

NO. 35834-4-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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SECURITY SERVICES NORTHWEST, INC.,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.

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ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT  
(Hon. Jay B. Roof)

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APPELLANT'S OPENING BRIEF

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Dennis D. Reynolds, WSBA #04762  
John E. Keegan, WSBA #00279  
Stephen James, WSBA #37804  
Davis Wright Tremaine LLP  
Attorneys for Appellant  
Security Services Northwest, Inc.

**ORIGINAL**

Suite 2200  
1201 Third Avenue  
Seattle, Washington 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax

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## I. INTRODUCTION

Appellant Security Services Northwest, Inc. (“SSNW”) has operated a security services business on the western shore of Discovery Bay in Jefferson County since 1988. In the summer of 2005, in response to complaints of noise emanating from the property, Jefferson County issued three enforcement orders against SSNW’s operations under its building and zoning codes. These enforcement orders were appealed by SSNW to the Jefferson County Hearing Examiner, who denied the appeal in January 2006, and refused to recognize SSNW’s right to a legal nonconforming use for its business.

The Honorable Jay B. Roof of the Kitsap County Superior Court concluded that the Hearing Examiner was clearly erroneous in determining that SSNW had never established a legal nonconforming use for its security services business. Jefferson County made no cross-appeal to contest this part of the Trial Court’s decision. However, the Trial Court imposed limitations on the scope and nature of SSNW’s nonconforming use that SSNW believes are contrary to law and contrary to the unrebutted evidence in the record below.

This appeal is not about whether SSNW has established a legal nonconforming use for its security business—that is now the law of the case—but rather about the scope and nature of such use. SSNW requests that

the Court reverse the Trial Court and direct the issuance of an Order that correctly identifies the scope and nature of SSNW's legal nonconforming use.

SSNW believes that its legal nonconforming use includes these core elements:

- Security patrol, site security, maritime security, alarm installation and monitoring, armored car services, K-9 detection and tracking
- Training in each of the above-mentioned security services, including small arms training for SSNW's employees as well as third parties
- Use of 3,700 acres of the Gunstone Property

SSNW is not asking the Court to act as the trier of fact. As explained in this Brief, SSNW believes that the Court can reach a correct determination of the scope and nature of SSNW's legal nonconforming use through application of the standards for granting relief provided in the Land Use Petition Act, RCW Ch. 36.70C.

## II. ASSIGNMENTS OF ERROR

### *Assignments of Error*

#### A. Trial Court.<sup>1</sup>

1. The Trial Court erred in limiting SSNW's legal nonconforming use to activities it conducted prior to January 6, 1992, without regard to legal continuations and intensifications of SSNW's use after such date. *See* Order, Finding and Conclusion ("F&C") 6b, 4:24-26, and Order, 5:12-18.<sup>2</sup>
2. The Trial Court erred in using the 2001 Jefferson County Code (§ 18.20.260) to measure the permissible intensification of SSNW's legal nonconforming use in the period from January 1992 until the adoption of the 2001 Code. *See* Order, F&C 6b, 4:24-26.
3. The Trial Court erred in its failure to invalidate the Hearing Examiner's use of a purported 1992 "Administrative Rule" regarding the expansion, alteration or change of a nonconforming use. *See* Decision, FF 15, at 15:23-26; CL 20, at 25:13-18.<sup>3</sup>
4. The Trial Court erred in upholding the Hearing Examiner's determination to consider only "tangible" evidence and in

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<sup>1</sup> For the Court's convenience, those portions of the Trial Court's Order and Hearing Examiner's Decision assigned as error are set forth verbatim in the "Appendix" to this Brief.

<sup>2</sup> The Trial Court's Order dated November 1, 2006, Clerk's Papers ("CP") 382-86, is referred to throughout this Brief as "Order."

<sup>3</sup> The Trial Court further erred in denying SSNW the right to conduct discovery for the purpose of determining the validity, meaning and applicability of such administrative rule. *See* CP 255-56.

disregarding a substantial body of unrebutted testimony in support of SSNW's rights with respect to the scope and nature of its legal nonconforming use. *See* Order, F&C 1, 3:13-18.

5. The Trial Court erred in finding that the scope and nature of SSNW's legal nonconforming use was limited to "armed transport, installation and monitoring of security systems, and limited firearms training of SSNW's full and part-time employees;" that there was "little to no evidence to conclude that training of third parties took place on the property;" that it should be limited to "the Hearing Examiner's determination from SSNW's payroll data that SSNW employed approximately two to three full-time employee equivalents (FTE's);" and that "the scope of the property legally used by SSNW prior to January 6, 1992, was the property identified in the initial lease of twenty acres from the Gunstones." *See* Order, F&C 6b, 4:27 to 5:9.

6. The Trial Court erred in concluding that "the operative date in question is January 6, 1992, not 2001." Order F&C 4, 4:5-9.

7. The Trial Court erred in upholding the Examiner's finding with respect to "work performed on-site versus off-site." Order, F&C 5, 4:10-12.

8. The Trial Court erred in ordering that "the current terms of the Temporary Restraining Order granted on October 3, 2005,

and the Modified Order Granting Preliminary Injunction entered on December 21, 2005, shall remain in effect pending the Hearing Examiner's final decision." Order, 5:19-22.

9. The Trial Court erred in failing to reverse the Decision of the Hearing Examiner under the standards for granting relief set forth in the Land Use Petition Act, RCW 36.70C.130(1), with respect to the rulings identified as errors in B1-B8 below.

**B. Hearing Examiner.<sup>4</sup>**

1. The Hearing Examiner erred in requiring tangible, documentary evidence to prove the existence of SSNW's legal nonconforming use. Decisions, Findings of Fact ("FOF") No. 5, at 12.<sup>5</sup>

2. The Hearing Examiner erred in his finding as to the testimony of SSNW witness Bruce Carver. Decision, FOF No. 8, at 14; *see also* COL No. 10, Decision at 21-22.

3. The Hearing Examiner erred in basing his Decision on a purported 1992 "Administrative Rule." *See* Decision, FOF No. 15, at 15; COL No. 20, at 25.

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<sup>4</sup> In the event that the Court treats any of the Examiner's Conclusions of Law as findings of fact, SSNW has assigned error to certain of the Examiner's Conclusions of Law.

<sup>5</sup> For the sake of convenience, the "Findings, Conclusions, and Decision" of the Jefferson County Hearing Examiner, dated January 10, 2006 (CP 24-55), is referred to throughout this brief as "Decision."

4. The Hearing Examiner erred in finding that complaints of SSNW's operations begin in 2001. Decision, FOF No. 17, at 16, and FOF No. 21, at 17.

5. The Hearing Examiner erred in his calculation of the number of SSNW's employees and in using such calculation to characterize the scope and nature of SSNW's use of the Property. Decision, COL Nos. 8, 11, 21, 22 and 23, at 21, 22, 25 and 26.

6. The Hearing Examiner erred in finding that nearly all of SSNW's business activities occurred off-site. Decision, COL No. 9, at 21.

7. The Hearing Examiner erred in presuming that there were unproduced documents unfavorable to SSNW. Decision, COL No. 21, at 25.

8. The Hearing Examiner erred in concluding that "the gap between 1992 and 1996 is not explained with substantial evidence" and placing the burden of explaining such gap in documentary evidence on SSNW. Decision, COL No. 23, at 26.

*Issues Pertaining to Assignments of Error*

1. May the burden be placed on SSNW to prove that its legal nonconforming use was not abandoned, discontinued or diminished once SSNW has established the existence of such use? *See*

LUPA criteria in RCW 36.70C.130(1)(a), (b) and (d). [Assignments of Error B7 and B8.]

2. May the scope and nature of SSNW's legal nonconforming use be limited solely to activities it conducted prior to adoption of the County's interim zoning on January 6, 1992, where continuations and intensifications of such use after that date were legal under subsequent County zoning and Washington case law? *See* RCW 36.70C.130(1)(b) and (d). [Assignments of Error A1 and A6.]

3. May the legal nonconforming use provisions adopted in the 2001 County zoning code be used to measure the permissible expansions of such use under the prior zoning codes? *See* RCW 36.70C.130(1)(b) and (d). [Assignment of Error A2.]

4. May a 1992 "Administrative Rule" that was never adopted by the County Commissioners, never produced in response to SSNW's public records requests, never made part of the hearing record, and never made available for cross-examination and rebuttal by SSNW, be used to determine the scope and nature of SSNW's legal nonconforming use? *See* RCW 36.70C.130(1)(a) and (f). [Assignments of Error A3 and B3.]

5. May proof of a legal nonconforming use be limited to documentary and tangible evidence only where there is substantial

unrebutted oral testimony in support of such use? *See* RCW 36.70C.180(1)(a) and (d). [Assignments of Error A4 and B1.]

6. Where there is unrebutted evidence to the contrary, may the scope and nature of SSNW's legal nonconforming use be limited to (a) armed transport, installation and monitoring of security systems, and limited firearms training of SSNW's full and part-time employees, (b) two to three full-time employee equivalents, and (c) use of only 20 acres of the 3,700 acre Gunstone property? *See* RCW 36.70C.130(1)(c). [Assignments of Error A5, A7, B2, B4, B5, and B6.]

7. May the Kitsap County Trial Court order SSNW to abide by the terms of a Jefferson County Superior Court Temporary Restraining Order and Preliminary Injunction that have been dissolved? *See* RCW 36.70C.130(1)(e) and (f). [Assignment of Error A8.]

### III. STATEMENT OF THE CASE

#### A. SSNW Establishes its Security Services Business on the Gunstones' Property.

In 1986, Joseph D'Amico, a Port Townsend native then serving as a reserve police officer in Wenatchee, Washington, purchased the business now known as Securities Services Northwest, Inc. ("SSNW").<sup>6</sup> II VRP

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<sup>6</sup> Security Services Northwest has previously been known as "Security Services of Jefferson County," "Security Services of Jefferson and Clallam Counties," and simply "Security Services." Though its business form and name have changed, its ownership and management has remained in the hands of Mr. D'Amico. III VRP 31-32 (D'Amico).

32-33 (D'Amico).<sup>7</sup> SSNW provides a variety of security services for businesses and government agencies, including security patrols (both land and marine), site security, armored car services, alarm installation and monitoring, K-9 detection and tracking, and SSNW also trains security personnel, both employees of SSNW and third parties, in each of these security services, including training in the proper use of small firearms. II VRP 38-41, 60-62 (D'Amico); SSNW Log 98, at 3-4.<sup>8</sup>

One of SSNW's early clients was the Gunstone family. The Gunstones, through family companies, own approximately 3,700 acres of land extending from the western shore of Discovery Bay near Gardiner, Washington, up to and across US 101, and into the foothills of the Olympic Mountains (the "Property"). SSNW Log 212, at 3 (Gunstone Decl.). They use the upper portion of the Property for logging and the Discovery Bay shoreline area for their shellfish harvesting business. *See* VII VRP 23-26 (Gunstone). In 1987, when law enforcement officers were frustrated in their efforts to halt timber and shellfish poachers on the Property, the Jefferson County Sheriff's Office suggested to the Gunstones

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<sup>7</sup> "II VRP 32-33 (D'Amico)" means that the citation is to the testimony of Joseph D'Amico on pages 32 and 33, Volume II of the Verbatim Report of Proceedings ("VRP"). All volumes of the VRP are from November 16-18, 2005. The VRP is organized into twelve volumes that correspond to the twelve tapes on which the proceedings were recorded, not the dates of the proceedings.

<sup>8</sup> The County organized the record by "Log Items," not as a consecutively paginated administrative record. For example, "Log 98" is a reference to Item 98 in Table 2 of SSNW's Table of Exhibits. *See* HE Decision, at 3-10.

that they retain Mr. D'Amico's company to provide security. II VRP 35-36 (D'Amico); VII VRP 39-44 (Gunstone). In its first day on the job, SSNW apprehended five individuals thought to be stealing from the Gunstones. VII VRP 42 (Gunstone).

In 1988, the Gunstones invited SSNW to relocate its business from Port Townsend to the Discovery Bay Property. II VRP 36 (D'Amico); SSNW Log 212, at 3 (Gunstone Decl.). Since that time, and without interruption, SSNW has operated its business from the Property. SSNW's activities on the Property have included firearms training, weapons qualification, shooting exercises, security team movement exercises, tactical training, K-9 unit training, marine patrol training and exercises, and other types of security training and operations, for SSNW employees as well as law enforcement agencies and other third parties. II VRP 36-52 (D'Amico); SSNW Log 209, at 3-4 (D'Amico Decl.); SSNW Log 212, at 3-4 (Gunstone Decl.). At the time SSNW established its business on the Property, there were no zoning regulations in place in Jefferson County. *See Jefferson County v. Lakeside Indus.*, 106 Wn. App. 380, 383-84, 389, 23 P.3d 542 (2001).

In November 1988, SSNW entered into a written rental agreement for approximately 20 acres of the Gunstone Property. SSNW Log 98, at 18 (rental agreement); VII VRP 26-29 (Gunstone). This portion of the

Property is located between US 101 and Discovery Bay. With the Gunstones' oral permission, SSNW has also regularly used portions of the entire 3,700 acre Property for security training since 1988. While much of SSNW's training, including firearms training and exercises, has taken place in the lower 20-acre portion of the Property, some training operations, including security team movement training, K-9 unit tracking, and firearms training, have taken place in areas throughout the 3,700 acre Property. III VRP 22-23, III VRP 65-66, VI VRP 8-12 (D'Amico); VII VRP 35-37, 57-58 (Gunstone); SSNW Log 212, at 3-4 (Gunstone Decl.)

**B. SSNW Begins Security Training on the Property in 1988.**

In 1988, at the same time it moved its business to the Property, SSNW began conducting regular firearms training at the Property. II VRP 51 (D'Amico); SSNW Log 212, at 3-4 (Gunstone Decl.); VII VRP 44-45 (Gunstone). Such training became state-mandated beginning in mid-1991 when the legislature enacted the Security Guard Act, RCW ch. 18.170, III VRP 52-53 (D'Amico). This Act requires regular firearms certification of all private security personnel who carry firearms, including armored car personnel and site security personnel. SSNW's business includes such state-mandated training for security guards. IV VRP 45-46 (Carver).

SSNW regularly conducted firearms training and exercises on the Property starting in 1988. II VRP 48-50 (D'Amico); VI VRP 39-41 (Tangen). From aerial photos in the record, Mr. D'Amico identified the location of the shooting ranges on the lower 20-acre portion of the Gunstone Property as well as in the upper portions of the 3,700-acre Gunstone Property. II VRP 65; III VRP 18-20, 22; and IV VRP 8-9 (D'Amico). Mr. Gunstone himself has observed SSNW's training in the use of firearms on the Property since 1988. VII VRP 44-45 (Gunstone). Several employees of the Gunstones who worked on the Property in the period 1988 to the present also witnessed firearms and other training on the Property. Log 98, at 87-94 (Decls. of Bachillo, O'Dell, Rogers and Cross). SSNW's employee-instructors described the firearms certification and other training that regularly occurred on the Property. VIII VRP 50-53 (Carver); V VRP 9-14 (Grewell). Harry Dudley, a retired Coast Guard captain, began to hear the sounds of a shooting range from his home site across Discovery Bay from the Property in approximately the late 1980's. XI VRP 39-41 (Dudley).<sup>9</sup>

Various police departments, including the Sequim Police Department, have conducted firearms training at the Property since the

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<sup>9</sup> Mr. Dudley did not complain about SSNW's shooting noise coming from the Property. Indeed, he noted that shooting noise from other sources was common in the area. XI VRP 39-41 (Dudley).

early 1990s. III VRP 24-25, 53-54, IV VRP 54 (D'Amico); V VRP 26, 52 (Grewell); SSNW Log 120 (letter from Sequim police chief). From the beginning, SSNW made its shooting ranges available to local law enforcement agencies without charge. "We've been donating our facility out there from the beginning. We've never felt—we felt it was a service to the counties, to the cities. We didn't charge the agencies." V VRP 15 (D'Amico).

In addition to conducting training on the Property, SSNW ran its security services business from the Property. The clients for SSNW's armored car, site security, and other services have included a variety of private companies and government entities, including Jefferson County, Port of Port Townsend, and Costco. SSNW Log 229, at 3; SSNW Log 98, at 22-23, 44. Public entities, both within and outside Jefferson County, have contracted with SSNW for marine patrol services since the early 1990's. III VRP 30-31, 33, 54 (D'Amico); SSNW Log 98, at 22-23. SSNW has also regularly provided K-9 tracking services to local governments on the Olympic Peninsula, successfully tracking down and apprehending suspects fleeing crime scenes and escaped prisoners. III VRP 34, 46 (D'Amico); SSNW Log 98, at 29-30.

Since 1988, training for all SSNW security personnel has also occurred on the Property. SSNW Log 209, at 4 (D'Amico Decl.). As

Mr. Carver explained, “Mr. D’Amico provides a platform for a lot of young people especially now coming out of the military doing whatever type of security work they do for him. Some of them have moved on to mainstream law enforcement either locally or the state level.” VIII VRP 52 (Carver).

**C. SSNW’s Security Training and Services Evolve From 1988 Until the Present.**

SSNW’s business was successful and the volume of its off-site security services, as well as its on-site training, grew substantially from 1988 to the present. This meant more full-time and part-time employees as well as more classes. V VRP 60-61 (Grewell). After the events of September 11, 2001, Mr. D’Amico testified that he “ramped up” the amount of training that was going on at the Property. IV VRP 59-60. By 2005, SSNW had 130-140 full- and part-time employees. VI VRP 26 (D’Amico).

Over time, SSNW’s security teams evolved to match its clients’ security needs. II VRP 56-59 (D’Amico). Although the teams have had different names, their training and objectives remained the same. *Id.*; VI VRP 43-44 (Tangen). Indeed, these teams often consisted of the same personnel, but with a new title applied to the same or similar security tasks: “We’ve changed the training. The training evolves over time. We

learn how to do things better, more efficient, safer.” II VRP 58 (D’Amico). That said, the types of weapons being used for both on-range and off-range training at the Property have not changed. II VRP 48-49, 59 (D’Amico).<sup>10</sup> Mr. Hall, an SSNW firearms instructor, explained that as a result of an increase in criminal use of sophisticated weapons, law enforcement and private security officers are more likely today to carry light semiautomatic rifles (.223 caliber AR-15’s) than they were in the past. VII VRP 4-8 (Hall). Some of the training occurs in a classroom environment where employees are taught weapons handling discipline and safety.<sup>11</sup>

Some of SSNW’s more advanced training involves “bomb awareness.” II VRP 59 (D’Amico). This bomb training has taken place since prior to 1992. II VRP 60 (D’Amico). SSNW does not, however, regularly explode bombs on the Property; Mr. D’Amico only remembers explosions taking place once or twice. *Id.*

#### **D. Jefferson County’s Enforcement Orders.**

In June 2005, seventeen years after SSNW relocated its security business to the Property, the County informed SSNW that it had received

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<sup>10</sup> The standard issue for security training is the AR-15, a semi-automatic rifle with a caliber slightly larger than a .22. *See* V VRP 16 (Grewell); VII VRP 7-8 (Hall); and VIII VRP 47 (Carver). There are no military M-16s used at the site. II VRP 62, IV VRP 38 (D’Amico).

<sup>11</sup> As Mr. Hall explained, officers are now training to keep their finger off the trigger or even to avoid pointing their weapon at a target until they actually intend to fire, while previous practice had been to point their weapons with their finger on the trigger. VII VRP 3-4 (Hall).

complaints about gunfire noise from residents around Discovery Bay. V VRP 63 (D'Amico); I VRP 38-39 (Scalf). Following discussions with Mr. D'Amico, the County also informed SSNW that it had determined there were several unpermitted buildings on the Property.<sup>12</sup> SSNW Log 209, at 5 (D'Amico Decl.). Up until this time, Mr. D'Amico never received any complaints about SSNW's operations. *Id.*; V VRP 63 (D'Amico).; VI VRP 53 (Tangen).<sup>13</sup>

In response to these complaints, Mr. D'Amico sought out County representatives to discuss how SSNW could remedy the situation. V VRP 69 (D'Amico); SSNW Log 209, at 5 (D'Amico Decl.). All County employees who investigated the matter concurred that Mr. D'Amico was

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<sup>12</sup> From 1997 to 2004, SSNW built a new bunkhouse, a latrine, and a classroom building, largely in replacement of the old buildings on the Property. III VRP 11-14 (D'Amico). In particular, as his growing family began to use more of the old farmhouse as residential space, Mr. D'Amico decided to build the classroom building and bunkhouse in order to make more space in the house available for residential use. *See* V VRP 66 (D'Amico). SSNW did not obtain permits for these new buildings, an error that Mr. D'Amico explained as follows: "Well, it was a bad judgment, actually, on my part. Having torn down the other buildings, I thought that I could build those buildings there, and I made a mistake." III VRP 14-15. SSNW believed that it was entitled to replace the old buildings with its new buildings pursuant to Jefferson County's nonconforming structures regulations, JCC 18.20.260(2). Although SSNW did not obtain building permits, the buildings appear to otherwise meet the safety standards necessary to comply with the Jefferson County Building Code, *see* Log 209, at 7 (D'Amico Decl.). Fred Slota, the County's building inspector, testified that they appeared safe to him from a structural standpoint. IX VRP 29-30 (Slota); *see also* SSNW Log 116 (letter from Zenovic & Associates civil engineers stating that, following inspections, "the bunk house, restrooms and meeting room do not appear to have any major structural deficiencies" and that "the buildings are safe to occupy"). The Trial Court determined that construction of buildings without building permits is unrelated to and cannot serve as a basis for denying SSNW its legal nonconforming use. *See* Order, F&C 6a, 4: 16-22.

<sup>13</sup> Not only did Mr. D'Amico receive no complaints regarding SSNW's operations until 2005, there is no evidence in the record indicating that the County received any complaints about SSNW prior to 2005.

cooperative and forthcoming. VIII VRP 36 (Hernandez); IX VRP 28 (Slota); and IX VRP 63 (Scalf). SSNW also began working on sound baffles to reduce the noise coming from the shooting ranges. V VRP 64-66 (D'Amico). On July 8, 2005, however, the County issued its first administrative order, a "stop work order" under the Building Code, prohibiting SSNW from using its classroom and bunkhouse buildings and from completing the baffles. SSNW Log 222 (July 8, 2005 Stop Work Order). SSNW then attempted to apply for building permits for the structures pursuant to the building official's suggestion. V VRP 65-66 (D'Amico); IX VRP 68-71 (Scalf). The County, however, refused to accept the permit applications. *Id.*; V VRP 8-9 (D'Amico).

At the same time, in accordance with the Jefferson County Development Code's preference for "voluntary correction" (*see* JCC 18.50.010(1) & 050), SSNW continued its efforts to achieve voluntary compliance. V VRP 64-65 (D'Amico). Specifically, on July 29, 2005, SSNW submitted materials to the County demonstrating its historical use of the Property. *See* SSNW Log 98.<sup>14</sup> On August 11, 2005, however, the County, without notice or warning, issued two more orders – a "stop work order" under the Zoning Code and a "notice and order" under the Zoning

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<sup>14</sup> Because SSNW is a small business, its historical records from the 1980's and early 1990's are incomplete and do not reflect the full scope of SSNW's operations at the time. The written records SSNW submitted, coupled with the sworn testimony of multiple witnesses, however, constitute ample evidence of SSNW's historical use of the Property.

Code – forbidding SSNW from conducting virtually all of its security training operations, including all use of the firing ranges. SSNW Log 224 (August 11, 2005, Stop Work Order); SSNW Log 223 (August 11, 2005, Notice and Order). SSNW appealed all three enforcement orders to the Jefferson County Hearing Examiner. Log 4, at 1-3; Log 10, at 2-4; Log 11, at 2-4.

At the time the County issued the August 11 orders, SSNW had several contracts in place with government agencies to provide small arms training between August and October 2005. Because SSNW felt compelled to honor its contracts with such agencies, SSNW continued training after August 11, 2005. However, SSNW and its counsel met with the County numerous times during this period in an effort to achieve what the County recognized as “voluntary compliance” with the Code, even offering to mitigate the noise at the site and move the shooting ranges. Log 3, at 1-2; Log 6, at 3-4; Log 142, at 1-2. The Department of Planning and Community Development said no.

The County then filed a lawsuit in Jefferson County Superior Court seeking a temporary restraining order requiring SSNW to comply with all of the County’s orders.<sup>15</sup> After a hearing, Judge Verser of the Jefferson County Superior Court entered an order requiring SSNW to comply with

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<sup>15</sup> See *Jefferson County v. Security Services Northwest, Inc.*, Jefferson County Superior Court No. 05-2-00282-3.

the County's orders pending a decision in its administrative appeals. At the same time, the Superior Court allowed SSNW to conduct firearms training at an inland range for the limited purpose of recertifying its security personnel and certifying new replacement personnel. SSNW Log 198, at 5. Judge Verser dissolved the Preliminary Injunction against SSNW and dismissed this lawsuit by Jefferson County on February 10, 2006.<sup>16</sup>

SSNW's administrative appeal of the three County enforcement orders was heard on November 16-18, 2005 by Jefferson County Hearing Examiner Irv Berteig. *See* VRP, Volumes I-XII. The Hearing Examiner issued his Decision denying the existence of SSNW's legal nonconforming use and denying SSNW's appeal on January 10, 2006. CP 24-55.

**E. SSNW's Land Use Petition to Superior Court.**

On January 27, 2006, SSNW timely filed a Land Use Petition in Kitsap County Superior Court to challenge the Hearing Examiner's Decision. CP 2-22. On March 3, 2006, SSNW brought a Motion for Stay of the Hearing Examiner's Decision and a Motion to Permit Pretrial Discovery regarding the origins and applicability of a 1992 "Administrative Rule" relied upon by the Examiner even though it was not

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<sup>16</sup> SSNW is moving to supplement the Clerk's Papers to include the February 10, 2006 Order Dissolving Preliminary Injunction and Order Dismissing Without Prejudice.

part of the hearing record. CP 79-95; CP 66-69. Judge Roof denied the Motion for Stay on March 15, 2006 (CP 254) and declined to allow SSNW its request for discovery in the “Stipulation and Order to Establish Care Schedule” (CP 255-56).

Judge Roof issued his Memorandum Opinion on the merits of the case on October 6, 2006 (CP 357-365), and his final Order on November 1, 2006 (CP 382-386). The Court found that SSNW had, indeed, established “a limited [legal] nonconforming use” prior to the enactment of the County’s January 6, 1992 zoning code and ruled that the Hearing Examiner’s determination to the contrary was erroneous. *See* Order, at 3:4-5 and 4:13-22. The Court ruled that the Examiner’s decision to evaluate the legality of SSNW’s use based upon its failure to obtain building permits for all of its structures was not supported by the case law. Order, F&C 6a, at 4:16-22. The Court also set forth what it thought were the elements of SSNW’s “limited” legal nonconforming use and remanded SSNW’s appeal to the Jefferson County hearing examiner “for further proceedings consistent with this opinion solely to determine the scope and nature of SSNW’s nonconforming use as of January 6, 1992, based on the existing record as established in the November 2005 hearing.” *See* Order, at 5:12-15.

SSNW moved for reconsideration of Judge Roof's November 1, 2006 Order, in particular because such order restricted SSNW's legal use to what existed as of January 6, 1992, and restricted it to what is permitted under JCC 18.20.260, a code provision that did not become effective until January 16, 2001. CP 396-98. The Court denied SSNW's motion for reconsideration on December 13, 2006. CP 411-12. SSNW then filed this appeal to Division Two of the Court of Appeals on January 12, 2007.<sup>17</sup>

#### IV. ARGUMENT

##### A. Standards for Granting Relief.

LUPA establishes six bases under which this Court may grant relief:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

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<sup>17</sup> Despite the timely appeal by SSNW of the Trial Court's final Order, the Jefferson County Hearing Examiner, without notice to SSNW and without the opportunity to submit briefs in support of its interpretation of the Court's Order, issued a new "Order in Response to Superior Court Remand" on January 22, 2007. SSNW filed a Petition under the Land Use Petition Act ("LUPA") on February 9, 2007, challenging the Hearing Examiner's decision on remand. *See Security Services Northwest, Inc. v. Jefferson County*, Kitsap County Superior Court No. 07-2-377-2. Based on the stipulation of the parties, this second LUPA action has been stayed pending a final decision on this appeal to Division Two of the Court of Appeals.

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). “[I]n order to grant relief . . . it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct.” RCW 36.70C.130(2). In this case, SSNW is entitled to relief under subsections (a), (b), (c), (d), and (f).

Under LUPA, “[e]rrors of law are reviewed de novo” by the appellate court. *City of University Place v. McGuire*, 144 Wn.2d 640, 30 P.3d 453 (2001). In addition, “[t]he decision as a whole will be reviewed for substantial evidence supporting the hearing examiner’s decision. Substantial evidence is ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth of correctness of the order.’” *Id.* (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

**B. Once a Valid Nonconforming Use Is Recognized, the Burden Shifts to the County to Prove Its Discontinuance. [Errors B7 and B8]**

The Trial Court reversed the Hearing Examiner and determined that SSNW has a legal nonconforming use for its security business. *See*

Order, F&C 6, 4:6-24. The Trial Court's recognition of SSNW's legal nonconforming use constitutes a paradigm shift in how the Court of Appeals must now view all of the evidence presented to the Hearing Examiner.

Once a landowner establishes the existence of a legal nonconforming use, the burden shifts to the party contesting the legality of the use to defeat it. *Jefferson County v. Lakeside Indus.*, 106 Wn. App. 380, 387-88, 23 P.3d 542, 29 P.3d 36 (2001); *Van Sant v. City of Everett*, 69 Wn. App. 641, 849 P.2d 1276 (1993). Misallocation of the burden of proof by a hearing examiner is "reversible error." *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 166, 43 P.3d 1250 (2002) (citing *Van Sant v. City of Everett*, 69 Wn. App. 641, 648-49, 849 P.2d 1276 (1993)). This error continues to prejudice SSNW in its ability to obtain the full scope of its legal nonconforming use.

In this case, the Examiner repeatedly disregarded this rule of burden-shifting in legal nonconforming use law and, instead, placed the burden on SSNW to prove that its use had not been abandoned or diminished. For example, the Hearing Examiner erred in concluding that "the gap between 1992 and 1996 is not explained with substantial evidence" and in placing the burden of explaining such gap in

documentary evidence on SSNW.<sup>18</sup> The Trial Court used this alleged “gap” to perpetuate the Examiner’s erroneous conclusions with respect to the nature and scope of the use legally established by SSNW, in particular the limitations the Trial Court imposed with respect to third-party training and the number and type of employees. *See* Order, F&C 6b, 4:24 to 5:9.

**C. The Trial Court Erred in Limiting SSNW’s Legal Nonconforming Use to Its Activities Prior to January 6, 1992, and Only as Permitted in Jefferson County Code 18.20.260. [Errors A1 and A6]**

The Trial Court erred in limiting SSNW’s legal nonconforming use to its activities prior to January 6, 1992. *See* Order, 5:12-15. The Trial Court also erred in its failure to recognize the continuation and intensification of SSNW uses legal nonconforming use included any SSNW uses commenced after January 1992 that were legal under then applicable Jefferson County Zoning and Washington case law.

**1. The January 1992 Zoning Code Did Not Prohibit SSNW’s Ongoing Uses, Including Shooting Ranges.**

Jefferson County adopted an “Emergency Zoning Ordinance” that became effective on January 6, 1992. *See* Ordinance No. 1-0106-92.<sup>19</sup>

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<sup>18</sup> This conclusion by the Examiner is also wrong and unsupported by the evidence in the record. There was considerable documentary as well as testimonial evidence describing SSNW’s activities during this period. [Cites from Log.]

<sup>19</sup> This Ordinance was adopted without notice and without public hearing. In taking such action, the County Board of Commissioners cited the provisions of the Planning Enabling Act, RCW 36.70.790, which is intended to apply to the adoption “as an emergency measure [of] a temporary interim zoning map.” The 1992 Zoning was hardly “temporary” and was

The Trial Court erred in using the effective date of this Ordinance as the cutoff date for establishment by SSNW of its legal nonconforming use. Such a cutoff would only be lawful if the 1992 Zoning Code prohibited all ongoing uses conducted by SSNW. It did not.

The 1992 Zoning Ordinance is short, only 33 pages in total. It zoned the bulk of the Gunstone Property where SSNW conducted its business as “General Use,”<sup>20</sup> which allowed a very broad range of uses:

It is the purpose of this section [General Use Zone] to establish permitted use zone. All uses and activities except those enumerated in Section 5—General Commercial Zone, Section 6—Light Industrial Zone, or Section 7—Light Industrial/Commercial Zone herein above, shall be considered permitted or conditional uses within the General Use Zone.

Ordinance No. 01-0106-92, § 8, page 17.

This case is fundamentally about the permissible scope of SSNW’s firearms training on the Gunstone Property. The activity which triggered the citizen complaints in the summer of 2005 was the alleged noise from outdoor shooting. However, shooting ranges were not expressly enumerated in the General Commercial Zone (§ 5), the Light Industrial Zone (§ 6), or the Light Industrial Zone (§ 7) of the 1992 Code. That

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extended for nearly a three year period. When Clallam County previously used the same device, their so-called “interim zoning” was condemned. *See Byers v. Board of Clallan County Com’rs*, 84 Wn.2d 796, 800-01, 529 P.2d 823 (1974).

<sup>20</sup> “The Gunstone property is outside any of the three mapped commercial and industrial zones; and therefore was classified as in the General Use Zone.” Decision, FOF 14, at 15.

meant shooting ranges were *allowed* in the “catch-all” General Use Zone where SSNW conducted its business. “All uses and activities except those enumerated in [the other zones] *shall be considered permitted* or conditional uses within the General Use Zone.” Ordinance No. 01-0106-92, § 8 (emphasis added).

Outdoor shooting ranges were not expressly called out and prohibited in Jefferson County until the adoption of the 2001 Zoning Code, called the “Unified Development Code.”<sup>21</sup> In the 2001 Code, “outdoor shooting ranges” are prohibited in every zone except the “Forest—Commercial, Rural and In holding” Zone. *See* JCC 18.15.040, Table 3.1. The bulk of the Gunstone Property is zoned “Rural Residential” in the 2001 Code.

What this means is that SSNW’s outdoor shooting ranges continued to be a legal nonconforming use until 2001 on all portions of the Gunstone Property used for firearms training. Therefore, the scope and nature of SSNW’s legal nonconforming use, particularly its firearms training, cannot be frozen as of January 6, 1992, as it was in the Trial Court’s Order. This recognition renders moot the debate over the scope of SSNW’s training of third parties and the number of employees it had on

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<sup>21</sup> “‘Shooting range’ means a facility specifically designed and used for safe shooting practice with firearms and/or archery practice, with individual or group firing positions for specific weaponry.” *See* JCC 18.10.190.

January 6, 1992, because SSNW is entitled to the full scope of such use as it evolved up to adoption of the 2001 Code, and, to the degree there is no change in the character of such use, beyond. *See* Part IV.C.2 below.

**2. Intensification of Nonconforming Uses Is Permitted in Washington.**

The growth of SSNW's business subsequent to the enactment of the 1992 zoning also qualifies as a permissible intensification of its use. "Intensifications" of nonconforming uses are permitted under Washington law. *University Place*, 144 Wn.2d at 649, 63 P.3d 1 (2002). The case law in Washington, as well as nationally, recognizes this pivotal distinction between a change of use and a permissible intensification of use. An increase in the volume of a use is not a prohibited change of use, even if the increase disturbs the neighbors. 1 Kenneth H. Young, *ANDERSON'S AMERICAN LAW OF ZONING* § 6.38 at 607 (4th ed. 2006) (citations omitted); 101A C.J.S. *ZONING AND PLANNING* § 186 at 267 (2005). Moreover, a nonconforming use may be expanded when the increase is due to growth of trade, *see id.* § 6.50 at 639, as long as the expansion of the nonconforming use is reasonable, not detrimental to the welfare of the community, and not in effect the creation of a new use. 8A Eugene McQuillin, *THE LAW OF MUNICIPAL CORPORATIONS* § 25.206.10 at 146 (3d ed. 2003 & Supp. 2005). Washington courts recognize that

“nonconforming uses do not always remain static.” *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 208, 810 P.2d 31 (1991).

In *Keller v. City of Bellingham*, 92 Wn.2d 726, 600 P.2d 1276 (1979), the Supreme Court outlined the framework for assessing when a nonconforming use can and cannot grow:

When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used.

*Id.* at 731 (internal citations omitted). In *Keller* the Court considered whether a liquid chlorine plant with twenty-six 50-foot long electrolytic cells that had been established as a legal nonconforming use could add an additional six electrolytic cells without impermissibly enlarging the nonconforming use. *See id.* at 727-28. Reasoning that “[t]he test is whether the intensified use is different in kind from the nonconforming use in existence when the zoning ordinance was adopted,” the Supreme Court found that adding the six cells would qualify as a permissible intensification, not an impermissible expansion. *See id.* at 732. Even the dissent in *Keller*, which took a substantially stricter view of what could qualify as a permissible intensification, characterized the difference

between intensification and expansion in a way that supports SSNW's position:

An analogous example which clearly demonstrates the difference between an enlargement and an intensification would be the operation of a 6-pump gas station as a nonconforming use. If the station increased the number of hours of operation and thus pumped more gas or devised some new modern method of pumping the gas faster out of the tanks that it had, such would amount to an intensification of the use. However, if the gas station added six pumps in order to increase production, there is no question in my mind but that it would constitute an enlargement of the use.

*Id.* at 734 (Williams, J., dissenting).<sup>22</sup>

The Hearing Examiner found that, after 1992, "SSNW created significant additional activity of a totally different character." COL No. 22, Decision at 26. This is error under established legal nonconforming use law. The fact that SSNW has more customers than it did in 1988 and conducts training more frequently is the equivalent of a gas station increasing the number of hours it operates or using the same number of pumps to pump gas faster to accommodate more customers. Thus, not only does the gradual evolution in SSNW's security business fit within the parameters of the *Keller* majority's analysis, it also would qualify as an intensification under the dissent's stricter analysis.

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<sup>22</sup> A valid nonconforming use also includes the right to exercise accessory uses considered customary and incidental to the primary use. *Ferry v. City of Bellingham*, 41 Wn. App. 839, 844, 706 P.2d 1103 (1985) (a crematorium was not an enlargement of a funeral home).

SSNW's security business operations at the Property are not inherently different today than they were prior to 1992. Mr. D'Amico testified that SSNW personnel trained with a range of small arms—rifles, handguns, and shotguns—prior to 1992, and those are the firearms still used today. II VRP 49-50 (D'Amico). While the firearms SSNW has been using are not necessarily identical to those used prior to 1992, they are the same basic types of weapons, with similar caliber and noise impacts. *See* Part III.C above.

The Trial Court made no allowance for the permissible intensification of SSNW's legal nonconforming use. Instead, it froze SSNW's use as it existed on January 6, 1992, the date of adoption of the County's Interim Zoning Code. Under Washington case law, this is error.

**3. The Trial Court Erred in Using JCC 18.20.260 as the Exclusive Measure of Allowable Changes and Expansions of SSNW's Nonconforming Use.**

The trial court restricted any changes and expansions of SSNW's legal nonconforming use to what is allowed in the current version of the Jefferson County Code (JCC), § 18.20.260:

SSNW's legal use is restricted, however, to the nature and scope of the activities at that time [January 6, 1992] and cannot be changed or expanded outside what is permitted in Jefferson County Code 18.20.260.

Order, 4:24-26 (emphasis in original). This is error.

JCC 18.20.260 currently governs changes in legal nonconforming uses in Jefferson County, but it has only governed such changes since it went into effect on January 16, 2001. Any changes, alterations, expansions, or intensification of SSNW's use of the Gunstone Property between January 6, 1992 and January 16, 2001 should and must be governed by the Codes in effect during that interim period, not the current Code.

The nonconforming use provisions that governed the period from January, 1992, to January 16, 2001, come from the 1992 and 1994 Codes. Both of these Codes were liberal in their treatment of legal nonconforming uses. On January 27, 1992, the Jefferson County Commissioners went out of their way to "bless" the continuation of lawful uses that preceded the adoption of its 1992 Emergency Zoning Ordinance:

The aforementioned **Emergency Zoning Ordinance** does not incorporate a finding clearly indicating that uses and activities lawfully existing at the time of enactment of the ordinance, though not in compliance with the ordinance, are not prohibited. *Such a finding should be included within the ordinance to assuage, in particular, the apprehensions of owners of property within the "general use zone."*

Ordinance No. 2-0127-92, Finding 11 (emphasis added). The Ordinance then went on to add the following Finding Number 19:

Any building, structure, or use, lawfully existing at the time of enactment of this ordinance, though not in compliance

with the provisions contained hereinbelow, shall not be prohibited.

Ordinance No. 2-0127-92, § 1.

The 1994 Code continued the County's strong deference to legal nonconforming uses:

Often referred to as "grandfathered," a non-conforming use is the legal term for an activity and structure that exists prior to the effective date of this Ordinance and is not in compliance with the provisions contained herein. Non-conforming uses are legitimate uses of property and therefore, for the purposes of this Ordinance, these activities are classified as to their current use. In addition, these preexisting or "grandfathered" activities may be altered, expanded or changed as provided for below.

Ordinance No. 09-0801-94, § 10.10, p. 43.

Neither the 1992 nor 1994 County Zoning Codes contained a requirement that the owner of a legal nonconforming use obtain a conditional use permit before expanding, altering, or changing such use.<sup>23</sup> In fact, the 1994 Ordinance expressly provides that "these preexisting or grandfathered activities may be altered, expanded or changed *as provided below.*" See § 10.10 (emphasis added). None of the provisions "below" either expressly or impliedly prohibited alterations, expansions, or changes

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<sup>23</sup> See Ordinance No. 01-0106-92, § 12; Ordinance No. 09-0801-94, § 10. The contested 1992 "Administrative Rules" used by the Examiner contains language that purports to require administrative decisions for "minor expansions" and "conditional use" permits for "major expansions" but such Rules were never adopted by the Jefferson County Commissioners and cannot be used to alter the explicit requirements of the 1992 Zoning Code. See discussion below in Part IVD.

of such uses or required a conditional use permit as a prerequisite to such alteration, expansion, or change of use. *See* §§ 10.30, 10.40, 10.50, 10.60 of Ordinance No. 09-0801-94. In the absence of a prohibition in the 1992 and 1994 Codes against intensification by SSNW of its legal nonconforming use, the use may continue and intensify in volume and number of employees without the necessity of a conditional use permit or other land use entitlement under the applicable zoning code. *See Bartz v. Board of Adjustment*, 80 Wn.2d 209, 492 P.2d 1374 (1972).

The Trial Court's retroactive application of JCC 18.20.260 to determine the permissibility of any changes or expansions of SSNW's legal nonconforming use is potentially significant because the 2001 Code requires that a "conditional use permit" be obtained for the "alteration or replacement" of a nonresidential nonconforming use in "rural residential zones" (the Gunstone Property changed from "General Use" to "Rural Residential" with adoption of the 2001 Code). JCC 18.20.260(1).

It is SSNW's contention, however, that its uses after adoption of the 2001 Code do not constitute an "alteration or replacement" of the legal nonconforming uses it established prior to the 2001 Code. SSNW's use of the Property from 2001 forward still involved the same panoply of land and marine security services and security training throughout the 3,700 acre Gunstone Property for its own employees as well as third parties. Although

SSNW's business grew, in terms of the number of employees and the number of classes, the business was not "altered" or "replaced" within the ordinary meaning of those terms as used in § 18.20.260(1) of the 2001 Unified Development Code. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992); *Moldt v. Tacoma School Dist. No. 10*, 103 Wn. App. 472, 477-78, 12 P.3d 1042 (2000).

Under cross-examination, Mr. Al Scalf, the Director of the Department of Community Development, confirmed SSNW's position that legal nonconforming uses can be lawfully "intensified" in Jefferson County, even under the 2001 Code, without the necessity of new land use permits. For example, he said that adding dinner service at a lunch-time only restaurant would be a permissible intensification. X VRP 8-9 (Scalf). A business that increases the volume of gas it pumps would not require a conditional use permit. X VRP 18 (Scalf). That's an "intensification, not an enlargement." *Id.*

#### **4. Legal Nonconforming Uses Are Vested Property Rights.**

Legal nonconforming uses are not inimical to the public interest and something to be discarded. In Washington, nonconforming uses are "vested property rights" that should not be voided easily. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Summit-Waller Citizens*

*Ass'n v. Pierce County*, 77 Wn. App. 384, 388, 895 P.2d 405 (1995); *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993).

In Washington, the Growth Management Act (GMA) requires that governments plan their growth, while also protecting the private property rights of individuals: "Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6). SSNW's security business is a "vested property right" required to be protected from arbitrary and discriminatory action. *See Clallam County v. Western Washington Growth Management Hearings Bd.*, 130 Wn. App. 127, 145, 121 P.3d 764 (2005).

**D. The Trial Court Erred in Its Failure to Invalidate the Hearing Examiner's Use of 1992 "Administrative Rules" That Were Not in the Hearing Record. [Errors A3 and B3]**

The Hearing Examiner erred in basing his Decision, in part, upon "Administrative Rules" that purport to supplement Jefferson County's 1992 Interim Zoning Ordinance. *See* Decision, FOF 15, at 15. These Administrative Rules were never adopted by the Jefferson County Commissioners, and even though they are dated January 13, 1992, they are contrary to the nearly contemporaneous enactments of the Jefferson County Commissioners. On January 27, 1992, the Commission enacted Ordinance

No. 02-0127-92, which went out of its way to allow the continuation of legal nonconforming uses without the administrative procedures discussed in the Administrative Rules. *See* discussion in Part IV.C.3 above.

Such Rules were not produced by the County before the hearing in response to SSNW's request (pursuant to RCW Chapter 42.17) for all public records pertaining to the County's zoning regulations from 1950 to the present (*see* Log 80).<sup>24</sup> The 1992 Administrative Rules were never introduced into the Hearing Examiner record. The Hearing Examiner violated RCW 36.70C.130 in deciding this case on evidence that was not made part of the administrative record in the open public hearing. In a LUPA case, the Trial Court is also required to decide the matter based on the record created before the hearing examiner. *Westside Bus. Park, LLC v. Pierce County*, 100 Wn. App. 599, 602-03, 5 P.3d 713, review denied, 141 Wn.2d 1023, 10 P.3d 1075 (2000) (citing RCW 36.70C.120(1); 36.70C.130(1)).

Finally, SSNW never had the opportunity to offer evidence, including the cross-examination of the County's witnesses, as to the origins and meaning of such Rules. The only way in which SSNW could probe the origin, validity, and meaning of such Rule was to conduct discovery in

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<sup>24</sup> In response to this public records request, Mr. Scalf stated that the County provided SSNW with all documents in its public records responsive to its request. *See* I VRP 29-30 (Scalf). "[I]n the interests of fairness, an agency must give the public notice of, and access to, rules and regulations prior to an intent to enforce them." 2 Am. Jur. 2d ADMINISTRATIVE LAW § 204 at 192 (2004).

superior court. In such cases, LUPA authorizes a petitioner to conduct limited pretrial discovery and, if relevant, to present evidence outside the record at the time of the hearing in this matter. *See, e.g., Responsible Urban Growth Group v. County of Kent*, 123 Wn.2d 376, 384, 868 P.2d 861 (1994). SSNW brought a Motion to Permit Pre-Trial Discovery with respect to the 1992 Administrative Rules (CP 66-89). The Trial Court erred in denying this request.

**E. The Examiner’s Use of Tangible Evidence Only to Establish the Existence, Scope and Nature of a Legal Nonconforming Use Is Unlawful and Clearly Erroneous. [Errors A4 and B1]**

The Hearing Examiner based his Decision on the mistaken premise that “[t]angible evidence is necessary to justify a nonconforming use.” FOF No. 5, Decision at 12. This singular error by the Examiner pervades his Decision and undermines the validity of almost every finding he made as to the scope and nature of SSNW’s use before and after January 6, 1992.<sup>25</sup> The Hearing Examiner’s limitation of proof to tangible evidence is an unlawful procedure, an error of law, and clearly erroneous. RCW 36.70C.130(l)(a), (b), and (d).

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<sup>25</sup> Such error by the Examiner also affected his findings and conclusions with respect to the very existence of SSNW’s legal nonconforming use. *See, e.g.*, FOF Nos. 5, 6, 16; COL 8, 9, 11, 21, 22, 23. The existence of SSNW’s legal conforming use has been established by Judge Roof’s Order, and no cross-appeal was made by Jefferson County. Therefore, in this brief, we focus on the effect the Examiner’s “tangible evidence only” rule had on establishing the scope and nature of SSNW’s use.

There is no support in Washington law allowing the Examiner to disregard oral testimony in proof of SSNW's legal nonconforming use. In *North/South Airpark Ass'n v. Haagen*, 87 Wn. App. 765, 942 P.2d 1068 (1997), the Court of Appeals looked to documentary and testimonial evidence to determine the existence, nature and scope of a legal nonconforming use. *Id.* at 772-73. Tangible evidence clearly is not necessary to establish a legal nonconforming use. *See also State ex rel. Lige and Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 829 P.2d 217 (1992) (oral testimony of user relied upon to establish legal nonconforming storage yard from early 1960s until rezone in 1977).

Like the rural runway at issue in *North/South Airpark*, SSNW is not the type of large business that maintains meticulous records dating back nearly two decades. While SSNW produced documentary evidence of its operations on the Property from 1988 to the present, it was limited. *See* III VRP 27-28 (D'Amico). SSNW provided what documentary evidence it had in its July 30, 2005, submission to the County, *see* SSNW Log 98, but the County simply denied its validity. In its appeal, SSNW provided the next best thing to documentary evidence: extensive, reliable oral testimony regarding the long history of its use of the Property, based on personal knowledge of the witnesses testifying.

The Court in *Van Sant v. City of Everett*, 69 Wn. App. 641, 651, 849 P.2d 1276 (1993), held that the hearing examiner's decision was "based primarily, and improperly, on the absence of a business license and tax records," a situation remarkably similar to the Examiner's determination with respect to SSNW. The Examiner's determination to limit his recognition of uses to those proven by documentary evidence severely prejudices SSNW in its ability to obtain a proper definition of the scope and nature of its legal nonconforming use. Unfortunately, the Trial Court erred in accepting the Hearing Examiner's stunted view of the record.<sup>26</sup>

**F. The Trial Court's Limitations on the Scope and Nature of SSNW's Legal Nonconforming Use Are Unsupported by Substantial Evidence. [Errors A5, A7, B2, B4, B5 and B6]**

SSNW presented voluminous un rebutted evidence demonstrating that the scope and nature of the business it legally conducted at the Property was far beyond the limitations imposed by the Trial Court. *See* Order, 4:27 to 5:9. Again, this error stems, in part, from the Hearing Examiner's insistence and the Trial Court's acquiescence in the proposition that only tangible, documentary evidence can be considered in establishing and

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<sup>26</sup> *See* Order, F&C 1, at 3:13-18. Although the Trial Court did its best to "save" the Examiner from his error, the Trial Court nevertheless based his findings as to the limited scope and nature of SSNW's legal nonconforming use on the findings made by the Examiner which were premised on this error.

defining the scope and nature of a legal nonconforming use. *See* discussion in Part IV.D above.

A nonconforming use is defined by the actual physical use of the land when a jurisdiction adopts a conflicting zoning ordinance. The scope of a nonconforming use right is determined by the use of the land established and maintained at the time a municipal authority imposes a new zoning ordinance that restricts the land in a manner contrary to such use. *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002).

**1. Legal Uses Identified by Trial Court Exclude Several Uses That Are Unrefuted.**

The Trial Court defined SSNW's legally established use as one that was limited to "armed transport, installation and monitoring of security systems, and limited firearms training of SSNW's full and part-time employees." *See* Order 4:27-28 (item b.i). The Trial Court left out altogether mention of security patrol, site security, maritime security, K-9 detection and tracking.

Security patrol and site security services for public and private clients, and training for such services on the Gunstone Property, have always been a key component of SSNW's business. *See* SSNW Lot 98, at 3-13. So have maritime security services. III VRP 16-17, 30-31

(D'Amico); VII VRP 43-45 (Gunstone); *see also* SSNW Log 98 at 22-24 (examples of maritime security services). SSNW has conducted K-9 detection and tracking services (II VRP 42), including services for the State Department of Corrections, since 1988. *See* II VRP 43, 45, 46, 60 (D'Amico); V VRP 20 (Grewell); Log 98, at 3-13, 20, 37-38, 42, 62-63. Even Jefferson County's enforcement orders in August 2005 recognized SSNW's K-9 services. CP 58-65.

The County failed to rebut this testimony on the scope of SSNW's use.

## **2. Training of Third Parties.**

The Trial Court concluded that there was "little to no evidence . . . that training of third parties took place on the property before January of 1992" and limited SSNW's legal nonconforming use to the training of SSNW employees only. *See* Order 5:1-2 (item b.ii). The Trial Court based its conclusion on the Hearing Examiner's mistaken assumption that most security services, other than work for the Gunstones, occurred off site and thus have no bearing on the establishment of "a nonconforming use any more than providing security guard services for a hospital, school or commercial center." COL No. 9.

While there is no question that some of SSNW's customer services are delivered off-site, not unlike a plumber, appliance repairman or any

other service provider, SSNW presented clear testimonial and documentary evidence that it has not only operated its business from the Property but it has used the entire Property for security training of third parties since 1988. *See, e.g.*, II VRP 46-47, 67 (D’Amico); VII VRP 35-38, 44-45 (Gunstone); Lot 98, at 3-13.

There is a general rule in Washington land use law that a municipality may not impose conditions on land use permits that “relate to the detailed conduct of the applicant’s business” rather than to zoning limitations on the use of the land. *See Woodinville Water Dist. V. King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001), citing 3 R. ANDERSON, AMERICAN LAW OF ZONING (4th ed. 1996) at § 21.32, p. 821. The Trial Court’s limitation of SSNW’s business to exclude the training of third parties is a condition that attempts to regulate the conduct of SSNW’s business based on the type of client or customer that it serves. This is highly irregular and should be annulled because such regulation is not the function of land use controls. 3 R. Anderson, *supra*, at § 20.71, p. 652.

If Jefferson County cannot regulate who businesses can serve with respect to a new business application under its Zoning Code, then it cannot limit the scope of SSNW’s legal nonconforming use based upon whether the trainees are employees of SSNW or persons employed by a law enforcement agency or some other third-party. The Trial Court’s attempt to

limit the scope of SSNW's legal nonconforming use to the training of SSNW employees only is an impermissible attempt to regulate the "detailed conduct of the applicant's business." *Woodinville Water District, supra* at 906.

### **3. Limitation to Full-Time Equivalent Employees.**

The Trial Court limited SSNW's legal nonconforming use to a scope of "two to three full time equivalents (FTE's) before January 6, 1992." *See* Order, 5:3-5.<sup>27</sup> In doing so, the Trial Court mistakenly assumed that the scope of SSNW's legal non-conforming use must be measured as of January 6, 1992. *See* discussion in Part IV.C above. In imposing such limitation, the Trial Court also relied upon the Hearing Examiner's mistaken conclusions regarding the role that numbers of employees plays in determining the scope and nature of a legal nonconforming use and in his distortion of the number of such employees. *See* Decision, COL Nos. 8, 11, 21, 22 and 23.

Based on incomplete written payroll records,<sup>28</sup> the Examiner calculated in minute detail what he thought the number of SSNW

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<sup>27</sup> The Trial Court's limitation makes no distinction between SSNW employees who work at the Gunstone Property, those who work off the Property and those who may do both. The Court's limitation also ignores the fact that most SSNW employees are part-time and that some instructors who teach at the site are contractors (such as Mr. Carver) and not employees. It's an unworkable and arbitrary formulation.

<sup>28</sup> This calculation of FTE's prior to 1992 is highly suspect because it relies upon admittedly incomplete payroll records only (the Examiner's "tangible evidence" rule) and ignores the testimonial evidence presented by SSNW.

employees were prior to January 1992. *See* Decision, FOF 6 (Table 5), COL Nos. 8, 11. He arbitrarily converted such data into “full-time equivalent” employees. *Id.* The Examiner then freely compared his FTE employment calculations prior to January 1992 (i.e., 3 FTE’s) with the number of all employees (part-time and full-time) in 2001 (i.e., 82) and declared that “the scope of the business activity by January 6, 1992 was considerably less than that described in the Deposition for 2001.” *See* Decision, COL No. 11, at 22. It is apples and oranges. The majority of SSNW’s employees are employed part-time, work on a contract basis only when needed, and do not come to the Property on a daily basis.<sup>29</sup>

The limitation on the number of SSNW employees is another example of the Hearing Examiner and the Trial Judge attempting to impermissibly regulate “the detailed conduct of the applicant’s business.” *See Woodinville Water District*, at 906.

#### **4. Geographic Scope of Use on Gunstone Property.**

The Trial Court erroneously limited the geographic scope of SSNW’s legal nonconforming use to the 20 acres covered by the written rental agreement of November 1998 and ignored SSNW’s use of the

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<sup>29</sup> Nevertheless, it is mathematically conceivable that SSNW’s 82 employees in 2001 would aggregate the equivalent of only three full-time employees, at the Gunstone Property, using the Examiner’s self-constructed “Payroll Report” (Decision, 13, Table 5). Three FTEs, using the Examiner’s construct, would work a total of 1,440 hours per quarter. If 82 part-time employees divided that work equally, they could each teach a 17-hour class.

Gunstone's 3,700 acres which SSNW used, beginning in 1988, pursuant to the owner's oral permission. Neither the unrebutted evidence in the record or Washington law support such a limitation. See II VRP 35-36; VII VRP 27, 35-27. The Trial Court's Order, limiting SSNW's firearms training to a 20-acre area closer to Discovery Bay rather than allow for shooting in the more remote and protected areas of the Gunstone Property, also makes it more difficult to mitigate noise emanating from SSNW's firearms training.

Whether all or part of a tract can be considered as devoted to the nonconforming use at a given time is generally reviewed against the criteria as stated in *Gross v. Allen*, 37 N.J. Super. 262, 117 A.2d 275 (1955). 4 A. RATHKOPF & D. RATHKOPF, ZONING & PLANNING § 73.18 (2005). In *Gross*, the New Jersey Superior Court stated:

The inception of a nonconforming use on a limited part of a plot does not necessarily constitute a preemption of the entirety of the plot for uses of that character as against a later prohibitory ordinance. *DeVito v. Pearsall*, 155 N.J.L. 323, 325 180 A. 202 (Sup. Ct. 1935); *Martin v. Cestone*, 33 N.J. Super. 267, 110 A.2d 54 (App. Div. 1954). The criterion is whether the nature of the incipient nonconforming use, *in light of the character and adaptability to such use of the entire parcel*, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance.

*Gross v. Allen* at 272 (emphasis added). The entire 3,700 acres of the Gunstone Property was not only adaptable to SSNW's security business, which involved training with firearms and K-9 tracking from the outset,

but it was actually utilized for SSNW's business from the outset. *See* Part IIIA and B, above.

The Trial Judge had to disregard the oral testimony of Mr. Gunstone (the lessor) and Mr. D'Amico (speaking for the lessee) in order to deny the establishment of SSNW's right to use the entire 3,700 acres for its security business. *See* Order, F&C 6b, at 5:6-9. Although it is unnecessary to satisfy the statute of frauds in order to establish a legal nonconforming use, testimony of the lessor in open court as to the terms of an "oral lease" is recognized as a sufficient "memoranda" to satisfy even the statute of frauds. *Powers v. Hastings*, 20 Wn. App. 837, 846, 582 P.2d 897 (1978). Here, Mr. Gunstone repeatedly affirmed the efficacy of the verbal agreement with SSNW for use of the full 3,700 acres. VII VRP 36-37.

The right to maintain a nonconforming use in Washington does not depend upon the nature of the ownership or tenancy of the land on which the use is situated. The right attaches to the land itself; it is not personal to the current owner or tenant. Like adverse possession, the establishment of a legal non-conforming use is all about the nature of the actual use of the land. Accordingly, the specific nature of SSNW's occupancy rights in the Gunstone property for its security business does not affect the validity, nature or scope of its legal nonconforming use. *City of University Place v. McGuire*, 102 Wn. App. 658, 9 P.3d 918 (2000) reversed on other

grounds, 144 Wn.2d 640, 30 P.3d 453 (2001), reconsideration denied (2001), citing 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 6.40 (3d ed. 1986) § 6.40 at 569-70.

Case law in Washington does not differentiate between the legality of a nonconforming use based upon whether the user is operating pursuant to oral rather than written permission from the owner to use land. Recognition of the entire 3,700 acres of the Gunstone Property as the geographic scope of SSNW's legal nonconforming use will not only reflect the actual use of the Property by SSNW, but will offer SSNW and Jefferson County the opportunity to more effectively buffer SSNW's business activities from its neighbors.

**5. There Is Not Substantial Evidence to Support the Trial Court's Limitations on the Scope and Nature of SSNW's Use.**

The County offered no witnesses or documents of its own which rebutted SSNW's evidence. Furthermore, Mr. Al Scalf, the Director of Jefferson County's Department of Community Development and the person who issued the enforcement orders against SSNW, admitted that he believed the testimony of Mr. D'Amico (X VRP 10-11), instructors Tangen (X VRP 11) and Carver (I VRP 66), and the letter from the Sequim Police Chief (I VRP 67), each affirming a broad range of security services and training practices on the 3,700 acres of the Gunstone Property

that involved SSNW employees as well as local law enforcement personnel and other third parties.

The Trial Court erred in its failure to consider the overwhelming body of evidence substantiating a scope of use for SSNW's business that is not limited to the three identified activities (armed transport, installation and monitoring of security systems, and limited training of SSNW's employees), is not limited to three full-time equivalent employees, and is not limited to 20 acres of the Gunstone Property. *See* Order, F&C 6b. This is not a case where the Trial Court may defer to the Hearing Examiner's views regarding the credibility of witnesses and "the weight to be given reasonable but competing inferences." *Freeburg v. Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 810 (1993). On the issue of the scope and nature of SSNW's legal nonconforming use, the County offered no probative evidence and, in fact, largely deferred to the credibility of SSNW's testimony.

**G. The Trial Court Erred in Attempting to Utilize a Temporary Restraining Order and Preliminary Injunction That Had Been Dissolved. [Error A8]**

The Trial Court's Order stated that "*the current terms* of the Temporary Restraining Order granted on October 3, 2005, and the Modified Order Granting Preliminary Injunction entered on December 21, 2005, *shall remain in effect* pending the Hearing Examiner's final decision [on remand]." Order, 5:19-21 (emphasis added). This is impossible.

On February 10, 2006, after argument of counsel, Judge Verser ordered the Preliminary Injunction then in place against SSNW dissolved and dismissed that action.<sup>30</sup> Judge Roof cannot resurrect and breathe life into an injunction that had previously been dissolved by the very court that issued it. To do so was error.

## V. CONCLUSION

The Hearing Examiner mistakenly concluded that SSNW had failed to establish a legal nonconforming use for its security business, choosing to disregard the unrebutted testimony and documentary evidence from SSNW's witnesses. The Trial Court reversed the Examiner, recognizing SSNW's legal nonconforming use. It then erred, however, in relying upon a set of findings and conclusions by the Examiner – which denied the existence of SSNW's use – to frame the definition of the use's scope. The Trial Court further erred in limiting the scope of the SSNW's use to those activities that occurred between 1988 and January 6, 1992, disregarding the legal continuation and intensification of such uses after that period.

SSNW requests that the Court reverse the Trial Court with respect to its limitations on the scope and nature of SSNW's legal nonconforming use and instruct the Trial Court to issue an Order that defines such uses in

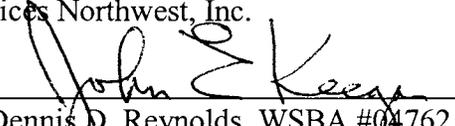
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<sup>30</sup> See Order Dissolving Preliminary Injunction and Order Dismissing Without Prejudice, which SSNW is moving to include as Clerk's Papers in this appeal.

a manner that is lawful and conforms to the unrebutted evidence in the record.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of June, 2007.

Davis Wright Tremaine LLP  
Attorneys for Appellant Security  
Services Northwest, Inc.

By   
Dennis D. Reynolds, WSBA #04762  
John E. Keegan, WSBA #00279  
Stephen James, WSBA #37804  
1301 Third Avenue, Suite 2200  
Seattle, Washington 98101-3045  
(206) 622-3150 Phone  
(206) 757-7700 Fax  
E-mail: dennisreynolds@dwt.com

## APPENDIX

### SSNW'S ASSIGNMENTS OF ERRORS

#### A. Trial Court

1. "SSNW's legal use is restricted, however, to the nature and scope of the activities at that time and cannot be changed or expanded outside what is permitted in Jefferson County Code 18.20.260." *See* Order, F&C 6b, at 4:24-26.

"ORDERED that SSNW's appeal shall be remanded to Hearing Examiner Iry Berteig for further proceedings consistent with this opinion solely to determine the scope and nature of SSNW's nonconforming use as of January 6, 1992, based on the existing record as established in the November 2005 hearing." *See* Order, at 5:12-18.

2. "SSNW's legal use is restricted, however, to the nature and scope of the activities at that time and cannot be changed or expanded outside what is permitted in Jefferson County Code 18.20.260." *See* Order, F&C 6b, at 4:24-26.

3. *See* Hearing Examiner's Assignment of Error B3 below.

4. "The Hearing Examiner did not err in giving documentary, "tangible" evidence more weight than testimonial evidence. While the use of the term "tangible" may have been inartful, the Hearing Examiner had authority to find some evidence more credible than other evidence and his

preference for documentation over recollection was the result of an appropriate weighing of the evidence, particularly where the documentary evidence was inconsistent with the memories of some of the witnesses.”

*See Order, F&C 1, at 3:13-18.*

5. “i. The evidence shows that the use prior to January 6, 1992, simply involved armed transport, installation and monitoring of security systems, and limited firearms training of SSNW’s full and part-time employees.

ii. There is little to no evidence to conclude that training of third parties took place on the property prior to January of 1992.

iii. The Hearing Examiner’s determination from SSNW’s payroll data that SSNW employed approximately two to three full-time employee equivalents (FTE’s) before January 6, 1992, was entirely appropriate and supported by substantial evidence.

iv. The scope of the property legally used by SSNW prior to January 6, 1992, was the property identified in the initial lease of twenty acres from the Gunstones. Testimony that a nebulous quasi-lease expanded the use of the property did not provide any basis to recognize a more expanded geographical use.” *See Order, F&C 6b, 4:27-5:9.*

6. “The Hearing Examiner did not erroneously reference complaints about SSNW’s activities between 2001 and 2005. While the

record shows that most of the complaints occurred in 2005, there was some evidence of complaints before that year. Moreover, to the extent there was any error with respect to this issue, such error was harmless. The operative date in question is January 6, 1992, not 2001.” *See* Order, F&C 4, 4:5-9.

7. “The Hearing Examiner did not err in his finding with respect to work performed on-site versus off-site because the finding was supported by substantial evidence when viewed in light of the whole record.” *See* Order, F&C 5, 4:10-12.

8. “ORDERED that the current terms of the Temporary Restraining Order granted on October 3, 2005, and the Modified Order Granting Preliminary Injunction entered on December 21, 2005, shall remain in effect pending the Hearing Examiner’s final decision.” *See* Order, 5:19-22.

**B. Hearing Examiner**

1. “Tangible evidence is necessary to justify a nonconforming use, typically in the form of customer acknowledgement of actual work, contracts, and receipts. Less tangible evidence, such as solicitations and bids, may indicate intent to do business—but not actual activity.” *See* Decision, FOF No. 5, at 12.

2. “Testimony by Bruce Carver, a firearms trainer, indicated that the first firearm training of SSNW employees occurred in 1992, after January 6, 1992. Bruce Carver also testified that off-duty police officers were not trained or certified on the Gunstone property.” *See* Decision, FOF No. 8, at 14.

“Testimony by Bruce Carver, however, indicated that the first firearm training of SSNW employees occurred in 1992, after January 6, 1992 (Bruce Carver also testified that off-duty police officers were not trained or certified on the Gunstone property.)” *See* Decision, COL No. 10, at 21-22.

3. “In addition to the provisions of § 9 Conditional Uses, the Administrative Rules established under the Ordinance clarifies § 12 by addressing non-conforming uses in one of two ways, including review by the Hearing Examiner as a conditional use. (Administrative Rules Establishing Development Standards Supplementing the Jefferson County Emergency Zoning Ordinance, No. 1-21-6-92 at Section IX.)” *See* Decision, FOF No. 15, at 15, and footnote 9.

“The ‘General Use Zone’ in the Interim Zoning Ordinance did not allow commercial and industrial uses without first obtaining a Conditional Use Permit as described in Findings 12 through 15.” *See* Decision, COL No. 20, at 25.

4. “Numerous and frequent complaints were received from 2001 to present. The complainants were located where sound carried, with many living along the shore across Discovery Bay. Other persons testified at the open record appeal hearing and are listed among the Participants Giving Testimony.” *See* Decision, FOF No. 17, at 16.

“The main impact of their success in soliciting other organizations stimulated the complaints from 2001 to the present.” *See* Decision, FOF No. 21, at 17.

5. “Findings 5, 6 and 7 together with Tables 4 and 5 illustrate an order of magnitude of the business activity prior to January 6, 1992. The Examiner used a conservative assumption of 480 hours per quarter (based on 20 work days per month and a 8-hour work day). This accounts for less than 3 FTE’s plus D’Amico for the three quarters reported in 1991. The use of off-duty police officers would result in fewer full-time employees. Testimony by Bob Grewell indicated that D’Amico and Glenn Bishop were the two full-time guards based in the Jefferson County area in January 1992.” *See* Decision, COL No. 8, at 21.

“The Employer’s Payroll Reports indicate that there were less than three FTEs at the end of 1991. According to Joe D’Amico’s Deposition in January 2001, the business had 82 employees by 2001. Therefore, the scope of the business activity by January 6, 1992 was considerably less

than that described in the Deposition for 2001.” *See* Decision, COL No. 11, at 22.

“Chart 1 graphs payroll hours over the whole period 1987 - 2005. Both vertical and horizontal axis are scaled and the data points illustrated by diamond points. When the connecting dashed line spans more than one quarter, the intervening data is missing. When contemporaneous documents are not produced, a reasonable presumption is that such documents would be unfavorable to SSNW.” *See* Decision, COL No. 21, at 25.

“Attention is directed to the period between Dec-92 and Mar-96 where 3 1/2 years of data is missing. Compare this to the dramatic growth between 1996 and 2001—from 14 to 74 FTE’s—and Joe D’Amico’s description of services in 2001. Since the data is payroll, the chart between 2001 and 2005 does not reflect the site impact of training non-SSNW employees. Trainees are not counted as payroll or FTE’s. Consequently, SSNW created significant additional activity of a totally different character.” *See* Decision COL No. 22, at 26.

“If a lawful nonconforming use had been established, expansion would be limited. As noted in Conclusions 21 and 22, the gap between 1992 and 1996 is not explained with substantial evidence. On the other hand, the expansion that took place in the 1996-2001 time-frames was

dramatic, and was exacerbated after 2001 by the new activity to train outside groups. The intensive training of outside groups—rather than only periodic employee certifications—was a change that conflicts with the provisions of JCC 18.50.070.” *See* Decision, COL No. 23, at 26.

6. “The scope of the business activity during the pre-January 6, 1992 period is important because nonconformity must relate to the land and buildings—not off-site activities. The record is clear that—with the exception of the direct security services for the Gunstone’s and their 3,700 acre holdings—all services occurred at off-site establishments.” *See* Decision, COL No. 9, at 21.

7. “When contemporaneous documents are not produced, a reasonable presumption is that such documents would be unfavorable to SSNW.” *See* Decision, COL No. 21, at 25.

8. “As noted in Conclusions 21 and 22, the gap between 1992 and 1996 is not explained with substantial evidence.” *See* Decision, COL No. 23, at 26.



The undersigned declares under penalty of perjury under the laws of the State of Washington that she is the legal assistant for Davis Wright Tremaine LLP, attorneys for Appellant Security Services Northwest, Inc.

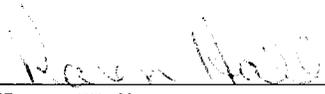
On the date and in the manner indicated below, I caused a copy of this Declaration, Motion to Supplement Clerk's Papers and Appellant's

Opening Brief to be served on:

Mark Johnsen  
Karr Tuttle Campbell  
1201 Third Ave., Suite 2900  
Seattle, Washington 98101

By United States Mail  
 By Legal Messenger  
 By Facsimile  
 By Federal Express/  
 Express Mail  
 By E-Mail

DATED at Seattle, Washington, this 8th day of June, 2007.

  
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Karen Hall