

No. 53898-9-II

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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

v.

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

and

IN THE MATTER OF 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.

REPLY BRIEF 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 *Amended Brief of Appellant* (“Opening Brief”) filed on February 20, 2020.

The Opening Brief showed that the trial court erred when it entered the *Order Amending February 5, 2016 Order Supplementing Judgment on Remand* (the “Order Amending Supplemental Judgment”) dated June 28, 2019 because its refashioned sound expansion remedies: (1) do not comply with this Court’s remand instructions in *Kitsap County v. Kitsap Rifle & Revolver Club*, No. 48781-1-II (Nov. 21, 2017) (hereafter, “Unpublished Opinion”); (2) are overbroad and not precisely tailored to remedy specific harms found to have occurred on the Club’s property; (3) are not supported by the findings of fact in the record or the trial court’s recollection of evidence presented at trial; (4) are not reasonably clear because their most important terms are vague or ambiguous and undefined; and/or (5) were issued without finding or balancing the relative interests of the parties and public.

The County’s Response misunderstands the applicable standard of review this Court’s prior decisions, the findings of fact in the record, the trial evidence, the implications of the trial court’s lack of recollection of the trial evidence, and the applicable law. These mistakes lead the County

to the flawed conclusion that the trial court did not err in any way when it entered the Order Amending Supplemental Judgment.

The County's Response fails to address the trial court's admission that she was unable to recall any of the evidence presented at trial or draw inferences from the findings of fact in the Original Trial Judgment, which was one of the most emphasized points in the Club's Opening Brief. This admission by the trial court contradicts the County's arguments and shows the trial court did not have an adequate basis to carry out this Court's remand instructions and refashion the sound expansion remedies without reopening the record of evidence or making new findings of fact.

The County attempts to excuse this by misconstruing certain findings in the Original Trial Judgment that do not justify the refashioned remedies. If those existing findings were sufficient to re-fashion the sound expansion remedies, this Court would not have twice remanded this case to the trial court with instructions to refashion the remedies to prohibit only those activities that constitute expansions of the Club's nonconforming use. The difference between the activities that did and did not cause the expansion has never been found with the specificity required by Washington law and this Court's prior rulings.

The difficulty in fashioning sound expansion remedies relates back to the County's chosen strategy of trying its case with no objective sound

studies, only ear-witness testimony about what sounds were objectionable. The difficulty also arises from the erroneous decision by the County and trial court to remedy the expansion by terminating the Club's entire nonconforming use. That was what the original trial was about, which is why the Original Trial Judgment did not include the findings necessary to prohibit only those activities that caused the sound expansion without prohibiting the Club's other activities, as this Court has required.

The Court's Unpublished Opinion affirmed the trial court's discretionary decision to keep the record closed during the first remand but instructed the trial court to refashion the sound expansion remedies to "reflect that only the more recent increases in noise levels constitute an expansion of use." Unpublished Op. at 22. On second remand the trial court disclosed that she could not recall the trial evidence, saying "There is just no way I could do that. I confess, I throw myself on my sword, I couldn't do that." RP at 7:18-24. The trial judge made no new findings, entered the remedies requested by the County, and retired.

It was error for the trial court to refashion the sound expansion remedies without the necessary findings or recollection of the evidence presented at trial. The Order Amending Supplemental Judgment must likewise be reversed and vacated, and the Court should remand for fact-

finding proceedings and discovery, along with the additional instructions requested in the Club’s Opening Brief.

II. REPLY ARGUMENT

A. **This Appeal Requires De Novo Review of Issues of Law, with No Deference to the Trial Court.**

The Club’s Opening Brief established that Washington law requires the declaratory judgment in the Order Amending Supplemental Judgment to be reviewed *de novo* because it declares certain activities to be unlawful expansions of a nonconforming use, which is a question of law. Opening Brief at 32–33.¹ The refashioned injunction depends on the declaratory judgment, so an error of law in the declaratory judgment requires reversal of the injunction.

Similarly, the questions of law underlying an injunction are reviewed *de novo*. Opening Brief at 32–33; *see Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003) (“Questions of law and conclusions of law are reviewed *de novo*.”). A trial court necessarily abuses its discretion when its order “is based on an erroneous view of the law or involves application of an incorrect legal analysis.” *Dix*

¹ *See Nollette v. Christianson*, 115 Wash.2d 594, 600, 800 P.2d 359 (1990) (holding an appellate court’s review of declaratory relief is subject to the substantial evidence standard when reviewing findings of fact and the *de novo* standard when reviewing conclusions of law); *Kitsap County v. Kitsap Rifle & Revolver Club (“KRRC”)*, 184 Wash. App. 252, 272, 337 P.3d 328 (2014) (“[W]e hold that the expansion/intensification determination is a question of law.”).

v. ICT Grp., Inc., 160 Wash.2d 826, 834, 161 P.3d 1016 (2007). A trial court also abuses its discretion if its decision is manifestly unreasonable, arbitrary, or based upon untenable grounds or reasons. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 668–69, 230 P.3d 583 (2010).

The County’s Response did not directly dispute the Club’s statement of the standard of review or the relevant legal authorities or rules cited in the Opening Brief related to that standard. Instead, the County presented its own flawed version of the standard of review and argued this Court must defer to the Order Amending Supplemental Judgment while reviewing it only for “substantial evidence” or “abuse of discretion.” Resp. at 3, 23, 36. This argument is contrary to Washington law and the record in this case, where the trial court declared as a matter of law that certain activities were expansions and enjoined those activities without recalling any of the evidence presented at trial. RP at 7:12–8:8. The trial court was in no better position than this Court to decide the remedies, and her decisions are not entitled to deference.

Whether the declaratory judgment and injunction remedies for the sound expansion were correctly refashioned based on the existing findings of fact and this Court’s prior rulings is subject to de novo review. Although the abuse of discretion standard does generally apply, it grants no deference to the errors of law committed by the trial court.

B. This Court’s Remand Instructions Raised Factual Questions That the Trial Court Did Not Answer, Which Resulted in an Order That Does Not Comply with the Unpublished Opinion.

The Club’s Opening Brief highlighted the instructions in the Unpublished Opinion for the trial court to refashion sound expansion remedies to allow the Club’s historical use and intensification while limiting “only the more recent increases in noise levels.” Unpublished Op. at 20–24. These instructions were necessary because the trial court twice fashioned overbroad remedies that permanently enjoined activities never found to have caused the sound expansion. The trial court had another chance to correct its legal errors on second remand, but repeated them. The trial court acknowledged she had no recollection of the trial evidence with which to distinguish between the Club’s lawful intensification of sound and its expansion. Yet the trial court still rejected the Club’s request for additional fact-finding proceedings. The result was an order that does not comply with this Court’s instructions and therefore must be vacated and reversed.

1. The “Practical Shooting” Remedy Does Not Comply with the Unpublished Opinion.

The Club established in its Opening Brief that the trial court’s “practical shooting” remedy does not comply with the Unpublished Opinion’s requirement that it “must reflect that only the more recent

increases in noise levels constitute an expansion of use.” Unpublished Op. at 24. The trial court granted this remedy at the County’s request, declaring that “more than two scheduled practical shooting competitions per month and more than ten scheduled practical shooting practices per month” are unlawful expansions. CP at 445–46.

The County did not refer the trial court to any findings of fact, conclusions of law, or any portion of the trial record to support the practical shooting remedy. CP at 129, 347–48. Instead, the County simply argued it was an appropriate remedy because “limiting competitions to twice a month is a practical remedy” that is consistent with KCC 10.25.090(4)(1)(i) and because the County “believe[d]” limiting practices to ten per month would be adequate. CP at 348. Those reasons do not reflect that “only the more recent increases in noise levels constitute an expansion of use,” as this Court required. Unpublished Op. at 24. The practical shooting remedy did not comply with the Unpublished Opinion, but the trial court granted it anyway.

The County’s Response abandons its arguments to the trial court and instead attempts to support this remedy by reference to facts in the trial record. Resp. at 24–27. The Club agrees this remedy is fact-dependent and wants the relevant facts to be found. The trial court did not find them, and there is no basis to infer the necessary findings from the

trial court's decision because she could not recall the evidence presented at a trial ten years ago involving a materially different remedy.

Even if this Court could consider trial evidence that the trial court could not recall, it should not adopt the County's misunderstanding of an incomplete body of evidence regarding practical shooting at the Club. If, as the parties seem to agree, any practical shooting remedy must allow the number of practical shooting events that occurred before 2006, that number must be found in a fact-finding proceeding on remand.

The evidence in question is a summary by County trial witness Kevin Gross of a detailed list of events, also created by Mr. Gross, which he claimed to have occurred at the Club between 2003 and 2010. CP at 288–91. There is no testimony or finding in the record that Mr. Gross's summary of events includes all actual events. The trial court acknowledged Mr. Gross was testifying only about the availability of information about Club events, not the events themselves. CP at 290. It is one thing to conclude the events Mr. Gross listed occurred. It is another to speculate there were no others, as the County asks this Court to do.

Even if Mr. Gross's evidence were a reliable count of the total number of events at the Club, it cannot be used to prove the number of "practical shooting practices" or "practical shooting competitions" that occurred because it does not use those terms and the Order Amending

Supplemental Judgment does not define them. Mr. Gross categorized each event as a “Competition,” “Class,” “Military,” or “Other.” CP at 292–340. It is unclear how these classifications or the event names in his exhibits correspond to the terms “practical shooting practices” and “practical shooting competitions.” Mr. Gross inexplicably categorized “Bullseye League Practice” and “Bullseye Pistol Practice” events as “Competition,” whereas “USPSA practice” is deemed “Other.” *E.g.*, CP at 304, 312–14. Mr. Gross did not testify that his purpose in compiling and presenting this information was to calculate the number of “practical shooting practices” or “practical shooting competitions” that occurred at the Club per month.

The number of practical shooting events that occurred prior to the sound expansion must be found before it can be remedied through any limitations on “practical shooting.” For the remedy to include distinct limits on “competitions” and “practices,” the findings must also explain that distinction and support those distinct limits.

The relevant facts should be found in a fact-finding proceeding on remand following focused discovery. The trial court’s decision to limit practical shooting practices and competitions without adequate findings and with no recollection of the trial evidence was a legal error. The Order Amending Supplemental Judgment should be reversed and vacated.

2. The “Caliber” Remedy Does Not Comply with the Unpublished Opinion.

The Club’s Opening Brief showed that the trial court erred in declaring any “discharge of fully automatic firearms” or “semiautomatic rifles greater than nominal .30 caliber” to be unlawful expansions. Opening Brief at 37–38. The Unpublished Opinion instructed the trial court to “clarify which weapons are prohibited because they create noise levels that constitute an impermissible expansion[.]” Unpublished Op. at 22–23. That instruction was subject to the additional instruction that the “trial court’s remedy must reflect that only the more recent increases in noise levels constitute an expansion of use.” *Id.* at 22. That instruction was intended to remedy the problem with the first “caliber” remedy in the Supplemental Judgment, which had prohibited “weapons that were not found to constitute an impermissible expansion of use.” *Id.* Because there are no findings stating that the “discharge of fully automatic firearms” or “semiautomatic rifles greater than nominal .30 caliber” constituted expansions of sound, the “caliber” remedy does not comply with the Unpublished Opinion and was entered in error.

According to the County’s Response, the caliber remedy is supported by statements in the Unpublished Opinion, *KRRC*, and Original

Trial Judgment. The Response takes these statements out of context, misunderstands them, and fails to identify the necessary findings.

First, the Response quotes the Unpublished Opinion where it states, “the noise created by the use of fully and semiautomatic weapons created an impermissible noise expansion because it contributed to the shooting range’s dramatically increased noise levels.” Resp. at 28 (quoting Unpublished Op. at 21–22). This statement does not clarify which fully and semiautomatic weapons increased the sound beginning around 2006. The Unpublished Opinion emphasized that such a clarification is necessary for the remedy to “reflect that only the more recent increases in noise levels constitute an expansion of use.” Unpublished Op. at 22 (underline added). The Unpublished Opinion did not find that the “discharge of fully automatic firearms” or “semiautomatic rifles greater than nominal .30 caliber” constituted an expansion.

Second, the County’s Response argues its “caliber” remedy is supported by the statement in *KRRC* that the “[u]se of fully automatic weapons, and constant firing of semi-automatic weapons led several witnesses to describe their everyday lives as being exposed to the ‘sounds of war.’” Resp. at 29 (quoting *KRRC*, 184 Wash. App. at 274). This does not say which fully- or semi-automatic firearms or calibers of firearms caused the expansion, and it suggests the “constant” firing was the

expansion, not the use of a particular firearm. This is not a finding that the “discharge of fully automatic firearms” or “semiautomatic rifles greater than nominal .30 caliber” constituted an expansion.

Similarly, the County’s Response cites *KRRC* for the legal conclusion that “high caliber weaponry greater than 30 caliber” contributed to the expansion. Resp. at 28. As the County admits, *KRRC* “went on to state that . . . the types of weapons alone do not create an expansion[.]” *Id.* at 29. *KRRC* did not find that the “discharge of fully automatic firearms” or “semiautomatic rifles greater than nominal .30 caliber” constituted an expansion.

The Response paraphrases the conclusion in *KRRC* that “increasing noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber, and practical shooting” “constituted expansions[.]” *KRRC*, 184 Wash. App. at 272–73; Resp. at 29. That conclusion did not authorize the overbroad remedy in the Supplemental Judgment that prohibited all “weaponry greater than .30 caliber.” Unpublished Op. at 22. Further, this conclusion in *KRRC* is not a finding that the “discharge of fully automatic firearms” or “semiautomatic rifles greater than nominal .30 caliber” constituted an expansion.

Third, the County’s Response asserts (without a citation) that the “.30 caliber limitation comes directly from the unchallenged findings of

fact and confirmed conclusions of law of the trial court[.]” Resp. at 29. The remedy in question applies to “nominal .30 caliber” rifles, not “.30 caliber” rifles, and the Club is not aware of any Finding of Fact made by the trial court at any stage of this case that uses the term “.30 caliber” or “nominal .30 caliber.” CP at 82–103.

Whether the “discharge of fully automatic firearms” or “semiautomatic rifles greater than nominal .30 caliber” caused the sound expansion beginning in 2006 is a question of fact. The County’s Response fails to show that this fact question was ever answered in this case. This remedy cannot be affirmed based on vague notions of “implied” or “unwritten” findings because the trial court admitted she could not recall the trial evidence. The caliber remedy must be reversed and vacated.

3. The “Explosive Devices” Remedy Does Not Comply with the Unpublished Opinion.

The Club’s Opening Brief showed that the trial court erred in declaring “discharging cannons” and “causing exploding targets to explode” to be unlawful expansions. Opening Brief at 38. This was error because the trial court did not “clarify which explosive devices were found to create an impermissible expansion,” as required by the Unpublished Opinion. Unpublished Op. at 20.

The County first argues the Club waived this assignment of error regarding the “explosive devices” remedy. Resp. at 31–34. The record shows the Club agreed the terms of this remedy were acceptable *only if* the Court also included in the order the Club’s proposed definitions for “exploding targets” and “cannon,” which in turn required definitions of “large” and “heavy.” CP at 202.² Advocating for certain language in conjunction with certain definitions does not waive a party’s objection to that same language when unaccompanied by the definitions. The Club preserved and did not waive its right to have the “explosive devices” remedy reviewed and reversed on appeal.

The County then argues that the “explosive devices” remedy complies with the Unpublished Opinion’s remand instructions. This argument fails because the Court’s instructions were twofold, and the County argues the Order Amending Supplemental Judgment complies with only one of those instructions. As the County points out, the Court instructed the trial court to “implement[] its original permanent injunction prohibiting the use of ‘exploding targets and cannons.’” Unpublished Op. at 21. The Court explained what that meant by remanding “with specific instructions to the trial court to clarify which explosive devices were

² See RP at 17:16–18, 20:14–23:24 (arguing that “to allow this order to be entered without defining what th[ese] key term[s] mean[], . . . would . . . be an error”).

found to create an impermissible expansion of the Club’s nonconforming use.” *Id.* at 19–20, 27–28 (underline added). Taken together, the two instructions required the trial court to clarify which exploding targets and cannons caused the expansion of sound beginning in 2006. This is a question of fact that is not answered by any existing findings in the record.

The Original Trial Judgment found “[t]he Club allows use of exploding targets, including Tannerite targets, as well as cannons, which cause loud ‘booming’ sounds[.]” CP at 102 (FOF 85). It also found the “[u]se of cannons or explosives was not common at the Club in approximately 1993,” which means these general categories of devices were part of the lawful use before the expansion. *Id.* (FOF 87).

There are no existing findings to clarify which exploding targets or cannons caused the expansion of sound beginning in 2006 or to distinguish them from the cannons and exploding targets that preceded the expansion. The trial court admitted she could not find those facts from memory. Because this remedy was entered without the clarification required by the Unpublished Opinion, it must be reversed and vacated.

C. The Expansion Remedies Were Not Appropriately Tailored to Remedy Proven Harms and Require Additional Fact-Finding Proceedings.

This appeal asks the Court to reverse and vacate the “practical shooting,” “caliber,” and “explosive devices” remedies and remand for

additional fact-finding. Opening Brief at 47–48. This is necessary to carry out this Court’s specific instructions in the Unpublished Opinion, as discussed above. It is also necessary to comply with Washington law requiring injunction remedies to be appropriately tailored to prohibit the cause of a proven harm without prohibiting lawful activities, such as the continuation and intensification of the Club’s nonconforming use. Opening Brief at 39–46; *Kitsap County v. Kev, Inc.* (“*Kev*”), 106 Wash.2d 135, 720 P.2d 818 (1986), *cited in* Unpublished Op. at 16.

The Original Trial Judgment concluded there was a sound expansion, and this conclusion was affirmed. The trial court, however, never made the findings necessary to tailor the sound expansion remedy to comply with Washington law and reflect the Club’s long history of firearm activities that did not constitute an expansion. That is what *KRRC* and this Court’s Unpublished Opinion were about. If the trial court had remembered the evidence presented at trial, she could have found the relevant facts. The trial court candidly ruled this out, however, by disclosing at the hearing that she lacked any recollection of the trial evidence. RP at 7:18–24.

The County’s Response makes absolutely no effort to account for the trial court’s lack of recollection. Instead, it asks this Court to accept that “[n]o additional fact finding is required because the necessary facts

are included as part of the record.” Resp. at 24. The Club disagrees with this argument because the remedies now sought by the County were materially different from what it sought at trial, and they require consideration of different facts. The most glaring problem with the County’s argument, however, is that the trial court could not have decided to grant the Order Amending Supplemental Judgment based on evidence in the trial record. She could not recall what that evidence was.

The Club offered a solution to the trial court’s predicament when it moved to reopen the record, but the trial court informed the parties that she would be retiring soon and referring her cases to a new judge. RP at 5:15–16, 6:11–12, 8:12–9:10, 34:12–23. She indicated a continuance was not an option and that she would “enter final orders,” which the Club might choose to appeal. RP at 5:12–15. “I cannot set this for an evidentiary hearing,” she explained, “certainly not before myself,” but she acknowledged, “if the Court of Appeals believes there needs to be an evidentiary hearing, it’ll come back down[.]” RP at 31:2–12.

Like the trial judge who could not remember the trial evidence, a new judge assigned to a third remand cannot refashion the expansion remedies without reopening the record to hear evidence. The issues to be decided depend on what was and was not happening at the Club before and after the onset of the sound expansion around 2006. These are fact-

intensive questions to which witnesses will need to testify, and potentially conflicting evidence will need to be weighed and synthesized.

One of the critical roles of a trial court sitting in equity to decide an injunction is to hear witnesses, weigh evidence, and find the relevant facts before fashioning a remedy. This role cannot be performed by a new judge reviewing a cold trial record from ten years ago in which the County sought a fundamentally different injunction remedy. The expansion remedy requires a trial-type, fact-finding proceeding. It would be an abuse of discretion for a new judge to try to refashion the expansion remedy without properly finding the facts.

In *Seidler v. Hansen*, this Court affirmed the trial court's decision to reopen the record to allow additional evidence after the trial court had ruled in favor of a party in open court. 14 Wash. App. 915, 917–18, 547 P.2d 917 (1976). The trial court had decided in favor of the plaintiff without finding whether the plaintiff was credible or not. *Id.* at 916. At the defendant's request, the trial court reopened the record, considered new evidence regarding the plaintiff's lack of credibility, and issued a decision for the defendant. *Id.* at 916–17. The Court affirmed because it was "proper for the trial judge and within his discretion to reopen the case and permit further proof" regarding a fact question not already decided. *Id.* at 918.

Accordingly, the Club’s Opening Brief asked this Court to remand with instructions for “fact-finding proceedings, including focused discovery and a bench trial, to resolve all remaining questions of fact and law necessary to refashion the expansion remedies.” Opening Brief at 47. The Club wants to address unresolved questions of fact, not re-litigate issues already decided or facts already found. The Opening Brief identified specific questions of fact that remain to be determined on remand, which limit the scope of discovery. The Civil Rules limit discovery to matters “reasonably calculated to lead to the discovery of admissible evidence.” CR 26(b)(1). Protective orders are also available “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” CR 26(c).

The County objects that the Club did not provide “any legal analysis as to why discovery is required[.]” Resp. at 37. Washington’s civil justice system, however, places paramount value in a litigant’s right to discovery. *See Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 782–83, 819 P.2d 370 (1991). “It is common legal knowledge,” explains *Doe*, that “discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense.” *Id.* A party’s “right of access to the courts” and “concomitant right of discovery must be accorded a high priority in weighing the respective interests of the parties[.]” *Id.* at 782–83.

The County opposes any further discovery whatsoever. But remanding for the trial court to hear new evidence and make additional findings without allowing the Club to first discover the County's facts and evidence would be fundamentally unfair and contrary to the interests of procedural due process and truth finding. The Court should remand with instructions for the trial court to reopen the record and allow focused discovery on the fact questions identified in the Club's Opening Brief. Opening Brief at 48.

The County emphasizes that the trial court denied reopening the record during the first remand. Resp. at 39–40. This Court affirmed that decision, but reversed the resulting remedies. Unpublished Op. at 12, 27–28. The circumstances are different now. The Unpublished Opinion identified questions of fact that had to be answered for the trial court to refashion the expansion remedies. The Court should now confirm that a trial judge with no present recollection or knowledge of the trial evidence must reopen the record, allow focused discovery, and hold a trial-type hearing in order to make additional findings of fact.

D. The Refashioned Remedies Are Not Reasonably Clear Such That an Ordinary Person Will Know Precisely What Actions Are Prohibited.

The Club's Opening Brief showed that the trial court's refashioned injunction remedies violated the rule that they must be "reasonably clear

so that an ordinary person will know precisely what action is prohibited.” Opening Brief at 40–46; CR 65(d); Unpublished Op. at 15. The injunction in the Order Amending Supplemental Judgment does not satisfy that legal standard, so it was an abuse of discretion.

Regarding the practical shooting remedy, the Court held it was only the frequently occurring and “regularly scheduled practical shooting practices and competitions” that “contributed to the noise levels on the Club’s shooting range.” Unpublished Op. at 23–24. The County acknowledges that the only definition of “practical shooting” in this lawsuit derives from the Original Trial Judgment.³ The County’s Response cited no opinion of this Court, trial decision, or portion of the trial record that defines, illustrates, or describes what constitutes “regularly scheduled,” “frequently occurring,” “rapid-fire shooting,” “multiple directions,” or “shooting bay.” The County’s Response offered no interpretation or explanation of these vague and ambiguous terms. Opening Brief at 33–34.

Regarding the “explosive devices remedy,” the County’s only response to the Club’s arguments about the vagueness and ambiguity of its terms was to cite the Original Trial Judgment’s finding that the “use of

³ “The Property is frequently used for regularly scheduled practical shooting practices and competitions, which use the shooting bays for rapid-fire shooting in multiple directions.” Resp. at 43; CP at 99; Unpublished Op. at 3 n.2.

exploding targets . . . as well as cannons, which caused loud ‘booming’ sounds” not to be common before 1993. Resp. at 43–44; CP at 103; Opening Brief at 44–46. Thus, according to the County, the Order Amending Supplemental Judgment enjoins only those “exploding targets and cannons” that caused “loud booming sounds” sometime after 1993. This argument begs questions of fact about what those vague and ambiguous terms mean.

Likewise, regarding the “caliber remedy,” the County’s only response is a question-begging citation to the Original Trial Judgment’s conclusion of law that “increasing the noise levels by allowing explosive devises [sic], higher caliber weaponry greater than .30 caliber and practical shooting significantly changed, altered, extended and enlarged the existing use.” Resp. at 44; Opening Brief at 44–45. As noted above, the term “nominal .30 caliber” does not appear in any of the Findings of Fact in the Original Trial Judgment. The other operative term, “rifle,” is similarly vague or ambiguous. *See* Opening Brief at 44–45.

The Club reasonably sought on remand to define the important terms used in the refashioned injunction. CP at 207–09. The trial judge appeared to acknowledge the meanings of these terms were fact questions, but then entered the County’s proposed form of order because she wanted to end the proceeding before she retired. RP at 24:15–19, 31:2–12. The

resulting injunction is not clear enough for an ordinary person to know precisely what actions it prohibits. It must be reversed and vacated and remanded with appropriate instructions.

E. The Trial Court Was Required to Balance the Equities Before Refashioning the Injunction, But Chose Not to Do So.

The Club showed in its Opening Brief that the trial court erred by entering an injunction without balancing the equities as required by Washington law. Opening Brief at 46–47. The County argued in its Response that, because the Court affirmed the injunction as an appropriate remedy and remanded only for a refashioning of its terms, the trial court was not required to balance the equities before entering the Order Amending Supplemental Judgment. Resp. at 46–47.

A plaintiff

“who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. . . . It is necessary, however, to clarify that since injunctions are addressed to the equitable powers of the court, the [foregoing] listed criteria **must be examined in light of equity including balancing the relative interests of the parties, and, if appropriate, the interests of the public.**”

Tyler Pipe Industries, Inc. v. State, Dept. of Revenue (“Tyler Pipe”), 96 Wash.2d 785, 792, 638 P.2d 1213 (1982) (bold added). The second

remand was about criterion (1) because it had to determine which activities the County had a right to enjoin as expansions without impinging on the Club's right to continue and intensify its nonconforming use. *Tyler Pipe* required this criterion to be examined "in light of equity including balancing the relative interests of the parties, and, if appropriate, the interests of the public." *Id.* The trial court erred by not doing that.

The County suggests the balance of equities does not apply when a trial court refashions vacated portions of an injunction because an injunction was already issued. An injunction, however, is not legally distinct from its terms.⁴ Accordingly, a trial court must balance the equities with respect to the specific terms of any injunction sought by a plaintiff. If the plaintiff seeks a different injunction on remand than it received earlier in the case and the existing findings do not already address the equities of the new injunction, they must be considered again.

According to *State ex rel. Carroll v. Junker*, whether an injunction properly remedies a harm depends not only on whether it enjoins the cause of that harm but also on "the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the

⁴ See CR 65(d) ("Every order granting an injunction . . . shall be specific in terms" and "shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts to be restrained.").

other.” 79 Wash.2d 12, 26, 482 P.2d 775 (1971). These “interests” and “reasons” can only be weighed and balanced in the context of a specific injunction proposed by a plaintiff. *See, e.g., Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wash. App. 70, 71–72, 587 P.2d 1087 (1978) (reversing injunction because “[n]owhere in the record d[id] it appear” that the trial court had balanced the equities “in his determination to grant the mandatory injunction”).

This case is like *Lenhoff* because there is no evidence in the record that the trial court balanced the equities related to the specific injunction it issued. As in *Lenhoff*, the trial court abused its discretion. The injunctions in the Order Amending Supplemental Judgment should be vacated and the case should be remanded with instructions for the trial court to fully balance the equities before refashioning any injunctive relief.

III. CONCLUSION

For the foregoing reasons and as requested in the Club’s Opening Brief, the Court should reverse and vacate the Order Amending Supplemental Judgment and remand with instructions for fact-finding proceedings to resolve all remaining questions of fact and law necessary to refashion the expansion remedies. *See* Opening Brief at 47–48 (listing fact questions).

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DATED: June 19, 2020

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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 June 19, 2020, I caused to be served a copy of the within
REPLY OF APPELLANT via e-mail to the following:

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DATED: June 19, 2020

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June 19, 2020 - 11:50 AM

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