion.

*b. The Britannia Case Is Distinguishable And Does Not Govern This Matter*

The Club relies upon *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 113 P.3d 1041 (2005) for its argument that the trial court must

make a specific finding regarding the contemnor's ability to comply. Strangely, the court of appeals in *Britannia* references the Washington Supreme Court's holding in *Moreman* (which clearly delineates that the law presumes one has the ability to comply and puts the burden on the contemnor to establish otherwise), but then abruptly departs from the precedential Washington Supreme Court holding by requiring the ability to comply be expressly established before a party can be found in contempt. *Britannia*, 127 Wn. App. at 934. Kitsap County was unable to find a Washington Supreme Court case adopting this ruling.

*Britannia* is inconsistent with *Moreman*, has undesirable policy implications, and should not be applied in this case. Requiring a trial court to make an express finding as to a contemnor's ability to comply before contempt sanctions may be imposed would nullify the legal presumption that all parties have the ability to comply with court orders. It would also improperly shift the burden of proof regarding a party's abilities to the party least likely to have access to relevant information. In practice, no party could seek to enforce a court order unless he or she could first provide evidence regarding the violating party's resources and financial status. As a result, a violating party could easily escape contempt by asserting (without offering any supporting evidence) that he or she lacked the funds or resources to comply. The holding in *Britannia*, strips a trial

court from enforcing its own orders whenever the moving party lacks access to the violating party's financial records. It places a nearly insurmountable burden on the shoulders of the party seeking to enforce a valid court order. This shifting of burdens is especially problematic where the opposing party is unlikely to be cooperative in providing access to critical information and who, by past conduct, has already shown difficulty or unwillingness to comply with court orders.

Washington Courts since *Britannia*, have not held parties to this standard, especially where the contempt sanction imposed by the trial court was not incarceration. *See e.g., Ortega v. Nw. Tr. Servs., Inc.*, 179 Wn. App. 1033 (2014).<sup>9</sup> This Court should do the same.

## **2. The Trial Court Had Proper Basis To Find Contempt And Issue Contempt Sanctions**

A contempt finding will be affirmed on appeal “as long as a proper basis can be found.” *Stella Sales, Inc. v. Johnson*, 97 Wn. App. 11, 20, 985 P.2d 391, 398 (1999) (citing *State v. Boatman*, 104 Wn.2d 44, 46, 700 P.2d 1152 (1985)).

### *a. Discretionary Standard For Determining Whether Contempt Is Appropriate*

The trial court has discretion in entering a finding of contempt. RCW 7.21.010(1)(b) defines contempt as an intentional “[d]isobedience of

---

<sup>9</sup> Unpublished cases filed after March 1, 2013 may be cited as nonbinding authority pursuant to GR 14.1.

any lawful judgment, decree, order, or process of the court.” RCW 7.21.030(2) allows a trial court to impose remedial contempt sanctions if an contemnor fails or refuses to perform an act that is within their power to perform.

When finding contempt and issuing sanctions, the trial court has great latitude and discretion to consider the specific circumstances of the case and the significance of the ends to be achieved. *King v. Dep't of Soc. & Health Servs.*, 110 Wn. 2d 793, 804-05, 756 P.2d 1303 (1988). In determining whether a contempt sanction is appropriate and whether it will have a coercive effect, the trial court is not bound by the “words and conduct” of the contemnor nor is the trial court bound by the “avowed intention” of the contemnor. *King*, 110 Wn.2d at 804. This level of discretion should equally apply to a trial court’s finding of contempt.

*b. Record Supports Contempt Where The Trial Court Was Unsatisfied By Minimal Effort to Comply*

The trial court’s contempt finding should be affirmed where the record shows that the Club made no meaningful attempt to comply with the court’s order despite its unsupported assertion that it lacked the ability to do so. In its appellate brief, the Club focuses disproportionately on whether the trial court expressly and formally found the Club had the ability to comply with the Supplemental Judgment without considering the

trial court's broad authority and discretion in crafting contempt sanctions as coercive tools to encourage compliance and without addressing the trial court's displeasure with the Club's level of effort.

In the present case, the trial court's determination of contempt by the Club is appropriate and supported by the record. Effort, and lack thereof, on the Club's part was determinative to the trial court's decision. The record reveals the Club has made minimal effort to comply with the Supplemental Judgment. Prior to the 180-day deadline, the Club's efforts to comply were limited to the work of its attorneys in trying to obtain insurance coverage. The Club allowed the deadline to lapse without requesting an extension from the trial court.

After the deadline passed, and the trial court granted the Club an extension, the Club attempted to submit an incomplete application without paying the required application fee. The Club presented no evidence that it had made any attempt to obtain the additional funds it claims was needed to complete a permit application. When the Club's insurer denied coverage, the Club determined it was excused from compliance. It did not attempt to fundraise, apply for grants, apply for loans or a line of credit.

Without a contempt sanction hanging over the Club's head, it would have no incentive to bring its Property into compliance in the future. This is especially true where, as the Club asserts, curing its

unlawful development will require some effort and money. In this case, if the Club is allowed to operate as if it were not in contempt and to continue to benefit from its unlawful development, it will have no incentive to change its behavior. If the courts can be satisfied with an unsupported assertion regarding the Club's inability to comply, the Club could simply continue to assert this defense rather than obtain additional funds.

The Club's efforts to comply did not satisfy the trial court. The trial court was similarly unsatisfied allowing the Club to continue to benefit from its unlawful development without creating an incentive. Accordingly, the trial court found the Club in contempt, an act that was well within its discretion.

*c. This Case is Distinguishable from Cases Cited By the Club*

In challenging the trial court's contempt order, the Club cites to two juvenile disciplinary matters in which contempt sanctions were ultimately vacated: *In re the Interest of J.L.*, 140 Wn. App. 438, 166 P.3d 776 (2007) and *In re the Interest of N.M.*, 102 Wn. App. 537, 545, 7 P.3d 878, 882 (2000). These cases are easily distinguishable.

The cases of *In re J.L.* and *In re N.M.* are juvenile court cases involving truancy of students where the contempt sanctions involved incarceration. The contempt sanction in *In re J.L.* was problematic

because it involved a “determinative sentence” that could be suspended on conditions and was thus a “criminal sentence.” *In re J.L.*, 140 Wn. App. at 446. The contempt sanction in *In re N.M.* was problematic because the trial court improperly “stacked” or aggregated multiple contempt sanctions in excess of the seven day incarceration maximum. *In re N.M.*, 102 Wn. App. at 543-535.

These cases, like numerous other cases which address civil contempt sanctions, are easily distinguishable by their facts. Unlike the contemnors in *In re J.L.* and *In re N.M.* who faced incarceration, the sanction in this case merely restores the status quo by prohibiting the Club from reaping the benefits of its unlawful site development until it brings its Property into compliance with Kitsap County Code.

The contempt sanction in the present case involves the application and enforcement of the Kitsap County Code and has a much broader impact than a typical contempt sanction case. The trial court’s contempt sanctions in the present case were specifically designed to address the unique and troubling situation of an organization that continues to benefit from its unlawful development activity and where it has a greater incentive to avoid compliance. Furthermore, ruling in favor of the Club on this appeal will, in essence, establish a new defense to violations of county code regulations on the basis of lack of financial resources or claimed

indigence.

### **3. Washington Law Does Not Require Formal Finding As to A Party's Ability To Comply**

To the extent the Club challenges the trial court's contempt order on the lack of any formal findings of fact regarding the Club's ability to comply, the Club's argument fails. Washington law does not require a formal finding on this issue. Washington law only requires specific written findings when the statute "says so." *In re of Rapid Settlements, Ltd's*, 189 Wn. App. 584, 605, 359 P.3d 823 (2015). Not including a specific formal finding does not create a presumption that the trial court did not "understand" Washington law or "disregard" it.

#### *a. Washington Courts Uphold Contempt Sanctions Despite Lack of Formal Findings*

Washington Courts uphold contempt sanctions orders even in the absence of formal findings of fact to support the sanctions. In *State v. Hobble*, 126 Wn.2d 283, 892 P.2d 85, (1995), the Washington Supreme Court devised a "bare minimum" standard with regard to findings for a contempt sanction against a criminal defendant. The Supreme Court upheld the contempt sanctions, holding that a contempt order is proper so long as it contains the "bare minimum" statement of fact describing the contemptuous conduct at issue. *Hobble*, 126 Wn.2d at 295.

Similarly, in civil cases, Washington Courts do not require every

element to be set-forth in formal findings. *See e.g., Weiss v. Lonquist*, 173 Wn. App. 344, 363-364, 293 P.3d 1264 (2013) (Upholding a contempt sanction with no formal findings of fact); *King*, 110 Wn.2d at 802 (lack of formal finding that no reasonable or effective alternative to incarceration is available is not required so long as it was demonstrated in the record); *In re of Rapid Settlements, Ltd's*, 189 Wn. App. at 605 (no formal finding of intentionality required).

Washington law establishes that detailed factual findings as to every element of a contempt order are not required. There is no presumption that the trial court misapplied the law due to the lack of a formal finding. To the contrary, a contempt order should be affirmed so long as the contemptuous conduct is sufficiently described. The Permitting Order far exceeds this standard.

*b. Finding of Ability to Comply Is Implicit In Court's Finding of Contempt*

Even though there is no express finding that the Club had the ability to comply with the Supplemental Judgment, such a finding is implicit in the Court's determination. Implicit findings can be identified through express findings and express rulings. *See In re of Rapid Settlements, Ltd's*, 189 Wn. App. at 605 (finding of contempt reflects implicit finding that acts and omissions were intentional.); *State v.*

*Sisouvanh*, 175 Wn.2d 607, 618, 290 P.3d 942 (2012) (finding regarding sufficiency of a competency expert's evaluation was implicit in trial court's rejection of motion to disqualify competency expert).

The trial court held "KRRC is in contempt of court." COL 5. In rendering its ruling, the trial court expressly rejected the Club's attempted defense that it lacked the ability to comply with the Supplemental Judgment, making an implicit finding. The record supports the trial court's implicit finding that the Club failed to meet its burden in establishing its affirmative defense that it lacked the ability to comply. The record confirms a sufficient basis for the trial court's finding of contempt.

C. **The Trial Court Did Not Err In Finding the Club Intentionally Violated the Trial Court's Order Because The Club Knowingly Violated the Order Despite Its Claimed Subjective Desire to Comply (Assignment of Error No. 2)**

A trial court's finding of fact will be upheld on appeal if supported by substantial evidence in the record. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 352-53, 172 P.3d 688, 695 (2007). There is substantial evidence to support a finding of fact when "there is sufficient evidence in the record "to persuade a rational, fair-minded person of the truth of the finding." *Id.* (internal quotations omitted).

The trial court did not err in finding that the Club intentionally violated the Supplemental Judgment because the record provides

substantial evidence that the Club knowingly violated the order despite its alleged subjective desire not to do so. The Club's argument that its violation was not intentional because it wanted to comply fails because it is based upon an incorrect understanding of the term "intentional" as applied to contempt proceedings under RCW 7.21 *et. seq.*

RCW 7.21.010(b) defines contempt of court as "intentional" "disobedience of any lawful judgment, decree, or order, or process of the court." In determining whether a party's conduct is "intentional" in the context of contempt proceedings, Washington courts consider whether the party's noncompliant conduct was performed knowingly. *In re Estates of Smaldino*, 151 Wn. App. 356, 365, 212 P.3d 579 (2009) (a contemnor must have either actual or reasonably imputed knowledge of the existence and effect of a court order to act intentionally); *In re Koome*, 82 Wn.2d 816, 821, 514 P.2d 520 (1973) (holding that a party's violation was intentional where he "had adequate notice of the entry of the stay order and was fully cognizant of the legal consequences of that order."). So long as a party's conduct was performed knowingly, then all "natural and probable consequences" flowing from such conduct is held to be "intended" by the party. *Smaldino*, 151 Wn. App. at 364.

The Club's intentional disobedience is overwhelmingly supported by substantial evidence. The Club, and its attorneys, had actual knowledge

of the Supplemental Judgment and never denied that they understood its requirements. The Club does not deny that it was aware of the court-ordered 180-day deadline. The record reveals that, despite its knowledge, the Club failed to make any meaningful effort to comply with the Supplemental Judgment.

The Club's conduct is easily contrasted with cases illustrating unintentional disobedience. Washington courts have held that a party did not act intentionally when the court order was ambiguous, or where it was addressed to a third party. *State, Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 769, 271 P.3d 331, 354 (2012) (violation of order was not intentional where the order was ambiguous with respect whether the order's requirement applied to the party in violation); *JZK, Inc. v. Coverdale*, 192 Wn. App. 1022 (2016)<sup>10</sup> (a party's violation of a writ was unintentional because the writ was addressed at a third person and because the party did not understand its legal effect as applied to her). These cases reveal that a violation of a court order is intentional so long as the violating party had notice of the order and its legal implications. The Club's disobedience cannot be excused simply because the Club claims it wanted to comply.

---

<sup>10</sup> Unpublished cases filed after March 1, 2013 may be cited as nonbinding authority pursuant to GR 14.1.

**D. The Trial Court Did Not Err When It Found the Club in Contempt of the Supplemental Judgment Because The Club Failed to Submit Permitting Application As Required By the Supplemental Judgment (Assignment of Error No. 3).**

The trial court's determination of whether a party has violated a court order will not be overturned except for abuse of discretion. *State v. Berty*, 136 Wn. App. 74, 83, 147 P.3d 1004 (2006). In a contempt proceeding based upon the violation of a court order, the order will be enforced according to the plain meaning of its terms when read "in light of the issues and purposes for which the suit was brought." *Graves v. Duerden*, 51 Wn. App. 642, 648–49, 754 P.2d 1027 (1988); *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 410, 780 P.2d 838 (1989) (citing *Johnston v. Beneficial Mgt. Corp. of Am.*, 96 Wn.2d 708, 712–13, 638 P.2d 1201 (1982)); *Coverdale*, 192 Wn. App. 1022 (2016).

The Club argues that it did not violate the Supplemental Judgment because it complied with the order's plain and literal meaning when it handed DCD staff an incomplete application for the wrong type of permit while also failing to pay the required permit application fee. The Club's proposed interpretation of the "plain meaning" of the Supplemental Judgment fails because it focuses solely on one provision within the Supplemental Judgment while ignoring the language immediately

preceding, it ignores the context of the litigation between the parties, and would allow for an absurd result. While true that an ambiguous order should be construed in favor of the contemnor, doing so does not require the Court to stray from the plain meaning of an order solely to allow a contemnor to avoid contempt.

**1. When The Permitting Injunction Is Read As A Whole, It Plainly Requires The Club To Submit An Application That Complies With Kitsap County Code**

The portion of the Supplemental Judgment particularly relevant to this appeal states as follows:

A permanent, mandatory injunction is hereby issued further requiring Defendant 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. Defendant's application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.

CP 286.

In its proposed construction of the trial court's order, the Club focuses exclusively on the second sentence while ignoring the first sentence. The first sentence is critical in that it describes the permitting that the Club must apply for and obtain, and thus provides important context to any rational understanding of the second sentence. The first sentence clearly orders 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.” The second sentence provides a timeline within which the Club must submit the permitting application discussed in the first sentence.

When the entire injunction is read together, its unambiguous language does not allow the Club to submit just any application in accordance with its own discretion. Instead the Club must submit an application for permitting which complies with Kitsap County Code and which will cure the violations of Kitsap County Code Titles 12 and 19 that have been clearly delineated in the trial court’s original 2012 judgment. For this reason, the term “submit” cannot be defined in accordance with the non-specific definition contained in a dictionary. It must be defined and read in the context of Kitsap County’s provisions governing permitting submissions.

**2. The Club’s Interpretation of the Injunction Ignores the Purpose And Context of the Litigation**

The trial court’s order must be read “in light of the issues and purposes for which the suit was brought.” *Johnston*, 96 Wn.2d at 713. The Club’s proposed interpretation of the order ignores the purpose of the County’s lawsuit against the Club and disregards the entire context of the litigation.

The County's lawsuit against the Club is an enforcement action seeking to remedy the Club's numerous violations of the Kitsap County Code. The purpose of the trial court's Supplemental Judgment was to craft an appropriate remedy for the Club's code violations. In issuing the Supplemental Judgment, the trial court made it very clear that the Code governed the remedy. RP (December 11, 2015), 14. The Club agreed with this and conceded that the trial court's order did not need to "rewrite the code for permitting." Id. at 36.

In this appellate proceeding, the Club argues that it complied with the Supplemental Judgment when it attempted to submit a permit application that does not comply with Kitsap County's permit submission requirements (discussed further below). In light of the purpose and context of this litigation, this is an unreasonable interpretation. This interpretation defeats the entire purpose of the County's enforcement lawsuit and allows the Club to submit an application that violates the Code as a remedy to cure its code violations.

### **3. The Club's Attempted Application Does Not Comply With the Code's Permit Submission Requirements.**

Because a reasonable interpretation of the injunction requires the term "submit" to be understood within the context of the Code's permit submission provisions, the Club's attempt to submit an incomplete permit

application fails and does not comply with the injunction.

*a. The Club Had Notice As To What A Permit Application Would Require*

The Club had notice that a permit application requires the payment of application fees. The Code clearly delineates permit application requirements and standards that bind both applicants and DCD. As discussed in more detail below, Title 21 provides the procedural requirements for permit applications including timing of review, what constitutes a submittal, the payment of fees, etc. The Code is available online for free.<sup>11</sup>

Kitsap County also provides checklists and brochures to applicants to help ensure that applicants submit complete applications which meet the Code standards. The Club included one of these checklists in its attempted application. CP 345-346. A review of the checklist would have made it reasonably clear to the Club that its attempted application was incomplete. *Id.* The Club had the option of a consultation with DCD staff to address permitting questions and issues. KCC §21.04.120. This consultation was expressly offered to the Club. CP 333-335. The Club declined. CP 336.

The Club also had adequate notice of what that permitting would

---

<sup>11</sup> The code is available at <http://www.codepublishing.com/WA/KitsapCounty>.

entail beyond what was stated in the Code or the permit checklists. The Club obtained a detailed scope of work after discussions with its own consultant. Moreover, Kitsap County's proposed order for the remand proceedings included a detailed list of the issues and reports that the Club's permit application would need to address. CP 956-971.

*b. The Club Did Not "Submit" a Permit Application In Compliance with Kitsap County Code*

In light of substantial notice of what was required, the Club's attempted application fell far below the Code requirements. The Club attempted to supply DCD with an incomplete application for the wrong permit just four days before their extension ended and then refused to pay the application fees.

KCC §21.10.010 clearly states that "***All applications for permits*** or actions by the county ***shall be accompanied by a filing fee*** in an amount established by county resolution." (Emphasis added). KCC §12.10.050(2) provides that Kitsap County will not issue a permit for site development unless the applicant pays the applicable fees.

Additionally, Chapter 21.04 KCC provides the permit application procedure for permit applications regarding development work governed by both Title 12 and 19 KCC. KCC §21.04.020. KCC §21.04.030 requires permit applicants to submit applications that are "fully complete" and to

pay the appropriate fees. KCC §21.04.030(B)(2) and (4). KCC §21.04.160 states that a permit application, at a minimum, must include the applicable fees. KCC §21.04.160(B)(5). This is also restated in KCC §21.04.150. Lastly, the permit application checklist on the application form clearly states that all fees are due at the time of submittal. CP 345.

Not only did the Club fail to pay the permit application fee, the Club also failed to submit a fully complete application as required by KCC §21.04.030(B)(2) and KCC §21.04.160(A) and (B). Instead, the Club submitted a history of the Club, google map images, and answered “not applicable” to the majority of requirements for the application. CP 399-404. Despite the Club’s allegations otherwise, those materials do not constitute a complete permit application which complies with the Supplemental Judgment.

#### **4. The Club’s Interpretation of the Supplemental Judgment Leads to an Absurd Result**

The Club’s interpretation of the Supplemental Judgment should also be rejected because it would lead to an absurd result. The Club argues that the definition of the word “submit” only requires the Club to hand DCD an application for the permit type of their choice, which contains only the materials they think are relevant and not those required by the Code, and not pay the permit fees every applicant is required to pay. In

other words, under the Club's interpretation of the trial court's order, the Club would be compliant if it handed a blank piece of paper labeled "permit application" to DCD and nothing more. That is an absurd result and is contrary to the plain meaning of the Supplemental Judgment.

**5. A Potential Warrant of Abatement Remedy Is Immaterial to a Contempt Finding**

The potential for a warrant of abatement is irrelevant to this appeal. The Club contends that any deficiencies in the Club's permitting efforts can and should be remedied by a warrant of abatement and that a warrant of abatement combined with the trial court's order to obtain permitting constitutes the County's sole and complete remedy. The sufficiency of the remedy is not an issue before this Court, which is only tasked with reviewing the sufficiency of the trial court's contempt order. Whether or not a warrant of abatement may be a remedy available to the County at some point in the future has no bearing on whether the trial court properly found the Club in contempt under RCW 7.21.010.

**E. The Trial Court Did Not Err in Using its Discretion to Craft a Contempt Sanction Designed to Coerce Compliance With the Supplemental Judgment**

The Club appears to be challenging both the contempt sanction as well as the purge condition. However, its argument does not appear to distinguish between the two. The Club's arguments fail because both the

sanction and the purge condition are properly coercive and result from a proper exercise of the trial court's discretion.

Washington Courts have both inherent and statutory authority to coerce compliance with their orders through the imposition of sanctions. *Moreman*, 126 Wn.2d at 42. The trial court has discretion to impose contempt sanctions designed to coerce compliance with a court order depending on the facts and circumstances of the case. *Smaldino*, 151 Wn. App. 356, 364, 212 P.3d 579 (2009); *Yamaha Motor Corp., U. S. A. v. Harris*, 29 Wn. App. 859, 866, 631 P.2d 423 (1981). In reviewing a contempt order, an appellate court must examine both the "substance of the proceeding and the character of the relief that the proceeding will afford." *King*, 110 Wn.2d at 799.

Washington law recognizes two types of contempt sanctions: remedial and punitive. RCW 7.21.010; *In re Dependency of A.K.*, 162 Wn.2d 632, 645-646, 174 P.3d 11 (2007). Remedial contempt sanctions are designed to coerce compliance with a previous court order rather than merely punish for past wrongdoing. RCW 7.21.110(3); *In re Dependency of A.K.*, 162 Wn.2d 632, 645-646, 174 P.3d 11 (2007). Contempt sanctions are remedial when the contemnor can "purge" the contempt by performing an act. *In re Mowery*, 141 Wn. App. 263, 275, 169 P.3d 835 (2007).

### **1. The Sanction Is Properly Coercive**

RCW 7.21.030 allows a trial court to impose the following remedial sanctions: fines, imprisonment, an order designed to coerce compliance with a prior order, or any other remedial sanction as necessary. During contempt proceedings, the County did not seek fines or imprisonment. The County requested sanction in the form of an injunction. The Court issued an injunction prohibiting the Club from operating a shooting facility on its Property until it complies with the Supplemental Judgment (which, in turn, merely requires compliance with the Kitsap County Code). This injunction was specifically designed to prevent the Club from reaping the benefits from its unlawful site development activity until it brings its Property into compliance with Code.

A sanction is remedial when it is imposed for an indeterminate amount of time and where compliance with the original order ends the sanction. *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 694, 959 P.2d 687 (1998). By contrast, punitive sanctions are often limited to a specific time (e.g., 5 days in jail) or to a specific amount of money without the opportunity to purge the contempt. *Id.*

The contempt sanction at issue here is both for an indeterminate amount of time and, as acknowledged by the Club in the opening brief, contains a purge condition. The contempt sanction is properly coercive. It

is critical to note that during the contempt proceedings, the trial court asked the Club if it could propose an alternative contempt sanction. The Club's only suggestion was to not impose contempt sanctions at all and to allow the Club to continue to use its Property as if it were not in contempt. RP (August 26, 2016), 16, 17; RP (December 2, 2016), 12, 16. The trial court properly utilized its discretion in issuing the County's proposed injunction.

It is also critical to note that the trial court did not immediately impose a sanction. Rather, it gave the Club one more opportunity to comply with the Supplemental Judgment. See *Rhinevault*, 91 Wn. App. at 695 (contempt sanction not punitive where court gave "ample opportunity" to comply). The trial court issued a contempt sanction after the Club failed to make a meaningful attempt to submit a permit application complying with the Code's permit submittal requirements. The trial court specifically noted that the Club had been on notice for at least two years that it would be required to obtain permitting. RP (December 2, 2016), 12. The trial court acknowledged that it was sympathetic to the Club's position, but that ultimately the Club must be encouraged to comply with the law. RP (August 26, 2016), 17-18.

**2. The Purge Condition Is Properly Coercive and Meets the Standard Set Forth In *In re M.B.***

The purge condition is also properly coercive. The purge condition imposed by the trial court's order requires nothing more than for the Club to comply with the Supplemental Judgment—i.e., to apply for and obtain permitting to cure its violations of Title 12 and 19.

In its appellate brief, the Club asserts that the contempt sanction fails to meet a “test” articulated by Division I in *In re M.B.*, 101 Wn. App. 425, 3 P.3d 780 (2000) to determine whether a purge condition is properly coercive. The Club's reliance on this test is misplaced because it does not apply. The test utilized in *In re M.B.* was adopted to address unique circumstances surrounding contempt sanctions in juvenile truancy cases where a juvenile is placed in detention until he or she complies with an order requiring attendance at school. *In re M.B.*, 101 Wn. App. 448-450. In such cases, the juvenile physically cannot purge the condition by attending school while he or she remains in detention. *Id.* The “test” outlined in *In re M.B.* was designed to offer guidance as to when a trial court can impose a purge condition that goes beyond compliance with the original order while still retaining its coercive character. *Id.*

The purge condition at issue in this appeal requires nothing beyond compliance with the trial court's Supplemental Judgment. For this reason,

it is purely coercive on its face and does not need to meet the additional requirements outlined in *In re M.B.* Kitsap County is unaware of any legal authority that imposes the *In re M.B.* test outside of the situation where a purge condition requires more than compliance with the original order.

Furthermore, the purge condition in the present case does meet the three prongs of the *In re M.B.* test—(1) it is directed at obtaining future compliance, (2) it is within the power of the contemnor to fulfill, and (3) it is reasonably related to the cause of the contempt. *In re M.B.*, 101 Wn. App. 425. First, the injunction is designed to serve remedial ends and is directed at future compliance because the purge condition requires nothing more than compliance with the original order. Second, the injunction is within the power of the Club to fulfill. As explained above, the Club failed to meet its burden of proof in establishing that it lacked the ability to comply and demonstrated only a minimal effort towards compliance. The law presumes the Club has the ability to comply until it has adequately established otherwise. Finally, it is reasonably related to the cause of the contempt (the Club's lack of effort) by incentivizing the Club to fully use its resources and utilize its options.

The Club attempts to argue that the injunction is improperly punitive because it depends upon DCD's discretion in issuing a permit. This is incorrect. DCD does not have discretion under Kitsap County Code

to deny a permit application for site development work if the applicant meets the requisite standards.<sup>12</sup> KCC §21.04.100 (SDAPs are Type I and Type II permits); KCC §21.04.050. Upon the Club's submission of a permit application that is sufficient enough to pass through the review process, DCD must issue a permit and the contempt sanction will be purged. KCC §12.10.050.

The Club also asserts that the purge condition in this case "is akin to prohibiting a judgment debtor from operating his business until he pays \$100,000 because he failed to pay a judgment of \$50,000." This analogy is inaccurate. Unlike the judgment debtor in the Club's analogy who must pay \$100,000 without the ability to purge this fee, the Club can purge the injunction by submitting a permit application. Also, the injunction does not require the Club to take any action beyond what is already required by the Supplemental Judgment and the Kitsap County Code (i.e., to obtain permits to cure the Club's numerous violations).

The injunction is also not punitive because it merely restores the status quo under the law until the Club complies with the Kitsap County Code. The Club's permitting violations span the majority of the eight-acre

---

<sup>12</sup> This is apparent when comparing the site development activity permit process with the process for a preliminary subdivision, for example, which requires approval by a hearing examiner in an open public hearing where the public can provide comments and where the hearing examiner can approve, deny, or impose additional requirements. KCC §21.04.100; KCC §21.04.050.

area of historical use that the Club can use for shooting activities and include: unpermitted installation of culverts, creation of numerous new shooting bays, encroachment into the wetland buffers, and expansion of the rifle range. Preventing the Club from utilizing those unlawfully developed areas encourages compliance with the Supplemental Judgment and precludes the Club from obtaining the benefit of its unpermitted work until it does so.

Finally, the purge condition cannot be punitive where it simply requires compliance with the Code. Contrary to the Club's apparent views regarding permitting provisions, requiring an entity to comply with the Code is not a punishment.

## VI. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's contempt order.

Respectfully submitted this 22<sup>nd</sup> day of May, 2017

TINA ROBINSON  
Prosecuting Attorney



CHRISTINE M. PALMER, WSBA NO. 42560  
LAURA F. ZIPPEL, WSBA NO. 47978  
Deputy Prosecuting Attorneys  
614 Division Street, MS 35A  
Port Orchard, WA 98366  
(360) 337-4992

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:

Brian D. Chenoweth	<input checked="" type="checkbox"/>	Via U.S. Mail
Brooks Foster	<input checked="" type="checkbox"/>	Via Email:
The Chenoweth Law Group	<input type="checkbox"/>	Via Hand Delivery
510 SW Fifth Ave., Ste. 500		
Portland, OR 97204		

---

SIGNED in Port Orchard, Washington this 22<sup>nd</sup> day of May, 2017.

  
BATRICE FREDSTI, Legal Assistant  
Kitsap County Prosecuting Attorney  
614 Division Street, MS-35A  
Port Orchard, WA 98366-4676  
(360) 337-4992

**KITSAP COUNTY PROSECUTING ATTORNEY'S OFFICE - CIVIL DIVISION**

**May 22, 2017 - 3:49 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50011-6  
**Appellate Court Case Title:** Kitsap County, Respondent v Kitsap Rifle and Revolver Club, Appellant  
**Superior Court Case Number:** 10-2-12913-3

**The following documents have been uploaded:**

- 2-500116\_Briefs\_20170522154544D2058655\_7311.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Countys Response Brief.pdf*
- 2-500116\_Letter\_20170522154544D2058655\_9035.pdf  
This File Contains:  
Letter  
*The Original File Name was Letter to Court.pdf*

**Comments:**

Response Brief of Appellee/Respondent Kitsap County and Letter to Court

Sender Name: Batrice Fredsti - Email: [bfredsti@co.kitsap.wa.us](mailto:bfredsti@co.kitsap.wa.us)

**Filing on Behalf of:** Christine M Palmer - Email: [cmpalmer@co.kitsap.wa.us](mailto:cmpalmer@co.kitsap.wa.us) (Alternate Email: )

Address:  
614 Division Street, MS-35A  
Port Orchard, WA, 98366  
Phone: (360) 337-4992

**Note: The Filing Id is 20170522154544D2058655**