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Court of Appeals  
Division II  
State of Washington  
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No. 53878-4-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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

v.

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

and

IN THE MATTER OF NUSAINCE 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, Defendant.

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REPLY OF APPELLANT

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## I. INTRODUCTION

Appellant Kitsap Rifle and Revolver Club (the “Club” or “KRRC”) presents the following reply in support of its *Brief of Appellant* (“Opening Brief”) filed on December 9, 2019. The Opening Brief showed that the trial court erred when it denied *Kitsap Rifle & Revolver Club’s Motion to Terminate Contempt Sanction* filed June 20, 2019 (“Motion”) and entered the *Order Denying Termination of Contempt Sanction* dated June 28, 2019 (“Order”). The trial court erred because the Club submitted credible, uncontroverted evidence of its inability to perform the purge condition set forth in the *Order Amending December 2, 2016 Contempt Order* (“Amended Contempt Order”).

The Amended Contempt Order prohibits the discharge of firearms at the Club’s historical shooting range property (the “coercive sanction”) but provides a “purge condition” such that the Club can have the coercive sanction terminated if it either satisfies the purge condition or proves it is unable to do so. The purge condition required the Club to submit a complete SDAP application to Kitsap County to cure certain site development violations found at trial. The Club’s Motion asked the trial court to terminate the coercive sanction on the grounds that the Club lacked the ability to perform the purge condition because it had less than

\$5,000 in cash and needed at least \$45,000 to pay for and submit a complete SDAP application. CP at 78–81.

In support of the Motion, the Club presented documentary evidence in the form of bank statements, treasurer’s reports, the County’s application fee schedule, and estimates for engineering and consulting services. Opening Br. at 30–34; CP at 96–99, 100, 107, 109–24, 127–46, 229–32. The County did not argue before the trial court that any of this evidence lacked credibility or was inaccurate. CP at 152–56; RP at 10:12–12:19. The County submitted no contradictory evidence that the cost of the permit application was less than \$45,000 or that the Club had more cash than it reported. *Id.* The County submitted no evidence that the Club had any other assets available to pay for the permit application. *Id.*

Instead of disputing the veracity of the Club’s evidence, the County argued the Club had not shown sufficient evidence of its inability to obtain the necessary funds from some hypothetical third-party lender or donor. *Id.* The Club correctly replied that such evidence was unnecessary because the purge condition did not require the Club to make such efforts and could not be interpreted to require them since Washington law prohibits purge conditions whose performance depends on discretionary acts of third parties. Opening Br. at 34–35; CP at 216–18.

The Club nonetheless supplemented its evidence that its fundraising efforts had yielded only about \$1,000; that the Club's status as a 501(c)(7) organization prevented it from receiving more than 15% of its gross revenue from non-member sources; that the Club had no collateral with which to secure a loan; and that the Club was already in debt for attorney fees incurred in litigation against its insurer. CP at 221–22, 229–31. At the hearing, the trial court denied the Club's Motion "based on whatever the County ha[d] argued." RP at 31:22–24. This was in error.

The County's Response asks this Court to affirm on the grounds that it must defer to an implied finding by the trial court that the Club's evidence of its financial condition lacked credibility. Resp. at 15–17. This argument is in error because the Club's evidence of its inability to pay for the permit application consisted of documents and declarations that the County's evidence did not contradict and because the trial court's stated reason for denying the Motion had nothing to do with credibility. When a trial court makes a decision like this based on uncontradicted declarations and documentary evidence, this Court's review is *de novo*, with no deference to the trial court. *In re Marriage of Rideout*, 150 Wn.2d 337, 349–51, 77 P.3d 1174 (2003).

This Court should perform *de novo* review of the evidence in the record. It should conclude based on the preponderance of this evidence

that the Club was unable to perform the purge condition. It should conclude as a matter of law that the Club did not have to present any additional evidence regarding its inability to obtain funding from some hypothetical third-party lender or donor. Alternatively, the Court should find that the preponderance of the evidence shows the Club was unable to get the money it needed from those types of sources.

The County's Response also errs by raising factual arguments the County did not present to the trial court, which were consequently not developed in the trial record. Resp. at 17–19. Washington law does not allow parties to raise new arguments on appeal to support a trial court's decision unless the record is sufficiently developed to allow the Court of Appeals to fully consider those new arguments. RAP 2.5(a). The record in this appeal is not sufficiently developed to consider the County's new arguments precisely because the Club had no reason to present evidence at trial to address them. The denial of the Club's Motion cannot be affirmed based on any of the new factual arguments the County presents to this Court but failed to present to the trial court.

The County argues the trial court's decision serves the interests of remediation. Yet at every turn the County has sought to punish the Club through contempt sanctions instead of curing the violations through its warrant of abatement remedy, which the trial court ordered "in the event

that the [Club's] participation in the County permitting process does not cure the code violations and permitting deficiencies on the Property.” CP at 45. The County’s opposition to the Club’s motion to terminate the coercive sanction is just the latest example of the County’s impermissibly punitive approach.

The Club’s only hope from being left in what is essentially a debtor’s prison is to have this Court reverse the trial court so as to grant the Club’s Motion. Alternatively, the Court should reverse the Order and remand to the trial court for entry of an order granting the Motion.

## **II. REPLY ARGUMENT**

### **A. The Club Did Not Have the Cash It Needed To Pay for the SDAP Application Required by the Purge Condition.**

The purge condition required the Club to submit “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[.]” CP at 68–69. The Club could terminate the coercive sanction by performing the purge condition or “by proving it [did] not have the ability to perform the Purge Condition[.]” CP at 68–69. When the Club filed its Motion, it did not have the cash it needed to pay for the SDAP application required by the purge condition. The trial court should have granted the Motion.

The Club was unable to perform the purge condition that required it to submit an SDAP application because the Club needed more than \$45,000 to prepare and submit the application, but it had less than \$5,000 to pay that expense. Opening Br. at 8–9, 21–22, 33. The Club presented evidence of these facts to the trial court in the form of objective, documentary evidence attached to declarations of the Club’s Executive Officer and President. CP at 95–149, 229–33.

The cost evidence consisted of a County permit fee schedule and estimates from the Club’s consultant and engineer. CP at 100, 107, 109–24. The evidence of available cash consisted of the Club’s recent bank statements and treasurer’s reports. CP at 127–46.<sup>1</sup> The County’s arguments and evidence in opposition did not dispute or contradict any of this evidence. CP at 152–56; RP at 10:12–12:19. Indeed, the County admitted the Club had “little in the way of liquid capital.” CP at 154.

The only evidence submitted by the County in opposition to the Motion was a declaration of Shawn Alire, in which he testified about Club representative Barbara Butterson’s submission of an SDAP-Commercial application. CP at 158–59. The County submitted no evidence or argument to contradict the Club’s evidence of the permit fee or the

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<sup>1</sup> The Club could not submit its 2018 tax return because it had not yet been filed at the time of the Motion. CP at 98.

estimates of its consultant or engineer. CP at 152–56; RP at 10:12–12:19. The County submitted no evidence or argument to contradict the Club’s bank statements or treasurer’s reports. *Id.* The County submitted no evidence or argument that the Club was withholding information about other bank accounts or assets it could use to pay for the permit application. *Id.* The County did not dispute or contradict in any way the Club’s evidence that it would cost more than \$45,000 to submit the application or that the Club had less than \$5,000 in cash available to pay that cost. *Id.*

The County adopts a different strategy in this Appeal. Its first argument is that the Club “failed to provide sufficient, credible documentation of its current resources or financial status[.]” Resp. at 1. It later argues the trial court “implicitly found the evidence presented by the Club to not be credible.” Resp. at 24. This argument about an “implied credibility finding” is very different from the County’s argument to the trial court that the Club failed to prove it could not get funding from a third-party lender or donor.

It is black letter law in Washington that when a trial court does not assess the credibility of live witnesses and its decision on review is based solely on declarations or documentary evidence that are not in conflict with one another, the appellate court stands in the same position as the trial court and reviews the evidence *de novo*. *Rideout*, 150 Wn.2d at 349–

51.<sup>2</sup> This is such a case because the trial court heard no live witnesses and the Club's evidence of estimated cost and cash on hand consisted entirely of documentary evidence and declarations that were not contradicted by the County. The credibility of the Club's evidence is simply not at issue.

This Court's Unpublished Opinion reviewed the Club's first attempt to prove it was unable to apply for an SDAP and concluded the Club's evidence was "minimal" because it did not include documentary evidence about the Club's "financial situation, including tax returns, assets and liabilities, or bank statements."<sup>3</sup> The Club took this to heart on remand. In support of its Motion, the Club submitted its most recent treasurer's reports and bank statements, which were its most current and accurate financial records because it had not yet filed its 2018 tax return. CP at 76 n.2, 97–98. This evidence showed the Club's average end of month operating balance between January and May 2019 was only \$4,738.62. CP at 77, 98. Its operating balance at the end of May 2019 was only \$4,022.22. *Id.* This objective, documentary evidence did not depend on any live witness testimony or demeanor evidence, and the County made no effort to dispute its credibility or accuracy.

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<sup>2</sup> See also *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Smith v. Skagit Cty.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969).

<sup>3</sup> *Kitsap County v. Kitsap Rifle & Revolver Club*, Case No. 50011-6-II, at 15–16, 2 Wn. App. 2d 1021, 2018 WL 623681 (Jan. 30, 2018) (unpublished opinion).

The Club also presented objective, documentary evidence of the minimum cost of submitting the SDAP-Commercial application required by the County. The County's permit fee schedule showed an application fee of \$6,722.40. CP at 100, 107. The estimate from the Club's consultant was for \$30,155 to provide "wetland delineation verification and habitat assessment field work, environmental planning and SEPA support, preparation of a Wetland and Fish and Wildlife Habitat Assessment Report with Conceptual Mitigation Plan, Final Mitigation Plan, and regulatory coordination." CP at 75, 109–12.<sup>4</sup> The estimate from the Club's engineer was for \$8,500 to provide surveying, land planning, and civil engineering. CP at 76, 113–24. The total cost of the application fee and the consulting and engineer estimates was \$45,377.40. The County did not dispute the credibility or accuracy of this sum.

The Club's documentary evidence about the cost of performing the purge condition and its available cash consisted of documents and declarations that were not contradicted by any County evidence. The Court must review this evidence *de novo*.

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<sup>4</sup> This estimate also recommended the Club establish a reserve contingency fund of \$15,000 to pay for any additional, necessary work. CP at 75, 111. This additional expense is not included in the over \$45,000 estimate the Club has been referring to as the minimum cost of preparing and submitting the SDAP application required by the County.

Because the County introduced no evidence with which to dispute the cost of the permit application or the Club's available cash, its Response in this appeal can only quibble with the Club's evidence. The County admits, for example, that the Club's evidence included "bank records . . . that appeared to indicate that the Club had on average between four thousand and five thousand dollars in the selected bank accounts," but the County criticizes the evidence as being "from only 2019." Resp. at 13. The County fails to appreciate that the Club's bank records spanned the four months leading up to its Motion, and the Club only had to show it was unable to pay at the time of the Motion, not earlier. *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 934, 113 P.3d 1041 (2005).

Similarly, the County criticizes the Club's failure to explain why it had \$11,000 in cash during the first contempt proceeding in 2016, but less than \$5,000 in cash in June 2019. Resp. at 18. This difference is immaterial because \$11,000 is far short of the minimum of \$45,000 the Club needed to pay for the application. Moreover, one can easily infer that the Club has been losing money because it has been shut down, and the reduction in the Club's meager cash balance over a span of three years is irrelevant to whether the Club had the ability to pay for the permit application when it filed its Motion.

Still further, the County criticizes the Club's evidence that at least \$45,000 was needed to complete the application because this was much less than the application cost of more than \$158,000 shown in an earlier estimate prepared by the Club's consultant in 2016. Resp. at 18. Yet the County cites no testimony or report from any knowledgeable expert or official saying the \$45,000 sum was incorrect, and the earlier estimate does not suggest the Club needed less than the \$45,000 minimum it carefully documented in support of its Motion.

The Club's Opening Brief discussed the instructive case of *Phillips v. Phillips*, 588 So.2d 9, 10 (Fla. Ct. App. 1991), which held a trial court errs in finding a contemnor able to perform a purge condition where unrebutted, credible evidence shows otherwise. Opening Br. at 31–32. The County does not attempt to distinguish *Phillips*, but argues it has no merit simply because it is 19 years old and comes from Florida. Resp. at 23. *Phillips*, however, is perfectly consistent with the controlling case of *Rideout*, 150 Wn.2d at 349–51, and the Club showed in its Opening Brief that the surrounding law of contempt and inability to comply is the same in Florida as it is in Washington. Opening Br. at 31.

The general burden of proof in a civil case is by a preponderance of the evidence, “or more likely than not, or more than 50 percent.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857

(2011). The preponderance of the evidence shows the Club lacked the cash it needed to pay for the application required by the purge condition. Given the County's lack of any meaningful effort to contradict the Club's evidence regarding its inability to pay for the permit application, this evidence would satisfy an even more stringent standard of proof.

**B. Neither the Purge Condition Nor Washington Law Required the Club to Show It Tried and Failed to Obtain Funds from Third-Party Lenders or Donors in Order to Show Its Inability to Perform the Purge Condition.**

The purge condition requires the Club to submit a complete SDAP application, not obtain loans or donations—and it cannot be interpreted to require that because, as the Club established in its Opening Brief, performance of a purge condition cannot depend on discretionary acts of third parties. Opening Br. at 28, 34. The County's Response nevertheless repeats its trial-level argument that the Club failed to carry its burden of proof because it has not shown “what steps have been taken to raise funding or exhaust avenues of funding.” Resp. at 19. This argument is both legally and factually incorrect.

This Court's Unpublished Opinion reversed the trial court's first purge condition as impermissibly dependent on a discretionary act of the County because it required the Club not only to apply for, but also obtain, SDAP permitting. Unpublished Op. at 21. The Club's position that this

rule applies with even greater force to a party's ability to pay is supported by *Britannia*. Opening Br. at 29–30. There, the court held that “control of sufficient assets must be established” before they would be considered available to perform a purge condition. *Britannia*, 127 Wn. App. at 934. If a party controls an asset, its ability to use that asset as a source of funding does not depend on the discretionary act of any other party.

The County attempts to distinguish *Britannia* by arguing it only “addresses the ability to comply at the entry of contempt” and this case is past that stage. Resp. at 22. That is a meaningless distinction because Washington law gives contemnors the opportunity to produce “new or additional evidence of an inability to comply in a future proceeding.” Unpublished Op. at 22. Because inability to comply can lift a sanction at any time, whether it is proven at or after entry of the contempt order is immaterial.

The County further attempts to distinguish *Britannia* on the grounds that it “did not state that [the contemnors'] assets must be in cash in a bank account, [rather] they only need to be within the [contemnors'] control or ability to access.” Resp. at 22–23. *Britannia*, however, did not use the term “ability to access.” It plainly held that “control of sufficient assets must be established” for the assets to be considered part of the ability to pay. The Club does not have control over potential loans or

donations from unidentified third parties, and such potential sources of funding are not assets of the Club. If such hypothetical sources of funding were considered assets of a party, no party could ever prove their inability to pay. *Britannia* shows that is not the law, and its ruling soundly reflects the practical reality that a party's ability to pay depends solely on assets within that parties' control.

The Club provided uncontroverted evidence that it had control of \$4,022.17 in liquid assets at the time it submitted an SDAP-Commercial application that would have cost over \$45,000 to complete and that its real property was valued at \$0. CP at 6 (FOF 21), 96–99, 107, 111–24, 127–46. The Club's evidence plainly shows it did not have "control of sufficient assets" to perform the purge condition.

The County's Response does not dispute that the Club's ability to obtain sufficient loans or donations depends on the discretion of third parties, but wrongly suggests this is permissible pursuant to the unpublished and distinguishable case of *JZK, Inc. v. Coverdale* ("JZK"). Resp. at 20 (citing 192 Wn. App. 1022, No. 46465-9-II, 2016 WL 236481 (Jan. 19, 2016) (unpublished opinion)).

In *JZK*, this Court declined to find a contemnor unable to perform a purge condition. *JZK*, 2016 WL 236481, at \*15. The trial court had found the party in contempt of an order to appraise a vehicle that was

subject to a writ of execution. Instead of appraising the vehicle, the party sold it. The trial court fined the contemnor \$3,000 but provided a purge condition that allowed the contemnor to avoid the fine by repurchasing the vehicle within three weeks. The contemnor sought reversal of the contempt order on appeal on the grounds that she “was unable to comply with the purge condition” since she had already spent the \$3,000 she had received for the car. *Id.* at \*15. The Court held the contemnor “provided no evidence to the superior court that she attempted to repurchase the car from [the buyer]” and she failed to “carry her burden of proving with credible evidence” that she was unable to “comply with the order.” *Id.* The court nevertheless remanded for reconsideration of the fine and purge condition on other grounds. *Id.*

Conspicuously absent from *JZK* is any discussion of whether the purge condition was impermissibly punitive because its performance depended on discretionary acts of third parties. It appears that nobody raised the issue so the court did not consider it. *JZK* therefore has no bearing on the legal issue here of whether the purge condition can be interpreted to require the Club to obtain discretionary loans or donations from unspecified third parties.

*JZK* is also readily distinguishable based on its material facts. First, the contempt sanction in *JZK* was a fine of \$3,000, whereas in this

case it is the perpetual closure of a historical shooting range. Second, the contemnor in *JZK* did not present documentary evidence of her lack of funds, she only testified she had already spent the \$3,000 she had received for the car. Third, there was no evidence the contemnor in *JZK* had made any effort to repurchase the vehicle, whereas the Club's evidence showed it submitted documents to begin the SDAP application process but was unable to continue. *Id.* at \*15. The Club did not even have the \$6,722.40 it needed to pay the application fee. CP at 97–98, 107. Fourth, the purge condition in *JZK* required the contemnor to repurchase the vehicle from a specific person, whereas the County interprets the purge condition here to require the Club to “exhaust avenues of funding” by fruitlessly asking an untold number of unidentified individuals and entities for \$40,000 before it can be deemed unable to perform the purge condition. Resp. at 19–22.

The County's extreme argument is not supported by the text of the purge condition or the distinguishable unpublished opinion in *JZK*, and it contradicts the Unpublished Opinion and controlling precedent. The Club's ability to perform the purge condition cannot depend on discretionary loans or donations from third parties. The Club's burden to prove it was unable to perform the purge condition therefore cannot require the Club to show it was unable to obtain loans or donations from third parties. Because the Club did not have the cash or control of any

other assets sufficient to pay for the application, it was unable to perform the purge condition and the contempt sanction must be lifted.

**C. The Club Was Unable to Obtain the Funds It Needed from Loans or Donations.**

If the County is correct that the Club's inability to obtain funding through loans or donations is legally relevant to this appeal, then the facts amply prove this inability. The Club's uncontradicted evidence showed that, aside from the Club's real property (which the trial court found to be valued at \$0 (CP at 6 (FOF 21))), the Club had "no other assets that could possibly be considered as collateral for a loan of over \$45,000." CP at 230. The Club also had "significant unpaid liabilities," such as an outstanding bill for over \$180,000 in attorney fees the Club had incurred in litigation against its liability insurer. CP at 230, 232. This evidence proves the Club was unable to obtain a loan of the money it needed.

As for donations and other potential sources of income, the Club's evidence showed that its "primary means of fundraising" was hosting charitable events. CP at 230. Because the Club has been shut down for several years by the contempt sanction, the Club has been unable to raise money through charitable events. *Id.* The Club therefore resorted to a fundraising campaign in which it sent "about 150 letters to shooting ranges, their members, and the NRA Board of Directors[.]" which

“generated less than \$1,000 in donations.” *Id.* The Club attempted to raise money through GoFundMe.com, but the company running that website “rejected the page intended to collect donations for the Club because it considered the effort too political.” *Id.*

Finally, the Club showed that, regardless of how zealously it attempts to raise money from non-member sources, those attempts cannot yield more than 15% of the Club’s gross income due to Internal Revenue Service regulations. *Id.* \$40,000 is 15% of \$266,667, which means the Club would have had to obtain \$266,667 from members before it could have sought funding elsewhere, yet the Club’s members paid only \$1,420 in dues between January and May 2019 (CP at 127–31)—far short of the \$6,722.40 application fee, let alone the remaining \$40,000 to prepare and submit the complete SDAP application required to purge the sanction.

The County submitted no evidence to contradict any of this. Because the trial court decided the Motion based on uncontradicted declarations and documentary evidence, this Court must review the evidence *de novo*. *Rideout*, 150 Wn.2d at 349–51. If these facts are legally relevant at all, this Court can safely conclude the Club lacked the ability to obtain from unspecified lenders or donors the \$40,000 or more that it needed to perform the purge condition.

**D. The Court Should Reject the New Factual Arguments Raised by the County for the First Time in This Appeal Because the Record Is Not Sufficiently Developed to Fully Consider Them.**

This appeal by the Club has properly focused on why the trial court was wrong to deny its Motion to terminate the contempt sanction on the record before it at the time of that decision. In its Response, however, the County tries to move the goal posts by raising new factual arguments it did not present to the trial court.

The Court should not consider the County's new factual arguments raised for the first time on appeal because the record is not sufficiently developed to fully consider them. Generally, a party's failure to raise an issue before the trial court precludes the party from raising the issue on appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). But RAP 2.5(a) provides, "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." The County's Response made no effort to comply with this rule.

In *State v. Barker*, this Court declined to consider a respondent's argument raised for the first time on appeal because there was no evidence in the record on which to consider the argument. *State v. Barker*, 162 Wn. App. 858, 863–64, 256 P.3d 463 (2011). In *Barker*, the trial court granted the defendant-respondent's motion to suppress the State's evidence of

methamphetamine found on his person in a search incident to arrest because the arrest warrant was invalid. *Id.* at 860. The respondent raised a new factual argument on appeal to affirm the trial court’s ruling on due process grounds, *viz.*, the trial court’s unchallenged finding that the “Wanted Person Entry Form” supporting the warrant contained no information whatsoever “in the space provided under [‘Community Corrections Officer’] comments” and was therefore insufficient to satisfy due process requirements. *Id.* at 863–64.

*Barker* applied RAP 2.5 and examined the record to conclude there was insufficient evidence to decide “whether [the respondent’s] due process rights were violated.” *Id.* at 863. The State did not challenge the finding regarding the “Wanted Person Entry Form” because the respondent did not raise the due process argument before the trial court and “neither the ‘Wanted Person Entry Form’ nor the arrest warrant [we]re part of the record”—therefore, the court could not “review the nature and extent of the notice given, if any.” *Id.* at 864.

Here, the County raises for the first time the factual argument that the Club’s Motion should be denied because the Club did not “disclose any additional financial resources, tax documents, [and] asset and liability reports.” Resp. at 17. The County’s Response also argues for the first

time that the Club should have shown it “attempted to work out a payment plan or other arrangement with their consultants.” *Id.* at 19.

The Court should not consider the County’s new arguments because, as in *Barker*, they were not raised before the trial court and the record has not been sufficiently developed to decide them. It would be contrary to law and fundamentally unfair to affirm on the grounds that the Club did not present evidence responsive to arguments the County did not make in opposition to the Motion before the trial court.

Another new argument presented by the County is that the Club’s \$45,000 cost estimate lacks credibility because the Club’s 2016 estimate for completing an SDAP application was \$158,000. *Resp.* at 18. Similarly, the County tries to make a credibility issue out of the fact that the Club reported liquid assets of about \$11,000 in 2016, which is more than it had in 2019. *Id.* The Club did not present evidence at the trial level to explain these insignificant differences because the County was not raising these issues at that time.

The Court should reject the County’s attempt in this appeal to raise new issues that were not fully developed in the trial record.

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**E. The County’s Argument That the Club Was “Unwilling” to Perform the Purge Condition Is False, Illogical, and Irrelevant to the Club’s Inability to Perform.**

The Club has shown that it has been unable to perform the purge condition in spite of its desire to do so. CP at 89–91, 97–98, 109–24. The County argues the Club’s problem is not that it lacks the necessary funds, but that it does not *want* to perform. The County’s evidence of this consists of nothing more than four of the 20 responses the Club gave on a Title 21 waiver request form. Resp. at 23–24 (CP at 168–69).

The legal issue, however, is not willingness, but ability. The two are independent because a party can be unable to perform with or without a desire to do so. The Club has shown its inability to perform, rendering questions about its willingness or mental state irrelevant. Moreover, what truly strains credulity is the County’s belief that the Club would deliberately choose to withhold performance and remain shut down under the contempt sanction rather than perform the purge condition. The so-called “coercive” sanction in effect since 2016 has not coerced the Club into compliance because it lacks the ability to comply, nothing more.

The County relies on *Moreman v. Butcher* to support its strained inference that the Club has been unwilling to perform the purge condition. Resp. at 24 (citing 126 Wn.2d 36, 38–39 (1995)). In *Moreman*, however, the contemnor’s evidence of his inability to deliver certain cabinets was

limited to his testimony that they were likely stolen, and he impeached his own testimony when he was heard “after the show cause hearing tell[ing] his son that he still had the cabinets and he was not going to give them back.” *Id.* at 39, 41. In contrast, there is no evidence in this case that the Club has control of the money or other assets it needs to pay for the permit application, and its evidence of inability is credible and objectively documented by uncontroverted evidence.

**F. If the Court’s Decision in Case Number 53668-4-II Renders This Appeal Moot, the Court Should Still Decide Whether the Club Must Present Additional Evidence of Its Inability to Obtain Needed Funds Through Loans or Donations, as the County Contends.**

The Club stated in its Reply Brief for Case Number 53668-4-II (“Permitting Appeal”) that this appeal will become moot if the Court decides that the purge condition should have required the Club to submit an SDAP-Grading 2 application because this appeal is about whether the Club had the ability to submit a complete SDAP-Commercial application. In that event, the Court should still decide the issue of whether the Club must present additional evidence of its inability to obtain needed funds through loans or donations.

An appellate court may decide an appeal that has otherwise become moot “when it can be said that matters of continuing and substantial public interest are involved.” *Eyman v. Ferguson*, 7 Wn. App.

2d 312, 320, 433 P.3d 863 (2019). “In deciding whether a case presents matters of continuing and substantial public interest, three factors are particularly determinative: (1) Whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.” *Id.* (internal quotations and brackets omitted).

Here, the issue of what the Club must prove to lift the contempt sanction is of a public nature because it will determine whether a shooting range that serves the public can be kept shut down by a local government under a public contempt order shown to be punitive rather than coercive. An authoritative determination of this issue will provide desirable guidance to Kitsap County officials in this lawsuit and to other government officials seeking to maintain contempt sanctions. If not decided here, the issue is likely to recur in this case because of the likelihood that the County will reject or deem incomplete the Club’s submission of any type of SDAP application for reasons the Club cannot afford to resolve.

Accordingly, whether the Club must present additional evidence of its inability to obtain loans or donations in order to prove its inability to submit the complete SDAP application required by the purge condition is an issue of continuing and substantial public interest. The Court should

decide the issue even if it decides the Permitting Appeal in the Club's favor and requires the purge condition to require some type of permit application other than the SDAP-Commercial required by the County.

### III. CONCLUSION

For the foregoing reasons, the Club respectfully asks the Court to reverse the trial court's denial of the Club's Motion to terminate the contempt sanction while clarifying that the reversal has the effect of granting the Motion. Alternatively, the Club asks this Court to reverse the denial of the Motion and remand the case with instructions for the trial court to enter a new order granting the Motion or to take other appropriate action consistent with the applicable legal standards discussed above and in the Club's Opening Brief.

DATED: April 10, 2020

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*(pro hac vice)*

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## DECLARATION OF SERVICE

I, Ethan Jones declare, under penalty of perjury under the laws of the State of Washington, that I am a resident of the State of Oregon, 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 April 10, 2020, I caused to be served a copy of the within REPLY OF APPELLANT via e-mail to the following:

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John Purves  
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DATED: April 10, 2020

CHENOWETH LAW GROUP, PC

/s/ Ethan Jones  
Ethan Jones, Paralegal  
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**CHENOWETH LAW GROUP, PC**

**April 10, 2020 - 3:59 PM**

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