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NO. 53668-4-II

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

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

Respondent,

vs.

KITSAP RIFLE AND REVOLVER CLUB, et al.

Appellants,

and

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

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

RESPONSE BRIEF OF APPELLEE/RESPONDENT KITSAP COUNTY

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I. INTRODUCTION

On remand, the trial court imposed a proper purge condition consistent with this Court's ruling as reflected in the Order Amending December 2, 2016 Contempt Order dated December 2016 ("Amended Contempt Order"). The trial court tailored a purge condition that places the ability to satisfy the purge condition directly into the hands of the Kitsap Rifle and Revolver Club. ("Club"). The purge condition merely requires the Club to submit a completed application for a Site Development Permit ("SDAP") rather than requiring the Club to actually obtain an SDAP. The Club now complains that in the absence of the trial court injecting itself into the permitting process and ordering a specific type of SDAP that the Club has no credible evidence to support the appropriateness of, that an abuse of discretion has necessarily taken place. The Club's position is not supported by the record or any ruling of the Court.

In order to better understand the issue before the Court and to augment the Club's recitation of facts, it is necessary to provide historical background regarding events leading up to and continuing during this litigation. The Club spent over a decade engaging in unlawful site development work on its property. The Club clear-cut 2.85 acres of trees and cut steep slopes into hill sides. The Club disregarded wetlands and

excavated and graded a significant amount of soil to create several new shooting bays. Contrary to Kitsap County Code (“Code”), it did not apply for a single permit.

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

In issuing a contempt order, the trial court acknowledged the unfortunate reality of the situation before it. If the Club were allowed to continue to operate as if it were not in contempt, it would continue to reap the benefit of its unlawful site development activities. There would be no incentive for the Club to comply. To avoid this outcome the trial court ordered that the Club submit and obtain an SDAP in order to purge the contempt order. This Court determined that such an order was in error since requiring KRRC to obtain an SDAP was a punitive sanction given KRRC’s

lack of control over actually obtaining a permit (a decision that rests in the County's control). On remand, this Court instructed the trial court to impose a proper purge condition for an otherwise valid contempt order. The trial court did exactly as the Court instructed in fashioning a purge condition which merely requires the Club to submit a completed SDAP application instead of having to obtain an SDAP.

The trial court's amended contempt order is properly coercive. It incentivizes compliance with the Supplemental Judgment and creates accountability where none would otherwise exist. The purge condition is within the control and ability of the Club and is consistent with the Supplemental Judgment. The trial court properly exercised its discretion and followed the order on remand. The amended contempt order should be affirmed and the request to reverse or vacate should be rejected.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion when it imposed a purge condition that requires the Club to submit a complete application for an SDAP to cure the Club's violations of Titles 12 and 19 of the Kitsap County Code in order to be relieved of contempt when submittal of an SDAP application is within the Club's control and does not rely on any discretionary acts by Kitsap County?

2. Does the purge condition requiring the Club to submit a

complete SDAP application to cure violations of Titles 12 and 19 of the Kitsap County Code reasonably relate to the cause or nature of the Club’s contempt—failing to submit an SDAP permitting application to correct violations of Titles 12 and 19 of the Kitsap County Code?

III. NOTICE OF RELATED CASES

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

COA Cause No: 53878-4-II (appeal of order denying lifting of contempt sanctions in Pierce County Superior Court Cause No. 10-2-12913-3); and

COA Cause No.: 53898-9-II (appeal of order supplementing judgment on remand entered in Kitsap County Superior Court Cause No. 15-2-00626-8).

IV. STATEMENT OF THE CASE

A. The Club’s Unpermitted Site Development Activities

The Kitsap Rifle and Revolver Club (“Club”) is a Washington non-profit corporation that engages in shooting range activities. CP 3 (Finding of Fact (“FOF”) 6). The Club’s property consists of 72 acres, including eight acres of active use with the remaining acreage consisting of timberlands and

wetlands. CP 3 (FOF 8). The wetlands on the property are connected to a larger system of wetlands and have high ecological value. CP 17 (FOF 60).

Prior to 1993, the Club's property consisted of one rifle range and one pistol range. CP 8 (FOF 29). From approximately 1996 forward, the Club began developing portions of its property by clearing, grading, and excavating wooded or semi-wooded areas to create several new "shooting bays." CP 9 (FOF 33). By 2007, the Club had also extended its rifle range by clearing, grading, and excavating into a hillside. CP 10 (FOF 33). By 2010, the Club had created eleven new shooting bays on its property. CP 10 (FOF 33).

In addition to the creation of several new bays, the Club also engaged in clearing and large-scale earthwork over a span of 2.85 acres to create a new proposed 300-meter range. CP 12 (FOF 41). The Club installed a pair of 475-foot long 24-inch diameter culverts to redirect the flow and drainage of storm water on the property. CP 15 (FOF 54). This development work also encroached a protected wetland buffer on the property. CP 18 (FOF 62 and 64). The Club did not apply for any site development activity permits for the site work. CP 9 (FOF 32); CP 15(FOF 51); CP 16 (FOF 56).

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

In 2012, the Pierce County Superior Court ruled that the Club's unpermitted site development activities were unlawful and contrary to Kitsap County Code ("KCC"). CP 30-31 (Conclusion of Law ("COL") 27-31). This ruling was made following a lengthy bench trial in 2011, which resulted in the entry of findings of fact, conclusions of law and final orders on February 9, 2012.¹ CP 1-35.

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

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

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

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

Id. at 275 (internal citations omitted). The case was remanded back to the trial court to fashion an appropriate remedy for the Club's permitting violations.

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

On February 5, 2016, the trial court issued an Order Supplementing Judgment on Remand ("Supplemental Judgment") (also referred to as "Permitting Order" in the Club's appellate brief). CP 42-45.

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

A permanent, mandatory injunction is hereby issued further requiring Defendant to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original judgment. Defendant's application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.

CP 45.

The 180-day deadline for the Club to apply for permitting was August 3, 2016. CP 62 (¶ 4).

D. The Trial Court's Original Order for Contempt Sanctions

Kitsap County filed a Motion for Contempt on August 18, 2016. CP 46-60. At the August 26, 2016 hearing on the County's motion, the trial ordered that the matter be continued until December 2, 2016. CP 196. The trial court ordered the parties to submit written status reports with the Court

seven days prior to the new hearing. *Id.* The parties appeared before the trial court on December 2, 2016 on Kitsap County’s Motion for Contempt. The trial court granted the County’s motion and entered a contempt order on December 2, 2016. CP 286-291.

E. The Appeal of the Contempt Order

KRRC appealed the December 2, 2016 contempt order. This Court affirmed the trial court’s finding of contempt but vacated the purge condition. *Kitsap County v. Kitsap Rifle and Revolver Club*, 2 Wn. App. 2d 1021 (2018) (unpublished). The Court found that the condition to obtain an SDAP was punitive rather than coercive because it relied on the action of the County to issue a permit. *Id.* at 11. The Court remanded the case for the trial court to impose a proper purge condition stating that “[a]lthough the Club may have control over submitting an application for an SDAP, it does not have control over *obtaining* an SDAP.” *Id.* (emphasis in original). The Club’s ability to obtain a permit is dependent on the County issuing a permit but its ability to apply for a permit is not. *Id.*

F. The Amended Contempt Order

The County and the Club were able to come to agreement on all issues with respect to crafting an order amending the Contempt Order, with the notable exception of whether the purge condition should specify the type of SDAP application that the Club would be required to submit in order to

purge the contempt. CP 400-401. The County maintained that specifying the type of SDAP application was inappropriate, while the Club insisted that the purge condition specify what type of SDAP was required. *Id.* The matter proceeded to a hearing before the trial court on June 7, 2019.

On June 7, 2019, the trial court heard argument from both sides on the specific issue of whether to include the specific type of application in the purge condition. The trial court determined that there was not enough evidence in front of it to determine the correct type of permit, and that any disagreement between the parties over the type of permit is better left to the permitting process and typical appeal process through the hearing examiner. RP 12:11-13. The trial court ruled in favor of the County and imposed a purge condition which only required the Club to submit a completed SDAP application without specifying the type of permit. The amended purge condition states in pertinent part:

Defendant KRRC is enjoined from operating a shooting facility until such time that: (a) KRRC submits a complete site development activity permit ("SDAP") application to Kitsap County for permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment (hereafter "Purge Condition") . . . to submit a "complete" SDAP application means to transmit through the County's online portal an SDAP application that contains each and every one of the items listed in KCC §21.04.160(B).³

³ The Club agreed to the requirements for a complete SDAP at the trial court level and they are not at issue on appeal. RP 11:5-18; CP 400-401.

CP 459.

G. The Club's Minimal Attempts at Compliance with the Court's Order to Obtain SDAP Permitting

Since the Supplemental Judgment was entered in February 2016, the Club has only made minimal efforts to comply with the trial court's injunction and has never successfully submitted a complete application.

The Club's only steps during the original 180-day period was to engage consultants to draft a scope of work, submit that scope of work to the Club's insurance, Northland Insurance Company, and when coverage was denied continued to attempt to obtain coverage through other means. *Kitsap Rifle and Revolver Club*, 2 Wn. App. 2d at 2.

After Kitsap County filed its original motion for contempt, the Club attempted to submit an SDAP application on November 28, 2016. *Id.* at 3. However, the Club's attempts were unsuccessful since the Club refused to pay any application fees, a required part of the application. *Id.* at 9-10; *see also* Kitsap County Code ("KCC") §21.04.030, .160.⁴ Additionally, the Club's application was later reviewed by Kitsap County Department of Community Development ("DCD") staff and found to be incomplete and

⁴ The code is available online at <http://www.codepublishing.com/WA/KitsapCounty>.

deficient in multiple areas. *Kitsap Rifle and Revolver Club*, 2 Wn. App.2d at 9.

On July 11, 2018 the Club's consultant, Soundview Consultants, had a staff consultation meeting with DCD staff. CP 441 (¶ 3). The purpose of a staff consultation is to "discuss in general terms project permit application questions." KCC §21.04.120(A); CP 441 (¶ 4). In the meeting, the Club's consultants provided information to DCD staff which suggested that the Club would need a commercial SDAP. CP 441 (¶ 5). The meeting was documented in staff notes and in a follow-up email from the Club's consultants. CP 441-442 (¶¶ 5-6); CP 445 (Exhibit A); CP 447-448 (Exhibit B).

After the Club's consultants met with the DCD staff, the Club once again waited until a court date on contempt was scheduled to act. In January of 2019 the Club submitted an incomplete SDAP application for a Type II SDAP. CP 437 (¶ 4). DCD staff responded to the Club stating that the application was returned due to the application not following what was agreed upon by the Club's consultants and DCD staff during the July 11, 2018 meeting. *Id.* The Club did not respond to DCD's email or otherwise provide any information to DCD as to the reason why they determined an SDAP commercial was not required. CP 438 (¶ 7); CP 442 (¶ 7).

It is now 2020 and the Club has never successfully taken even the first step towards compliance or towards purging the contempt by submitting a complete application for an SDAP that addresses the violations of Title 12 and 19 KCC found by the trial court on the property in 2012.

V. ARGUMENT

A. Standard of Review

Contempt findings are reviewed for abuse of discretion. *King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). Meaning, a finding of contempt should be upheld so long as there is a proper basis for the contempt. *In re M.B.*, 101 Wn. App. 425, 454, 3 P.3d 780 (2000). Similarly, whether the purge condition meets the legal standard for remedial contempt sanctions is also reviewed under the abuse of discretion standard. *Id.* However, a de novo standard of review applies to the argument that a purge condition exceeded the trial court's authority. *Id.*; *see also In re of Rapid Settlements, Ltd's*, 189 Wn. App. 584, 614, 359 P.3d 823 (2015). The de novo standard of review should not be applied to this case. The Club's assignment of errors and legal argument focuses on whether the purge condition meets the standards for a remedial sanction, not that the trial court exceeded its authority.

B. The Purge Condition Meets the Standards for a Remedial Contempt Order

Washington Courts have both inherent and statutory authority to coerce compliance with their orders through the imposition of sanctions. *Moreman v. Butcher*, 126 Wn.2d 36, 42, 891 P.2d 725 (1995). The trial court has discretion to impose contempt sanctions designed to coerce compliance with a court order depending on the facts and circumstances of the case. *In re Estates of Smaldino*, 151 Wn. App. 356, 364, 212 P.3d 579 (2009); *Yamaha Motor Corp., U. S. A. v. Harris*, 29 Wn. App. 859, 866, 631 P.2d 423 (1981). In reviewing a contempt order, an appellate court must examine both the “substance of the proceeding and the character of the relief that the proceeding will afford.” *King*, 110 Wn.2d at 799.

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

The purge condition at issue here is properly coercive. The purge

condition imposed by the trial court's order requires nothing more than for the Club to comply with the Supplemental Judgment—i.e., to apply for permitting to cure its violations of Title 12 and 19 KCC. In fact, the purge condition allows the Club to purge its contempt by doing less than required by the Supplemental Judgment. The Club only has to submit a complete application for an SDAP, it does not have to obtain a permit.

Purge conditions for remedial contempt sanctions must meet three requirements. First, the purge condition must allow the Club to purge contempt through an affirmative act. *In re Silva*, 166 Wn.2d 133, 142, 206 P.3d 1240 (2009). The Club does not dispute that the purge condition satisfies this requirement. The second requirement states that Club must have the ability to satisfy the purge condition. *In re of Rapid Settlements, Ltd's*, 189 Wn. App. at 614. The Club argues that it cannot comply with the purge condition because the type of SDAP is not specified.

The last requirement only applies when the purge condition requires something beyond compliance with the underlying order the contempt is enforcing. *Id.* In those cases, the purge condition must be reasonably related to the cause or nature of the contempt. *Id.* Even though the contempt sanctions arose from the Club's failure to apply for and obtain an SDAP to cure the violations of Title 12 and 19 KCC, the Club argues that the purge condition requiring that the Club submit a complete SDAP application to

cure the violations of Titles 12 and 19 KCC is “not reasonably related to the cause and nature of the contempt.” Appellant Brief at 24. Both of the Club’s arguments fail because the purge condition easily meets the two contested requirements.

C. Submitting a Complete SDAP Application is Within the Club’s Power and Does Not Rely on Any Action or Discretion of Kitsap County

The Club’s first argument ignores the permitting process, alleging Kitsap County has control over the Club’s submittal of an application in requiring a specific type of SDAP. In its argument, the Club puts the cart before the horse by flipping the roles of the County and the Club in the permitting process.

1. Kitsap County Code is Clear that the Club Is Responsible for Submitting a Complete Permit Application

Kitsap County’s permitting process for SDAPs is provided in chapter 21.04 KCC. KCC §21.04.030 outlines the roles and responsibilities of both the applicant and DCD. Specifically, permit applicants are responsible for submitting complete applications. KCC §21.04.030(B)(2). As agreed to by the parties, KCC §21.04.160(B) provides the minimum requirements for a complete application. For SDAPs, additional requirements are found in Title 12 KCC. For sites with critical areas, like the Club’s property, additional requirements are also found in Title 19 KCC.

Both the Club and Kitsap County are bound by the Code. *Eastlake Community Council v. Roanoke Associates., Inc.*, 82 Wn.2d 475, 482, 513 P.2d 36 (1973).

The Club can purge the contempt injunction by submitting a complete permit application which addresses the violations of Kitsap County Code found in the Original Judgment. Once submitted, the Club can file a motion with the trial court to lift the contempt sanctions. If Kitsap County receives a complete application from the Club and disagrees that the Club's application is the correct type of SDAP to address the violations of County Code, it can respond in multiple ways. The County can oppose the Club's motion to lift the contempt sanctions and provide evidence that the type of SDAP application submitted does not address the violations. The County can also reject and return the Club's application or request additional information that may clarify and resolve the parties' differences. KCC §21.04.160(D), .170; CP 437-438 (§§5-6). Either way, the County's actions come after the Club's action of submitting an SDAP application and do not take away or impact the Club's ability to comply with the purge condition—to submit a complete application for an SDAP.

The County relies on the Club for the information needed to determine the correct type of SDAP. This reliance is inherent to the permitting process. The Club controls their own scope of work for any

SDAP and the County cannot speculate what the Club's plans are prior to the actual submittal of a complete application or other information provided by the Club. The County's reliance has already been documented in the Club's actions. The Club claims the County "already moved the goalpost once" regarding the type of SDAP application the Club should submit. Appellant Brief at 20. The Club's argument ignores that the County's change was solely based on information provided by the Club's consultants to the County. CP 441 (§ 5). The County's actions as the permitting agency will always be in response to the information provided by the Club or other relevant agencies.⁵

For example, it is unclear that the Club's current work on the property would meet current code requirements. To obtain an SDAP and comply with the Supplemental Judgment the Club may be required to do some additional work on the property to bring their previous site work into compliance with current Code. It is the Club's responsibility as the property owner and applicant to determine what that work would entail and how they will accomplish it. Where there are various options for compliance, the County cannot make that decision for the Club. Without

⁵ Other relevant agencies may include Department of Ecology, Department of Fish and Wildlife, other local jurisdictions, the Kitsap Public Health District, local Tribes, and other entities that may comment or have regulatory authority over a related and required permit.

that information neither the Court nor the County can determine the proper permit type.

This purge condition is comparable to the purge condition upheld in *Matter of Detention of Faga*, 8 Wn. App. 2d 896, 437 P.3d 741 (2019). In *Faga*, the Court of Appeals affirmed a purge condition requiring Faga to comply with the trial court's original order to submit to evaluations by the State's experts. Faga argued that the purge condition was not under his control because it required action by a third party, the state evaluators. *Id.* at 901-902. The Court of Appeals disagreed with Faga's argument, noting that the reason Faga refused to comply with the trial court's original order was because he refused to sign required waiver forms, something he chose to not comply with which was within his ability. *Id.* at 902. Similarly, here, the Club is arguing that the County's response to its submittal of an application is the reason it does not have the ability to comply with the purge condition because the County's response is not within its control. However, the Code is clear that it is the Club's responsibility to submit an application. KCC §21.04.030(B)(2). The Club's ability to submit an application is within its control and ability, exactly like it was in Faga's control and ability to sign the waiver forms.

The application for an SDAP permit is in the hands of the Club. Once received, DCD is required by code to review the application,

determine if the proper application was submitted, and assess whether additional information is required. However, prior to the actual submittal of an application, Kitsap County has no control over the Club's application process. The Club's argument that Kitsap County controls the Club's ability to apply for a permit is unsupported by the record or the County Code.

D. The Purge Condition Does Not Require Any Action Beyond What Is Required By the Supplemental Judgment

The Club asserts that the trial court erred in crafting a purge condition that did not reasonably relate to the cause or nature of the Club's contempt. Specifically, the Club asserts that the trial court erred by not specifying what type of permit application is required to cure the site development violations that are the basis of the contempt. The Court should decline to find any merit in the Club's position.

If a purge condition requires more or different requirements than what was required by the original court order that the contempt order is enforcing, the new and different requirements must be reasonably related to the original order. *In re of Rapid Settlements, Ltd's*, 189 Wn. App. at 614 (quoting *In re M.B.*, 101 Wn. App. at 450). This requirement does not apply here because the purge condition is wholly consistent with the requirement to submit SDAP permitting in the Supplemental Judgment. Unlike in *Matter*

of Marriage of Galando, 200 Wn. App. 1031 (2017) (unpublished)⁶ and *In re M.B.*, the purge condition at issue in this appeal does not add to what was originally required in the Supplemental Judgment. To comply with the Supplemental Judgment, the Club would have to meet the requirements of the purge condition and apply for an SDAP. There is no need to engage in the reasonably related test.

The Supplemental Judgment orders the Club to do the following:

A permanent, mandatory injunction is hereby issued further requiring Defendant to apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment. Defendant's application for permitting shall be submitted to Kitsap County within 180 days of the entry of this final order.

CP 45.

The purge condition requires the Club to do the following:

KRRC submits a complete site development activity permit ("SDAP") application to Kitsap County for permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment (hereafter "Purge Condition") . . . to submit a "complete" SDAP application means to transmit through the County's online portal an SDAP application that contains each and every one of the items listed in KCC § 21.04.160(B).

CP 459.

⁶ The County cites to this unpublished opinion because it is discussed in the Club's brief. Appellant Brief at 22-23. Unpublished opinions filed after March 1, 2013 may be cited as non-binding persuasive authority. GR 14.1(a).

A simple comparison of the Supplemental Judgment with the purge condition easily shows that the purge condition does not require anything additional or different than the Supplemental Judgment:

Supplemental Judgment	Purge Condition
Apply for SDAP permitting	Submit a complete SDAP application
Obtain SDAP permitting – chapter 21.04 KCC requires a complete application before obtaining permitting	
SDAP permitting must cure violations of KCC Titles 12 and 19 found to exist on the Property in the Original Judgment	SDAP application is for permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the Original Judgment

Even if the purge condition does require something additional or different than the Supplemental Judgment, it is abundantly clear that a purge condition that merely requires application for a SDAP to cure violations of KCC Titles 12 and 19 is reasonably related to the cause or nature of the Club's contempt. The Club's argument fails.

E. There is Not Enough Evidence in the Record to Show an SDAP 2 is the Proper Permit

1. The Club's Evidence Regarding the Correct SDAP Goes Against Information Provided by the Club's Consultants

The Club argues that an SDAP 2 is the correct permit because the Original Judgment does not affirmatively state that there was over 5,000

cubic yards of earth moved. Appellant Brief at 21. The Club's argument fails to recognize that the Original Judgment's findings were based on the minimum amount of earth movement needed to trigger permitting requirements and thus be in violation of Kitsap County Code. KCC §12.10.030(3) (Grading activities that result in earth movement of over one hundred and fifty cubic yards requires a site development activity permit); KCC §12.32.010 (Grading in violation of Title 12 KCC is a public nuisance); see also CP 30-31 (COL 27-31). Since the injunction requiring the Club to apply for and obtain SDAP permitting was proposed on remand from the Court of Appeals 2014 decision in *Kitsap Rifle & Revolver Club*, 184 Wn. App. 252 in the Supplemental Judgment, and since the trial court agreed with the Club that it would not insert itself into the permitting process to determine the specific type of SDAP needed, the actual amount of earth moved or type of SDAP needed was never factually determined by the trial court. Reliance on the lack of a fact in the Original Judgment's findings of fact is not enough evidence to support the Club's argument.

By contrast, the record includes declarations by Shawn Alire, DCD Development Services and Engineering Supervisor, and Jeff Rimack, DCD Director, documenting why DCD staff believe that an SDAP 2 is the inappropriate permit. CP 436-439, 440-449. As noted in Mr. Alire's declaration, DCD staff have been onsite during the discovery process for

the 2012 trial and have information to suggest that at least 5,000 cubic yards of earth has been moved. CP 437 (¶ 3). Additionally, the record is clear that the change from DCD regarding a SDAP 3 to an SDAP Commercial arose from a staff consultation meeting with the Club's consultants. CP 441-442 (¶ 5). Lastly, earth movement is not the only factor in what type of SDAP is applicable. As stated by Jeff Rimack, the amount of cleared area is also a factor and determines the types of engineering reports needed to be submitted with an application. CP 441 (¶ 5); KCC §12.16.030(3) (Land disturbing activity of one or more acres requires an engineered grading plan). The Findings of Fact in the Supplemental Judgment are clear that over an acre of earth has been disturbed. CP 9-10 (FOF 33); CP 12 (FOF 41).

The Club failed to provide credible evidence supporting that an SDAP 2 is the proper permit type. The Court should decline the Club's invitation to involve itself in the permitting process because it is unnecessary to meet the legal requirements for a purge condition and the record does not support the Club's request.

2. *The Club's Permit Application Should Contain Information that will Help Determine Which Type of SDAP is Appropriate*

Title 21 KCC provides the permitting procedures for SDAP applications. KCC §21.04.030 states the responsibilities and requirements

for both applicants and DCD staff. The code is clear that it is the Club's responsibility to read the code and understand what is required for a project, and to take any concerns that the code is not being properly applied to DCD management. KCC §21.04.030(B)(1) and (6). The code is also clear that it is DCD's role to ensure that any conditions requested are supported by code. KCC §21.04.030(4).

In accordance with Titles 12 and 19 KCC, KCC §21.04.160(B), and information provided by the Club's consultants, the Club will likely need to submit a SEPA checklist, engineering reports, wetland studies, and other required information that will clarify the work done including the amount of earth moved, the area of land disturbed, and the mitigation necessary to address the site work done in the critical areas on the Club's property. CP 442 (§5); CP 447-448 (Exhibit B). While some of these reports were previously completed by the Club for litigation, they will need to include updated information. CP 447-448 (Exhibit B). That information will help the permitting process move forward and the Club will in the end have the correct permit type based on the information they provide to DCD as part of the permit application.

3. *Assistance for the Permitting Process is Available to the Club*

While the Club's argument suggests that the Club has determined what type of SDAP best applies to their property, if they do have questions about the permitting process or determining the scope of work needed to address the violations, Kitsap County Code provides several options for the Club to discuss their issues with DCD staff to help answer any questions that may arise. KCC §21.04.120 provides three types of assistance: staff consultations, application assistance, and pre-application meetings. DCD's general policy is to get an "applicant" to yes. CP 428 (§7). To do so, DCD staff make themselves available to the public for questions both pre-submittal and post-submittal of an application. *Id.*

The Club utilized this resource and had their consultants met with DCD staff regarding the needed SDAP. CP 441 (§5). It was agreed between the Club's consultant and DCD that an SDAP commercial was appropriate. *Id.* If the Club had additional information or documentation that Soundview provided incorrect information to DCD they were well within their rights under the code to reach out to DCD and explain why they believed an SDAP 2 was the correct permit type. Instead of working within the permitting procedures, the Club is requesting that this Court make a determination about the specific type of permit needed based upon a limited record with

no clear information from the Club as to the Club's proposed scope of work for the permit.

If any part of the Club's argument rests on the permitting process being too difficult to comply with due to their own lack of understanding about the various types of SDAPs, such a problem is already addressed in County Code.

F. The Club Has Other Legal Remedies Available if the Club and the County Disagree on the Permit Type

If the Club submits an SDAP 2 application and the County disagrees that it is the correct type of permit and denies the permit based on the information provided by the Club in the application, the Club has legal remedies outside of this court case to resolve any potential issues. Initially, the Club may appeal to the Kitsap County Hearing Examiner. KCC §21.04.290. If the Hearing Examiner rules against the Club, the Club may then appeal to superior court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. LUPA was specifically created by the legislature to provide for "timely judicial review of land use decisions made by local jurisdictions" *Knight v. City of Yelm*, 173 Wn.2d 325, 335-36, 267 P.3d 973 (2011). The explicit legislative purpose of LUPA is to provide uniform procedures for review and of land use decisions and "uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and

timely judicial review.” RCW 36.70C.010. There is no need to circumvent a potential LUPA appeal by attempting to define the specific type of permit in a contempt order.

That being said, whether or not the parties disagree on the type of SDAP required after its submittal or whether the permit is issued or denied by Kitsap County is ultimately irrelevant to the purge condition because it stops with the submittal of a complete application.

G. A Potential Warrant of Abatement Remedy Is Immaterial to the Purge Condition

The potential for a warrant of abatement is irrelevant to this appeal. The Club contends that since the County is able to obtain a warrant of abatement contempt sanctions are unnecessary. The sufficiency of the remedy is not an issue before this Court, which is only tasked with reviewing the sufficiency of the trial court’s purge condition on remand. Whether or not a warrant of abatement may be a remedy available to the County at some point in the future has no bearing on whether the trial court properly crafted a purge condition. Further, the potential for a warrant of abatement does not impact the trial court’s injunction to obtain SDAP permitting. While the Club may believe that the application requirements are “onerous” it is simply being treated as any other applicant for a permit

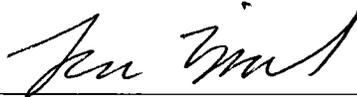
in Kitsap County. Not wanting to comply is not a legal excuse for non-compliance.

VI. CONCLUSION

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

Respectfully submitted this 17th day of January, 2020

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CERTIFICATE OF SERVICE

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

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

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

SIGNED in Port Orchard, Washington this 17th day of January,
2020.



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