

FILED
Court of Appeals

Division II
Seattle, WA
4/6/2018 3:00 PM

No. 50574-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY, Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB, Appellant,

APPELLANT'S OPENING BRIEF

Attorneys for the Appellant:

Bruce O. Danielson
WSBA #14018
Danielson Law Office, P.S.
1001 4th Avenue, Suite 3200
Seattle, WA 98154
206-652-4550
bruce@brucedanielsonlaw.com

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	4
III. ISSUES RELATED TO ASSIGNMENTS OF ERROR	4
IV. STATEMENT OF THE CASE.....	5
A. Standard of Review.....	5
V. ARGUMENT FOR REVERSAL OF THE ORDER FOR PERMANENT INJUNCTION.....	6
A. The Trial Court Lacked Authority to Enter an Order for Relief Exceeding the Court’s Prior Orders on Declaratory Judgment.....	6
B. The Order of the Trial Court Entering a Final Judgment and Ruling that “There are no remaining issues to be resolved by this Court . . .” Deprived the Trial Court of Jurisdiction Over the Matter and Precludes a Subsequent Entry of an Order for Permanent Injunction.....	9
C. The Trial Court Lacked the Authority to Enter a Permanent Injunction Following the Filing of an Appeal by the Club Absent Consent by the Court of Appeals.....	12
VI. CONCLUSION.....	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anderson & Middleton Lumber Co. v. Quinault Indian Nation</i> , 79 Wn. App. 221, 901 P.2d 1060 (1995), <i>aff'd</i> , 130 Wn.2d 862, 929 P.2d 379 (1996).....	10
<i>Britannia Holdings Ltd. v. Greer</i> , 127 Wn. App. 926, 113 P.3d 1041 (2005).....	13
<i>Catlin v. United States</i> , 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945) (quoted by <i>Marriage of Greenlaw</i> , 67 Wash.App. 755, 759, 840 P.2d 223 (1992), <i>reversed on other grounds</i> , 123 Wn.2d 593, 869 P.2d 1024 (1994)).....	10
<i>Rose ex rel. Estate of Rose v. Fritz</i> , 104 Wn. App. 116, 15 P.3d 1062 (2001).....	10
<i>Folsom v. Burger King</i> , 135 Wn.2d 658 (1998).....	5
<i>Green v. Normandy Park</i> , 137 Wn.App. 665, 151 P.3d 1038 (2007).....	11
<i>Inman v. Netteland</i> , 95 Wn. App. 83, 974 P.2d 365 (1999).....	17
<i>Johnson v. Aluminum Precision Prods., Inc.</i> , 135 Wn. App. 204, 143 P.3d 876 (2006).....	15
<i>Kemmer v. Keiski</i> , 116 Wn. App. 924, 68 P.3d 1138 (2003).....	6, 7, 10
<i>Kitsap County v. Kev, Inc.</i> , 106 Wash.2d 135, 720 P.2d 818 (1986).....	17
<i>Kucera v. State, Dep't of Transp.</i> , 140 Wn.2d 200, 995 P.2d 63 (2000).....	5

<i>Olsen Media v. Energy Scis., Inc.</i> , 32 Wn. App. 579, 648 P.2d 493 (1982).....	12
<i>Presidential Estates Apartment Associates v. Barrett</i> , 129 Wn.2d 320, 917 P.2d 100 (1996).....	11
<i>Rabon v. City of Seattle</i> , 135 Wn.2d 278, 957 P.2d 621 (1998).....	16
<i>Schaaf v. Highfield</i> , 127 Wn.2d 17 (1995).....	5
<i>Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs.</i> , 193 Wn. App. 377, 377 P.3d 214 (2016), <i>review denied sub nom. Seiu Healthcare 775 N.W. v. State of WA DSHS</i> , 186 Wn.2d 1016, 380 P.3d 502 (2016).....	14
<i>State v. Gibson</i> , 75 Wash.2d 174, 449 P.2d 692 (1969).....	15
<i>State v. Gilkinson</i> , 57 Wn. App. 861, 790 P.2d 1247 (1990).....	8
<i>State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall</i> , 42 Wn.2d 885, 259 P.2d 838 (1953) (<i>finding made without evidence and an order based upon such finding is arbitrary</i>).....	15
<i>Tyler Pipe Indus., Inc. v. Dep't of Revenue</i> , 96 Wn.2d 785, 638 P.2d 1213 (1982).....	17
<i>Washington Fed'n of State Employees v. State</i> , 99 Wn.2d 878, 665 P.2d 1337 (1983).....	5
<i>Whatcom County v. Kane</i> , 31 Wash.App. 250, 640 P.2d 1075 (1981).....	17
<i>White v. Powers</i> , 89 Wash. 502, 154 P. 820 (1916).....	16
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434 (1982).....	5

Statutes

RCW 7.24.0804, 6
RCW 9.41.2901
RCW 36.70B.....8

Washington Statutes

Washington State Constitution Article 1 § 316

I. INTRODUCTION

The Kitsap Rifle and Revolver Club (hereinafter the “Club”) is a non-profit organization founded for sport, training and national defense. The Club was chartered in 1926 and has safely operated a shooting range on its 72 acres in the same location in Kitsap County for more than 90 years.

Despite the Club’s 90-plus year record of no harm to any person or property outside of, or adjoining the Club’s shooting facility, in 2013, Kitsap County passed a local ordinance, KCC 10.25, *Discharge of Firearms*. KCC 10.25 regulates countywide all aspects of the discharge of firearms and the operations of shooting ranges. KCC 10.25 requires all shooting ranges in Kitsap County to secure a permit to operate. The Ordinance includes a grandfathered use provision, pursuant to which the Club meets all requirements. *See* KCC § 10.25.090¹ But the County has maintained that the Club must, nonetheless, obtain a shooting range permit under the 2013 law.

Not seeking to expand or change its historic operations, the Club initially did not apply for a permit, relying upon its vested/grandfathered rights, preemption of local firearm regulations pursuant to RCW 9.41.290 and the individual Club’s members state and federal constitutional rights

¹ A copy of KCC 10.25 is annexed hereto as **Appendix A-1**.

to keep and bear arms. As a consequence of the Club's decision not to apply for a permit in accordance with its enumerated and protected rights, on or about March 31, 2015, Kitsap County filed a complaint for a Declaratory Judgment in which it sought to compel KRRC to apply for an operating permit per KCC 10.25 and requested the issuance of a temporary injunction until such time as the Club applied for a permit.

On or about April 21, 2015, Kitsap County filed a Motion for Preliminary Injunction prohibiting KRRC from operating its shooting facility pending the submission of an application for an operating permit pursuant to KCC 10.25.

On April 17, 2015, the trial court issued a Memorandum Opinion and Order granting a Preliminary Injunction, and on April 24, 2015 the trial court issued its final Order for Preliminary Injunction. Thereafter, on March 16, 2016, the Club submitted an application for a permit pursuant to KCC 10.25. (CP 136)

On August 5, 2016, the trial court entered an Agreed Order Identifying Documents and Evidence Considered by the Court Prior to Entry of the May 31, 2016 Order on Summary Judgment; and Order Confirming Final Judgments. (CP 32-36) On June 29, 2016, the Club filed a timely Notice of Appeal as a matter of right. This first appeal was

assigned cause No. 49130-3 II. The County did not file a cross-appeal of the Order.

More than three months after entry of the Order Confirming Final Judgments (CP 32-36), while the first appeal was pending, Kitsap County filed a Petition seeking a Permanent Injunction, alleging that the Club acted in “bad faith” in filing its permit application under KCC 10.25, because the application was deemed withdrawn for inactivity, in the face of request by the Club per Kitsap County Code Section 21.04.03 (C)(1)² for technical guidance from the County as regards the application.. The new cause of action was filed under the same cause number as the original action and considered by the same judge. The County did not request reconsideration of the appealed Order under CR 59, nor did it seek to vacate the final Order under CR 60. No ambiguities in the final Preliminary Injunction Order were identified by the trial court or any party. No factual hearing was allowed on the request for permanent injunction, including confrontation of witnesses.

The Club’s appeal herein challenges the legality of the Order for Permanent Injunction entered after the Club’s filing of an appeal under Cause No. 49130-3 II, while the appeal was pending. It does not explicitly

² A copy of this law is annexed hereto as **Appendix A-2**. A new permit application has been filed and is pending a decision.

challenge any findings, since its procedural due process rights were violated, and the purported findings are tainted for that reason.

II. ASSIGNMENTS OF ERROR

Error No. 1: The trial court was without lawful authority to enter the Order Granting Permanent Injunction after entry of an Order Confirming Final Judgment and resolving all issues that had been appealed by the Club and not cross-appealed by the County.

Error No. 2: The trial court lacked authority to amend a prior Final Judgment and enter an Order for Permanent Injunction without any party requesting reconsideration or relief from judgment under CR 59 and/or 60.

Error No. 3: The trial court lacked the authority, following the filing of an appeal by the Club, which appeal was pending and not resolved, to enter an order involving new factual and legal issues.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

(1) Does RCW 7.24.080 confer jurisdiction on the trial court to amend a prior judgment and to add, and rule on, a new cause of action seeking a permanent injunction?

(2) May a trial court open or amend a judgment on its own volition without complying with CR 59 and/or 60?

(3) Does the filing of an appeal preclude the trial court from amending its prior order under appellate review on appeal, by entering a

new order involving new issues of fact and a substantive change in the prior judgment of the court?

IV. STATEMENT OF THE CASE

A. Standard of Review

This Court reviews the summary judgment *de novo*. See *Folsom v. Burger King*, 135 Wn.2d 658 (1998) (summary judgment orders are reviewed *de novo*). “In analyzing orders on summary judgment, this court has traditionally noted that a moving party under CR 56 bears the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.” *Schaaf v. Highfield*, 127 Wn.2d 17, 21 (1995). A court “must consider the facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). “The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Id.*

“A trial court’s decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion.” *Washington Fed’n of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). A trial court necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary.” *Kucera v. State, Dep’t of Transp.*, 140 Wn.2d

200, 209, 995 P.2d 63, 68 (2000).

**V. ARGUMENT FOR REVERSAL OF THE ORDER FOR
PERMANENT INJUNCTION.**

**A. The Trial Court Lacked Authority to Enter an Order for
Relief Exceeding the Court’s Prior Orders on Declaratory
Judgment.**

The entry of a Final Judgment holding that there are no remaining issues, and subsequently the entry of Permanent Injunction in the same case and at a later date, makes meaningless a “Final Judgment” and a court order that “There are *no remaining issues* to be resolved by this Court as *all the claims and rights and liabilities of the parties have been adjudicated.*” (emphasis added) CP 33.

While it is true that in a Declaratory Judgment actions, the Court retains the authority to grant further relief based on its prior orders pursuant to RCW 7.24.080 and RAP 7.2(c), the authority of the trial court under these circumstances is not without limits, and is statutorily confined to enforcing its prior orders. *See Kemmer v. Keiski*, 116 Wn. App. 924, 68 P.3d 1138, 1142 (2003)

The holding in *Kemmer v. Keiski, supra*, distinguished between enforcing a prior judgment and amending a prior judgment. In *Kemmer*, a dispute arose between neighbors concerning access to certain lands and a cross claim for an implied easement. Following a bench trial, on May 31,

2000, the trial court entered findings of fact, conclusions of law and a judgment. The ruling of the trial court established an easement not to exceed 12 feet in width in favor of the cross claimant. The judgment “resolved all claims and all parties then pending before the court.” *Kemmer*, 116 Wn. App., at 927. “When a judgment disposes of all claims and all parties, it is both appealable and preclusive.” *Kemmer*, supra, at 932.

On September 11, 2000, or approximately three plus months after the final judgment, the cross complainant filed a motion for contempt asking the trial court to enforce its judgment and to expand the easement. On August 10, 2001, the trial court entered a judgment captioned as a “clarification” expanding the easement to nearly 30 feet.

The Court of Appeals issued a well-reasoned opinion addressing the scope and authority of a trial court following entry of a final judgment, including actions of the trial court as allowed per RAP 7.2(c). Setting aside the order of the trial court, the Court of Appeals held that the trial court judgment of Clarification: “[C]onstituted a substantial and significant modification of the May 2000 judgment, not a mere “clarification” of the May 2000 judgment. It was not accomplished in compliance with CR 59, CR 60, or any other exception to preclusion that

we are aware of. We hold that the August 2001 judgment was precluded by the May 2000 judgment.” *Kemmer*, supra at 934.

The finality of a judgment requires that any modification or amendment be accomplished pursuant to CR 59 or 60, as stated in *State v. Gilkinson*, 57 Wn. App. 861, 865, 790 P.2d 1247, 1249 (1990), “The inherent powers of courts are generally limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction. Such powers are strictly procedural in nature and do not confer any substantive authority nor increase the jurisdiction of the court.” (citations omitted).

Here, it is without dispute that the County did not request the new, significantly modified relief pursuant to CR 59 and/or CR 60. The Order granting a Permanent Injunction differs significantly from and does not merely “clarify” the Order granting a Preliminary Injunction.

The preliminary injunction allowed the Club to continue with its operations upon the submittal of a permit application to the County and during the extensive permit application process. The permanent injunction, (CP 2073), to the contrary requires the issuance of an operating permit and another motion and hearing by the Club to allow it to resume full operations. Once the permit is issued by the County, a step not

imposed by Kitsap County's land use procedures nor state law. *See* Kitsap County Code Chapter 21.04. *See also* RCW 36.70B.

B. The Order of the Trial Court Entering a Final Judgment and Ruling that “There are no remaining issues to be resolved by this Court . . .” Deprived the Trial Court of Jurisdiction Over the Matter and Precludes a Subsequent Entry of an Order for Permanent Injunction.

On June 28, 2016, the trial court entered an Agreed Order Identifying Documents and Evidence Considered by the Court Prior to Entry of the May 31, 2016, Order on Summary Judgments; and Order Confirming Final Judgments. (CP 32-36). The Order specifically held:

2. The rulings and findings in the May 31, 2016 Order, which Order is incorporated herein by reference, are hereby confirmed and adopted in this *final judgment*. (emphasis added) (CP 32)

and

4. There are *no remaining issues* to be resolved by this Court as all the claims and rights and liabilities of the parties have been adjudicated pursuant to the May 31, 2016 and June 28, 2016 Orders.

(Emphasis added) (CP 32)

The Club appealed the Orders of the trial court granting a temporary injunction, among other causes of action. The County did not cross-appeal the June 28, 2016 Order. The entry of a final order deprived the trial court of further authority to amend the petition and the relief

sought by the County. Thus, the Club was justified in relying upon the trial court's express and unequivocal ruling that the declaratory judgment case was fully adjudicated, with no remaining issues and the trial court:

“A final judgment is a judgment that *ends the litigation, leaving nothing for the court to do but execute the judgment*. *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945) (emphasis added) (quoted by *Marriage of Greenlaw*, 67 Wash.App. 755, 759, 840 P.2d 223 (1992), *reversed on other grounds*, 123 Wn.2d 593, 869 P.2d 1024 (1994)).” *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn. App. 221, 225, 901 P.2d 1060, 1062 (1995), *aff'd*, 130 Wn.2d 862, 929 P.2d 379 (1996).

Moreover: “When a judgment disposes of all claims and all parties, . . . it directly precludes all further proceedings in the same case” *Kemmer*, *supra* at 932. Simply put, the trial court divested itself of all authority to take any further action in the matter by entering a final judgment.

The County did not make a motion to reopen or vacate the final Order Confirming Final Judgment. (CP 32-36). Nor did the trial court cite any authority to do so when it issued the new Order after entry of the Final Judgment while an appeal of such judgment was pending: “Once a judgment is final, a court may reopen it only if authorized by statute or

court rule. For purposes of most cases, including this one, CR 59 and CR 60 set forth the conditions under which a party may seek relief from judgment.” *Rose ex rel. Estate of Rose v. Fritz*, 104 Wn. App. 116, 120, 15 P.3d 1062, 1064 (2001).

This is not a case where the trial court “clarified” its Order granting a Preliminary Injunction. Rather, the court entered an Order granting entirely new relief after a final judgment had already been entered and appealed.

In *Green v. Normandy Park*, 137 Wn.App. 665, 151 P.3d 1038 (2007), the court reviewed a denial of a motion for clarification. There, the appellants argued in a motion to the trial court that a Community Club's refusal to process a revised application was in violation of the trial court's prior ruling. The trial court considered the appellants' request as a motion to clarify the court's final orders and judgment. It noted that CR 60(a) allows a court to correct clerical mistakes in a judgment by correcting language that did not convey the court's intention, or to supply language that was inadvertently omitted. Clearly, the trial court in the instant appeal went beyond correcting clerical mistakes and the wholly new relief granted in the Order granting Permanent Injunction cannot be a mere expression of clarified intent in the original Order on the Preliminary Injunction. C.f., *Presidential Estates Apartment Associates v. Barrett*, 129

Wn.2d 320, 328-29, 917 P.2d 100 (1996) (ruling that trial court properly clarified final order that had not been appealed concerning scope and purpose of an easement because the final order was unclear or ambiguous).

C. The Trial Court Lacked the Authority to Enter a Permanent Injunction Following the Filing of an Appeal by the Club Absent Consent by the Court of Appeals.

After review is accepted of a trial court order, a trial court has the authority to enforce its decisions (RAP 7.2(c)) and authority to take “actions to change or modify a decision that is subject to modification by the court that initially made the decision.” RAP 7.2(e). A party is required to seek permission of the Court of Appeals if a post-judgment motion will change a decision being reviewed by the Court of Appeals, however. RAP 7.2(e). “Change” is determined to have been established if the revised order affects the prior order in a substantive manner and does not require or entail additional evidence. *Olsen Media v. Energy Scis., Inc.*, 32 Wn. App. 579, 588, 648 P.2d 493, 499 (1982).

Here, the County’s request for a Permanent Injunction changed the prior order in a substantive manner because compliance and completion of the permit application is in the hands of the County and beyond the Club’s ability to control. KCC 10.25 is not a “fixed” set of requirements for a shooting range, but rather standards “guiding” the Kitsap County

Department of Community Development in approving a range permit application. KCC10.25.090(3). With final approval of a permit in the control of the County, the situation is analogous to holding a party in contempt when they did not have the means or ability to comply with a court order. See generally *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 113 P.3d 1041, 1044 (2005).

It is the law of the case that the County cannot condition compliance by the Club on actions within the County's Control. See *Kitsap County v Kitsap Rifle and Revolver Club*, Unpublished Opinion, filed January 30, 2018, Case No. 50011-6-II. P. 2. ³

The completion of the permitting process to the satisfaction of the County may take years to accomplish and indefinitely prevents the Club from fully utilizing its property. Deprived of the use of its property, the Club has suffered significant financial losses and will continue to suffer financial losses.

i. The Order Granting Permanent Injunction with Findings of Fact and Conclusions of Law Involved New Issues of Fact Arising after the Filing of an Appeal by the Club.

The "crux" of the trial court's entry of a permanent mandatory injunction is premised upon "Conclusion of Law", paragraph 7:

7. A permanent mandatory injunction is necessary

³ A copy of this opinion is annexed hereto as **Appendix A-3**.

and proper given KRRC's repeated and continuous failure to comply with KCC Chapter 10.25, KRRC's bad faith conduct in the permitting process and in allowing its two permit applications to lapse. CP 2080

New issues of fact are the key components of the Order for Permanent Injunction. Prior to the trial court's entry of the Order Granting Permanent Injunction with Findings of Fact and Conclusions of Law, commencing on September 26, 2016, no less than eight new declarations were filed with the Court involving factual issues regarding good faith and the permit applications by the Club. (CP: 49, 75, 95, 104, 135, 1988, 2026 and 20136)

The Finding of Fact in the Order Granting Permanent Injunction, beginning on page 5 of the Order (CP 2077-2079) included ten paragraphs of findings for actions taking place following the filing of the Notice of Appeal by the Club on June 29, 2016.

To address the allegations of bad faith, the Club repeatedly sought an evidentiary hearing. (CP 1959). The trial court denied the request for an evidentiary hearing. Despite the contradictory factual contentions of the parties, the trial court made a summary determination concerning the request of the County for a Permanent Injunction. The Club should have been afforded a full hearing on the issue of a permanent injunction: "A TRO and a preliminary injunction both are designed to preserve the status

quo **until the trial court can conduct a full hearing on the merits.**”

(emphasis added) *Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 392, 377 P.3d 214, 221 (2016), *review denied sub nom. Seiu Healthcare 775 N.W. v. State of WA DSHS*, 186 Wn.2d 1016, 380 P.3d 502 (2016).

In this case, no full hearing on the merits was allowed despite the repeated requests of the Club for such a hearing. (CP 1959) What constitutes “bad faith” is an issue of fact which precludes the trial court from summarily issuing an Order on Permanent Injunction and constitutes a due process violation.

ii. *The Order Granting Permanent Injunction with Findings of Fact and Conclusions of Law Involved New Issues of Fact and Law.*

It was an error of fact and law for the court to supplement or create findings to support its Order without competent evidence. *State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall*, 42 Wn.2d 885, 891, 259 P.2d 838 (1953) (finding made without evidence and an order based upon such finding is arbitrary).⁴ Speculation cannot sustain a finding. *See Johnson v. Aluminum Precision Prods., Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006) (mere speculation and conjecture will not sustain a finding). The refusal of the trial court to hold a full hearing on the merits

⁴ Arguments of counsel do not constitute evidence. *E.g., State v. Gibson*, 75 Wash.2d 174, 177, 449 P.2d 692 (1969).

at which the Club could submit evidence to rebut the assumed “findings” of the County to support the enforcement of KCC 10.25 against the Club violated the Club’s rights under the law and deprived it of constitutionally protected due process rights.

Perhaps more importantly, issuance of the Permanent Injunction involves due process scrutiny under the Washington State Constitution Article 1 § 3 and the 14th Amendment to the United States Constitution. The essential elements of due process of law, as applied to matters of this kind, are notice and opportunity to be heard. *E.g. White v. Powers*, 89 Wash. 502, 509, 154 P. 820 (1916). The trial court here violated the Club’s due process rights to an opportunity to be heard with respect to issuance of a Permanent Injunction.

A trial court abuses its discretion if its decision is " based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). “[S]ince injunctions are within the equitable powers of the court, these criteria must be examined in light of equity, including the balancing of the relative interests of the parties and the interests of the public, if appropriate." *Id.* Here, however, the trial court made new findings of fact without providing the Club an opportunity to present its interests, relative to the County and the public in an evidentiary hearing.

As this Court is well-aware, an injunction is an extraordinary equitable remedy designed to prevent serious harm; its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792-96, 638 P.2d 1213 (1982). The trial court must precisely tailor a permanent injunction to prevent a specific harm. *Kitsap County v. Kev, Inc.*, 106 Wash.2d 135, 143, 720 P.2d 818 (1986); *Whatcom County v. Kane*, 31 Wash.App. 250, 253, 640 P.2d 1075 (1981). As a result, the order granting the injunction must describe in reasonable detail the acts enjoined as well as the reasons supporting issuance of the injunction, above and beyond the complaint or other documents. See CR 65(d).

The trial court's failure to allow presentation of evidence militating against issuance of an injunction – let alone a narrowly tailored injunctive order – is clear error of law and must be reversed by this Court.

“Because the appellate court must decide matters based upon the record before the trial court, the consideration of events occurring during the pendency of an appeal would interfere with its ability to conduct a fair and orderly review.” *Inman v. Netteland*, 95 Wn. App. 83, 89, 974 P.2d 365, 368 (1999). The entry of the Order for Permanent Injunction, requiring the filing of a second appeal, is the type of interference the decision which should not be condoned by this Court and the Order for

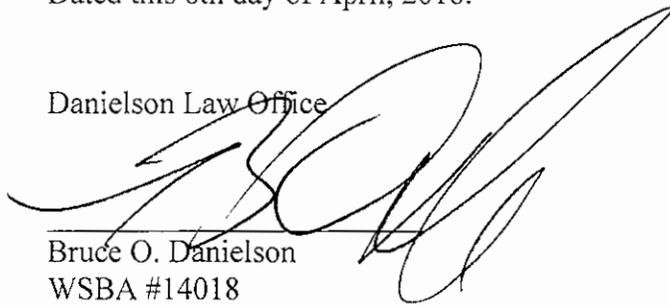
Permanent Injunction should be vacated.

VI. CONCLUSION

The KRRC's appeal should be granted and the Order for Permanent Injunction should be vacated.

Dated this 6th day of April, 2018.

Danielson Law Office

A large, stylized handwritten signature in black ink, appearing to read 'B. Danielson', is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Bruce O. Danielson
WSBA #14018
Attorney for Appellant
Kitsap Rifle and Revolver Club

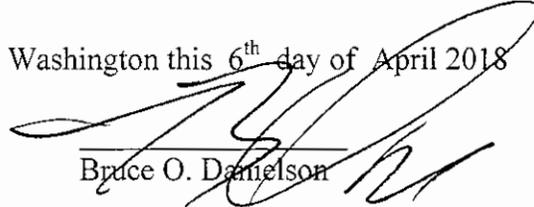
DECLARATION OF SERVICE

Bruce O. Danielson hereby declares, under penalty of perjury under the laws of the State of Washington that on the date given below, I caused to be served the above-entitled document upon the following person(s) as follows:

Kitsap County Prosecutor and its Deputy	<input checked="" type="checkbox"/>	U.S. Mail
Prosecuting Attorneys	<input type="checkbox"/>	Facsimile
Christine M. Palmer, WSBA #42560	<input checked="" type="checkbox"/>	Email
Laura F. Zippel, WSBA # 47978	<input type="checkbox"/>	Hand Delivery
614 Division Street, MS-35A		
Port Orchard, WA 98366-4676		

I SWEAR UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Orchard, Washington this 6th day of April 2018



Bruce O. Danielson

KRRC – Opening Brief

Appendix A-1

Chapter 10.25 FIREARMS DISCHARGE

Sections:

Article 1 – No-Shooting Areas

- 10.25.010 Definitions.
- 10.25.020 Discharge of firearms – Areas where prohibited.
- 10.25.030 Exceptions.
- 10.25.040 Designation of additional no-shooting areas through petition method.

Article 2 – Shooting Ranges

- 10.25.060 Purpose.
- 10.25.070 Definitions.
- 10.25.090 Ranges – Operating permit required.
- 10.25.110 Shooting facility environmental controls.
- 10.25.120 Review committee.
- 10.25.130 Exceptions.
- 10.25.140 Application and construction of this chapter.

Article 1 – No-Shooting Areas

10.25.010 Definitions.

The following definitions shall apply in the interpretation and enforcement of the ordinance codified in this article:

(1) "Firearm" means any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion. The term "firearm" shall include but not be limited to rifles, pistols, shotguns and machine guns. The term "firearm" shall not include devices, including but not limited to "nail guns," which are used as tools in the construction or building industries and which would otherwise fall within this definition.

(2) "Ordinary high water mark" means that mark on all lakes, streams and tidal water which will be found by examining the bed and banks in ascertaining where the presence and action of waters are so common and usual and so long continued in all ordinary years as to mark

upon the soil a characteristic distinct from that of the abutting upland in respect to vegetation, provided, that in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide.

(3) "Range" means a place set aside and designated for the discharge of firearms for individuals wishing to practice, improve upon or compete as to their shooting skills.

(4) "Shoreline" means the border between a body of water and land measured by the ordinary high water mark.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.020 Discharge of firearms – Areas where prohibited.

(1) The discharge of firearms is prohibited within five hundred yards of any shoreline in the unincorporated areas of Kitsap County.

(2) The discharge of firearms in the unincorporated areas of Kitsap County is further prohibited in the following instances:

(a) In any area designated as a "no-shooting" area pursuant to Section 10.25.040; specifically:

(i) Section 23, Township 25, Range 1 West, Willamette Meridian, Kitsap County, Washington, except for the following area. The southwest quarter, except that portion lying northeast of the Seabeck Highway, of Section 23, Township 25, Range 1 West, Willamette Meridian;

(ii) That area bounded on the west by Bethel-Burley Road, on the north by Burley-Olalla Road, on the east by Bandix Road, and on the south by the Kitsap County/Pierce County line;

(iii) That area bounded on the west by a line that begins at the southwest corner of tax parcel number 252301-4-012-1009, thence in a straight line northeasterly to the northeast corner of tax parcel number 252301-1-019-1008, thence north along the east boundary of tax parcel number 252301-1-018-1009 to its intersection with the south boundary of tax parcel number 252301-4-013-1009, thence west along said south boundary to the southwest corner of said tax parcel, thence north along the western boundary of said tax parcel to the intersection of Southwest Lake Flora Road, thence easterly along the southerly right-of-way of said road to its intersection with J.M. Dickenson Road Southwest, thence southwesterly along the westerly right-of-way of said road to its intersection with the eastern boundary of tax parcel number 252301-4-018-1003, thence north along said boundary to the northeast corner of said parcel, thence west along the northern boundary of said parcel to the Alpine Lake no-shooting area

(b) On any parcel of land less than five acres in size,

(c) Towards any building occupied by people or domestic animals or used for the storage of flammable or combustible materials where the point of discharge is within five hundred yards of such building;

(d) Later than one-half hour after sunset or earlier than one-half hour before sunrise unless otherwise authorized under state hunting regulations.

(e) Within five hundred yards of the following lakes located, in whole or in part, in the unincorporated areas of Kitsap County: Long Lake, Kitsap Lake, Wildcat Lake, Panther Lake, Mission Lake, Tiger Lake, William Symington Lake, Tahuya Lake, Island Lake, Horseshoe Lake, Carney Lake, Wye Lake, Buck Lake, Fairview Lake and Bear Lake

(f) Nothing in this section shall be construed or interpreted as abridging the right of the individual guaranteed by Article I, Section 24 of the state Constitution to bear arms in defense of self or others.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.030 Exceptions.

The provisions of Section 10.25.020 shall not apply to the discharge of firearms.

(1) By law enforcement officers, including Washington State Department of Fish and Wildlife officers, or security personnel in the course of their official duties;

(2) On a shooting range; provided, that any such range shall comply with the criteria for ranges adopted by the Kitsap County board of commissioners pursuant to Article 2 of this chapter;

(3) In the course of farm slaughter activities;

(4) For lawful hunting in accordance with state and federal hunting laws, or responding to wildlife threatening human safety or causing property damage as provided by state law.

(Ord. 515A (2014) § 1, 2014; Ord. 515 (2014) § 2 (part), 2014)

10.25.040 Designation of additional no-shooting areas through petition method.

(1) The establishment or disestablishment of a "no shooting" area in addition to those described in Section 10.25.020 may be requested by petition by the registered voters residing in such proposed additional areas. Such petition may include a request that the discharge of certain types of firearms be nevertheless allowed during certain times and under certain conditions. The superintendent of a school district may also request by petition that school property within that district which is located in the unincorporated area of Kitsap County and on which a building having an occupancy classification of "E" under the Uniform Building Code is situated, together with the area within five hundred yards of the school property's perimeter, be designated as a "no shooting" area. Any such petition shall be presented to the Kitsap County board of commissioners and shall substantially comply in content with the following criteria:

(a) The proposed area shall contain a minimum of fifty dwelling units or, in the alternative, a minimum area of one square mile;

- (b) The proposed area shall have readily identifiable boundaries, which shall be shown on a map attached to the petition;
 - (c) A petition requesting that the discharge of certain types of firearms be nevertheless allowed during certain times and under certain conditions shall set forth with specificity the types of firearms, times and conditions being proposed;
 - (d) The petition for the proposed area shall bear the signatures of at least fifty-one percent of the proposed area's registered voters; provided, however, that a petition for a "no shooting" area involving school property need be signed only by the superintendent of the school district in which the school property is located;
 - (e) Ranges permitted under Article 2 of this chapter shall not be declared a no-shooting area by petition method.
- (2) A petition for a "no shooting" area shall be in substantially the following form:

PETITION TO CREATE A "NO SHOOTING" AREA

To: The Kitsap County Board of Commissioners

We, the undersigned citizens of Kitsap County, State of Washington, being legally registered voters within the respective precincts set opposite our names, do hereby respectfully request that the area generally known as _____ be established as a "No Shooting" area pursuant to Kitsap County Code Section 10.25.020.

We further request that the discharge of certain types of firearms, commonly known as _____, be nevertheless allowed during certain times of the year, namely, _____, under the following conditions:

- 1. _____
- 2. _____
- 3. _____
- 4. _____
- 5. _____

The proposed area's boundaries are shown on the attached map and are generally described as follows:

[Here insert proposed area boundary description]

Each of us says:

- (1) I am a legally registered voter of the State of Washington in the precinct written after my name below.
- (2) The portion of such precinct within which I reside is included within the proposed "No Shooting" area.
- (3) My residence address is correctly stated below.
- (4) I have personally signed this petition.

Petition Name and Signature	Precinct Name	Residence Address Number and Street	City or PO Box No.	Zip Code

Failure of a petition to comply with any of the above format shall not automatically invalidate such petition but shall be a matter for consideration by the Kitsap County board of commissioners as to whether the intent and standards of this section have been met.

(3) Upon the receipt of such a petition, the board of commissioners shall forward the petition to the Kitsap County auditor for verification of the signature requirements of this section. Upon the return of area verification from the auditor, the board shall set the matter for consideration at the next regularly scheduled public hearing or as soon thereafter as it may appropriately be heard.

(4) At any time after one year from the effective date of the establishment of a "no-shooting" area pursuant to this section, the residents of such area may seek abrogation of such by the same procedure provided in this section for the establishment of a "no-shooting" area; provided, however, that in the event of such abrogation, Section 10.25.020 shall remain in full force and effect as to that area.

(Ord. 515 (2014) § 2 (part), 2014)

Article 2 – Shooting Ranges

10.25.060 Purpose.

The purpose of this article is to provide for and promote the safety of the general public by establishing a permitting procedure and rules for the development and operation of shooting range facilities. The shooting range standards adopted herein are intended to protect and safeguard participants, spectators, neighboring properties and the public, while promoting the continued availability of shooting ranges for firearm education, practice in the safe use of firearms, and recreational firearm sports.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.070 Definitions.

The following definitions shall apply in the interpretation and enforcement of the ordinance codified in this article:

- (1) "Backstop" means a device constructed to stop or redirect bullets fired on a range, usually directly behind the target line.
- (2) "Baffles" means barriers to contain bullets and/or to reduce, redirect or suppress sound waves. Baffles are placed either overhead, alongside or at ground level to restrict or interrupt errant or off-the-target shots.
- (3) "Ballistic trauma" means a form of physical trauma sustained from the discharge of arms or munitions. Commonly it is the penetration of the body by a bullet, marked by a small

entrance wound and a larger exit wound. The wound is usually accompanied by damage to blood vessels, bones, and other tissues.

- (4) "Berm" means an embankment used for restricting bullets to a given area, or as a protective or dividing wall between shooting areas.
- (5) "Buffer" means a nonclearing native vegetation area which is intended to protect the functions and values of critical areas.
- (6) "Cowboy action shooting" means a type of match utilizing one or a combination of pistol (s), rifle, and/or shotgun in a variety of "Old West themed" courses of fire for time and accuracy.
- (7) "Department" means the Kitsap County department of community development.
- (8) "Firearm" means any weapon or device by whatever name known which will or is designed to expel a projectile by the action of an explosion. The term "firearm" shall include but not be limited to rifles, pistols, shotguns and machine guns. The term "firearm" shall not include devices, including but not limited to "nail guns," which are used as tools in the construction or building industries and which would otherwise fall within this definition.
- (9) "Firing line" means a line parallel to the targets from which firearms are discharged.
- (10) "Firing point" means a location from which one individual fires at an associated target down range.
- (11) "Five-stand shooting" means a shotgun shooting sport where there are five stations or stands on the firing line and multiple strategically placed target throwers that throw targets in front of the firing line.
- (12) "Integrated lead management program plan" means a written plan that details the specific design and operational elements that a shooting range employs to control and contain lead bullets and bullet fragments; prevents the migration of lead to surface and ground waters; removes accumulated lead bullets and bullet fragments from the shooting range for recycling; and documents and reports the plan's implementation work.
- (13) "Life safety violation" means an incident that causes substantial bodily harm to an individual or domestic animal, e.g., a bullet wound resulting in a 911 notification; or damage to a structure that results in a call to 911, sheriff's office, or the department for investigation.
- (14) "Physical containment" means the use of physical barriers that are sufficient to contain the projectile from the highest power firearm used on a shooting range. Physical barriers include baffles, sidewalls, backstops and berms of adequate design, quantity and location to ensure that no errant projectiles can escape the shooting range.
- (15) "Practical shooting" means a sport which challenges an individual's ability to shoot rapidly and accurately with a full-power handgun, rifle, or shotgun. To do this, shooters take on obstacle-laden shooting courses called stages, some requiring many shots to complete, and

others just a few. While scoring systems vary between practical shooting organizations, each measures the speed with which the stage is completed, with penalties for inaccurate shooting.

(16) "Range officer (RO)" or "range safety officer (RSO)" or "safety officer" means a person or persons appointed by the operators of a shooting facility to oversee the safe discharge of firearms in accordance with any conditions of permit approval and any other additional safety rules and procedures adopted by the operators of the shooting facility.

(17) "Routine maintenance" means simple, small-scale activities (e.g., repairing berms using less than one hundred fifty cubic yards of soil; repairing structures such that a building permit is not required under county code, etc.) associated with regular (daily, weekly, monthly, etc.) and general upkeep of a structure of existing building, firing line, target line, parking lots, etc. Routine maintenance activities are associated with maintaining a facility in its original condition; expansion and construction of new firing positions on a firing line, new ranges, etc., are not routine maintenance.

(18) "Rules and regulations" means standards used in the operation of a facility. Rules and regulations are set up to govern the facility operations and are normally part of the facility's safety plan.

(19) "Safety fan" means all areas in or around a range where projectiles, including errant projectiles, may impact or ricochet. The length of the safety fan extends to the maximum range of the cartridge and firearm used on the firing range unless adequate physical containment is provided. When physical containment is adequate, the safety fan is limited to the area within the containment.

(20) "Safety plan" means the written procedures and/or policies of a shooting facility specifically defining the safety requirements utilized at that facility.

(21) "Shooting facility" or "facility" means an entity with a site having one or more shooting ranges, but does not include residential property.

(22) "Shooting range" or "range" means a place set aside and designated for the safe discharge of firearms for individuals wishing to practice, improve upon or compete as to their shooting skills. There may be one or more ranges located at a shooting facility.

(23) "Skeet shooting" means a shotgun shooting sport where firer is on the firing line and fires at targets launched from two houses in somewhat sideways paths that intersect in front of the shooter.

(24) "Sporting clays" means a form of clay pigeon shooting which consists of multiple shooting stations laid out over natural terrain such that target presentations simulate the unpredictability of live quarry shooting.

(25) "Target line" means the line where targets are placed.

(26) "Trap shooting" means a shotgun shooting sport where a firer on the firing line shoots at targets launched from a single launching point and generally away from the shooter.

(27) "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include, but are not limited to, swamps, marshes, estuaries, bogs, and ponds less than twenty acres, including their submerged aquatic beds and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, storm water facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.090 Ranges – Operating permit required.

(1) Shooting facilities shall be authorized and operated in accordance with an operating permit issued by the department. The operating permit shall govern the facilities and scope of operations of each shooting facility, and shall be issued, denied or conditioned based upon the standards set forth in this article. No proposed or existing shooting facility may operate without an operating permit issued pursuant to this chapter, except as provided in subsection (2) of this section. This operating permit is not intended to alter the legal nonconforming use status and rights of existing ranges, which are governed by Title 17 and the common law, nor shall this operating permit authorize expansion of range uses which otherwise require approval pursuant to a conditional use permit or other land use permits per Title 17. Failure to obtain a range operational permit will result in closure of the range until such time a permit is obtained. Ranges that operate without a permit are subject to code compliance enforcement, including but not limited to injunctive relief.

(2) Each owner or operator of a shooting facility shall apply for and obtain an operating permit. The owner or operator of a proposed new shooting facility shall apply for the facility operating permit at the time of application for any necessary building or land use permits. The owner or operator of an established shooting facility in active use on the effective date of the ordinance codified in this article shall apply for the initial facility operating permit not later than ninety days after the effective date of the ordinance codified in this article. A shooting facility operating permit is valid for five years from the date of issuance or renewal. The owner or operator of each facility shall apply for a permit renewal at least thirty days prior to the date of current permit expiration.

(3) In reviewing a new application for a shooting facility operating permit, or renewal of an existing permit, the department shall be guided by the current edition of the "NRA Range Source Book" published by the National Rifle Association. Reference to the NRA Range Source Book may not be used as the basis for any claim of civil liability against the NRA or against Kitsap County or its officers, directors, employees, agents or representatives based upon deviation from, citation to, or reliance upon the NRA Range Source Book.

(4) Shooting facilities shall meet the following standards:

(a) Each shooting range within a shooting facility shall be designed, constructed, operated and maintained to contain bullets, shot or other discharged projectiles within the facility property. A shooting facility shall use the NRA Range Source Book, or other engineered specifications that meet or exceed the standards established by the Source Book, as a minimum to develop and implement institutional and facility controls for the safe operation, improvement and construction of shooting ranges. Facilities should engineer and construct facilities to reduce sound impacts on neighboring communities to the maximum extent feasible.

(i) Rifle and pistol ranges that allow modern smokeless powder cartridges or center-fired cartridges shall provide adequate physical containment of projectiles in addition to any institutional controls. Adequate physical containment requires the use of the appropriate combination of overhead baffles, impact berms and sidewalls or side berms.

(ii) Overhead baffles shall be constructed of material of sufficient design to stop and contain any projectile fired from the most powerful cartridge authorized for use on that specific range, shall be placed at intervals that are sufficient to eliminate the possibility of a projectile to be fired over the top of any preceding or successive baffle, and shall extend downrange far enough to prohibit a projectile being fired over the top of the impact berm.

(iii) Impact berms shall be constructed of material of sufficient height and thickness to stop and contain any projectile fired from the most powerful cartridge authorized for use on that specific range at any elevation that is not contained by the last overhead baffle. The surface of the impact berm should be free of large rocks and debris to reduce ricochet.

(iv) Sidewalls or side berms shall be constructed of material of sufficient height and thickness that will stop and contain any projectile fired from the most powerful cartridge authorized for use on that specific range at any elevation that is not contained by an overhead baffle or impact berm.

(b) Each shooting range shall have a safety plan as described herein. Each shooting range shall be used only for the shooting activities identified in the safety plan.

(c) Designs and safety procedures shall be evaluated by an NRA Range Technical Team Advisor (RTTA) or by a professional engineer with experience in shooting facilities or other qualified professional consultant with experience and expertise in the evaluation and design of shooting ranges. Qualified professional consultants must demonstrate their education, experience and expertise by identifying their certifications from nationally recognized shooting organizations that provide such certifications, the number and location of shooting facilities they have designed or evaluated and contact information for those facilities. Their home facility will not count towards this qualification.

- (d) A shooting facility shall have at least one qualified safety officer present when open to the public. When the facility is closed to the public, a facility member who has passed the minimum training requirements of the range shall be present.
- (e) Shooting facilities shall meet all applicable local fire codes when storing explosives.
- (f) A shooting range may not be used for training of units of any branch of the United States military, National Guard or reserve forces, or Homeland Security, unless the facility's application identifies all proposed activities, types and calibers of firearms to be used, and the facility is currently certified by the regional command as meeting the service's range safety manuals and standards. This does not restrict individual members of the military, National Guard or reserve forces, or Homeland Security to use a shooting facility for improving their individual skills with privately owned firearms.
- (g) A facility may allow the use of exploding targets (e.g., Tannerite, etc.) as provided in this subsection. Use of exploding targets is limited to one day per calendar month during a designated four-hour period between the hours of 9:00 a.m. to 5:00 p.m. The facility must designate the day and time of use in its application. If used, exploding targets must meet parameters defined and identified in the safety plan, including that exploding targets shall only be used within the parameters defined by the manufacturer, and shall not exceed one-half pound of mixture. A facility allowing use of exploding targets shall demonstrate how it mitigates the noise impacts on surrounding neighbors. Mitigation may be an approved bunkering system that surrounds the target on three sides and forces the sound back towards the shooter and upward.
- (h) If a facility utilizes cannon(s) for audio effect purposes, a noise variance per Chapter 10.28 shall be required.
- (i) All shooting facilities shall provide a means for participants and spectators to readily contact emergency services such as fire or medical aid.
- (j) Shooting facilities within five hundred yards of a shoreline, wetland or wetland buffer must orient the firing away from these areas or demonstrate how bullets are contained so that they do not enter these areas.
- (k) Firing lines, targets and target lines must be located so that the direction of fire is not toward any structure housing people or domestic animals located within five hundred yards of the point of discharge.
- (l) Shooting facilities conducting cowboy action shooting, practical shooting, and similar sports shooting matches must meet the following requirements:
- (i) A shooting facility is limited to two competition events per calendar month; and
 - (ii) All such competition events or practices shall take place on a range constructed in compliance with subsection (4)(a) of this section; and

- (iii) For any competition event or practice in which shooting takes place where overhead baffling is not present, an on-duty range control officer must be present at the practice site alongside the shooter; and
 - (iv) For practice in which shooting takes place where overhead baffling is not present, the facility must limit the hours of practice to daylight hours between 9:00 a.m. to 5:00 p.m.; and
 - (v) Practice must be restricted to one range at any given time.
- (5) Application Contents. The application for an initial shooting facility operating permit shall include the following documents:
- (a) A safety plan, which shall include:
 - (i) Firearm handling rules, general range rules, specific range rules and administrative rules and regulations established by the owner/operator to include any firearms and/or caliber restrictions on specific shooting areas.
 - (ii) Emergency plan, to include provision for timely notification to the Kitsap County sheriff's office and to the department of any type of ballistic trauma with initial notification within a ninety-six-hour time period. The accidental or unintended release of a bullet from a shooting area shall be documented by the facility and available for inspection by the department as requested.
 - (iii) Brief description of the facility training plan for range safety officers and others.
 - (iv) Ranges conducting cowboy action shooting, practical shooting, and similar sports shooting matches shall follow the guidelines established by the sporting association that governs such matches and include it in the safety plan. The facility will identify the association governing the match and attach the safety guidelines to the permit application. If no such guidelines exist, then as a minimum, each shooter will have a range control officer within arm's length to ensure control of the direction of the firearm's muzzle. The range control officer can also perform as the timer of these activities.
 - (b) Shooting facility layout and design which shall include:
 - (i) Dimensional drawings of physical layout to include orientation of each shooting area, location and description of terrain and any natural vegetation, and locations of critical areas, buildings, structures, fences, gates, roadways, trails, foot paths, major lighting, signage, and parking areas.
 - (ii) Locations of firing lines or firing points, target lines and impact areas to include any backstops, berms, containment structures and any baffles or side containment structures.
 - (iii) For practical shooting ranges without overhead baffles, a safety fan diagram based on the most powerful cartridge proposed to be shot on the range.

- (c) An evaluation of the facility design and safety plan.
 - (i) The evaluation must be performed by a NRA range technical team advisor (RTTA) or a professional engineer with expertise in the design of shooting ranges that reports any safety issues or proposed uses which are inconsistent with the NRA Range Source Book for facility designs and institutional controls or qualified consultant that meets the credentials previously stated. The evaluation must be in written form and signed by the evaluator.
 - (ii) The department may, at county expense, arrange for an additional or independent inspection and evaluation of the shooting facility, including the facility's uses and institutional controls described in an application for an operating permit. In cases where there is dispute between the evaluation provided by the facility and the evaluation performed at the option of the county, the dispute shall be decided by the hearing examiner pursuant to Title 21.
 - (d) For exploding targets used on a facility, plans for mitigation of noise impacts on neighbors.
- (6) Each owner or operator of a shooting facility must apply to the department for an amendment to the operating permit when additional firing lines, firing lanes, or shooting ranges are proposed or the design of any facility range is altered beyond the scope of the original permit approval. Such proposed changes shall not be implemented prior to department approval.
- (a) Routine maintenance of existing berms, backstops, structures and facilities shall not be construed as a change requiring an amendment to an operating permit.
 - (b) Changes to shotgun range configuration or safety plan procedure shall not be construed as a change requiring an amendment to an operating permit if the discharged shot is wholly contained on the shooting facility property.
 - (c) Changes to rifle or pistol range configuration or safety plan procedure shall not be construed as a change requiring an amendment to an operating permit if the direction of fire and safety structures are not altered and the safety procedures are not reduced.
- (7) An application for renewal of an operating permit shall include a current copy of the facility safety plan. Permit renewal does not require the submittal of layout and design documents or a written evaluation by an RTTA or professional engineer if the shooting facility range design has not been altered from previously approved submittals. However, the application must include a written statement by the owner of the facility declaring that no such changes have been made.
- (8) During the operating permit review or renewal process, the department shall inspect the facility to determine that the ranges are consistent with the application descriptions and to assess any deficiencies or corrective actions necessary to meet the intent of this article. The department shall inform the applicant of any deficiencies or corrective actions to be taken and

allow a reasonable time for the owner/operator to take corrective action. The department may reinspect the facility to verify corrective action.

(9) Application for a new or renewed operating permit shall be processed, reviewed and be appealable under the procedures for a Type I director's decision pursuant to Title 21. Permit renewals shall be issued without additional restrictions provided there have been no substantial changes to range design or operation. Permit renewals may not be unreasonably withheld. Shooting facilities shall be allowed to continue operations while a review of a permit renewal is performed.

(10) Upon receiving evidence of noncompliance with the operating permit or receiving evidence of a reasonable likelihood that humans, domestic animals, or property have been or will be jeopardized, the department will contact the shooting facility within twenty-four hours and will give the facility a written notice of the complaint. The owner/operator shall make the facility available for inspection not later than forty-eight hours after receiving a request for an inspection.

(a) If the department concludes there is a life safety violation of this article or the terms of the operating permit, the department may suspend or modify the permit to close the range or modify range operations and shall provide the owner/operator a written notice that shall set forth each claimed violation with a specific reference to the applicable article provision and/or permit condition. The owner or operator shall have thirty days to respond in writing and to take any necessary corrective measures. The department shall be provided access to the shooting facility to verify compliance after providing notice and scheduling an appointment. An operational range permit that has been suspended requires the shooting facility to cease any firing activities.

(b) A department decision to suspend, modify, or revoke an operating permit may be appealed to the hearing examiner pursuant to Title 21.

(11) Nothing in this section or any other provision of this article shall be construed as authorizing an application or a permit for a shooting facility to be located in whole or in part in an area designated as an area where the discharge of firearms is prohibited under Article 1 of this chapter. Shooting ranges in such areas are expressly prohibited. Nothing in this article shall be construed as permitting the discharge of firearms the ownership or possession of which is otherwise prohibited by law. Nothing in this article shall be construed as permitting the use or possession of a firearm by an individual who is otherwise prohibited by law from owning or possessing that firearm.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.110 Shooting facility environmental controls.

Each shooting facility operator shall develop and submit an integrated lead management program plan to reclaim lead deposited by shooting activities. This plan will be reviewed by the Kitsap public health district.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.120 Review committee.

The Kitsap County board of commissioners may direct the director of community development to establish a review committee to evaluate proposed changes to the shooting facility requirements governed by this article. The committee will consist of the director of the department of community development or the director's designee (chair), Kitsap County sheriff or the sheriff's designee, a representative of each currently permitted shooting facility in unincorporated Kitsap County and an equal number of citizens at large appointed by the Kitsap County board of commissioners. The citizens at large shall go through the appropriate application process. An appointed citizen at large may not be a member of or affiliated with any established shooting facility in unincorporated Kitsap County.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.130 Exceptions.

(1) Shooting facilities and ranges that solely conduct trap, skeet, sporting clay or five stand shooting operations are exempt from this article if they meet the following conditions:

- (a) Shells fired are not greater than No. 7-1/2 shot; and
- (b) The facility has sufficient land to contain all shot fired.

(Ord. 515 (2014) § 2 (part), 2014)

10.25.140 Application and construction of this chapter.

A facility may not generate noise at a level that creates a public nuisance. Notwithstanding any other provision in this chapter, upon obtaining a ruling from a court of record that a shooting facility has been found to create a public nuisance, the department may require additional noise, environmental or safety controls as a condition of continuing a shooting facility operating permit. No provision of this chapter shall act to nullify or render void the terms of any existing or future injunctive order issued by a court of record pertaining to operations or activities at a shooting range or shooting facility. No provision of this chapter shall be construed to allow or authorize the discharge of firearms otherwise prohibited by state or federal law.

(Ord. 515 (2014) § 2 (part), 2014)



The Kitsap County Code is current through Ordinance 550 (2018), passed February 12, 2018, and Resolution 169-2013, passed November 25, 2013.

Disclaimer: The Clerk of the Board's Office has the official version of the Kitsap County Code. Users should contact the Clerk of the Board's Office for ordinances passed subsequent to the ordinance cited above.

County Website: <http://www.kitsapgov.com/>

County Telephone: (360) 337-5777 / (800) 825-4940

Email the county: openline@co.kitsap.wa.us

Code Publishing Company

KRRC – Opening Brief

Appendix A-2

21.04.030 Roles and responsibilities.

A. The department is responsible for processing project permit applications consistent with this chapter and other applicable federal, state, and local laws. Unless otherwise stated, the department shall issue the proper notices of application and decision, and conduct permit review.

B. Permit applicants are responsible for cooperating in the review process. This includes, but is not limited to:

1. Reading the code for their project;
2. Submitting applications that are fully complete so they can be processed in a timely manner;
3. Monitoring time limitations and review deadlines for applications;
4. Paying the appropriate fees;
5. Managing their project team to ensure requested information is complete and provided in a timely manner; to the extent practicable, consolidating inquiries to minimize inefficient review; and identifying one point of contact for all communication;
6. Addressing issues with department leadership when they think conditions or service is not code-based or appropriate; and
7. Maintaining Active Applications. If an application expires, a new application may be filed with the department, but it shall be subject to new application fees and a new vesting date.

C. The department is responsible for processing applications in a manner that is timely and adequate. This includes, but is not limited to:

1. Providing applications, checklists, and information to direct the applicant to pertinent parts of the code that must be met for a fully complete application;
2. Processing the application in the times established within this chapter;
3. Ensuring the applicant, or point of contact, is notified in a timely manner when additional materials for review are required;
4. Ensuring project conditions are supported by applicable federal, state, or local law; and
5. Providing a process for applicants to address concerns regarding conditions or departmental service delivery.

Where possible the department shall strive to outperform time frames for communication, noticing and processing of project permit applications.

(Ord. 490 (2012) § 3 (Att. 1), 2012)

KRRC – Opening Brief

Appendix A-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON July 30, 2018

DIVISION II

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 ROES I-XX, inclusive.

Appellant.

No. 50011-6-II

UNPUBLISHED OPINION

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.

MAXA, A.C.J. – The Kitsap Rifle and Revolver Club (Club) appeals the trial court’s order of contempt, which enjoined the Club from operating a shooting facility on its property until it obtained a site development activity permit (SDAP) for prior site development work performed without a permit. The court found the Club in contempt for failing to comply with the court’s supplemental order requiring the Club to apply for an SDAP for the prior development work within 180 days.

We hold that the trial court did not err in finding the Club in contempt because (1) the plain language of RCW 7.21.030(2) shows that the trial court was not required to make an express finding that the Club was able to comply with the court’s supplemental order, (2)

substantial evidence supports the trial court's implied finding that the Club was able to comply with the court's supplemental order, (3) substantial evidence supports the trial court's finding that the Club intentionally failed to comply with the court's supplemental order, and (4) substantial evidence supports the trial court's finding that the Club failed to submit an SDAP application when it declined to pay the required application fee. However, we hold that the trial court erred in ruling that the Club was required to *obtain* an SDAP (rather than apply for one) in order to purge the contempt because actually obtaining a permit is beyond the Club's control.

Accordingly, we affirm the trial court's contempt order except for the requirement that the Club obtain an SDAP in order to purge the contempt. We remand for the trial court to address the imposition of a proper purge condition.

FACTS

County's Lawsuit Against the Club

The Club has operated a shooting facility in the same general location in Bremerton since the 1920s. *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 262, 337 P.3d 328 (2014).¹ As of 1993, the Club's operation was a lawful, nonconforming use. *Id.* at 262-63.

Beginning in the 1990s, the Club engaged in extensive development of the property on which its shooting range was located. *Id.* at 264. This development included clearing and excavating wooded or semi-wooded areas, removing vegetation, replacing a water course that ran through a wetland buffer with two 475-foot culverts, and excavating and moving soil. *Id.* The Club did not obtain permits for any of this work. *Id.*

¹ A more complete version of the facts leading up to the County's lawsuit is included in *Kitsap Rifle*, 184 Wn. App. at 262-66.

In 2011, the County filed a complaint against the Club, alleging in part that the Club had engaged in unlawful development activities because it lacked the necessary permits. *Id.* at 265. After a bench trial, the trial court concluded that the Club's use of the property was illegal because it had not obtained any permits for its development work. *Id.* at 266. The court entered conclusions of law that this unpermitted use terminated the nonconforming use of the Club's property as a shooting range. *Id.* at 265-66. On that basis, the trial court issued a permanent injunction prohibiting the Club from using its property as a shooting range until it obtained the proper permits. *Id.* at 266.

On appeal, this court affirmed the trial court's ruling that the Club's development work violated County land use permitting requirements. *Id.* at 275. However, the court held that terminating the Club's nonconforming use status was not a proper remedy. *Id.* at 300-01. The court remanded for the trial court to determine the proper remedies for the Club's permitting violations. *Id.* at 301.

Order Supplementing Judgment

On remand, the trial court entered an Order Supplementing Judgment on Remand. The supplemental order stated,

A permanent, mandatory injunction is hereby issued further requiring Defendant to apply for and obtain site development activity permitting to cure violations of KCC [Kitsap County Code] 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.

Clerk's Papers (CP) at 286. The court entered the order on February 5, 2016, with the 180-day period set to end on August 3.

The Club took some immediate steps to comply with the court's order. First, the Club engaged consultants to draft a scope of work, which listed the required activities for the Club to comply with the relevant permitting requirements. Preparing the scope of work cost \$8,000, and was completed on February 24. The scope of work estimated that the cost of preparing the Club's SDAP applications would exceed \$158,000 and that the cost of completing all required activities would be \$398,939.

Second, the Club submitted the scope of work to its insurer, Northland Insurance Company. Northland had been participating in the Club's defense of the County's lawsuit, but denied coverage for the costs associated with the scope of work. On July 28, the Club informed the County of the Club's dispute with Northland and the Club's intent to pursue avenues to receive coverage from Northland.

Motion for Contempt

The Club did not submit an SDAP application by the August 3 deadline. On August 18, the County filed a motion for contempt, requesting that the court prohibit the Club from operating a shooting range until it submitted an application for an SDAP.

In response, the Club submitted a declaration from Marcus Carter, its executive officer. Carter stated that the Club had been attempting to comply with the court's order by obtaining the scope of work and seeking money from its liability insurer to pay for the required work. He noted that the Club was a nonprofit organization with no endowment and stated that its 2016 end-of-month operating account balances never exceeded \$11,000. Carter stated, "The Club has never intended to disobey or violate the SDAP order. The Club has taken steps to comply, and it is still engaged in the difficult task of persuading or forcing its insurer to pay for the SDAP work.

The Club wants to comply with the SDAP order, but has lacked the means to do so in the time frame ordered.” CP at 218.

The trial court held a hearing on August 26. The Club focused on the ongoing coverage dispute with its liability insurer, and argued that it was unable to comply with the court’s order because of the expense. The court declined to find the Club in contempt at that time and provided 90 additional days for the Club to file the required SDAP application. The court scheduled a second hearing for December 2.

Carter submitted a declaration stating that on November 28 the Club had “attempted to submit an SDAP application to the County.” CP at 330. Carter stated, “The Club prepared the application materials without the assistance of any professional consultant or engineer because it was unable to afford those types of services without funding from its insurer. The Club made a good faith effort to prepare the application using the application forms and instructions provided on the Kitsap County website.” CP at 330-31. Carter also stated,

Any lack of compliance by the Club with the SDAP order in the supplemental judgment is not intentional and is in spite of the Club’s good faith efforts to comply or obtain the financial means to do so. The Club wishes to hire qualified professionals to assist with its SDAP application, but without insurance coverage for the cost of those services that level of compliance with the SDAP order is not within the Club’s power to perform. The Club intends to continue its attempts to work with both the County and its insurer to resolve all issues related to the SDAPs.

CP at 331.

Before the second contempt hearing, the County submitted a declaration from Jeffrey Rowe, the deputy director of the Kitsap County Department of Community Development. According to Rowe, when Carter attempted to submit the Club’s application he indicated that he was not prepared to pay the associated fee. Rowe informed Carter that the fees were a part of a

complete application and that the County could not accept a permit application until the applicant paid the required fees. Carter stated that the Club was unable to pay the fees because it had no money. Carter then left without submitting the application. The record shows that the appropriate application fee was either \$1,512 or \$3,612, depending on the type of application required.

Rowe did not review at that time the application materials that Carter attempted to submit. Rowe later reviewed the application when Carter attached it to his declaration, and Rowe determined that the application was deficient in multiple respects.

Second Contempt Hearing

At the second contempt hearing, the County argued that the Club had not met its burden of establishing an inability to pay the expenses of the permit process. The County noted that the Club had presented only Carter's unsupported assertions and had not submitted bank statements, asset and liability information, or tax returns. The County also pointed out that there was no information about whether the Club had made efforts to obtain grant funding or engage in fundraising to pay for the necessary expenses.

The Club emphasized that it was not trying to avoid complying with the court's order, but stated that it lacked the ability to pay for the professional and engineering services required to submit a complete SDAP application. The Club argued that Carter's two declarations provided un rebutted evidence that it was unable to pay the \$158,000 cost for those services.

The trial court granted the County's motion for contempt and gave a brief oral ruling:

Well, I thought that 90 days would help. I certainly thought that two years from the time that the Court of Appeals made a decision would alert the Club, we need to do fundraising, we need to do something to make sure that we're in compliance with the original order that was affirmed by the Court. Based on that, I think the County's

position is well-taken, they've not come through with what they were ordered to do, and I am going to enjoin the Club from further operations until they comply.

Verbatim Report of Proceedings (Dec. 2, 2016) at 18-19.

Contempt Order

The trial court entered an order granting the County's motion for contempt and making findings of fact and conclusions of law. The court found:

3. [The Club] failed to submit an application for an SDAP within 180 days of the entry of the Supplemental Judgment and has failed to submit a complete application as of the date of the entry of this order.
4. [The Club]'s failure to comply with the Supplemental Judgment's mandatory injunction to submit a permitting application to Kitsap County within 180 days was intentional.

CP at 412. The court did not make an express finding of fact that the Club had the ability to comply with the supplemental order.

The court entered a conclusion of law that the Club was in contempt of court. The court also concluded that "[a]n injunction prohibiting [the Club] from operating a shooting facility until it obtains an application for permitting is an appropriate remedial sanction for [the Club]'s contempt of court." CP at 412. On that basis, the court ordered, "[The Club] is enjoined from operating a shooting facility until such time that [the Club] *obtains* permitting in compliance with KCC Titles 12 and 19." CP at 413 (emphasis added).

The Club appeals the trial court's contempt order.

ANALYSIS

A. REMEDIAL CONTEMPT SANCTIONS

Chapter 7.21 RCW provides courts with the authority to impose sanctions on a person for contempt of court. Contempt of court includes the "intentional . . . [d]isobedience of any lawful

judgment, decree, order, or process of the court.” RCW 7.21.010(1)(b). The person subject to contempt is referred to as the “contemnor.”

The contempt statutes distinguish between remedial (or civil) sanctions and punitive (or criminal) sanctions for contempt of court. *In re Interest of Silva*, 166 Wn.2d 133, 141, 206 P.3d 1240 (2009). Remedial sanctions are “imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person’s power to perform.” RCW 7.21.010(3). Punitive sanctions are imposed to punish past contempt of court to uphold the court’s authority. RCW 7.21.010(2).

A court can impose a remedial sanction after notice and hearing. RCW 7.21.030(1). But an action to impose a punitive sanction must be initiated by the prosecutor, RCW 7.21.040(2), and the person subject to contempt must receive the due process rights afforded to criminal defendants. *Silva*, 162 Wn.2d at 141.

Under RCW 7.21.030(2), a court may find a person in contempt of court and impose a remedial sanction “[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.” The court may impose one or more of several listed sanctions, including “[a]n order designed to ensure compliance with a prior order of the court.” RCW 7.21.030(2)(c).

The contempt statutes provide three requirements for imposing remedial contempt sanctions. First, the contemnor must have “failed or refused to perform an act,” RCW 7.21.030(2), which under RCW 7.21.010(1)(b) includes the disobedience of a lawful order. Second, the failure to perform an act must have been intentional. RCW 7.21.010(1). Third, the act must have been within the contemnor’s power to perform. RCW 7.21.030(2).

We review contempt rulings for an abuse of discretion. *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 768, 271 P.3d 331 (2012). “ ‘Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal.’ ” *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoting *In re Pers. Restraint of King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988)). A trial court abuses its discretion if its contempt decision was manifestly unreasonable or based on untenable grounds. *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 355, 236 P.3d 981 (2010). In addition, a contempt ruling based on an erroneous view of the law or an incorrect legal analysis constitutes an abuse of discretion. *In re Estates of Smaldino*, 151 Wn. App. 356, 364, 212 P.3d 579 (2009).

When applicable, the trial court's finding of contempt also must be supported by substantial evidence. *In re Rapid Settlements, Ltd.*, 189 Wn. App. 584, 601, 359 P.3d 823 (2015), *review denied*, 185 Wn.2d 1020 (2016). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the finding's truth. *Blackburn v. Dep't of Soc. & Health Servs.*, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016).

B. ABILITY TO COMPLY WITH ORDER

The Club argues that the trial court erred in imposing remedial contempt sanctions because the Club was financially unable to comply with the court's supplemental order that the Club apply for and obtain an SDAP for its prior unpermitted development work. We hold that the trial court did not err in implicitly finding that the Club had not met its burden of proving that it was unable to comply with the supplemental order.

1. Legal Principles

As noted above, one requirement for imposing remedial sanctions is a finding that compliance with a court's order is "within the person's power to perform." RCW 7.21.030(2). In the context of civil or remedial contempt, we presume that a person is able to perform actions required by the trial court. *Moreman*, 126 Wn.2d at 40. Therefore, the inability to comply with a court order is an affirmative defense to contempt. *Id.*

The contemnor has both the burden of production and the burden of persuasion regarding his or her claimed inability to comply. *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." *Id.* at 40-41 (quoting *King*, 110 Wn.2d at 804). In other words, before imposing a coercive sanction, the trial court must find that the contemnor has failed to prove an inability to perform the act at issue.

2. Requirement of Express Finding

The Club argues that RCW 7.21.030(2) required the trial court to make an *express* finding regarding the Club's ability to comply with the court's order before imposing remedial sanctions. The Club claims that the contempt order is invalid in the absence of such an express finding. We disagree.

a. Principles of Statutory Interpretation

Interpreting RCW 7.21.030(2) is a question of law that we review *de novo*. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislature's intent, as evidenced by "the language of the provision in question, the context of the statute in which the provision is found, and related

statutes.” *State v. Evergreen Freedom Foundation*, 1 Wn. App. 2d 288, 299, 404 P.3d 618 (2017). We give undefined statutory language its usual and ordinary meaning and interpret words in the context of the statute in which they appear. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 396, 325 P.3d 904 (2014).

When interpreting the plain meaning of a statute’s words, we look to the context in which they are used. *Evergreen Freedom Foundation*, 1 Wn. App. 2d at 299. When the legislature uses different terms in the same statute, we presume the legislature intended the terms to have different meanings. *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007).

If the plain meaning of a statute is unambiguous, we must apply that plain meaning as an expression of legislative intent without considering extrinsic sources. *Jametsky*, 179 Wn.2d at 762. A statute is ambiguous if its language is subject to more than one reasonable interpretation. *Id.* We resolve ambiguities by considering other indications of legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Id.*

b. Language of RCW 7.21.030(2)

RCW 7.21.030(2) states, “*If the court finds* that the person has failed or refused to perform an act that is yet within the person’s power to perform,” then the court may find the person in contempt and impose remedial sanctions. (Emphasis added.) The phrase “if the court finds” clearly requires the trial court to decide whether the person has the ability to perform before imposing remedial sanctions. But stating that a court must *decide* an issue is different than stating that the court must make an *express finding* on that issue.

Two aspects of RCW 7.21.030(2) suggest that the trial court is not required to make an express finding regarding ability to perform. First, the plain statutory language does not

specifically require an express finding. RCW 7.21.030(2) uses the language “[i]f the court finds” instead of “if the court *expressly* finds” or “if the court *makes a finding*.” A court can “find” a fact without making an express finding. We will not use statutory interpretation to add language that the legislature did not use. *Nelson v. Dep’t of Labor & Indus.*, 198 Wn. App. 101, 110, 392 P.3d 1138 (2017).

Second, the legislature did use the phrase “expressly finds” in a different subsection of RCW 7.21.030(2). RCW 7.21.030(2)(d) states that the trial court may impose a remedial sanction not specified in (a) through (c) “if the court *expressly finds* that those sanctions would be ineffectual.” (Emphasis added.) The legislature’s decision to use the term “expressly finds” in subsection (2)(d) but not in subsection (2)(b) suggests that the legislature did not intend to require an express finding under RCW 7.21.030(2)(b).

c. Case Law

No Washington case has specifically addressed this issue. And the few cases discussing remedial sanctions do not clearly require an express finding.

The discussion by Division Three of this court in *Rapid Settlements* provides some support for a rule that an express finding is not required. *Rapid Settlements* addressed a different issue: whether RCW 7.21.010(1) required an express finding concerning a contemnor’s *intent*. 189 Wn. App. at 604-05. That statute states that contempt of court means “intentional” disobedience. RCW 7.21.010(1). The court compared other statutes that clearly require the trial court to make a written finding. *Rapid Settlements*, 189 Wn. App. at 605; *see* RCW 4.84.185 (court may award expenses “upon written findings by the judge that the action . . . was frivolous”); RCW 13.34.155(2)(b) (“dependency court . . . must make a written finding” that

parenting plan is in a child's best interest); RCW 13.40.193(2)(a) (juvenile unlawfully in possession of a firearm must receive a certain disposition "unless the court makes a written finding" otherwise). The court held that, because nothing in chapter 7.21 RCW stated that the trial court had to make a written finding of intentional conduct, such a finding was not required. *Rapid Settlements*, 189 Wn. App. at 605.

The language "if the court finds" in RCW 7.21.030(2) is different than the language of RCW 7.21.010(1), which does not refer to any finding when requiring that a failure to act be intentional. But the statutes cited in *Rapid Settlements* are still more specific than RCW 7.21.030(2), and the same analysis applies here.

The Club relies on *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 113 P.3d 1041 (2005), to support its argument that the trial court was required to make an express finding. In *Britannia Holdings*, Division One reversed a finding on contempt because the trial court did not find that the contemnors had the present ability to comply. *Id.* at 928. The contemnors were judgment debtors who claimed that they lacked funds to comply with a court-ordered payment. *Id.* at 928-29. The trial court found the debtors in contempt because, although they previously had control over sufficient funds, they transferred the money to foreign countries and therefore knowingly disobeyed the court's orders. *Id.* at 929-30.

Division One stated that a threshold requirement of the exercise of contempt power "is a finding of *current* ability to perform the act previously ordered." *Id.* at 934. The court held that the trial court erred by failing to "make a finding" that the contemnors had the ability to purge the contempt at the time of the contempt order. *Id.* However, the court did not specifically

address whether the trial court was required to make an *express* finding. Instead, the court's focus was on the contemnors' current as opposed to previous ability to pay.

In another case, *In re Guardianship of Wells*, Division One indicated that an express finding of ability to comply is not necessarily required under RCW 7.21.030(2). 150 Wn. App. 491, 501-02, 208 P.3d 1126 (2009). Division One recognized its statement in *Britannia Holdings* that a threshold requirement for a court's exercise of contempt power was a finding of a current ability to perform the act ordered. *Id.* at 500 n.16. The court noted that although the trial court did not enter specific findings on the contemnor's ability to comply, the contemnor represented that he had the ability and the evidence was undisputed that he had the current ability to comply. *Id.* at 501. The court held that "[u]nder the circumstances, the court's order recognizing [the contemnor's] ability to pay was a sufficient determination to support the court's order of contempt. *Id.* at 501-02. The court concluded, "[The contemnor] had the burden to show he was unable to comply with the trial court's order. Given his testimony, he could not meet this burden." *Id.* at 502.

d. Conclusion

We hold that when a trial court imposes a remedial sanction under RCW 7.21.030(2), the court is not required to make an express finding that the contemnor has failed to prove the inability to comply with the court's prior order. This holding is supported by the plain language of RCW 7.21.030(2), which does not specifically require an express finding regarding the contemnor's ability to perform but in a related subsection does require an express finding on another matter. Further, the case law does not clearly require an express finding.

Accordingly, we hold that the trial court did not err in imposing remedial sanctions without making an express finding that the Club failed to prove that it was unable to comply with the court's order.

3. Evidence of Club's Inability to Comply

The Club argues that even if the trial court was not required to make an express finding regarding the Club's ability to comply with the supplemental order, the trial court erred in imposing remedial sanctions for contempt because the evidence did not support an implied finding that the Club had the ability to comply. The Club emphasizes that it presented evidence that it did not have the financial ability to comply and the County made no effort to rebut that evidence. We hold that the trial court did not err.

As noted above, the trial court must make at least an implicit finding that the contemnor has the ability to comply before imposing a coercive sanction. RCW 7.21.030(2). And the ability to comply with a court order is an affirmative defense to contempt and the contemnor has the burden of production and persuasion. *Moreman*, 126 Wn.2d at 40. Although no court appears to have addressed the standard of proof for proving an affirmative defense to contempt, the general civil standard is preponderance of the evidence. *See Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 208, 378 P.3d 139 (2016).

Here, the Club presented limited evidence that it lacked sufficient funds to complete an SDAP application. Carter's declaration showed that completing the application alone would cost in excess of \$158,000 and that the Club's end-of-month operating account balances in 2016 never exceeded \$11,000. The County did not rebut the cost of an application, but argued that the Club failed to present information about its financial situation, including tax returns, assets and

liabilities, or bank statements. The County argued that the Club presented only unsupported assertions, which were insufficient to show an inability to pay.

The trial court was in the best position to evaluate the evidence. The Club had the burden of proving to the court that it was financially unable to comply with the court's order. And as the court stated in *Moreman*, the person subject to contempt must present evidence of a kind that the court finds credible. 126 Wn.2d at 40-41. In light of the minimal evidence the Club presented, it is apparent that the court concluded that the Club did not present credible evidence of inability to pay and therefore did not meet its burden of proof. Given the abuse of discretion standard of review, we will not second guess the court's determination.

Accordingly, we hold that the lack of detailed evidence regarding the Club's claim that it was unable to comply with the court's order supports the trial court's imposition of remedial sanctions under RCW 7.21.030(2).

C. FINDING OF INTENTIONAL FAILURE TO COMPLY

The Club argues that the trial court erred in entering the contempt order because substantial evidence does not support the court's finding that the Club's violation of the court's supplemental order was intentional. We disagree.

RCW 7.21.010(1) states that contempt of court must be intentional. Therefore, a person must act intentionally to be found in contempt. *Rapid Settlements*, 189 Wn. App. at 605. Here, the trial court expressly found that the club's failure to comply with the court's order was intentional.

Chapter 7.21 RCW does not define "intentional" and no contempt case has discussed this requirement in depth. One clear rule is that for a contemnor to act intentionally, he or she must

have actual or constructive knowledge of the “existence and substantive effect of the court’s order or judgment.” *Smaldino*, 151 Wn. App. at 365. In addition, the court’s order must be clear enough that the contemnor understands what is necessary for compliance. *See Tiger Oil*, 166 Wn. App. at 769-71 (stating that contradictory provisions in two consent decrees supported the contemnor’s argument that it did not intentionally disobey one of the consent decrees).

The Club claims that its failure to comply with the court’s supplemental order was not intentional because it was financially unable to comply. But as discussed above, the contemnor’s inability to comply is a separate affirmative defense to the imposition of remedial sanctions. No court has suggested that a contemnor’s ability to comply is relevant to whether he or she intentionally did not comply.

There is no question that the Club had actual knowledge of the court’s supplemental order. And the order’s requirement was clear: the Club had to apply within 180 days for an SDAP for the development work performed without a permit. Further, at the first contempt hearing the court again made it clear that the Club had to apply for an SDAP within the 90 day extension.

Despite the clear requirement in the court’s order, the Club failed to submit an application for an SDAP. Carter brought an application to the County offices, but after stating that the Club could not afford the application fee he left without submitting it. Although the Club may have had an explanation for its failure to comply, there is no question that the failure was intentional in the sense that the Club *deliberately* did not submit an application.

Accordingly, we hold that substantial evidence supports the trial court’s finding of fact that the Club intentionally failed to comply with the court’s order.

D. VIOLATION OF APPLICATION REQUIREMENT

The Club argues that based on a strict reading of the supplemental order, substantial evidence does not support the trial court's finding that the Club failed to submit an SDAP application in violation of the order. The Club argues that the order required only that the Club submit an application, without specifying what qualified as a proper submission. We disagree.

When determining whether the contemnor violated a court's order, we must strictly construe the order in the contemnor's favor. *Rapid Settlements*, 189 Wn. App. at 601-02.

Further, the contemnor must have committed a plain violation of the order. *Id.*

The trial court's supplemental order stated that the Club was required to apply for an SDAP to cure violations of KCC Titles 12 and 19 and that an "application for permitting shall be submitted" within 180 days. CP at 286. In its contempt order, the trial court made a finding that the Club "failed to submit an application for an SDAP within 180 days" of its order and "failed to submit a complete application" as of the date of the contempt order. CP at 412.

The Club argues that it did comply with the court's supplemental order when Carter delivered to the County an application he completed using the forms and instructions on the county's website. The Club acknowledges that the County later determined that the application that Carter proffered had multiple deficiencies. But the Club emphasizes that the court's order did not specify that the application be without deficiencies or acceptable to the County, only that the application be made. The Club claims that under a strict construction of the court's order, it complied with the order by bringing the application to the County.

We need not decide whether submitting a patently deficient application would constitute compliance with the court's supplemental order because the evidence is undisputed that the Club

did not actually submit an SDAP application with the County. Carter stated only that the Club had “*attempted* to submit” the application. CP at 330 (emphasis added). The County informed Carter that it could not accept an application unless he paid a required filing fee, and he was not prepared to pay the fee. Carter then took the application and left.

The Club does not address its failure to pay the application fee. But it is clear that under the Kitsap County Code, permit applications must include any applicable fees. KCC 21.04.160; *see also* KCC 21.04.030 (stating that the review process includes “[p]aying the appropriate fees”). Therefore, paying the required fee is a prerequisite to submitting an SDAP application.

Accordingly, we hold that substantial evidence supports the trial court’s finding of fact that the Club did not submit an SDAP application as of the date of the contempt order.

E. PUNITIVE PURGE CONDITION

The Club argues that even if the trial court did not err in finding the Club in contempt and deciding to impose a sanction, the sanction imposed was punitive rather than remedial and therefore was improper. Specifically, the Club focuses on the requirement in the contempt order’s purge condition that the Club *obtain* a permit rather than merely requiring a permit application. We agree.

1. Legal Background

As noted above, a remedial or civil sanction is one that is designed to coerce performance when the contempt involves a failure to perform an act. RCW 7.21.010(3). The goal of the sanction is to remedy the nonperformance by subjecting the contemnor to certain consequences until the act is performed. A remedial sanction remedies a contemnor’s failure to comply with an order by requiring compliance. *See In re Marriage of Didier*, 134 Wn. App. 490, 501, 140

No. 50011-6-II

P.3d 607 (2006). Conversely, a punitive sanction simply punishes a past contempt. RCW 7.21.010(2). Imposing a sanction that is punitive rather than coercive in a civil contempt proceeding is improper. *See Didier*, 134 Wn. App. at 501.

To qualify as remedial, a contempt sanction must satisfy three requirements. First, a contempt order must contain a purge condition allowing the contemnor to purge the contempt by committing an affirmative act. *Silva*, 166 Wn.2d at 141-42. The existence of a purge condition shows that the sanction has a coercive effect. *Id.* at 142. A contemnor with the ability to purge the contempt has “the key to the jailhouse door in his possession at all times.” *Moreman*, 126 Wn.2d at 43. On the other hand, a sanction is punitive when the contemnor cannot take an action to end the sanction. *See Didier*, 134 Wn. App. at 503-05 (holding that requirement for contemnor to serve a fixed time in jail if he did not pay an obligation by a certain date was punitive).

Second, the contemnor must have the ability to satisfy the purge condition. *Rapid Settlements*, 189 Wn. App. at 613. A sanction becomes punitive when the contemnor cannot purge the contempt. *Id.* As discussed above, to prevent the imposition of sanctions the contemnor has the burden of proving the inability to comply with a court order. *Moreman*, 126 Wn.2d at 40. The same rule applies regarding the inability to comply with a purge condition. *Rapid Settlements*, 189 Wn. App. at 614-15.

Third, if the purge condition involves something other than complying with the original order that the contemnor violated, the condition must be “ ‘reasonably related to the cause or nature’ ” of the contempt. *Rapid Settlements*, 189 Wn. App. at 614 (quoting *In re Interest of M.B.*, 101 Wn. App. 425, 450, 3 P.3d 780 (2000)).

In addition, a sanction that initially was remedial may become punitive as circumstances change. If a sanction loses its coercive effect, such as when a contemnor loses his or her ability to comply with the court order that was violated, the court must terminate the sanction. *King*, 110 Wn.2d at 804; *see also M.B.*, 101 Wn. App. at 440 (stating that if it becomes clear that a remedial sanction will not produce the desired result, the justification for such a sanction disappears).

2. Analysis

Here, the trial court's contempt order satisfies the first requirement of a remedial sanction. The order contains a purge condition – the Club can resume operating its shooting facility when it obtains an SDAP. The order clearly is designed to coerce the Club into complying with the court's original order.

However, the contempt order does not satisfy the second requirement. Although the Club may have control over *submitting* an application for an SDAP, it does not have control over *obtaining* an SDAP. The County determines whether to issue development permits. As a result, even if the Club does everything in its power to obtain an SDAP, the Club's ability to satisfy the purge condition is dependent on the County's response to its application. Because the Club does not have the ability to satisfy the purge condition without relying on the County's actions, the contempt order is punitive.

Accordingly, we hold that the trial court erred in imposing a punitive purge condition.

F. FURTHER PROCEEDINGS

Because the trial court imposed a punitive purge condition, we remand for the trial court to impose a proper purge condition for the otherwise valid contempt order. In addition, two other issues may properly be addressed in future proceedings.

First, the fact that the Club in December 2016 did not prove its inability to comply with the trial court's supplemental order does not preclude the Club from producing new or additional evidence of an inability to comply in a future proceeding. The contemnor must be given the opportunity "at regular intervals, to present new evidence tending to show that the [sanction] has lost its coercive effect or that there is no reasonable possibility of compliance with the court order." *King*, 110 Wn.2d at 805; *see also Moreman*, 126 Wn.2d at 43 (stating that the contemnor could raise the issue with the trial court if a sanction became punitive rather than coercive).

Second, when addressing the purge condition the Club claimed that the trial court's contempt order was punitive because the court should have ordered the Club to cease operations only in the areas where the unpermitted work was performed, not in the entire facility. We do not address this argument because it involves the scope of the sanction, not the purge condition, and the Club did not assign error to the sanction's scope. However, the Club is free to argue in a future proceeding that closing the Club's entire facility as a sanction no longer is coercive but has become punitive.

CONCLUSION

We affirm the trial court's contempt order except for the requirement that the Club actually obtain an SDAP in order to purge the contempt. We remand for the trial court to address the imposition of a proper purge condition.

No. 50011-6-II

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

Maxa, A.C.J.

MAXA, A.C.J.

We concur:

Johanson, J.

JOHANSON, J.

Sutton, J.

SUTTON, J.

DANIELSON LAW OFFICE PS

April 06, 2018 - 3:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50574-6
Appellate Court Case Title: Kitsap County, Respondent v. Kitsap Rifle and Revolver Club, Appellant
Superior Court Case Number: 15-2-00626-8

The following documents have been uploaded:

- 505746_Briefs_20180406145704D2119857_0294.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief.pdf

A copy of the uploaded files will be sent to:

- cmpalmer@co.kitsap.wa.us
- dennis@ddrlaw.com
- lzippel@co.kitsap.wa.us

Comments:

Sender Name: Bruce Danielson - Email: bruce@brucedanielsonlaw.com
Address:
1001 4TH AVE STE 3200
SEATTLE, WA, 98154-1003
Phone: 206-652-4550

Note: The Filing Id is 20180406145704D2119857