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OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON  
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SECURITY SERVICES NORTHWEST, INC.,

Appellant,

v.

JEFFERSON COUNTY,

Respondent.

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APPELLANT'S OPENING BRIEF

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**ORIGINAL**

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## I. INTRODUCTION

Appellant Security Services Northwest, Inc. (“SSNW”) appeals dismissal of its suit for damages resulting from Jefferson County’s issuance of three enforcement orders in 2005, upheld by the County’s Examiner. The orders, as upheld, prohibited SSNW from engaging in any business, even activities outside the County, so long as SSNW based its business at its present location near Discovery Bay.<sup>1</sup> The Kitsap County Superior Court reversed, holding that SSNW established a legal nonconforming use. This Court in 2008 affirmed reversal and remanded to permit SSNW to demonstrate the extent of its nonconforming use and any lawful intensification. In that hearing, held June 23, 2009, the County conceded the validity of SSNW’s core use, consisting of security services and security services training, and related components. It also conceded some lawful intensification of use by hiring more employees, both on- and off-site, to serve natural growth in SSNW’s customer base.<sup>2</sup>

On July 27, 2009, the County’s Hearing Examiner issued a decision on remand ruling that SSNW had shown additional components of its

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<sup>1</sup> Since 1988, SSNW has conducted a security services business use consisting of security services and security services training for businesses and government from its location on leased property above Discovery Bay in Jefferson County. SSNW’s activities have included security patrols, site security, armored car services, alarm installation and monitoring, K-9 detection and tracking, and the training of security personnel, both employees of SSNW and third parties, in each of these security services, including training in the proper use of small firearms. County officials were aware of most, if not all, of these activities, for many years.

<sup>2</sup> A copy of the stipulation entered into in the remand proceedings is at App. A; a copy of an excerpt from the County’s briefing is at App. B.

nonconforming use and lawful intensification of that use.<sup>3</sup> While the decision is good for SSNW, considerable harm has already been done. SSNW suffered greatly to preserve its business and to force the County to be more reasonable. In this action, SSNW argues that the County wrongfully tried to put SSNW out of business by overreacting to citizen complaints, despite knowledge of SSNW's lawful, nonconforming use.

Jefferson County's overreaction for impermissible reasons is uncontested. In June 2005, residents began complaining to the County about noise allegedly coming from the SSNW site.<sup>4</sup> SSNW disclosed to the County that SSNW had built a few structures onsite without building permits. County officials said that they would "work with" SSNW to obtain permits pursuant to a written County policy favoring voluntary compliance. The County had no noise or firearm ordinances and, as held by this Court, SSNW's use was legal although nonconforming.

Hearing that the County intended to "work with" SSNW, a small but vocal group of residents organized the Discovery Bay Alliance ("DBA"). The DBA immediately and effectively pressured the highest reaches of County government. At critical moments, DBA members met

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<sup>3</sup> A copy of the decision is at App. C.

<sup>4</sup> SSNW expects the County's opening brief to characterize this training as "military," "paramilitary," or "combat" training, as it has done in the past. Although SSNW has provided security training to military personnel, however, there is no evidence that the training itself is "military," "paramilitary," or "combat" in nature. SSNW does not claim such use nor has it engaged in such training.

with County Commissioners, the County Administrator, staff of Community Development, and the Prosecutor's office urging the County to "shut down" SSNW. The County responded by abandoning voluntary compliance and issued the three orders at issue.

The record is shocking. The DBA and County worked as a "team" to bring SSNW down. The evidence proved a long and deep cooperation, and shared hostility to SSNW, between the County and the DBA. The DBA and the County discussed SSNW's financial state and how forcing SSNW to litigate would put SSNW out of business – "solving" the DBA's concerns, even if its argument had no legal merit. This dispute has been costly to SSNW. Since 2005, the County has unlawfully limited SSNW's operations, violating its right to continue a lawful, nonconforming use.

SSNW below sought damages to compensate for this loss, asserting claims for tortious interference, violation of its civil rights, and violation of RCW 64.40.<sup>5</sup> The trial court erred in dismissing those claims on summary judgment and this Court should reverse and remand for trial.

## II. ASSIGNMENTS OF ERROR

*Assignment of Error No. 1:* The trial court improperly granted summary judgment dismissing SSNW's Section 1983 claim.

*Issue No. 1:* As a lessee, did SSNW have a protectable "property

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<sup>5</sup> SSNW does not here appeal dismissal of its RCW 64.40 claim; the only claims at issue therefore are its tortious interference and Section 1983 claims.

interest” in continuing its lawful, nonconforming use, where its lease was proved by a written document, oral testimony, and partial performance, and the cases hold that Section 1983 protects the rights of lessees and lawful, nonconforming uses?

*Issue No. 2:* Was SSNW’s Section 1983 claim barred by collateral estoppel even though no prior proceeding had considered, much less determined, any of the elements of SSNW’s Section 1983 claim, and the doctrine would not apply under well-established Washington law?

*Assignment of Error No. 2:* The trial court improperly granted summary judgment dismissing SSNW’s tortious interference claim.

*Issue No. 3:* Was SSNW’s tortious interference claim barred by collateral estoppel even though no prior proceeding had considered, much less determined, any of the elements of SSNW’s Section 1983 claim, and the doctrine would not apply under well-established Washington law?

### **III. STATEMENT OF FACTS**

#### **A. Background.**

##### **1. 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, purchased a business now known as Security

Services Northwest, Inc. (“SSNW”).<sup>6</sup> CP 257 ¶ 2. The Gunstone family was one of SSNW’s early clients. CP 258 ¶ 4. The Gunstones own or manage approximately 3,700 acres extending from the western shore of Discovery Bay across US 101 and into the foothills of the Olympics (the “Property”). *Id.* They use the Property as a tree farm and the shoreline area for shellfish harvesting. *Id.* In 1987, frustrated in its efforts to halt poaching, the County Sheriff’s Office suggested that the Gunstones use SSNW to provide security. *Id.* ¶ 5. In its first day, SSNW apprehended five suspected poachers. *Id.*

In 1988, the Gunstones invited SSNW to relocate its business to the Discovery Bay Property. *Id.* ¶ 6. SSNW has operated its business continuously on the Property from that time. *Id.* In addition to its office and dispatch, SSNW’s activities on the Property 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, both for its employees and law enforcement agencies and other third parties. *Id.*

There were no zoning regulations in place in Jefferson County at that time.

*See Jefferson County v. Lakeside Indus.*, 106 Wn. App. 380, 383-84, 389,

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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 D’Amico. It was incorporated in 1995. CP 257 ¶¶ 1, 2.

23 P.3d 542 (2001).

In November 1988, SSNW entered into a written rental agreement for approximately 22 acres of the Property located between US 101 and Discovery Bay. CP 258-59 ¶ 7, 269-70. The Gunstones permitted SSNW to regularly used portions of the entire 3,700 acre Property for security training since 1988. *Id.*; CP 316 ¶ 3; CP 258-59 ¶ 7.

The 1988 agreement identified the “Landlord” as Mr. and Mrs. Charles Gunstone and the “Tenant” as Joseph N. D’Amico – Security Services, for “commercial” use. CP 259 ¶ 8, 269-70. The lease was of indefinite duration. *Id.* The leased property has been owned by ARK Group LLC, an entity owned and controlled by the Gunstones’ children, since at least 2000. CP 315-16 ¶ 2. Since then, SSNW has paid rent to ARK; SSNW in its corporate form has acted as “Tenant” under the 1988 rental agreement since its incorporation in 1995. CP 259 ¶ 8. There is no written assignment, but SSNW and ARK have continued to perform the lease, with SSNW making payment to ARK for rent. *Id.* ¶ 9; CP 316 ¶ 4.

Both SSNW and ARK have treated the agreement as covering approximately 20 acres, including land on which certain improvements are located, and the Gunstones have allowed SSNW to use large parts of the balance of the 3700 acres. CP 259-60 ¶ 11; 316-17 ¶ 6.

The Gunstones value the security SSNW provides for the entire

3700-acre Property. CP 316 ¶ 5. The Gunstones have never thought of terminating the lease. To the contrary, the parties have discussed formally extending the lease for a term of twenty years, and Gunstone is willing to consider such a lengthy term. *Id.*

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

In 1988, SSNW began conducting regular firearms training at the Property for employees and third-party law enforcement employee guests. CP 260 ¶ 12. Such training became required beginning in mid-1991, with enactment of the Security Guard Act, RCW 18.170. The Act requires regular firearms certification of all private security personnel who carry firearms. SSNW's business included such state-mandated training for security guards. *Id.* From the outset, police departments, including the Sequim Police Department, conducted firearms training at the Property. SSNW made its shooting ranges available to local law enforcement without charge as a public service. *Id.* ¶ 13.

SSNW also ran a security services business from the Property. Its clients included a variety of private companies and government entities, including Jefferson County, the Port of Port Townsend, and Costco. *Id.* ¶ 14. Public entities, both within and outside the County, contracted with SSNW for marine patrol services since the late 1980s. *Id.* SSNW also regularly provided K-9 tracking services to governments, tracking down

suspects fleeing crime scenes and escaped prisoners. *Id.* Since 1988, all SSNW security personnel (and other third parties) trained on the Property, including firearms. *Id.*

### **3. SSNW's Security Training and Services Evolve from 1988 Until the Present.**

SSNW's business succeeded. The volume of its off-site security services and on-site training grew substantially from 1988 to 2005. CP 261 ¶ 15. This meant more full- and part-time employees and more classes. *Id.* After September 11, 2001, SSNW "ramped up" the amount of training on at the Property. *Id.* By 2005, SSNW had approximately 140 full- and part-time employees. *Id.*

Over time, SSNW's security teams evolved to match clients' needs, although their fundamental training and objectives have remained constant. *Id.* ¶ 16. The types of weapons used for both on-range and off-range training at the Property have not changed. *Id.* For example, the standard issue for security training has always been the AR-15, a semi-automatic rifle with a caliber slightly larger than a .22. CP 261 ¶ 16. Public and private security officers are more likely today to carry such a weapon in response to greater criminal sophistication, requiring more frequent *but not different* training. *Id.* Some training occurs in a classroom, where SSNW teaches weapons handling discipline and safety. *Id.*

### **4. County Knowledge of SSNW Activities.**

The County had extensive knowledge of SSNW's activities long before the enforcement actions at issue. The County's Director of Community Development (Al Scalf) first became aware of SSNW during a "flood event" in 1996. CP 616 (33:2-10). County agencies communicated with SSNW about issues relating to its business. CP 275-76.

In 1998, D'Amico attended a meeting of the Board of County Commissioners to address a draft comprehensive plan and potential rezone of the Property. CP 262 ¶ 18, CP 287. Scalf also attended. CP 299. D'Amico spoke about "his own security business" and his concern "about the down zoning of commercial property in Gardiner." CP 287. He wrote to Commissioner Huntingford about his concern, describing his business as including armored car services, "onsite ... training," "armed with rifles and shotguns," and "more than 50 employees." CP 292-93. Scalf understood "that Security Services was engaged in canine training, small arms, armored car services, security service, working for the Gunstones." CP 616 (33:18-25). On July 29, 2005, D'Amico provided to Scalf a copy of the Gunstone lease and 99 additional pages documenting SSNW's past use of the property. CP 261-62 ¶ 17.

#### **5. SSNW's Exclusive Possession and Substantial Improvement of the Leased Property.**

The lease Property always consisted of more than the farmhouse that now serves as SSNW's offices, dispatch, classroom, and D'Amico's

residence. CP 262-63 ¶ 19. From 1997 to 2004, SSNW built a new bunkhouse, a latrine, and a classroom building to replace old buildings on the Property. *Id.* For example, D’Amico built a classroom building and bunkhouse to allow his growing family to occupy more of the farmhouse as their residence. *Id.* SSNW did not obtain permits for these new buildings, an error D’Amico acknowledges. *Id.* He believed that SSNW was entitled to replace old buildings under the County’s nonconforming structures regulations. *Id.*

Although they lacked permits, the buildings otherwise met the standards embodied in the County’s Building Code. *Id.* The County’s building inspector concluded that the structures were safe. CP 639-40 (28:14-29:25). An engineering firm concluded that “the bunk house, restrooms and meeting room do not appear to have any major structural deficiencies” and that “the buildings are safe to occupy.” CP 262-63 ¶ 19, CP 295.

SSNW constructed these improvements at its cost. CP 263 ¶ 20. D’Amico did much of the labor himself. *Id.* He estimated the cost to be \$150,000. *Id.* SSNW also bought and installed gravel for its access roadway, improved and maintained a water well, and installed a septic system. *Id.*

SSNW’s possession has been exclusive. *Id.* ¶ 21. The Gunstones do not have keys to any of the improvements and did not use the access road until their own was washed out. CP 317 ¶ 8. D’Amico happily offered the use of his own road and SSNW did not object to this use.

In proceedings described below, the Kitsap County Superior Court concluded that construction of buildings without permits was unrelated to and could not serve as a basis for denying SSNW its legal nonconforming use of the Property. CP 74 ll. 16-22.

**B. Jefferson County's Enforcement Orders.**

In June 2005, the County told SSNW that it had received "complaints" about gunfire noise from residents around Discovery Bay and that there were unpermitted structures on the Property. CP 263 ¶ 22. SSNW had never before received any complaints about its operations. *Id.*

The County could not regulate the discharge of firearms unless there was a reasonable likelihood of harming persons, property, or animals. *Id.* ¶ 23; RCW 9.41.290; RCW 9.41.300(2). There was no likelihood of harm, considering the remoteness of SSNW's site and the practices employed. The Sheriff confirmed that the shooting was not illegal. Scalf testified that the Sheriff's Office told him that SSNW's shooting activities posed "no danger" to the public. Consequently, the County could not regulate SSNW's firearms training. The County also had not adopted a noise ordinance. CP 263-64 ¶ 24. State law provided the only pertinent regulation. Under the Washington Administrative Code, shooting ranges operating within defined hours are exempt from noise regulation. WAC 173-60-050.

D'Amico sought out the County to discuss how SSNW could remedy the unpermitted structures. CP 264 ¶ 25. County employees agreed that D'Amico was cooperative and forthcoming. CP 635 (36:13-24), 639 (28:5-18), 640 (63:2-22). SSNW also worked on sound baffles to reduce noise coming from the shooting ranges. CP 264 ¶ 25.

The County Code provides for voluntary compliance:

If after investigation, the administrator determines that any provision of the UDC has been violated, a notice of voluntary correction letter should be the first attempt at obtaining compliance. If voluntary compliance is not obtained, the administrator shall serve a notice and order. . .

JCC § 18.50.50. Pursuant to this policy, County officials told SSNW that it could “pull permits” for the unpermitted buildings (*i.e.*, obtain after-the-fact permits), provided it complied with the Building Code and Health Code. CP 264 ¶ 26. SSNW voluntarily began working with the County to secure “after-the-fact” building permits. *Id.*

On July 8, 2005, however, the County radically changed position. It issued a Stop Work Order prohibiting SSNW from using the unpermitted buildings or proceeding with noise abatement. This immediately followed an illegal Executive Session held by the County on July 5, 2005, solely to discuss Security Services. CP 264-65 ¶ 28, CP 300. SSNW did not dispute that it was required to obtain building permits for the unpermitted structures. It nonetheless appealed to preserve its rights and in

particular to preserve its use of the structures while seeking permits. CP 264-65 ¶ 28. The County Code stayed the first Stop Work Order pending SSNW's appeal. *Id.*

When SSNW tried to apply for permits, however, County staff refused to accept any application, *id.*, turning its focus from keeping SSNW in business to shutting SSNW down. The County's refusal violated SSNW's right to at least secure a decision, as required to process applications under Local Project Review, Chapter 36.70B, RCW. SSNW nonetheless continued its efforts to achieve voluntary compliance, and on July 29, 2005, submitted materials to the County demonstrating its historical use of the Property. CP 261-62 ¶ 17.

On August 11, 2005, however, the County, without probable cause, notice or warning, issued two more orders – a “Stop Work Order” and a “Notice and Order” under the Zoning Code – forbidding SSNW from conducting virtually all of its security training operations, including all use of the firing ranges. CP 265-66 ¶ 30, CP 305-08, 310-14. SSNW appealed all three enforcement orders to the County Hearing Examiner. CP 265-66 ¶ 30. SSNW met with the County numerous times to try to achieve “voluntary compliance,” even offering to mitigate noise at the site and move the shooting ranges. *Id.* The County said “no.”

The County then filed a lawsuit in Jefferson County Superior Court

seeking an order requiring SSNW to comply with all of the County's orders. CP 266 ¶ 31. After a hearing, the court enjoined SSNW to comply with the County's orders pending a decision in its administrative appeals. *Id.* ¶ 32. The court also allowed SSNW to conduct firearms training at an inland range for the purpose of certifying its employees. CP 89-94. On February 10, 2006, the court dissolved the injunction against SSNW and dismissed the lawsuit. CP 266 ¶ 32.

SSNW's appeal of the three County orders was heard on November 16-18, 2005, by County Hearing Examiner Irv Berteig. CP 266 ¶ 33. The Examiner issued a decision on January 10, 2006, denying SSNW's appeal and holding that SSNW had no legal nonconforming use and thus no right to conduct business on the Gunstone property.

**C. The Political Basis of the County's Decision-Making.**

SSNW later discovered that the County's decision to abandon voluntary compliance and to take SSNW "to the wall" was the product of pressure by a small but vocal group of residents calling themselves the Discovery Bay Alliance. Evidence was obtained from public records requests and from Sam Parker, one of the two "leaders" of the DBA. A comparison of critical dates with communications between the DBA and the County demonstrates that the two were joined at the hip.

On June 8, 2005, the County received its first complaint con-

cerning “shooting” (noise) on the SSNW property. The Sheriff’s Office confirmed the same day that the shooting was not illegal, and the County had no noise ordinance. Nonetheless, on June 13, 2005, a petition containing 20 signatures was presented to the County concerning the noise. In June, D’Amico informed the County that SSNW had constructed buildings on the SSNW property without permits. On June 15, 2005, D’Amico’s father passed away. On June 21, 2005, D’Amico met with Scalf and assured him that SSNW would cooperate. CP 264 ¶ 25. Scalf told D’Amico that the County knew SSNW was “grandfathered”; the only question was to what extent. *Id.* On June 29, 2005, D’Amico again met with Scalf, County Administrator John Fischbach, and other County staff. *Id.* The County gave SSNW until July 31 to produce evidence of SSNW’s legal nonconforming use. *Id.* The County also told SSNW that it could “pull permits” – obtain them after the fact – to the extent necessary; this was done “all the time.” *Id.* ¶ 26.

On June 29, 2005, the *Port Townsend Leader* published an article quoting Scalf saying “if any permits are needed, we will work with [SSNW].” *Id.* ¶ 27, CP 297-98. This produced a storm of complaints. Gabe Ornelas,<sup>7</sup> a Discovery Bay resident, organized a gathering of “con-

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<sup>7</sup> Ornelas’s involvement cannot be understated. He is a Democrat and has served as Jefferson County Democratic Party Vice Chair. CP 322 (28:3-24). Many of the Jefferson County elected officials involved in this case were Democrats. Ornelas gave money to the campaigns of Democrats seeking to become Jefferson County

cerned citizens.” CP 359 (10:17-12:19), 331-32 (85:3-86:4). The DBA then came to life with the purpose of opposing SSNW by, among other things, approaching County officials, generating publicity, and the like. CP 360 (21:1-7), 363 (28:17-5); 365 (40:22-41:1). Ornelas told County officials that he spoke on behalf of the DBA. CP 326 (45:18-22). He was a member of DBA’s steering committee. *Id.* (44:19-45:2). In the next six days, the County received complaints from no less than 75 citizens. CP 642, 643-49, 650, 742-43, 744-45, 746-47, 748-49.

Ornelas and Parker decided early that they did not trust Scalf to “do the right thing” – they concluded that Scalf was too willing to work with SSNW. CP 360-61 (21:16-22:5), 365-67 (40:2-46:23). So they targeted the County Administrator and Commissioners. CP 365-67 (40:2-46:23). Parker made from 15 to 20 calls to Commissioners Johnson and Sullivan, “all of them related to SSNW.” CP 325 (39:9-40:11).

On July 5, 2005, the Board of County Commissioners held an executive session to discuss SSNW, although no litigation was pending or threatened. CP 617 (48:6-49:18), CP 331 (82:17-23). This meeting

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Commissioners. CP 323 (30:9-18). Ornelas met, emailed, and called Fischbach and Commissioners Sullivan and Johnson numerous times about SSNW during the critical months of July and August 2005. CP 328 (55:2-57:1). He entertained Commissioner Sullivan at his house at least twice, probably in August 2005. CP 323 (31:9-19). He speaks frequently with elected officials – “whenever I saw them.” CP 324-25 (37:20-38:3). He discussed the grandfathering of SSNW with Fischbach so much that he “can’t tell you how many times.” CP 327 (46:24-47:5). He had “face to face” meetings with Fischbach “many times” – perhaps 20, CP 328 (56:2-9), and has never communicated with Fischbach on any subject other than SSNW, CP 325 (38:10-12).

therefore violated the Open Public Meetings Act, RCW 42.30. Parker emailed the County's enforcement officer, Molly Pearson, on July 8, 2005, demanding that something be done about SSNW "NOW."

The County abandoned its adopted policy of voluntary compliance in the face of public protest and the Board's July 5 executive session. DBA lobbied to have SSNW shut down despite SSNW legal, nonconforming, use. CP 363-64 (28:10-30:9), 366-67 (44:12-46:9), 378 (119:7-11), 379 (123:19-125:18). Even Fischbach expressed a desire to see SSNW "shut down." CP 353-54 (53:16-54:10); *see also id.* (55:8-56:2).

On July 8, 2005, the County issued a Stop Work Order relating to the unpermitted structures on SSNW's property, CP 300, despite the County's policy of "voluntary compliance," SSNW's cooperation, and the fact no site inspection occurred until July 11, 2005 – three days later.<sup>8</sup> CP 265 ¶ 29. That inspection disclosed no serious issues with the unpermitted structures; an engineer's report confirmed that the buildings were safe for use. *Id.* D'Amico sent a letter to Scalf on July 11 about voluntary compliance, but Scalf never responded. *Id.*, CP 302-03. On July 13, the County escalated matters by asking the public to register complaints about SSNW.

On July 29, 2005, SSNW submitted 99 pages of documents in support of its claim to a legal nonconforming use. CP 261-62 ¶ 17. Scalf,

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<sup>8</sup> None of the challenged orders was issued with a staff report or any reported investigation by staff.

however, had already decided that SSNW was not grandfathered and would have to apply for a conditional use permit. CP 355-56 (79:13-80:1, 81:23-82:18).

On August 2, 2005, Parker and Ornelas met to discuss strategy. CP 366-67 (43:18-46:23). They concluded that an “*in your face*” meeting with Fischbach was necessary to keep the County moving as they preferred. *Id.* They decided to tell him that they “expect[ed] that operation [SSNW] to be shut down.” *Id.* Ornelas followed up with telephone calls to Pearson on August 4 and on August 9 with Fischbach. CP 169. Ornelas met personally with Fischbach on August 10, CP 328-30 (54:25-62:4), and reported back to Parker that he had done as the two of them had discussed on August 2. CP 367 (48:12-19). At the August 10 meeting, Ornelas provided Fischbach with a “book” of information the DBA had collected on SSNW. CP 328-30 (54:25-62:4).

On August 11, 2005, only one day after Ornelas met with Fischbach, the County issued a Stop Work Order and Notice and Order effectively shutting down SSNW’s entire business. CP 265 ¶ 30, CP 305-08, 310-14. Scalf issued the orders despite not knowing what training was going on, CP 619 (6:12-8:9), and the fact that the first Stop Work Order applied only to the unpermitted structures. He knew that SSNW had previously conducted training onsite – meaning that some training would

be “grandfathered” as a legal nonconforming use – but elected to compel SSNW to cease “ALL training.” CP 621 (17:1-25). He cited D’Amico for a “noise code” violation, but admitted he had no “sound readings” to prove a violation. CP 620-21 (12:18-13:16:18). Scalf argued that SSNW violated the State Environmental Policy Act (SEPA), but admitted that an existing legal nonconforming use did not require SEPA compliance. CP 621 (14:19-24). On the same day, Fischbach called Ornelas about the “orders.” CP 171. It is reasonable to infer that the timing of these orders the day after Fischbach met with Ornelas was not coincidence.

While SSNW preserved its rights by appealing these latest orders, D’Amico called Scalf on August 16, 2005, and offered to move the firing range in order to reduce noise. CP 266 ¶ 31. Rather than explore this possibility, the County filed a lawsuit on August 17, 2005, in Jefferson County Superior Court seeking a temporary restraining order and permanent injunction to prohibit SSNW from carrying on all but the most basic of business at its property. *Id.* Parker kept up pressure by calling Fischbach on at least August 18, 19, and 25. CP 173-75.

D’Amico again called Scalf on August 24, 2005, to discuss voluntary compliance. CP 266 ¶ 31. Nothing came of the call. Instead, on August 25, 2005, the County presented a motion for a temporary restraining order in Jefferson County on limited notice to SSNW. *Id.* The case

was before Judge Craddock Verser.

On August 29, 2005, while the TRO motion was still before the court, Parker, Ornelas, and Fred Herzog met with Juelie Dalzell, the County's Prosecuting Attorney. CP 369-70 (58:17-63:13). They told Dalzell that they wanted to have the same "team" relationship with her that they had with Fischbach. *Id.* They wanted to "be aligned, coordinated with every appropriate County official in our efforts against SSNW." *Id.* (60:13-21). They presented her with a copy of the book of documents and notes they had compiled to use against SSNW. Dalzell met with Fischbach at noon. *Id.* That afternoon, Dalzell called Parker and asked him if he would do her a favor. *Id.* (62:14-65:10). He said yes. Dalzell asked Parker to compile a notebook – much like the one Parker and Ornelas had presented her that morning – on the relationship between Judge Verser and Dalzell's election opponent, Peggy Bierbaum. *Id.* Parker said he would "get back to her" but never did.

On August 30, 2005, Ornelas and Parker met with County Commissioner Johnson and Fischbach. CP 175. Ornelas kept up with calls to Fischbach on at least September 7, 8, 16, 20 (the same day as another executive session of the Board of County Commissioners), and 28. CP 176-77 179-81. On September 20, 2005, Fischbach discussed the SSNW matter with the County Examiner. *Id.*

On October 3, 2005, Judge Verser entered a TRO against activity on the SSNW property. Fischbach met with or called Parker and Ornelas on October 6 and 11. CP 182-83. On October 18, 2005, after Berteig had held the pre-hearing conference with the parties (held September 29), Fischbach met with the Examiner regarding the SSNW matter, and called Ornelas on the same day. CP 184.

On October 18, the DBA met to discuss how to prepare for the upcoming hearing. CP 381-82 (133:9-135:20), 396. At that meeting, Parker told the steering committee of his discussion with the County's attorney, Mark Johnsen. Johnsen told him that Parker would be his sole point of contact with the DBA and that their relationship should be "under the radar, if you will." CP 374 (86:3-87).

Before the hearing, Parker called the Examiner directly. CP 372 (79:16-81:9). Prior to the hearing, Parker told Johnsen about his discussion with Berteig. CP 372-73 (81:10-82:22). This *ex parte* communication was never reported in the record, and when SSNW sought leave to conduct discovery from Judge Roof, Johnsen denied that any such communications had occurred. CP 202-04.

Parker, as the liaison for the DBA, worked with Johnsen, Pearson (the County's enforcement officer), and the County to prepare for the hearing. CP 371-73 (77:12-84:23). This included the solicitation of

witnesses, deciding which witnesses would be most effective, and the order in which witnesses would be called. *Id.* SSNW believes that the presentation was orchestrated – or “queued” – with the cooperation of Berteig. CP 266 ¶ 33.

From October 25 to 28, Parker or Ornelas and Fischbach spoke by telephone at least four times. CP 185-87. On October 31, 2005, Scalf called Berteig and spoke with him for 19 minutes; Scalf then called Johnsen. CP 222. On the same day, Dalzell met with Fischbach.

The hearing before the Examiner occurred over three days – November 16-18, 2005. On the last day, Parker called Fischbach to tell him that he believed D’Amico was violating the Jefferson County TRO, CP 188, even though the TRO permitted SSNW to train employees. Over the next two weeks, Fischbach’s records note numerous phone calls with Parker and with Scalf labeled “Enforce SSNW.” CP 189. In fact, the County brought a motion for contempt against SSNW; the County provided a copy of its brief to Parker to review before filing it. CP 371 (75:3-19). Parker attempted to contact Judge Verser at least twice in the course of the injunction proceedings. First, on November 19, 2005, the day after Parker complained to Fischbach that SSNW was violating the TRO, Parker called Judge Verser with the same charge. CP 376 (103:2-104:17), 389. The second occurred on February 11, 2006, the day after Judge

Verser dismissed the action. CP 376-77 (104:1-106:15), 390.

On January 9, 2006, at 11:04am, Pearson called Parker. CP 256. At 11:29am, she called D'Amico and asked him what he was going to do with his business since he was going to be shut down – despite the fact that Berteig had not yet finalized his decision. *Id.*; 266-67 ¶ 34. At 11:32am, Pearson again called Parker. CP 256. Between 2:00 and 5:00pm, Berteig edited and published his “final draft decision.” On January 10, 2006, Parker emailed Fischbach, indicating that Parker had spoken with Berteig that afternoon (another *ex parte* communication), and telling Fischbach that Berteig would be emailing his decision to Fischbach. CP 375 (98:13-100:8).

The Examiner issued his initial decision on January 10, 2006. CP 399-429. He applied a “clearly erroneous” standard to issues of law, and a “substantial evidence” standard to questions of fact. CP 416. Nowhere did he address whether the County’s actions were “arbitrary and capricious” or whether the County employed improper means or had an improper motive in trying to shut SSNW down. He denied that SSNW had a legal nonconforming use at anytime. CP 428. He therefore ordered that “all training activities and use of firearms and weapons on the property be prohibited,” CP 429, effectively shutting SSNW down.

The DBA was elated. Herzog, a member of the steering commit-

tee, wanted to tell County officials “that there would be a political price to pay if our interests were given short shrift.” CP 335. The DBA continued to pressure the County. Parker spoke with Pearson on January 18 to discuss enforcement of Berteig’s decision. Fischbach met with or called Parker on February 16 and 17. CP 195. On February 17, 2006, Fischbach told Parker to call him on his cellphone because SSNW’s attorneys were seeking telephone records through public records requests. CP 381 (132:17-133:22), 394-95. In emails to Pearson, Parker argued that SSNW should be put out of business; Parker was assured by Fischbach that the matter was being taken care of – that the County would shut down SSNW. CP 379 (123:19-124:20), 380 (127:21-128:5), 391-93.

When it deposed Berteig in December 2007, SSNW learned for the first time that County Assistant Prosecuting Attorney David Alvarez – who had previously advised the County’s enforcement officers as to actions to be taken against SSNW, including attending all of the Executive Sessions that considered enforcement actions against SSNW – acted as Berteig’s attorney and in fact communicated with Berteig *ex parte* concerning substantive matters. App. D ¶ 6.<sup>9</sup> However, he refused to identify the substance of those discussions, claiming attorney-client privilege. And

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<sup>9</sup> This document is the Supplemental Declaration of Alan S. Middleton, dated December 6, 2007, submitted in support of SSNW’s motion to stay or for more time pursuant to CR 56(f). *See also* RP 12-13 (Dec. 7, 2007). SSNW will supplement its designation of clerks papers to designate this document.

in a public records request in 2009, SSNW discovered that Pearson had faxed materials to Berteig after the record was closed but before Berteig issued his decision. App. E.<sup>10</sup>

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

On January 27, 2006, SSNW timely filed a Land Use Petition to challenge the Examiner's Decision in Kitsap County Superior Court, Case No. 06-2-00223-9 (the "First LUPA Appeal"). LUPA Appeal CP 2-22.<sup>11</sup>

On March 3, 2006, SSNW moved to permit discovery regarding *ex parte* communications and the origins and applicability of a 1992 "Administrative Rule" relied upon by the Examiner even though it was not part of the record. *Id.* 79-95; *id.* 66-69. Judge Roof denied the motion. *Id.* 254-56.

On October 9, 2006, Judge Roof issued a Memorandum Opinion in the First LUPA Appeal. CP 71-84. His review of the facts was limited to a "substantial evidence" standard; it was not his task to determine whether the acts of the County were "arbitrary and capricious." CP 74. The opinion makes no finding on the issue of "arbitrary and capricious" conduct, and does not address "improper means" or "improper motive."

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<sup>10</sup> SSNW will move to supplement the record to include this document, which the County should have produced long before.

<sup>11</sup> Only portions of the record in the First LUPA Appeal to the Kitsap County Superior Court, and the ensuing appeal to this Court under Case No. 35834-4-II, are a part of the record in the present appeal. References to "LUPA Appeal CP" are to the Clerks Papers in Case No. 35834-4-II.

This was a clear victory by SSNW. Despite the deference he gave to the Examiner, Judge Roof ruled that the Examiner erred in denying that SSNW had a legal nonconforming use. CP 73, 74. Judge Roof specifically rejected the Examiner's conclusion that SSNW's construction of unpermitted structures meant that its use of the Property was unlawful. CP 74. Judge Roof found that a "limited nonconforming use existed prior to enactment of the January 6, 1992, zoning code," and remanded for further proceedings "to determine the scope and nature of SSNW's nonconforming use as of January 6, 1992." CP 74-75. He specifically held that "limited firearms training" was a part of SSNW's legal, nonconforming use, CP 74 – a clear rejection of the Examiner's order prohibiting "all training activities and use of firearms and weapons on the property."

SSNW moved for reconsideration because the order restricted SSNW's legal use to what existed as of January 6, 1992, and restricted it to what was permitted under JCC § 18.20.260, a code provision that did not become effective until January 16, 2001. LUPA Appeal CP 396-98. The Court denied SSNW's motion for reconsideration on December 13, 2006. *Id.* 411-12. SSNW then timely filed an appeal to Division II of the Court of Appeals on January 12, 2007, Case No. 35834-4-II.

On October 20, 2006, Scalf wrote to Berteig instructing him what he should do about Judge Roof's remand decision. Despite the timely

filing of SSNW’s appeal ten days earlier, on January 22, 2007, Berteig issued his “remand decision” – without providing SSNW an opportunity to brief or argue the issues to be addressed or to introduce any further evidence. CP 267 ¶ 35. SSNW timely petitioned for review under Kitsap County Cause No. 07-2-00377-2 (the “Second LUPA Appeal”).<sup>12</sup> The parties agreed to stay those proceedings pending resolution of the First LUPA Appeal. CP 611-13.

Following Judge Roof’s ruling that SSNW had established a legal nonconforming use, Parker, realizing that there was now no way to stop gunfire on the SSNW property entirely, attempted to broker a deal between SSNW and the County. CP 383-85 (144:8-152:8). Although SSNW and two of three County Commissioners agreed to mediate, ultimately the County’s attorney persuaded the County not to do so. *Id.*

Parker firmly believed that the County’s actions toward SSNW were the result of undue political pressure applied by the DBA. 367-68 (49:19-50:21). On January 31, 2007, Parker wrote a public letter to the

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<sup>12</sup> SSNW contested the Examiner’s jurisdiction to enter any decision on remand pending resolution of a timely appeal. SSNW also assigned error to the Examiner’s refusal to allow SSNW to supplement the record with “previously unavailable, significantly relevant evidence” on the nature and extent of its nonconforming use. CP 586.

The Rules of Practice and Procedure of the Office of Hearing Examiner for Jefferson County and the County Code accord parties the right to a notice of hearing and an opportunity to appear and present evidence and argument. JCC § 18.05.085(10). The Remand Decision was issued without notice and opportunity to present any new evidence or argument. CP 267 ¶ 35. The Remand Decision entered by the Examiner violated SSNW’s statutory and constitutionally based procedural rights, as argued below.

County Commissioners in which he observed:

It is now well documented that since 2005 there has been a pattern of inappropriate conduct by certain County officials in their handling of the SSNW controversy. On numerous occasions the County has acted in direct contravention to their own rules and regulations.

CP 397. “[T]hey were making it up, basically, as they went along, as they got pressure from us.” CP 386 (156:3-16).

I think that the county saw a lot of pressure put on them from us -- from us, that the DBA, Gabe Ornelas, and myself, among others, to solve this matter. And I think they went into panic mode. And I don't think -- based what they did, they didn't even consider their own policies and procedures. They felt threatened themselves, and they reacted accordingly, and that was just to stop [D'Amico].

CP 387 (158:25-159:17). The County did not treat D'Amico fairly. *Id.* (158:25-160:2). “[I]’s very clear to me that there is a serious collective animus among those individuals toward D'Amico. There’s no ... doubt at all in my mind that that’s the case.” *Id.*

[N]ot once, in any instance, in any communication that I had with any county official, whether it was e-mail or telephone or personal meetings, did I ever hear anybody express any concern for whether D'Amico even had rights, much less what they were.

CP 388 (162:9-13).

#### **E. Court of Appeals Decision.**

The Court of Appeals’ review in the First LUPA Appeal was necessarily limited by the deferential standard of review it applied. It

reviewed based upon the record developed before the Examiner, reviewing questions of law de novo to determine whether the decision was supported by fact and law. *Security Services Northwest, Inc. v. Jefferson County*, 144 Wn. App. 1002, 2008 WL 1723629 (2008).

Despite this deference, on April 15, 2008, this Court reversed the Examiner in substantial part and remanded with instructions to the trial court to order remand to the Examiner to permit a far broader inquiry into SSNW's legal nonconforming use than allowed by Judge Roof as well as permissible intensification.<sup>13</sup> This Court was "concerned that the trial court's remand to the hearing examiner was unduly restrictive," and directed that the Examiner "consider additional evidence on intensification of pre-1992 uses consistent with this opinion." 2008 WL 1723629.

**F. SSNW's Damages Action.**

SSNW filed this action on or about February 15, 2007. To meet the thirty-day requirement of RCW 64.40.030, SSNW filed the action within thirty days of the denial of reconsideration. The initial complaint sought recovery under the Federal Civil Rights Act, 42 U.S.C. § 1983, and RCW 64.40.010, *et seq.* SSNW did not file a notice of claim pursuant to RCW 4.96.010, as neither the RCW 64.40 claim nor the Section 1983

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<sup>13</sup> The Examiner's Decision was in error in many respects. CP 431-94, 496-566. Judge Roof and this Court, constrained by their limited review, upheld the Examiner on many of the claimed errors. Given that the standards applied in the First LUPA Appeal and in this damages action are substantially different, a detailed discussion is unnecessary; suffice it to say that a jury could come to a markedly different conclusion.

claim requires it. *See, e.g., Felder v. Casey*, 487 U.S. 131 (1988) (Section 1983 action); *Wilson v. City of Seattle*, 122 Wn.2d 814, 863 P.2d 1336 (1993) (RCW 64.40).

The County moved for summary judgment; the motion was heard December 7, 2007. The County moved on several grounds. As for the Section 1983 claim, the County argued that SSNW's claims were barred by waiver and res judicata, CP 44-47; that SSNW possessed no constitutionally-protected property interest, CP 47-49 (specifically, that SSNW as a tenant month-to-month had no such interest); that SSNW's Procedural Due Process claim was without merit, CP 49-52; that SSNW's Substantive Due Process claim was without merit, CP 25-28; and that SSNW's Equal Protection claim was without merit, CP 55-56.

The trial court granted summary judgment on both claims. SSNW does not appeal dismissal of its RCW 64.40 claim. The order granting summary judgment did not specify the grounds on which the trial court dismissed the Section 1983 claim, CP 848-49, but in his oral ruling, Judge Spearman was very specific. He based his ruling on two grounds: First, he held that SSNW lacked a "property interest" protectable under Section 1983. RP 66 (Dec. 7, 2007). Second, he held that res judicata barred SSNW from raising the constitutional claims because SSNW allegedly did not raise them in the LUPA appeal. RP 67 (Dec. 7, 2007). He specifically

*denied* summary judgment on the merits of the Section 1983 claims, believing that SSNW had raised sufficient factual issues on the merits. *Id.*

In February 2007, SSNW had filed a notice of claim pursuant to RCW 4.96.010, the tort claim statute. CP 1068-69 ¶¶ 3-4, 1072-92. The County denied the claim. CP 1094.

Judge Spearman also granted SSNW's motion to amend. CP 850-69. SSNW's amended complaint asserted a new claim for tortious interference. CP 878-96. In its answer to the amended complaint, CP 897-904, the County raised SSNW's alleged failure to comply with RCW 4.96.010, the tort claim statute. The County argued that SSNW had to give notice and wait sixty days before filing its *initial* complaint – although doing so meant waiving SSNW's RCW 64.40 claim, which required filing within thirty days.

SSNW filed a new action on August 29, 2008, under Kitsap County Superior Court Case No. 08-2-01423-3. That action was identical to the amended complaint filed in the action initiated on February 15, 2007. CP 970-87. The actions were consolidated.

The County moved for summary judgment on two grounds. First, the County argued that collateral estoppel barred the tortious interference claim. CP 911-17. Second, the County argued that SSNW had failed to comply with the tort claim statute. CP 917-18. On February 6, 2009,

Judge Spearman summarily dismissed SSNW's tortious interference claim based upon collateral estoppel. CP 1116-17; RP 23 (Feb. 6, 2009). He *denied* summary judgment based upon SSNW's alleged failure to comply with the tort claim statute. *Id.*

**G. The Remand Hearing.**

The remand hearing mandated by this Court in the First LUPA Appeal occurred on June 23, 2009. On July 27, 2009, the Examiner ruled that SSNW had shown that its nonconforming use included use of gun ranges for on-site employee training; use of the Gunstone Property for training off-site employees, food service, and overnight accommodations; helicopter landing for security services; and use of a dock for marine security training. The Examiner also found "lawful intensification" as follows: (a) unlimited increase in the number of off-site employees; (b) unlimited increase in the number of on-site administrative/monitoring employees not engaged in security guard activities or weapons training; (c) a limit of 21 security personnel working on or from the site, including part- and full-time employees and independent contractors; and (d) weapons training (firearms) of on-site, security guard employees at one range. App. C, p. 14X.

**H. This Appeal.**

SSNW timely filed its notice of appeal on March 6, 2009. App. F.

## IV. ARGUMENT

### A. Standard of Review.

This Court reviews the trial court's granting of summary judgment *de novo*. *Campbell v. Ticor Title Ins. Co.*, \_\_\_ Wn.2d \_\_\_, \_\_\_, 209 P.3d 859, 861 (2009). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 160, 856 P.2d 1095 (1993). Even where evidentiary facts are not in dispute, summary judgment is inappropriate if "different inferences may be drawn therefrom as to ultimate facts" such as intent, knowledge, good faith, negligence, and any other issue in dispute. *Preston v. Duncan*, 55 Wn. 2d 678, 681-82, 349 P.2d 605 (1960). The court must give all favorable inferences to a party opposing summary judgment. *Coffel v. Clallam County*, 58 Wn. App. 517, 520, 794 P.2d 513 (1990).

### B. SSNW Presented Sufficient Evidence to Support Its Section 1983 Claim.

The trial court explicitly denied summary judgment on the merits of SSNW's Section 1983 claim. RP 67 (Dec. 7. 2007). However, a brief review is necessary to understand the relationship of SSNW's Section 1983 claim to the issues presented in allegedly preclusive prior actions.<sup>14</sup>

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<sup>14</sup> The County claims unspecified preclusive effect in Judge Verser's issuance of injunctive relief. However, it is undisputed that Judge Verser vacated the injunction he

## 1. Section 1983 Claims Generally.

SSNW asserted a claim under the federal Civil Rights Act, 42 U.S.C. § 1983 (“Section 1983”). Section 1983 creates a private cause of action for damages if a person, acting under color of state law, deprives the plaintiff of a right, privilege, or immunity arising under the U.S. Constitution or federal law. *Mission Springs, Inc., v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). A municipality is a “person” under the Act. *Robinson v. City of Seattle*, 119 Wn.2d 34, 58, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992). A plaintiff in a Section 1983 action is entitled to recover compensatory damages. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

There are two elements to a claim under Section 1983. A plaintiff must show first, that a person deprived it of a federal constitutional or statutory right; second, that in doing so that person acted under color of state law. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998); *Carey v. Phipps*, 435 U.S. 247 (1978). The County has never argued that the actions at issue were not under color of state law. Thus the only disputed element is whether the County deprived SSNW of a federal constitutional or statutory right.

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issued and dismissed the case. Accordingly, there is no “final judgment” as required for application of res judicata or collateral estoppel. *See Leija v. Materne Bros.*, 34 Wn. App. 825, 827, 664 P.2d 527, 528 (1983) (final judgment required).

SSNW claimed that the County's actions deprived it of three federal constitutional rights – procedural due process, substantive due process, and equal protection. Section 1983 has been used in the land-use context to vindicate procedural due process rights,<sup>15</sup> substantive due process rights,<sup>16</sup> and equal protection rights.<sup>17</sup>

## 2. SSNW Had a Property Right.

State law governs what constitutes a “property right” under Section 1983. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Our Supreme Court's last significant decision on what constitutes a “property right” under Section 1983 is *Mission Springs, Inc., v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). The Court recognized that the right to use and develop property free from arbitrary conduct in the permitting process is itself a “property right” protected by the Fourteenth Amendment. *Id.*, 134 Wn.2d at 962-63; *see also Robinson v. City of Seattle*, 119 Wn.2d 34, 61, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (“right to be free from arbitrary or irrational zoning actions”).

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<sup>15</sup> *E.g.*, *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

<sup>16</sup> *E.g.*, *Mission Springs*, 134 Wn.2d at 970-71; *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000); *DeBlasio v. Zoning Bd. of Adjustment for Twp. of West Amwell*, 53 F.3d 592, 593 (3d Cir. 1995); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) (denial of permit to which applicant is entitled); *Sanderson v. Village of Greenhills*, 726 F.2d 284 (6th Cir. 1984); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983).

<sup>17</sup> *E.g.*, *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Cordeco Dev. Corp. v. Santiago Vasquez*, 539 F.2d 256 (1st Cir. 1976).

SSNW's lease with the Gunstones gave it a "property interest" protectable under Section 1983. SSNW would have a "property interest" in the portion of the Gunstone property it leased even if the agreement between SSNW and the Gunstones were entirely oral. Under Washington law, an oral lease will be enforced where there has been part performance. *Powers v. Hastings*, 20 Wn. App. 837, 846, 582 P.2d 897 (1978), *aff'd*, 93 Wn.2d 709, 612 P.2d 371 (1980); *McKennon v. Anderson*, 49 Wn.2d 55, 298 P.2d 492 (1956) (part performance overcomes lack of adequate legal description); *cf. Kruse v. Hemp*, 121 Wn.2d 715, 724-25, 853 P.2d 1373 (1993) (doctrine as applied to leases, but inapplicable under facts).

SSNW presented substantial evidence of part performance. Part performance requires proof of two of these three factors: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial, and valuable improvements, referable to the contract. *Kruse*, 121 Wn.2d at 724-25. A leasehold may arise by "long acquiescence." *Gattavara v. Cascade Petroleum Co.*, 27 Wn.2d 263, 177 P.2d 894 (1947). SSNW easily met all of these tests. Whether part performance removes a lease from the statute of frauds is a question of fact. *Berg v. Ting*, 125 Wn.2d 544, 557-59, 886 P.2d 564 (1995); *Tiegs v. Watts*, 135 Wn.2d 1, 16, 954 P.2d 877 (1998). Here, both Mr. D'Amico and Mr. Gunstone testified to the existence of the

lease, delivery and assumption of actual and exclusive possession, payment of rent by SSNW, and substantial, permanent improvements to the Gunstone property for purposes of serving SSNW's business.

The lack of a written assignment between Mr. D'Amico, d/b/a Security Services, and Charles Gunstone, Jr., does not change the result because an assignment need not be in writing or acknowledged. *Cravens v. Cravens*, 136 Wash. 126, 238 P. 901 (1925); *American Sav. Bank & Trust Co. v. Mafridge*, 60 Wash. 180, 110 P. 1015 (1910). Part performance in any event overcomes the absence of a written assignment. *Mobley v. Harkins*, 14 Wn.2d 276, 186-87, 128 P.2d 289 (1942).

SSNW also had a property right in use of the property vis-à-vis the County. Nonconforming uses are "vested property rights." *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). A legal, nonconforming use is a property right under Section 1983. *Greene v. Town of Blooming Grove*, 879 F.2d 1061 (2d Cir. 1989); *Gavlak v. Town of Somers*, 267 F. Supp. 2d 214 (D. Conn. 2003). SSNW clearly had a "property interest" under Section 1983.

Under *Mission Springs*, SSNW need not show that it had a "property right" in permits it sought or might have sought. But even if SSNW had to seek a conditional use permit, it still had a claim under Section

1983 and for tortious interference. Discretion in the issuance of a permit does not defeat an applicant's property interest in the permit. *See, e.g., Crowley v. Courville*, 76 F.3d 47 (2d Cir. 1996); *Association of Orange Cty. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983). SSNW had the right, pursuant to the County's voluntary compliance policy, to apply for permits after-the-fact. The structures met applicable codes; they simply lacked permits. By denying SSNW the opportunity to apply for permits, the County deprived SSNW of a constitutionally-protected right.

All of the "property rights" identified – the right to use and develop property free from arbitrary conduct in the permitting process; the right to have its permits considered; its vested right to continue a legal, nonconforming use – were denied to SSNW by the County. They are certainly sufficient to prove a "property right" protectable under Section 1983 and in a claim for tortious interference. The trial court erred in dismissing SSNW's claim for lack of a "property right."<sup>18</sup>

### **3. SSNW Presented Evidence of a Valid Substantive Due Process Claim.**

The trial court properly denied summary judgment on the merits of SSNW's substantive due process claim. To prove that claim, SSNW had to prove only that the City acted arbitrarily and capriciously in interfering with a constitutionally-protected property right. *Mission Springs*, 134

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<sup>18</sup> In the remand proceedings, the County conceded SSNW's use area. App. A.

Wn.2d at 970 (citing *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988)). SSNW easily met its burden. The County arbitrarily and capriciously denied SSNW the right to pursue after-the-fact building permits and to continue an existing, vested, legal nonconforming use, due to the objections of the DBA, who wanted SSNW “shut down” despite the lack of any County regulation of shooting or noise. The County’s rationale was pure pretext – the decision was politically motivated.

Whether the County acted arbitrarily and capriciously is a question of fact for the jury. *New Port Largo, Inc. v. Monroe Cty.*, 95 F.3d 1084 (11th Cir. 1996), *cert denied*, 521 U.S. 1121 (1997); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (7th Cir.), *reh’g en banc denied*, 893 F.2d 346 (11th Cir. 1989).

The denial of a permit to which an applicant is entitled is a denial of substantive due process *per se*. See, e.g., *Mission Springs*, 134 Wn.2d 947 (grading permit); *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375 (2d Cir. 1995), *cert. denied*, 523 U.S. 1153 (1996).<sup>19</sup> Denying or revoking a land use approval merely because neighbors object to a project violates substantive due process. *Washington ex rel. Seattle Title Trust Co. v.*

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<sup>19</sup> See also *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56 (9th Cir. 1994); *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir.), *cert. denied*, 515 U.S. 1131 (1995); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) (building permit); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) (building permit).

*Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990).

SSNW presented evidence sufficient to raise a triable issue as to whether the County's actions violated substantive due process. The trial court did not err in denying summary judgment on the merits of this claim.

#### **4. SSNW Had a Valid Procedural Due Process Claim.**

The trial court properly denied summary judgment on the merits of SSNW's procedural due process claim. SSNW alleged four grounds for its claim. First, the County denied SSNW procedural due process when it refused to accept SSNW's after-the-fact permit applications – it denied SSNW any “process” at all. Second, the Examiner engaged in improper *ex parte* communications with opponents of SSNW. Third, the Examiner used and relied upon the unpromulgated 1992 “Administrative Rules” without giving SSNW notice and opportunity to be heard on the application of those rules to the matter. Fourth, the Examiner gave no notice or opportunity to be heard prior to issuing his remand decision.

The appearance of fairness doctrine is a judicially-created doctrine that seeks to prevent participation in the decision-making process by a person who is potentially interested or biased. *City of Hoquiam v. Public Employment Relations Comm'n*, 97 Wn.2d 481, 646 P.2d 129 (1982). The

doctrine preserves public confidence in government. *Swift v. Island Cty.*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976).

It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.

*Smith v. Skagit Cty.*, 75 Wn.2d 715, 740, 453 P.2d 832 (1969). In *Smith*, the Court enunciated a “test of fairness”:

[W]hether a fair-minded person in attendance at all of the meetings on a given issue, could, at the conclusion thereof, in good conscience say that everyone had been heard who, in all fairness, should have been heard and that the legislative body required by law to hold the hearings gave reasonable faith and credit to all matters presented, according to the weight and force that were in reason entitled to receive.

*Smith*, 75 Wn.2d at 741. *Ex parte* communications between the decision-maker and opponents of a proposal violate the appearance of fairness.

*E.g.*, *Chrobuck v. Snohomish Cty.*, 78 Wn.2d 858, 480 P.2d 489 (1971).

The Legislature codified the doctrine in 1984. The statute bars *ex parte* communications between a decision-maker and opponents or proponents of a proposal. RCW 42.36.060; *see also* Code of Judicial Conduct, Canon 3(A)(4). The doctrine preserves the integrity of the hearing process; consequently, no showing of actual prejudice is required.

The proceedings before the Examiner at best were highly irregular. Parker, an opponent of SSNW, had at least *two* *ex parte* communications with the Examiner. Those contacts were known to the County and its

counsel, but were not disclosed to the public or to Judge Roof. And the County actively worked with the DBA in preparing for the hearing. Finally, as disclosed by Berteig in deposition in this matter, there were *ex parte* communications on matters of substance between him and Alvarez, who had advised the County about dealing with SSNW before and after allegedly becoming Berteig's "attorney." The record is also full of well-timed communications by County employees, including Fischbach, with Berteig. Everyone except SSNW, it seems, was talking to Berteig outside of the record proceedings. In short, the proceedings before Berteig were tainted to such a degree as to violate the appearance of fairness doctrine and to support a claim for violation of procedural due process.

The trial court did not err in denying summary judgment on SSNW's procedural due process claim.

#### **5. SSNW Had a Valid Equal Protection Claim.**

Finally, the trial court properly denied summary judgment as to SSNW's equal protection claim. It is well-established that violation of the clause will impose liability on the governmental agency responsible.<sup>20</sup> To prove a violation of the Equal Protection Clause, the owner of an interest

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<sup>20</sup> See, e.g., *Olech v. Village of Willowbrook*, 528 U.S. 562 (2000); *Baker v. Coxe*, 230 F.3d 470 (1st Cir. 2000); *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000); *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000); *Del Monte Dunes, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd on reh'g*, 127 F.3d 1149 (9th Cir. 1997), *aff'd on other grounds*, 526 U.S. 687 (1999); *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983).

in real property need show only that he or she was treated differently from other, similarly-situated owners. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Scott v. City of Seattle*, 99 F. Supp. 2d 1263 (W.D. Wash. 2000). Discrimination need not be class-based to prove an equal protection violation if the actions were intentionally and arbitrarily discriminatory. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). A decision based on the negative attitudes of neighbors of a project violates equal protection. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Finally, where enforcement is selective, the malicious intent to harm is a sufficient “improper motive” to give rise to a violation. *See, e.g., Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004).

The evidence established at least two bases for SSNW’s equal protection claim. A jury could reasonably infer that the County’s decisionmaking was based upon the negative attitudes of neighbors or a malicious intent to harm SSNW. With additional discovery, SSNW believes it could have also established that the City’s actions (a) in denying SSNW the right to file for after-the-fact building permits; and (b) in depriving SSNW of an existing, legal nonconforming use were unique.

The County’s attitude changed radically once the DBA made its opposition vocal and began threatening County officials. There is at least sufficient evidence supporting an inference that this pressure induced the

County to take the position it did, in violation of the County's preference for voluntary compliance. There is a triable issue, and the trial court did not err in denying the motion on this ground.

**C. Collateral Estoppel Does Not Bar Either SSNW's Section 1983 Claim or its Tortious Interference Claim.**

**1. The Law of Collateral Estoppel.**

As the terms are sometimes confused, including in the briefing by the County below, it is useful to understand the taxonomy of res judicata and collateral estoppel. Res judicata bars the relitigation of *claims*. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985) ("Trautman"). Collateral estoppel bars the relitigation of *issues*. *Id.*

As for res judicata, there is no evidence that either the Examiner or Judge Roof considered SSNW's claims for damages arising under Section 1983 or tortious interference. Under RCW 36.70C.130(2), relief under LUPA "by itself may not establish liability for monetary damages or compensation," and LUPA does not apply to claims for damages. RCW 36.70C.030. The argument that res judicata bars SSNW's claims, therefore, is not just meritless but frivolous.

Collateral estoppel bars only relitigation of issues *actually decided* in a prior action. *Energy Northwest v. Hartje*, 148 Wn. App. 454, 465, 199 P.3d 1043 (2009). Whether collateral estoppel bars subsequent

litigation of an issue is a legal issue to be decided by the court. *State v. Bryant*, 100 Wn. App. 232, 236 n.9, 996 P.2d 646 (2000).

**2. The Trial Court Ignored Well-Established Limitations on Collateral Estoppel.**

The trial court erred because it ignored well-established Washington law limiting the doctrine of collateral estoppel.

**a. Prior Review Was More Deferential to the County.**

The burden of proving a civil rights or tortious interference claim is the preponderance standard the Hearing Examiner, Judge Roof, and the Court of Appeals could not consider. *See Westmark Devel. Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007) (tortious interference); *Tatro v. Kervin*, 41 F.3d 9 (9th Cir. 1994) (Section 1983).

None of these tribunals applied a “preponderance of the evidence” test. The Examiner applied “a *clearly erroneous* standard of review to issues of law, and a *substantial evidence* standard to questions of fact.” Judge Roof applied a “substantial evidence” test in his review of the LUPA actions. Although his review of “legal issues” was *de novo*, Judge Roof’s review was necessarily restricted by the Examiner’s application of a “clearly erroneous” standard to issues of fact. This Court reviewed the Examiner’s decision constrained by the clearly erroneous standard applied by and based solely upon the record before the Examiner.

“[A] difference in the degree of the burden of proof in the two proceedings precludes application of collateral estoppel.” *Standlee v. Smith*, 83 Wn.2d 405, 407, 518 P.2d 721 (1974). Washington courts refuse to give preclusive effect in situations similar to those here, where SSNW had a significantly more difficult burden of proof before the Examiner and in the First LUPA Appeal than it does in attempting to prove its claim for damages for violation of its civil rights and tortious interference. *See, e.g., id.; Beckett v. Dept. of Social & Health Servs.*, 87 Wn.2d 184, 550 P.2d 529 (1976) (prior criminal acquittal did not bar subsequent civil action); 14A TEGLAND, WASHINGTON PRACTICE, CIVIL PROCEDURE § 35.36 (2003); *see also* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982).

The trial court therefore erred when it dismissed SSNW’s claims based upon the County’s collateral estoppel affirmative defense.

**b. Prior Tribunals Lacked Jurisdiction to Consider SSNW’s Claims.**

The Examiner acted in a quasi-judicial capacity with limited authority. That authority involved only the power to hear SSNW’s appeal of the three orders issued by the County – the first Stop Work Order, the second Stop Work Order, and the Notice and Order. The Hearing Examiner did not have jurisdiction to consider or decide a claim for damages for violation of civil rights or tortious interference. Judge Roof’s jurisdiction

was likewise limited. The Land Use Petition Act does not apply to claims for damages. RCW 36.70C.030 (“this chapter does not apply to ... [c]laims provided by any law for monetary damages or compensation”). The Court of Appeals’ review was also limited, based as it was solely upon proceedings before the Hearing Examiner.

Because neither the Hearing Examiner, Judge Roof, nor the Court of Appeals had the jurisdiction to address the claims SSNW raises, collateral estoppel simply does not apply. *See Nichols v. Snohomish County*, 47 Wn. App. 550, 553, 736 P.2d 670 (1987).

**c. The Issues Actually Decided by the Hearing Examiner, Judge Roof, and the Court of Appeals Were Not Identical to the Issues Before the Trial Court.**

The County had the burden of proving that an issue *actually decided* in a prior proceeding was identical to an issue presented to the trial court in the second action. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304-305, 57 P.3d 300 (2002) (burden on party asserting collateral estoppel). Collateral estoppel is inappropriate if there is any uncertainty as to whether an issue was previously litigated. *Davis v. Nielson*, 9 Wn. App. 864, 875, 515 P.2d 995 (1973); *Mead v. Park Place Props.*, 37 Wn. App. 403, 407, 681 P.2d 256 (1984).

The County simply could not meet its burden of proving identity of issues. The Examiner’s decision *did not* address any of the elements of a

Section 1983 action or tortious interference; neither did Judge Roof's order, and neither did this Court's opinion. Specifically, no tribunal addressed whether the County's actions were arbitrary and capricious, whether SSNW's procedural due process rights were violated, or whether the County had impermissibly treated SSNW differently from other, like persons. As for tortious interference,<sup>21</sup> no tribunal addressed whether the County had employed improper means or acted with an improper purpose.<sup>22</sup> In fact, none of these tribunals could address SSNW's claims regarding *ex parte* communications and improper motive because SSNW was not permitted to discover the facts relevant to those claims.

Before the trial court, the County simply took the approach of claiming vindication by Judge Roof and this Court. However, the most relevant inquiry was whether SSNW had a legal, nonconforming use. On that issue, SSNW *prevailed*. Both Judge Roof and this Court held that the Examiner erred in depriving SSNW of its vested legal, nonconforming use, and this Court went one step further to require that the Examiner consider lawful intensification of the established use.

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<sup>21</sup> The elements of a Section 1983 claim are addressed above; to prevail on its claim for tortious interference, SSNW had to prove only that that the County interfered for an *improper purpose* or by use of *improper means* with a valid and lawful *expectancy* of SSNW. *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997); *Westmark Development Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007).

<sup>22</sup> In fact, Judge Roof chastised the County for attempting to “compel [the] lawful land user [SSNW] to dismantle their [its] businesses.” CP 82.

**d. The Hearing Examiner's, Judge Roof's, and the Court of Appeals' Procedures Precluded a Full and Fair Hearing.**

The party asserting collateral estoppel must prove that application of the doctrine would not work an injustice. 14A TEGLAND, WASHINGTON PRACTICE, CIVIL PROCEDURE § 35.36 (2003). This rule most commonly precludes collateral estoppel when the party against whom the doctrine is asserted did not have a full and fair opportunity to litigate the issue. *Id.*; see also *Nielson v. Spanaway Gen'l Med. Clinic, Inc.*, 135 Wn.2d 255, 956 P.2d 312 (1998); *Barr v. Day*, 69 Wn. App. 833, 854 P.2d 642 (1993).

The trial court should not have applied collateral estoppel in this case because SSNW was limited in its ability to present evidence and to argue its case both before the Examiner, Judge Roof, and in the ensuing appeal. It is undisputed that formal discovery was not allowed. Consequently, SSNW had no way of discovering, then presenting, evidence concerning the 1992 Administrative Rule and the *ex parte* contacts previously described. Indeed, Judge Roof denied SSNW's request for discovery based at least in part on Johnsen's assurance that there were no *ex parte* contacts, despite Parker's testimony that he told Johnsen about his *ex parte* communications with the Examiner, and Berteig admitted certain unspecified but substantive communications with Alvarez.

The proceedings before the Examiner, Judge Roof, and this Court

in the First LUPA Appeal did not afford SSNW a full and fair opportunity to litigate issues relating to its Section 1983 and tortious interference claims. Dismissing those claims based upon collateral estoppel was error.

#### V. CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court's orders granting summary judgment and remand for trial.

RESPECTFULLY SUBMITTED this 29th day of July, 2009.

Davis Wright Tremaine LLP  
Attorneys for Appellant

By 

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**CERTIFICATE OF SERVICE**

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

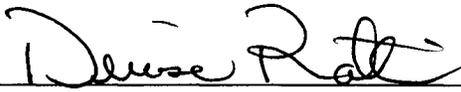
On this date I caused to be served in the manner noted below a copy of the document entitled **APPELLANT'S OPENING BRIEF** on the following:

Mark R. Johnsen  
Karr Tuttle Campbell  
1201 Third Avenue, Suite 2900  
Seattle, WA 98101-3028

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DATED this 29th day of July, 2009.

  
Denise Ratti

# **APP. A**

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EXAMINER STEPHEN CAUSSEUX  
HEARING DATE: JUNE 23-24, 2009

JEFFERSON COUNTY HEARING EXAMINER

RE: APPEAL TO EXAMINER,

STIPULATION FOR REMAND HEARING

FILE NO.: BLD 05-00471  
COM 05-00076

APPELLANT:  
SECURITY SERVICES NORTHWEST, INC.

I RECITALS

1.1 Appellants Security Services Northwest, Inc. ("SSNW") and Jefferson County ("the County") desire to save time, effort and expense in the Remand Hearing scheduled before the Jefferson County Office of Hearing Examiner on June 23 and 24, 2009 in the captioned matter.

1.2 To effectuate these purposes, SSNW and the County enter into the following Stipulation.

II STIPULATION

2.1 Jefferson County adopted its first interim zoning ordinance on January 6, 1992.

2.2 SSNW had a legal non-conforming use on 20 or 22 acres of the Gunstone property in the General Use Zone when the Code went into effect. The location of that acreage has not been resolved, but was discussed at the first hearing before the Examiner by reference to the "Old Farmhouse" and surrounding 20-22 acres. Prior to hearing, the parties

1 to this stipulation will attempt to reach agreement as to the location of the "surrounding 20-22  
2 acres." SSNW reserves the right to show that certain uses were permitted uses under the  
3 Zoning Code after January 6, 1992 which occurred outside of the 20-22 acres.

4 2.3 SSNW's core security services business use before January 6, 1992 consisted  
5 of security services including the following components:

- 6 a. armed and unarmed site security;
- 7 b. armed and unarmed armored car security;
- 8 c. armed and unarmed K-9 detection and tracking;
- 9 d. security alarm installation, monitoring and security response;
- 10 e. dispatching services, which included armed and unarmed security guards ;
- 11 f. security service training for employees;
- 12 g. armed and unarmed patrol; and
- 13 h. armed and unarmed maritime patrol.

14 2.4 SSNW's nonconforming use as of January 6, 1992 utilized the old Gunstone  
15 farmhouse (for offices, dispatching, conference room, restroom, kitchen, and sleeping).

16 2.5 The following structures were not a part of SSNW's nonconforming use in  
17 January 6, 1992, but SSNW intends to submit an "after-the-fact" building permit once the full  
18 scope of its legal non-conforming use is established:

- 19 a. The new current bunkhouse as of 2005
- 20 b. The new showers and latrine facilities as of 2005
- 21 c. The new classroom building as of 2005

22 2.6 The scope of the Remand Hearing is to clarify the extent or scope of SSNW's  
23 non-conforming use (including its components) prior to January 6, 1992 and to determine any  
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1 lawful intensification of such uses subsequent to that date. In order to assess both the scope  
2 and intensification of SSNW's non-conforming use, the Examiner should consider additional  
3 evidence.

4           2.7 The Parties will trade pre-hearing briefs and any additional written  
5 documentary evidence seven (7) days prior to hearing on June 16, 2009. These materials may  
6 be served via facsimile or electronically, and regular mail. The Examiner will be copied with  
7 the submittals, with the originals submitted at the commencement of the hearing on June 23,  
8 2009 for inclusion in the Remand. Service on the Examiner will be deemed complete upon  
9 mailing. Each party to this Stipulation reserve their objections as to admissibility of evidence  
10 at the Remand Hearing.

12           2.8 Nothing herein precludes SSNW from contending at the remand hearing that,  
13 based upon law and facts, and subsequent laws which rescinded the 1992 interim zoning  
14 ordinance, its non-conforming use as of January 6, 1992 has more components than Jefferson  
15 County is willing to concede in this Stipulation and that its use lawfully intensified. The  
16 County by entering into this Stipulation does not admit to any particular amount or extent of  
17 intensification and/or valid enlargement of SSNW's non-conforming use at this time. SSNW  
18 by entering into this stipulation does not concede the validity of the zoning ordinance adopted  
19 on January 6, 1992.

21           2.9 Post hearing, if the Examiner desires, each Party will simultaneously submit a  
22 written argument/reply after the close of the testimony at a date set by the Examiner.

24           2.10 The Parties agree that the record submitted to date reviewed by the Kitsap  
25 County Superior and Court of Appeals is part of the record for the Remand Hearing,  
26

1 supplemented by additional evidence submitted by the Parties pursuant to the Order of  
2 Remand entered by the Kitsap County Superior Court in Cause No. 06-2-00223-9.

3 SO AGREED this \_\_\_\_\_ day of June, 2009.

4 LAW OFFICES OF KARR, TUTTLE, CAMPBELL

5  
6 By \_\_\_\_\_  
7 Mark R. Johnsen, WSBA #11080  
8 Attorney for Jefferson County

9 DENNIS D. REYNOLDS LAW OFFICE

10  
11 By \_\_\_\_\_  
12 Dennis D. Reynolds, WSBA #04762  
13 Attorneys for SSNW

1 CERTIFICATE OF SERVICE

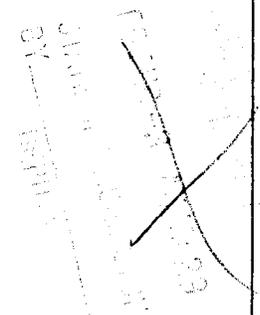
2 I, the undersigned, hereby certify under penalty of perjury under the laws of the State  
3 of Washington, that I am now, and have at all times material hereto been, a resident of the  
4 State of Washington, over the age of 18 years, not a party to, nor interested in, the above-  
entitled action, and competent to be a witness herein.

5 I caused a true and correct copy of the foregoing pleading to be served this date, in the  
6 manner indicated, to the parties listed below:

7 Mark R. Johnsen, WSBA #11080 8 Karr Tuttle Campbell 9 1201 Third Avenue, #2900 Seattle, WA 9801 (206) 223-1313, tel / (206) 682-7100, fax Attorneys for Defendant/Respondent	<input type="checkbox"/> Legal Messenger <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> First Class Mail <input type="checkbox"/> UPS, Next Day Air <input type="checkbox"/> Email
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10 DATED at Bainbridge Island, Washington, this \_\_\_\_ day of June, 2009.

11  
12  
13 \_\_\_\_\_  
Joy K. Lawrence  
Paralegal



Appendix A

# **APP. B**

Examiner Stephen Causseaux

**RECEIVED**  
JUL 7 2009  
Dennis D. Reynolds  
Law Office

JEFFERSON COUNTY HEARING EXAMINER

RE: APPEAL TO EXAMINER	)	
	)	JEFFERSON COUNTY'S POST-REMAND
FILE NO. BLD 05-00471	)	HEARING BRIEF
COM 05-00076	)	
	)	
APPELLANT: SECURITY SERVICES	)	
NORTHWEST, INC.	)	

I.

INTRODUCTION

The hearing on June 23, 2009 provided no evidence to support any nonconforming use beyond those identified in the Stipulation for Remand Hearing. Mr. D'Amico admitted that there was no third-party training by SSNW on the property prior to January 1992, and offered no evidence of third-party commercial activity on the property of any kind prior to 2004. Moreover, the testimony of Mr. Ebner raised no issue relevant to SSNW's nonconforming use.

Nor did the exhibits provided by SSNW on remand provide any basis for expanding the non-conforming use beyond those in the stipulation. Indeed, all contemporaneous exhibits in the record which predate January 1992 (and even all documents before 2001)

JEFFERSON COUNTY'S POST-REMAND  
HEARING BRIEF - 1  
#713989 v1 / 30313-015

*Law Offices*  
**KARR TUTTLE CAMPBELL**  
*A Professional Service Corporation*  
1201 Third Avenue, Suite 2900, Seattle, Washington 98101-3028  
Telephone (206) 223-1313, Facsimile (206) 482-7100

**FILE COPY**

1 uniformly reflect that SSNW's business consisted of (a) alarm installation and monitoring;  
2 (b) site security and patrols; and (c) armored car services.

3  
4 Jefferson County submits that the Examiner should limit the nonconformance uses to  
5 those set forth in the stipulation, limit the area of use to 20 to 22 acres, and exclude any  
6 third-party use and any firearms use on the property.

7 With respect to intensification, Jefferson County believes that SSNW should be  
8 allowed a reasonable increase of employees who work offsite. However, with regard to on-  
9 site employees, reasonable intensification should not allow more than a doubling or tripling  
10 of employees working on site at any one time.

11  
12 Further, all of the buildings constructed in 2005 without permits (the classroom, the  
13 bunkhouse and the bathroom and shower facilities) are not part of the nonconforming use,  
14 and therefore should not be allowed to be utilized for commercial purposes. If SSNW  
15 wishes to use those buildings or to modify or increase its use of the property in any way, it  
16 must go through the permit process under the current Unified Development Code.

17  
18 II.

19  
20 DISCUSSION

21 A. Only Site Security and Patrols Should be Added to the Uses Approved by Judge  
22 Roof.

23 As the County stipulated, SSNW's non-conforming uses should be those identified  
24 in Judge Roof's decision (alarm installation and monitoring and armored car services), as  
25 well as site security and patrol activities. The County believes that those additional use  
26 were mistakenly left off of Judge Roof's November 1, 2006 Order.

1 The other uses that SSNW argues should be treated as nonconforming uses – third  
2 party training, third party use and commercial use of firearms – were not established as  
3 nonconforming uses prior to 1992, and would constitute an unlawful change or modification  
4 in the nonconforming use.  
5

6 The overwhelming preponderance of the evidence shows that third party use and  
7 training was not a part of SSNW's business, and any firearms discharge by the two armed  
8 employees before 1992 was de minimis.  
9

10 1. Only Commercial Uses are Relevant to SSNW's Nonconforming Use.

11 As the Court of Appeals has held, the 1992 Zoning Code prohibited all uses within  
12 the General Use zone which were commercial or industrial in nature. (Ordinance  
13 No. 1-0106-92, Section 8). Therefore, in evaluating the nonconforming use, the Examiner  
14 should look only at commercial uses, not residential uses. The fact that Mr. D'Amico (or  
15 Mr. Gunstone) may have fired handguns at targets on the leased property before 1992 is not  
16 germane to the nonconforming commercial use of the property. Nor is it relevant that  
17 Jefferson County did not have a specific ordinance banning firearms use in this part of the  
18 County. The prohibition on activities in the General Use zone in the 1992 Zone Code  
19 relates to *commercial* uses only. Just as the County lawfully prohibited other commercial  
20 uses in this zoning district (car lots, motorcycle repair shops, hardware stores, etc.) so too,  
21 any commercial facility for shooting ranges or firearms training was unlawful, unless it was  
22 established as an existing commercial use prior to January 6, 1992.  
23  
24  
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1 As explained below, there was no evidence that SSNW was selling services relating  
2 to weapons use or training of any kind prior to 1992 (indeed, prior to 2001). Therefore, no  
3 such uses can properly be considered part of SSNW's legal nonconforming use.  
4

5 2. The Examiner Should Place Great Weight on Contemporaneous Documents.

6 Jefferson County urges the Hearing Examiner to place great weight on the  
7 contemporaneous documents as the most reliable indicator of the nature and scope of  
8 SSNW's pre-1992 nonconforming use. There are numerous records of SSNW's business  
9 which predate 1992. Those SSNW business documents include the following:  
10

- 11 • R-78 (consisting of Exhibits 1 through 38, previously offered to  
12 Examiner Berteig for the first remand hearing).
- 13 • SSNW's original exhibits 1 through 15.
- 14 • Log Item 98, pages 20 through 34.
- 15 • R-14.
- 16 • R-16 (SSNW's phone book advertising).

17 Review of each and every pre-1992 contemporaneous document should leave no doubt  
18 whatsoever in the reader's mind as to the nature and scope of SSNW's pre-1992 uses.

19 These contemporaneous documents include numerous contracts, invoices, memoranda and  
20 correspondence relating to site security patrols and alarm installations. Yet there is not the  
21 slightest hint or suggestion that SSNW was in the business of third-party training, third-  
22 party use of the property or firearms use on the property.<sup>1</sup>  
23  
24

---

25  
26 <sup>1</sup> All of the documents relied upon by SSNW to suggest more extensive use were prepared in 2005 or  
27 later - in response to the County's enforcement action. Such documents should be given little or no weight  
28 when not consistent with the extensive contemporaneous documents.

1           Indeed, the same is true even for all contemporaneous documents between 1992 and  
2 2001. Such documents, which include those listed below, show the same business activities  
3 as those pre-1992, and no third-party training or third-party use of any kind:  
4

- 5           • SSNW's original exhibits 16 through 48.
- 6           • Log Item 98, pages 37-66.

7           The absence of any contemporaneous documents supporting SSNW's argument  
8 regarding third party use and firearms use speaks volumes.  
9

10           3.     SSNW Concedes There Was No Third-Party Training Before '92.

11           There is no doubt whatsoever that SSNW's pre-1992 use did not include the  
12 provision of training to third parties. As noted above, not a single contemporaneous  
13 document of any kind reflects that SSNW sold or provided training services to any  
14 customer on site. Moreover, Mr. D'Amico admitted unambiguously at the remand hearing  
15 that SSNW provided no training to any third party before January 1992. Indeed, the record  
16 reflects that SSNW provided no training of any kind on site until late 2004 or early 2005.  
17 Mr. D'Amico's reference to Exhibit R-6 as suggesting self-defense training in 1996, was  
18 shown at the hearing to relate to self-defense training at a *different location* (the Gardiner  
19 Community Center). Jefferson County is confident the Examiner will find not a single  
20 reference to third-party training on the property until late 2004.<sup>2</sup>  
21  
22  
23  
24

---

25           <sup>2</sup> The Court of Appeals apparently made a typo when it stated at page 15 that there was abundant  
26 evidence of third-party training after 1995. Jefferson County submits that the Court of Appeals meant to say  
27 "2005." This is supported by page 3 of the Court of Appeals opinion which refers to the first evidence of  
28 third-party training in 2005. Furthermore, there is simply no evidence whatsoever in the record of extensive  
training until after 2001, as even Mr. D'Amico acknowledged.

1           4.     SSNW's Business Did Not Include Third-Party Use of the Property.

2           Although SSNW has suggested that its nonconforming commercial use should  
3 include third-party use (as opposed to third-party training), the evidence fails to establish  
4 regular third-party use as a part of SSNW's business. First, there is not a single  
5 contemporaneous document prior to January 1992 which demonstrates any on-site third-  
6 party use. Indeed, no such document shows third-party use until after the enactment of the  
7 Jefferson County 2001 Unified Development Code.  
8

9           The only "evidence" offered of pre-1992 third-party use was a declaration of Joel  
10 Wasankari (who failed to appear for cross-examination) that the City of Sequim Police  
11 Department may have used a shooting range on the property before 1992. This is the *only*  
12 evidence of third party use.<sup>3</sup> No contemporaneous documents support Wasankari's  
13 recollection. But even if his recollection is accurate, the Examiner should note (a) there  
14 was no contract, receipt, invoice or any documentation of any such arrangement between  
15 SSNW and the City of Sequim; (b) the use was nor formalized in any significant way;  
16 indeed Mr. D'Amico said that sometimes they would show up when he was not there;  
17 (c) any such target practice was not a *commercial* activity of SSNW - no monies were paid  
18 to SSNW for use of the property. At most, this was a casual, occasional, non-commercial  
19 use by a single party. As such, it cannot constitute a part of SSNW's nonconforming  
20 commercial use.  
21  
22  
23  
24

25           <sup>3</sup> SSNW selectively quotes from Bruce Carver's testimony to suggest that he somehow established  
26 use prior to 1992. Yet Carver testified that he never was on the property until 1992, and that he has never  
27 witnessed third-party training on the property (Tape 8, pages 50, 57). Although he did indicate that he saw  
28 some third-parties on the property, he gave no time frame for having seen third-parties, and it was certainly  
after his first visit to the property in 1992. (Tape 8, page 52). Further, Doug Tangen testified that he only  
worked with firearm training (of SSNW employees) in 1999. (Tape 6, pages 56-57, 59).

1 Jefferson County questions whether any such use by Sequim actually occurred  
2 before 1992. The Examiner should note that there was a written contract between the City  
3 of Sequim and SSNW relating to SSNW's offsite provision of K-9 services to the police  
4 department starting in June 1992. (Exhibit R-49). The fact that there was no comparable  
5 contract, invoice, receipt or any other document reflecting a commercial relationship for  
6 use of the Gunstone property suggests that any such use by the Sequim Police Department  
7 was occasional, informal and not a part of SSNW's business. To constitute a  
8 nonconforming use, the land use activity must have been more than intermittent or  
9 occasional prior to enactment of the new law. Meridian Minerals v. King County, 61 Wn.  
10 App. 195, 208, 810 P.2d 31 (1991).  
11  
12

13 5. Any Use of Firearms by SSNW Guards Before 1992 was De Minimis.  
14

15 SSNW argues that its pre-1992 nonconforming commercial use included discharge  
16 of firearms by SSNW employees. But any such use was de minimis, and cannot be used to  
17 bootstrap substantial firearms use on the property going forward.

18 The record clearly shows that there were only two armed guards prior to March or  
19 April of 1992, when Mr. Grewell left the military and was hired by SSNW. (Transcript  
20 Tape 5, pp. 37-42). The record further reflects that legislation requiring certification of  
21 armed guards was not enacted until mid-1991, and guards did not need to obtain the  
22 certification until mid-1992. (D'Amico testimony). The record further reflects that Bruce  
23 Carter was the first person hired to provide a firearm certification in the spring of 1992.  
24 (Tape 8, p. 57). (Mr. Grewell was in the first group of trainees, and therefore this first  
25 session had to have been after March of 1992). Thus, any firearms use on the property  
26  
27  
28

1 before January 1992 could have only involved informal and occasional use by the two  
2 armed guards (Mr. D'Amico and Mr. Bishop) and was de minimis.

3 Even after 1992, the annual firearms certification required that a guard shoot 25 to  
4 30 rounds, and obtain a score of 70% of the rounds hitting the target. (Tape 8, pp. 60,  
5 62). Even assuming some pre-certification practice, one would not expect more than 50 or  
6 60 rounds to be necessary for each trainee. Thus, with only two armed guards before  
7 1992, one would expect a total firearms discharge to be no more than about 100 or 200  
8 rounds annually. Mr. Grewell also testified that when he began working at SSNW in the  
9 spring of 1992, there was only one shooting range on the property. (Tape 5, pages 23, 46).

10 This de minimis firearm use should not be used to shoehorn a much greater use of  
11 firearms on the property. If, for example, all of SSNW's current off-site employees  
12 (perhaps 30 to 50 employees) were allowed to come on to the property for regular use of  
13 the shooting range, such use would be substantially different than the lawful nonconforming  
14 use, and therefore would be treated as an unlawful expansion.

15 A substantial increase in the scope of activity is a prohibited enlargement of a  
16 nonconforming use. Meridian Minerals v. King County, supra, 61 Wn. App. at 210. As  
17 the Supreme Court held in Keller v. City of Bellingham, 92 Wn.2d 726, 600 P.2d 1276  
18 (1979) a substantial increase in volume or intensity of use is an unpermitted expansion:

19 When an increase in volume or intensity of use is of such  
20 magnitude as to effect a fundamental change in a  
21 nonconforming use, courts may find the change to be  
22 proscribed by the ordinance.

23 92 Wn.2d at 731.  
24  
25  
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27  
28

1 B. The 1992 Code Did Not Allow Any Commercial Use and Did Not Allow Expansion  
2 or Change of Use Without Application and Approval of a CUP.

3 As the Examiner properly noted at the remand hearing, the applicable code is the  
4 1992 Zoning Code, as referenced by the Court of Appeals. That Code very clearly states  
5 that no commercial uses of any kind are permitted under the General Use Zone, at least  
6 without applying for a Conditional Use Permit. (Section 8). (See, Court of Appeals  
7 Opinion, p. 10). Therefore, whether the use is a used car dealership or a security services  
8 establishment, any such commercial use is not allowed, unless it was pre-existing before the  
9 Code went into effect.  
10

11 Moreover, Section 12 of the 1992 Code made clear that any expansions or  
12 alterations were also subject to the Code (i.e., no commercial use in General Use Zone  
13 without CUP). Finally, the 1992 Code provided that administrative rules may be enacted  
14 further refining some of the provisions of the 1992 Code (Section 13). Indeed, only a few  
15 weeks after enactment of the 1992 Code, an Administrative Rule was enacted through  
16 Ordinance No. 2-0127-92 which provided that for any proposed expansion or alteration of a  
17 nonconforming use, the applicant was required to submit a "proposal" which was to be  
18 considered by either the Code Administrator (Director of the Department of Community  
19 Development) if it was minor; or by the Hearing Examiner, if it involved a major  
20 expansion or alteration. (see Administrative Rule, IX, attached hereto).  
21  
22

23  
24 Needless to say, SSNW did not submit an application or proposal for expansion or  
25 change in its use. Therefore, the general prohibition remained in place as to any expansion  
26 or change in SSNW's pre-1992 nonconforming commercial use.  
27  
28

1 Contrary to the arguments by SSNW, the 1992 Administrative Rule was properly  
2 considered and utilized by Hearing Examiner Berteig. SSNW asked Judge Roof during the  
3 LUPA proceeding to strike any reference to the 1992 Administrative Rule. Judge Roof  
4 refused to do so. Later, SSNW argued in its Opening Appeal Brief that the 1992  
5 Administrative Rule was improperly considered by the Examiner (pages 35-37). Once  
6 again, the Court of Appeals declined to accept SSNW's argument.  
7

8 Moreover, even if the 1992 Administrative Rules were not considered, there is  
9 nothing in the 1992 Zoning Code which allowed expansion or alteration in nonconforming  
10 uses without application for, and receipt of a CUP.  
11

12 Nor do the deposition excerpts from Al Scalf indicate otherwise. Mr. Scalf was  
13 presented with selected portions of the 1994 Code at the deposition and asked if that code  
14 or any "prior versions of Section 10" precluded expansion or alteration. (R-25, pp. 64-65).  
15 Mr. Scalf said he would need to do some research on that and as he was sitting in his  
16 deposition did not know of any such language. In fact, there were no "prior versions of  
17 Section 10." Thus, the question was meaningless, and Mr. Scalf's answer cannot possibly  
18 be viewed as changing the language of the 1992 Zoning Code. It surely cannot override the  
19 language of the zoning ordinance itself, which did not allow any commercial uses in the  
20 General Use Zone, without prior application for a Conditional Use Permit. (See additional  
21 Excerpts from Scalf Deposition, attached hereto).  
22  
23

24 It is anticipated that SSNW will argue in its Post-Hearing Brief that the 1994 code  
25 should still apply. The Court of Appeals and the Examiner properly held that it is not  
26 applicable. But even if one looks at the 1994 Code, it does not say what SSNW claims it  
27  
28

1 says. SSNW has inaccurately stated that the 1994 Code allowed alterations and expansions  
2 of nonconforming uses. In fact, the '94 Code clearly states that changes to a "less  
3 restrictive [more expansive] use" were not allowed:  
4

5 A nonconforming use shall not hereafter be changed to a less  
6 restrictive use.

7 1994 Code, Section 10.30. Thus, even if the 1994 Code did apply, that Code did not allow  
8 change to a less restricted (more expansive) use, such as commercial firearms use and third-  
9 party weapons training facilities.

10 Finally, regardless of which pre-2001 Code is applicable, there is no evidence in the  
11 record of *any* third-party training or third-party use as a part of SSNW's commercial use  
12 prior to enactment of the 2001 Unified Development Code. Therefore, the only uses which  
13 can be considered as nonconforming are those which were stipulated by the parties to have  
14 been present in 1992 (and also, by the way, throughout the 1990s), i.e., alarm installation  
15 and monitoring; site security and patrols; armored car services.  
16  
17

18 C. Intensification Should Allow Only Modest Increase in On-Site Use, and No  
19 Commercial Firearms Use on the Property.

20 The Court of Appeals instructed the Examiner to determine whether after January  
21 1992 SSNW lawfully intensified its use of the property. In so doing, it made clear that  
22 intensification could not include expansion or change of use. Jefferson County believes that  
23 lawful intensification should allow SSNW to increase significantly the number of *offsite*  
24 employees above its pre-1992 numbers. However, the level of activity on the property by  
25 on-site employees should not be allowed to significantly increase. In view of the finding  
26 that prior to '92 SSNW had approximately three full-time employee equivalents (FTE) it  
27  
28

1 would be reasonable to allow a modest increase in the number of on-site employees,  
2 perhaps a doubling or tripling of that pre-'92 number.

3           However, intensification should not allow on-site commercial firearms use. As  
4 noted above, the record reflects only two armed guards before 1992, and the statute  
5 mandating annual firearms certification did require firearm certification until 1992. Thus,  
6 it is clear that the pre-'92 commercial use of firearms on the property was de minimis. It  
7 would be an inappropriate expansion and alteration to allow all of SSNW's on-site and  
8 offsite employees to engaging in firearms use on the property. Therefore, the County  
9 believes that commercial firearms use should not be included as a lawful intensification of  
10 the pre-1992 nonconforming use.  
11  
12

13           With respect to acreage, the map provided by SSNW in general appears to identify a  
14 reasonable 22 acre space within which activities may be allowed to continue. One  
15 exception may be the dock, which is derelict and clearly has not been used as part of  
16 SSNW's business for many years. Any prior commercial use of the dock was clearly  
17 abandoned, and therefore is no longer a part of any lawful nonconforming use. The other  
18 buildings, which were constructed after 1992 (everything except the "Farmhouse") should  
19 not be allowed to be used for commercial purposes. Any use of such buildings, or other  
20 expansion of the nonconforming use would be dependent on a future application for  
21 Conditional Use Permit or other permit available under the current Unified Development  
22 Code.  
23  
24  
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26  
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28

DATED this 6th day of July, 2009.

  
\_\_\_\_\_  
Mark R. Johnsen, WSBA #11080  
Of Karr Tuttle Campbell  
Attorneys for Jefferson County

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IN THE BOARD OF COUNTY COMMISSIONERS  
IN AND FOR THE COUNTY OF JEFFERSON

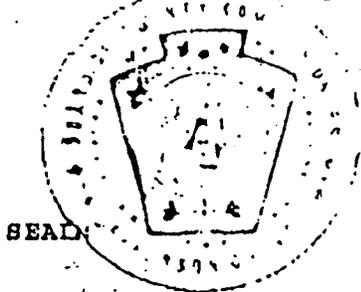
IN THE MATTER OF an ordinance amending )  
the Jefferson County Emergency Zoning )  
Ordinance, No. 1-0106-92, adding maps )  
depicting the "general commercial zone" )  
and the "light industrial zone" and )  
making substantive changes to the )  
provisions of the ordinance relating )  
to "home businesses" and the fees for )  
initiating the administrative remedy )  
of the "zone change." )

ORDINANCE NO. 2-0127-92

Severability: If any portion of this ordinance is held invalid by any court of competent jurisdiction, such portion shall be deemed a separate portion of this ordinance and such holding shall not affect the validity of the remaining portions of this ordinance.

Effective Date: These amendments are necessary for the immediate preservation of the public peace, health, and safety, and shall become effective on the 27th day of January, 1992.

Adoption: Adopted by the Jefferson County Board of Commissioners this 27th day of January, 1992.



SEAL:

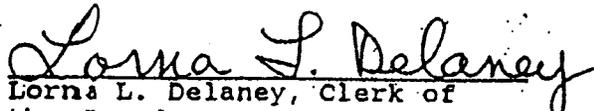
JEFFERSON COUNTY BOARD OF  
COUNTY COMMISSIONERS

  
Larry W. Bennison, Chairman

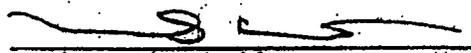
  
B. G. Brown, Commissioner

(Excused Absence)  
Richard E. Wojt, Commissioner

ATTEST:

  
Lorna L. Delaney, Clerk of  
the Board

APPROVED AS TO FORM:

  
Mark Huth, Jefferson County  
Prosecuting Attorney

Effective Date: January 13, 1992 approved by the Planning & Bldg. Dept.; reviewed and recommended for adoption by the Jefferson County Planning Commission February 5, 1992

\*\*\* JEFFERSON COUNTY PLANNING AND BUILDING DEPARTMENT \*\*\*

ADMINISTRATIVE RULES ESTABLISHING DEVELOPMENT  
STANDARDS SUPPLEMENTING THE JEFFERSON COUNTY EMERGENCY  
ZONING ORDINANCE, NO. 1-0106-92,

Rules intended to : (a) delineate the administrative responsibilities and authority of county agencies under the Jefferson County Emergency Zoning Ordinance, No. 1-0106-92; (b) clarify the computation of time periods prescribed by the Jefferson County Emergency Zoning Ordinance, No. 1-0106-92; (c) establish specific development standards for: lighting, landscaping, screening and buffering, permissible noise emission levels, signs, drainage, steep slopes, geologically unstable areas, traffic generation, parking space requirements, off-street parking dimensions, access, surfacing, loading zones, hours of operation, and storage; (d) clarify the administrative procedures pertaining to the expansion, alteration, or change in use of existing uses and activities; and, (e) establish standard road classifications for arterial and collector roads within Jefferson County.

**Authority:** These administrative rules are consistent with, and expressly authorized by, Section 13(1) of the Jefferson County Emergency Zoning Ordinance, No. 1-0106-92.

**Scope:** No development subject to the Jefferson County Emergency Zoning Ordinance, No. 1-0106-92, shall be approved unless it is found to be in conformity with the standards contained within these administrative rules.

**Jefferson County Emergency Zoning Ordinance References:**

- Section 5 - General Commercial Zone, Subsection 5(e);
- Section 6 - Light Industrial Zone, Subsection 5(e);
- Section 7 - Light Industrial\Commercial Zone, Subsection 5(e);
- Section 9 - Conditional Uses, Subsection 3(a)(2);
- Section 9 - Conditional Uses, Subsection 3(c)(2);
- Section 9 - Conditional Uses, Subsection 3(d)(3);
- Section 12 - Expansion, Alteration, or Change in Use; and
- Section 13 - Administration, Subsection (1).

12. **Event Signs:** Signs promoting public festivals, community or special events, or grand openings and retail promotions (not exceeding one (1) per year) may be displayed up to thirty (30) days prior to the event and shall be removed no later than seven (7) days after the event. The sponsoring entity is responsible for sign removal.
13. **Community Signs:** Signs which identify a recognized community or unincorporated place are permitted at each entrance to the community. Said signs are limited to one (1) per entrance, and may not exceed ninety-six square feet (96 s.f.) or eight feet (8') in height. Signs relating to clubs, societies, orders, fraternities and the like shall be permitted as part of the community sign.
14. **Personal Signs:** Signs displaying personal messages shall be no larger than sixteen (16 s.f.) in size.
15. **Billboards:** Billboards are considered off-premise advertising signs and, therefore, are prohibited.
16. **Sandwich Board or "A" Board Signs:** In addition to the total signage, businesses may erect temporary sandwich or "A" board signs subject to the following criteria:
  - a. Not more than two (2) "A" board signs may be erected per business;
  - b. "A" board signs shall not exceed four feet (4') in height or three feet (3') in width;
  - c. "A" board signs shall be displayed during business hours only;
  - d. "A" board signs shall be located not more than one hundred and fifty feet (150') from the related business;
  - e. "A" board signs shall not be placed on sidewalks;
  - f. "A" board signs shall not be placed in public road rights-of-way unless approved by the Jefferson County Department of Public Works.
17. **Planned Residential Community Signage:** Planned residential communities may request approval of a signage plan independent of the requirements of this section. Said plan shall be submitted to the Planning and Building Department which shall formulate a recommendation to the Board of County Commissioners. No one (1) sign in said plan shall exceed ninety-six square feet (96 s.f.) in size, or eight feet (8') in height.

**IX. Administrative Rules Clarifying the Review Procedures Relating to Reviewed Pursuant to Section 12 - Expansion, Alteration, or Change in Use:**

The expansion, alteration, or change in use of a nonconforming use is subject to the appropriate development, transportation and

parking standards of the Jefferson County Emergency Zoning Ordinance.

An expansion, alteration, or change in use of a nonconforming use may be accommodated in one of the following ways:

1. The proposal is determined to be a minor expansion, alteration or change in use by the zoning administrator. In making this determination, the proposed expansion, alteration or change in use shall be administratively approved in accordance with Section 13, Subsection 4 of the Jefferson County Emergency Zoning Ordinance, provided the proposal is found to meet all of the following criteria:
  - a. The proposal will not serve to significantly alter the character of the neighborhood nor appreciably increase impacts to the use and enjoyment of surrounding properties; and
  - b. The proposal will not cause an endangerment to the public health, safety, or general welfare; and
  - c. All new construction is in compliance with applicable development standards; and
  - d. The overall development is no less conforming than prior to approval.

(Examples of expansions, alterations, or changes in use that are "minor," include, but are not limited to: unheated additions to existing structures which do not exceed one hundred and twenty square feet (120 s.f.); replacement of existing signage, steps, siding, porches, decks, etc.; and, alterations which do not exceed one thousand five-hundred dollars (\$1,500), PROVIDED, that the alteration does not affect structural components, reduce existing egress, lighting, or ventilation as determined by the Jefferson County Building Official).

OR

2. The proposal is administratively determined to be a major expansion, alteration, or change in use. In doing so, the proposal will be reviewed by the Hearing Examiner as a conditional use (see, the Jefferson County Emergency Zoning Ordinance, No. 1-0106-92, Section 9 - Conditional Uses).

The expansion, alteration, or change in use of a conforming use is subject to the appropriate development, transportation and parking standards of the Jefferson County Emergency Zoning Ordinance, and shall be administratively approved in accordance with Section 13, Subsection 4 of the Jefferson County Emergency Zoning Ordinance.

X. Administrative Rules Relating to the Establishment of Road Classifications:

To clarify the location standards for development activities initiated as conditional uses under the Jefferson County Emergency Zoning

**Excerpts from the Deposition of Al Scalf  
In Kitsap County Superior Court No. 07-2-09438-8  
Security Services Northwest, Inc. v. Jefferson County**

Page 63, Line 19 -- Page 64, Line 12:

Q. 10.7 applies only to structures, does it not?

A. Yes.

Q. And 10.80 also applies only to structures, correct?

A. Yes.

Q. Would you agree with me that no provision of Section 10 of the 1994 Code prohibits the expansion of grandfathered activities so long as that expansion does not involve the expansion or alteration of a physical structure?

MR. JOHNSEN: Object to the form of the question.

THE DEPONENT: No, I wouldn't ---

BY MR. MIDDLETON: Why not?

Q. Why not?

A. -- preclude it at this point in view of simply that section. I'd have to look at the code in its entirety to see if there is any other provision in the code that's required for such an application.

# **APP. C**

**OFFICE OF THE HEARING EXAMINER**

**JEFFERSON COUNTY**

**REPORT AND DECISION**

**CASE NO.:** BLD 05-00471  
COM 05-00076

**APPELLANT:** Security Services Northwest, Inc.

**SUMMARY OF REQUEST:**

This matter is before the Examiner pursuant to a Remand from the Court of Appeals, Division Two of the State of Washington, Case No. 35834-4-II.

**SUMMARY OF DECISION:**

See decision.

**PUBLIC HEARING:**

After reviewing the Jefferson County Department of Community Development and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on June 23, 2009, and June 24, 2009.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

**SEE ATTACHED INDEX LIST**

**NOTE:** A complete record of this hearing is available in the office of Jefferson County Department of Community Development.

**FINDINGS, CONCLUSIONS AND DECISION:**

**FINDINGS:**

1. The Hearing Examiner has heard testimony, made a site visit with both counsel, admitted documentary evidence into the record, and taken this matter under

advisement.

2. This request is exempt from review under SEPA.
3. Appropriate notice was provided.
4. In Security Services NW, Inc. v. Jefferson County, Cause No. 35834-4-II, Division II of The Court of Appeals of the State of Washington in an unpublished opinion issued April 16, 2008, remanded this matter to the Jefferson County Hearing Examiner for further consideration of Security Services Northwest Inc.'s, (SSNW) nonconforming use rights and lawful intensifications thereof. In compliance with the Court's remand, the Examiner reviewed the transcript of the original hearing together with exhibits and log items entered into the record. The Examiner also convened a public hearing on Tuesday, June 23, 2009, for the purpose of receiving additional testimony and evidence relevant to the Court's remand order.
5. The Court of Appeals' decision generally upheld a land use decision issued by Irv Berteig, Jefferson County Hearing Examiner, on January 10, 2006. Examiner Berteig upheld the Jefferson County Building Official's Stop Work Order dated July 8, 2005, and the Director of Community Development Department's Stop Work Order and Notice and Order dated August 11, 2005. In addition, Examiner Berteig determined that SSNW had no legal nonconforming rights to use the site for its security services business. SSNW (Appellant) appealed Examiner Berteig's decision to the Kitsap County Superior Court, which determined that SSNW had established limited nonconforming use rights and referred the matter back to the Examiner for further review of the record, but not requiring a new public hearing. SSNW appealed the Superior Court decision to the Court of Appeals which upheld the Superior Court decision, but also ordered a new public hearing to consider not only nonconforming use rights, but also lawful intensification thereof. A complete procedural history of this matter is set forth on pages 1-6 of the Court of Appeals' decision. Subsequent to issuing his decision Mr. Berteig retired from service as Jefferson County Hearing Examiner and the present Examiner now serves in said capacity.
6. Neither the Jefferson County Code (JCC) nor the Jefferson County Hearing Examiner Code contain procedures addressing hearings required by a court remand. In the present case, the County and the Appellant entered into a "Stipulation for Remand Hearing" that set forth agreements between the parties regarding the scope of SSNW's security services business on or before January 6, 1992, the effective date of the Interim Jefferson County Zoning Ordinance. Said ordinance prohibited commercial uses on the parcel used by SSNW and caused its existing business to become a legal nonconforming use. The "Stipulation" also set forth schedules for hearing briefs and service dates for additional documentary evidence proposed for admission into the record. The parties also agreed to submit written arguments/reply briefs after the close of testimony if the Examiner so

desired. The Examiner requested such and both counsel submitted a post remand hearing brief that included their closing arguments.

7. The Court of Appeals set forth the scope of its remand as follows:
  - A. Reversed the portion of Examiner Berteig's decision wherein he determined that SSNW had no nonconforming use rights as of January 6, 1992;
  - B. Affirmed the Kitsap County Superior Court's decision that SSNW had limited nonconforming use rights as of January 6, 1992;
  - C. Determined that SSNW's nonconforming use rights are "circumscribed by SSNW's pre-1992 activities". (Page 1 of decision);
  - D. Found that the record contained insufficient evidence regarding activities on the site in 1992, and that the record likewise contained insufficient evidence regarding the intensification of such activities (pages 1 and 2 of decision);
  - E. Required the Hearing Examiner to "consider additional evidence on intensification of pre-1992 uses consistent with this opinion" (page 14 of decision).
  
8. To determine SSNW's pre-1992 activities and consider "additional evidence on intensification...consistent with this opinion", the Examiner first considered the Court's specific findings regarding SSNW's nonconforming uses and intensifications thereof. Specific findings are as follows:
  - A. In early 1992 SSNW had three employees to include Joseph D'Amico, the sole owner prior to incorporation (pages 2, 16).
  - B. Description of the uses on the site in 1992, 2001, and 2005 (pages 2, 3).
  - C. SSNW constructed three buildings on the property without any required permits to include building and septic.
  - D. The Superior Court found that SSNW conducted "limited firearms training of both its full – and part – time employees" (page 6).
  - E. The Superior Court found that SSNW had leased approximately 20 acres of a 3,700 acre farm (pages 6, 16).
  - F. SSNW activities fell within the general commercial activities prohibited in the General Use zone as established in Jefferson County Ordinance No. 1-010609, Section 19. On January 6, 1992, the entire SSNW business became a nonconforming use to include the shooting ranges (pages 8, 9, 10).

- G. The record supports the establishment of a lawful, nonconforming use prior to 1992 and possible lawful intensification of said use (page 10).
  - H. The 1992 interim zoning code governs the establishment of the nonconforming use. To expand or change said use, the application must meet the requirements of the present JCC 18.20.260. The intervening editions of the zoning code are irrelevant (page 11).
  - I. Examiner Berteig's determination that SSNW had impermissibly expanded its use is far from "clearly erroneous" (page 14). The current activities (in 2005) constitute an impermissible expansion of the pre-1992 use (page 14).
  - J. SSNW did not train third parties on the property before 1992. (Mr. D'Amico confirmed the Court's finding in his testimony at the June 24, 2009, hearing.)
  - K. Military or paramilitary training of third parties "is quite different from training SSNW's employees to provide private security services". The County may prevent SSNW from engaging in a substantially different kind of business with substantially different effects on surrounding properties (pages 15, 16).
  - L. The record contains evidence that SSNW engaged in other "low impact" activities pre-1992 and "changed its use of the property after 1992" in a manner that would constitute a valid intensification (page 16).
  - M. Hiring of additional employees to provide the same services and training them on site constitutes a valid intensification (page 17).
  - N. The remand is "only to determine the boundaries" of SSNW's nonconforming use rights (page 17).
  - O. Examiner Berteig properly took judicial notice of Jefferson County's 1992 Administrative Rules, and SSNW's assignment of error is without merit (pages 17, 18).
  - P. The County prevailed before Examiner Berteig and substantially prevailed before the Superior Court and the Court of Appeals and was awarded attorney fees.
9. In accordance with the Court's decision, SSNW and the County agreed that the security services business included the following components on January 6, 1992:
- A. Armed and unarmed site security;
  - B. Armed and unarmed armored car security;

- C. Armed and unarmed K-9 detection and tracking;
- D. Security alarm installation, monitoring, and security response;
- E. Dispatching services, which included armed and unarmed security guards;
- F. Security service training for employees;
- G. Armed and unarmed patrol; and
- H. Armed and unarmed maritime patrol.

The parties also agreed that the nonconforming use utilized the old Gunstone farm house for offices, dispatching, conference room, restroom, kitchen, and sleeping quarters. Thus, housing and feeding occurred before 1992. The parties further agreed that the three structures built without permits were not part of the nonconforming use, but acknowledged SSNW's intent to submit an "after-the-fact" building permit application. The buildings, all constructed in 2005, consist of a bunkhouse, new showers and latrine facilities, and a classroom building. The parties also agreed that the nonconforming use covers approximately 22 acres as shown by the dotted red line on Exhibit "R81". Said area includes the location of the buildings and the dock and access thereto.

10. In its written Argument/Reply Brief on Remand, SSNW requests that the Examiner take the following action:
- A. Vacate the Stop Work Orders and Notice and Order issued by the County in 2005.
  - B. "Rule that all of SSNW's uses as were being conducted in 2005 were lawful and valid uses and activities of the Gunstone property". Such would include training third parties, and use of the shooting ranges by military or paramilitary personnel.
  - C. Rule that all SSNW uses and activities can immediately proceed and continue without the threat of future enforcement action by the County.

The above requests are either beyond the jurisdiction of the Examiner or not consistent with the decision of the Court of Appeals. The Examiner cannot entertain any of the above requests. SSNW's requests amount to a "second bite at the apple" and require a reconsideration and rehearing of the entire case. Such would essentially ignore the Court of Appeals' decision remanding the case for consideration of two limited issues. The following findings address remaining undecided issues as to uses occurring on the site on January 6, 1992, and lawful

intensification thereof in compliance with the Court's remand.

11. The largest undecided issues concern off-site employees, on-site employees, and use of an on-site shooting range. SSNW asserts that intensification of its nonconforming use or the commencement of an accessory use allows it to have an unlimited number of employees working at the site, all of whom can use the shooting range. In its Post Remand Hearing Brief the County writes:

...Jefferson County believes that lawful intensification should allow SSNW to increase significantly the number of off-site employees above its pre-1992 numbers. However, the level of activity on the property by on-site employees should not be allowed to significantly increase. In view of the finding that prior to '92 SSNW had approximately three full-time employee equivalents (FTE) it would be reasonable to allow a modest increase in the number of on-site employees, perhaps a doubling or tripling of that pre-1992 number.

However, intensification should not allow on-site commercial firearms use...It would be an inappropriate expansion and alteration to allow all of SSNW's on-site and off-site employees to engaging [sic] in firearms use on the property....

Thus, the County agrees that SSNW may expand the number of off-site employees without limit, but that "the level of activity on the property by on-site employees should not be allowed to significantly increase".

12. SSNW appears to have two different types of employees working on the site:
  - (1) Those monitoring alarm systems and performing administrative work for the company; and
  - (2) Those involved in security work.

If SSNW expands the number of off-site employees significantly, it may need additional alarm monitors/administrative personnel to work on site. However, these personnel would not perform security work and therefore would not need firearms training. Thus, SSNW may employ the necessary on-site administrative/alarm monitoring personnel to support off-site employees and alarms. However, the number of armed and unarmed security personnel working on or from the site and needing weapons/firearms training should be limited to 18. Such number provides a total of six personnel per eight hour shift and represents a reasonable increase of one guard per year from the three employees in 1992 (to 2005). Further increases would change the nature of the business and expand use of the firing range. Such would require either a conditional use permit or nonconforming use permit

expansion.

13. The security service business includes the provision of armed guards. For both their own safety and the safety of the public, armed guards need appropriate training in the use (or non-use) of weapons to include firearms. Training for SSNW's on-site employees should occur at one range in use prior to 1992. While the County argues that the employees used the range only informally before 1992, no governmental agency had adopted weapons training requirements prior to 1992, and thus training occurred "informally". Even if SSNW did not provide armed security personnel prior to 1992, it needed to offer such service utilizing trained employees. Furthermore, SSNW was providing K-9 service to law enforcement agencies, which very likely required trained, armed personnel. SSNW has shown that its business included on-site, firearms training of its employees prior to 1992.
14. The Court of Appeals determined that third party use and training on the ranges did not occur prior to 1992, and therefore any non-employees receiving training or using the ranges would constitute an illegal expansion of the nonconforming use. Training of or use of the ranges by third parties would also not constitute a legal, accessory use. Due to SSNW's limited number of employees (3), third party training or range use would constitute either a new primary use or would overshadow the existing nonconforming use. Use of the ranges by police departments and governmental security agencies would have the potential of greatly increasing the number of days used and the number of rounds fired, and thus noise generated from the site would likewise increase (as happened in 2005). Furthermore, such would constitute a use separate and apart from the security services business, and thus amount to an illegal expansion. SSNW submitted no additional evidence of third party training or use of the range before 1992 (other than occasional) at the remand hearing (See Exhibit R78). Mr. D'Amico confirmed in testimony that SSNW had no contract for third party training until 2004-2005.
15. Another issue remaining unresolved is whether SSNW may bring its off-site employees to the site for training. Mr. D'Amico testified that he needs his employees to come to the site periodically for policy training, water survival training, updating administrative files, notification of administrative changes, and instruction in changing technology. He schedules employee training one to two times per year for one half to one day per session. Employees may or may not use the shooting ranges. The County asserts that bringing 40 to 50 off-site employees onto the site for firearms training constitutes a major expansion of the nonconforming use.
16. It is reasonable to expect that off-site employees would come to company headquarters for training one to two times per year. It is also reasonable to assume that the company would want to ensure that all armed employees are properly trained in the use of weapons. However, overuse of the shooting range adversely impacts the community as shown in the previous hearing. Because the County has agreed that SSNW may expand the number of off-site employees without limitation,

future use of the ranges by off-site employees should be evaluated pursuant to the conditional use permit process or the nonconforming use expansion process. Therefore, pursuant to its nonconforming use rights, SSNW may bring its off-site employees to the site for periodic training excluding firearms training.

17. Testimony in the present case and testimony and evidence in the previous case shows that helicopters landed at the site to transport K-9 units and security personnel to various locations to search for criminals, missing persons, or escapees from a State prison. Evidence in the previous hearing also shows at least one helicopter landing at the site to transport victims of a traffic accident on US 101 to a hospital. However, the record contains no evidence that SSNW utilized helicopters for training or surveillance prior to 1992. Thus, SSNW has established a nonconforming use for helicopter landings to transport K-9 units and security personnel as well as to assist law enforcement/paramedics in transporting injured citizens. The addition of helicopter training and surveillance would constitute an illegal expansion of the business, not an intensification of an existing use or a new accessory use. SSNW may request such uses through the conditional use/nonconforming use process.
18. In its intensification arguments, SSNW relies heavily upon the Washington Supreme Court decision in the case of Robert H. Keller, Jr. et al v. City of Bellingham, 92 Wn. 2d 726, 600 P.2 1276 (1979), which held that intensification of a nonconforming use is permissible “where the nature and character of the use is unchanged and substantially the same facilities are used”:

The test is whether the intensified use is “different in kind” from the nonconforming use in existence when the zoning ordinance was adopted... In unchallenged findings of fact, the trial court found that intensification wrought no change in the nature or character of the nonconforming use by GP. Further, the court found that the intensified use “[has] no significant effect on the neighborhood or surrounding environment”. 92 Wn. 2d 726 at 731, 732.

SSNW argues that none of its 2005 on-site activities differ in kind from its 1992 activities, and that the intensification of its existing uses “brought no change in the nature or character of the nonconforming use”. However, the 2005 uses generated a significant number of citizen complaints. An investigation by the County determined that utilization of the shooting ranges by third parties and other on-site activities to include car bombs had a “significant effect on the neighborhood or surrounding environment”. The Court of Appeals agreed.

19. The intensification authorized by Keller, supra., consisted of the addition of six electrolyte cells to an existing 26 electrolyte cell use within the same building. The added cells would increase chlorine production by 20% to 25%, and the building housing the nonconforming use was originally constructed to accommodate 32

cells. Our Supreme Court initially noted that the right to continue a nonconforming use “may not include the right to extend it to other portions of the building”. However, the Court authorized the following exception:

...Such extension is permissible, however, if the “design of the structure indicates that at the time of the passage of the zoning restriction it was intended to dedicate the building, in its entirety, to such use”. 92 Wn. 2d 726 at 732.

In the present case SSNW’s business in 1992 consisted of three employees, occasional use of the shooting range by law enforcement agencies, and the uses set forth in the “Stipulation for Remand Hearing” (R76) as amplified above. SSNW’s expansion to its number of uses and volume of uses at the site in 2005 was of such a magnitude as to affect a fundamental change in the nonconforming use.

20. SSNW’s increases are analogous to the increases addressed by the Washington Court of Appeals in Meridian Minerals Company et al v. King County et al, 61 Wn. App 195 (1991). Assuming that law enforcement agencies used SSNW’s ranges on a sporadic, invitational basis prior to January 6, 1992, an occasional, intermittent use of a parcel does not establish a nonconforming use. As set forth in Meridian Minerals, supra.:

A nonconforming use is defined in terms of the use of the property lawfully established and maintained at the time zoning was imposed... The existing use must have been more than intermittent or occasional. 61 Wn. App 195 @ 207, 208.

In the present case, the Court of Appeals in its remand decision determined that SSNW’s expansion between 1992 to 2005 more closely fits the facts in Meridian Minerals, supra., than in Keller, supra. The Court found that the present nonconforming use is “circumscribed by SSNW’s pre-1992 activities” and that the Examiner must consider “additional evidence on intensification of pre-1992 uses consistent with this opinion”.

21. In limiting the number of on-site, security guard employees the Examiner has carefully considered the Court of Appeals decision in Woodinville Water District v. King County et al, 105 Wn. App 897 (2001). As in Woodinville, this decision does not limit the number of permanent employees SSNW may employ, but only the number it may employ prior to applying for either a conditional use permit or expansion of its nonconforming use. SSNW operates its business on 22+ acres in an extremely rural area. On-site employees will not impact abutting neighbors or traffic on US 101. However, Meridian Minerals v. King County, supra., and Keller v. Bellingham, supra, prohibit a fundamental change to a nonconforming use. To prevent such from occurring and to prevent overuse of the range such that neighboring property owners are impacted by noise, limiting the number of

employees as set forth above ensures lawful intensification.

22. While the dock on the Gunstone property does not appear in good condition, the parties have stipulated that the SSNW business included "armed and unarmed marine patrol" prior to January 6, 1992. In addition, the Court of Appeals found evidence in the record that SSNW engaged in "maritime security" prior to 1992, and that such evidence "could support a finding that SSNW changed its use of the property after 1992 in a way that would be considered a valid intensification of its nonconforming use" (page 16). Training employees for marine security requires use of the dock, and therefore SSNW has established that use of the dock is either part of its legal nonconforming use or a valid intensification thereof.
23. SSNW asserts that it has always operated a "commercial business" with "weapons training" at its 22+ acre parcel on the Gunstone property, and that it does nothing today "different in kind from prior to 1992". SSNW argues that it is not "the number of gallons pumped [at a gasoline station] or the number of bullets fired, but the use of the land" that determines intensification. However, such argument is not in accord with State ex rel June B. Miller v. John B. Cain, 40 Wn. 2d 216 (1952), wherein our Supreme Court addressed expansion of a nonconforming gasoline station. The Court held that the owner of a nonconforming gasoline service station could not expand the business to a new and larger nonconforming building that would likely have included additional pumps and an additional "number of gallons" pumped:

We are not in accord with appellant's contention that she is possessed for all time of the right to utilize her property as a gasoline service station, unless and until it can be classed as a nuisance. We cannot agree, as she seems to argue, that, since a service station was being operated on her lot when the zoning ordinance was adopted, it became an island surrounded by properties subject to the exercise of the police power as exemplified in the zoning ordinance, but itself untouched thereby....40 Wn. 2d 216 @ 220.

Accepting SSNW's logic would allow the Jefferson County Airport to expand to accommodate Boeing 747s or Southwest Airlines as it would remain an airport.

24. SSNW argues that the Court of Appeals decision in Joe Ferry v. City of Bellingham, et al, 41 Wn. App 839, 706 P2d 1103 (1985), authorizes a valid nonconforming use to include accessory uses that are considered customary and incidental to the principal use. SSNW quotes from Ferry, supra., on page 18 of its reply brief on remand as follows:

A valid nonconforming use carries with it the right to the exercise of those accessory uses which are considered customary and incidental to the principal use. Whether a use is viewed in the perspective of a presently permitted use or of a use required to be

permitted despite a present prohibition in the ordinance, there is no difference as to the extent to which it can be supplemented by customary accessory use.

25. However, the quote is from 4 A. Rathkopf and D. Rathkopf, Zoning and Planning Section 51.01[3] (4<sup>th</sup> ed. 1985). The quote set forth in SSNW's brief is followed by the following language in the Rathkopf treatise:

...The exercise of the right to engage in such an accessory use does not constitute a prohibited change of use where the accessory use does not achieve the status of an additional co-equal use, but remains subordinate to the previously existing nonconforming use in scale, volume, and intensity. 41 Wn. App 839 at 845.

Even if third party training on the ranges or use of the ranges by military/paramilitary agencies are considered accessory uses, such uses are not subordinate to either use of the site by SSNW in 1992, or any valid, legal intensification subsequent thereto.

#### **JEFFERSON COUNTY'S OBJECTION TO ADMISSION OF EVIDENCE**

26. At the hearing Mark Johnson, attorney at law representing Jefferson County, objected to the admission of Exhibits R25 – R28; R33 – R38; R55 – R64; and R66 as irrelevant to the remand hearing. These exhibits consist of pleadings and depositions from a damages lawsuit filed by SSNW against Jefferson County in a separate action (Security Services NW, Inc. v. Jefferson County, Kitsap County Cause No. 07-2-00438-8). Mr. Johnson asked that if the Examiner admitted said exhibits into the record, then he should also admit Exhibit R75 which he proffered in response.
27. Dennis Reynolds, attorney at law representing SSNW, asserted that the depositions of former Examiner Berteig and Al Scalf, Director of the Jefferson County Department of Community Development are highly relevant as they show bias, an attempt to put SSNW out of business, and improper ex parte contact between the County and the Examiner.
28. Based upon the limitations of the remand decision, none of the proffered exhibits are relevant to the issues on remand. The Examiner will therefore exclude Exhibits R25 – R28; R33 – R38; R55 – R64; R66 and R75 from evidence.
29. Mr. Johnson also objected to the introduction of Exhibits R18 – R34 and R39 – R46 as they include portions of various codes which do not apply to the present case. Jefferson County adopted said codes subsequent to the January 6, 1992, Interim Zoning Ordinance. Mr. Reynolds asserts that the codes are valid in determining the

legal intensification of SSNW's nonconforming use.

30. The Court of Appeals set forth the codes that the Examiner must consider. These codes are limited to the January 6, 1992, Interim Zoning Ordinance and the present nonconforming use criteria set forth in the JCC at Section 18.20.260. Therefore, intervening codes are not relevant and Exhibits R18 – R24 and R39 – R46 are not admitted to the record.

### **SSNW's MOTION TO STRIKE**

31. Subsequent to the submittal of written closing arguments and post hearing briefs, Dennis Reynolds, attorney for SSNW, submitted a Motion to Strike certain language in Mark Johnson's brief on behalf of Jefferson County and all references to the administrative rules (ARs) and the rules themselves. Mr. Johnson responded to the Motion and Mr. Reynolds replied to Mr. Johnson's response. Mr. Reynolds also made an additional motion to admit Exhibit R26, excerpts from the deposition of Examiner Berteig, a portion of which concerned the ARs. Mr. Reynolds submitted declarations of Mr. D'Amico and himself in support of the motion.
32. Points 1, 4, 5, and 6 in Mr. Reynolds initial Motion To Strike are in the nature of closing argument, and Mr. Reynolds in his motion has adequately responded to Mr. Johnson's alleged misquotes and characterization of the dock. The testimony of Mr. Carver, Mr. Tangen, and Mr. Grewell are accurately set forth in the transcript of the previous hearing, and the Court of Appeals decision speaks for itself.
33. The Examiner will not strike references to the ARs set forth in Mr. Johnson's Post Hearing Brief. While both counsel have extensively referred to the decision of the Superior Court, the Court of Appeals' decision governs the scope of the remand and is the law of the case. The Court of Appeals' decision supercedes the Superior Court's decision. The Court of Appeals specifically ruled that Examiner Berteig properly considered the ARs:

The County correctly responds that the Hearing Examiner properly took judicial notice of the rules as part of the applicable law of the case. A Court may take judicial notice of administrative rules...Accordingly, this argument is without merit. (Page 18).

The Examiner has no authority to consider issues surrounding the adoption or non-adoption of the ARs. The Court has decided that the ARs were properly considered. SSNW does not assert that it followed the ARs in attempting to expand its nonconforming use. However, despite its non-compliance with the ARs, the Court of Appeals determined that SSNW had established a nonconforming use on the site and that legal intensification of that use may have occurred. The present decision sets forth SSNW's nonconforming uses and legal intensification thereof. Because

the Court of Appeals has resolved all issues regarding the ARs, further argument is not necessary or appropriate. The Examiner has no authority to amend a court decision, and is strictly limited to the scope of a remand.

### **CONCLUSIONS:**

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. Division II of the Court of Appeals of the State of Washington in its decision in Security Services NW, Inc. v. Jefferson County ordered the Examiner to conduct a public hearing to accept new testimony and evidence relevant to legal nonconforming uses existing on SSNW's site on January 6, 1992, and the possible legal intensification thereof. In addition, the Court ordered the Examiner to consider evidence and testimony submitted in the previous three day hearing on said issues. The Court's decision set forth the parameters of the inquiry and made determinations on certain issues set forth in the findings above that became the law of the case.
3. Jefferson County and SSNW reached agreement on some uses that occurred on the site prior to January 6, 1992, the effective date of the Jefferson County Interim Zoning Ordinance that made SSNW's business a nonconforming use. The remaining issues are resolved as set forth in the findings above.
4. Requests to vacate previously issued Stop Work Orders and/or Notice and Order are beyond the scope of the remand hearing. The Examiner assumes that DCD will process applications for building permits, conditional use permits, and nonconforming use permits in accordance with applicable codes and will treat SSNW courteously and fairly as it does all applicants for land use permits.

### **DECISION:**

SSNW has established that its security services business on or before January 6, 1992, consisted of the following:

- A. Armed and unarmed site security.
- B. Armed and unarmed armored car facility.
- C. Armed and unarmed K-9 detection tracking.
- D. Security alarm installation, monitoring and security response.
- E. Dispatching services which included armed and unarmed security guards.
- F. Security service training for employees.
- G. Armed and unarmed patrol.
- H. Armed and unarmed maritime patrol.

In addition to the above SSNW established the following nonconforming use intensification:

- A. Unlimited increase in the number of off-site employees.
- B. Unlimited increase in the number of on-site administrative/monitoring employees that do not engage in security guard activities or weapons training.
- C. A limit of 21 security personnel working on or from the site. Such increase includes part-time employees, full time employees, and independent contractors, and represents an increase of one security personnel per year from 1992-2005.
- D. Weapons training to include firearms training of on-site, security guard employees at one range.
- E. No on-site weapons training of off-site employees; however off-site employees may come to the site periodically for other than firearms training.
- F. Helicopter landings for transportation of K-9 units, security personnel, and emergencies (accidents on US 101, boating, etc.).
- G. Utilization of the dock on the Gunstone parcel for marine security training.

SSNW's nonconforming use of January 6, 1992, utilized the old Gunstone farm house (for offices, dispatching, conference room, restroom, kitchen, and sleeping). Thus, the use includes food service and overnight accommodations.

The following structures were not part of SSNW's nonconforming use on January 6, 1992, but SSNW may submit an after-the-fact building permit application to legalize said structures:

- A. The new current bunkhouse.
- B. The new showers and latrine facilities.
- C. The new classroom building.

SSNW legally operated its business on January 6, 1992, from a 22+ acre parcel as shown on Exhibit R81.

**ORDERED** this 27<sup>th</sup> day of July, 2009.

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**STEPHEN K. CAUSSEAU, JR.**  
Hearing Examiner

# **APP. D**

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
KITSAP COUNTY

SECURITY SERVICES NORTHWEST, INC.,	)	
	)	
Plaintiff,	)	No. 07-2-00438-8
	)	
v.	)	<b>SUPPLEMENTAL</b>
	)	<b>DECLARATION OF ALAN S.</b>
JEFFERSON COUNTY,	)	<b>MIDDLETON IN SUPPORT OF</b>
	)	<b>PLAINTIFF'S MOTION TO</b>
Defendant.	)	<b>STAY AND/OR FOR</b>
	)	<b>ADDITIONAL TIME</b>
	)	<b>PURSUANT TO CR 56(F)</b>

Alan S. Middleton states:

1. I am an attorney with Davis Wright Tremaine LLP, attorneys of record for plaintiff Security Services Northwest, Inc. (SSNW). I make this supplemental declaration in support of Plaintiff's Motion to Stay and/or for Additional Time Pursuant to CR 56(f).

2. The County's motion for summary judgment was initially noted for November 16, 2007. SSNW timely moved for a stay and additional time under CR 56(f) to gather and present relevant evidence to the court. There was not enough time prior to the noting date of the original motion to perform the deposition and document discovery required to respond to the motion.

1           3.       Because the motion for summary judgment was initially noted to be heard by  
2 Judge Roof, despite the fact that Judge Roof had not been pre-assigned to this case, the motion  
3 had to be renoted to December 7. With the additional time, SSNW has been able to conduct  
4 additional discovery but has not completed the necessary discovery.

5           4.       Specifically, SSNW noted the deposition of John Fischbach, the County  
6 Administrator, for the week after Thanksgiving. The deposition was renoted at the request of  
7 the County's counsel to Wednesday, December 5, 2007, because of Mr. Fischbach's schedule.  
8 Once the date for Mr. Fischbach's deposition was resolved upon, SSNW noted several other  
9 depositions on December 4 and 5, consistent with Mr. Johnsen's statement of his availability.

10          5.       On December 4, SSNW deposed Irv Berteig, the County Hearing Examiner.  
11 The parties were then to proceed to Port Townsend to depose Fred Slota, another County  
12 planning employee, and Fred Herzog, and non-County witness. Mr. Berteig was unable to  
13 arrive at the scheduled 9:00am time due to complications from the record-setting rainfall  
14 experienced over the prior 24 hours – specifically, he was unable to start his car, and arrived at  
15 9:45am. That, combined with the length of Mr. Berteig's deposition, led SSNW to abandon  
16 plans to move on to Port Townsend and instead to depose Mr. Slota and Mr. Herzog on the next  
17 day, Wednesday, December 5. Although ordered, the transcript of Mr. Berteig's deposition has  
18 not yet been delivered.

19          6.       Mr. Berteig testified to his handling of the appeal. Among other things, Mr.  
20 Berteig stated that it was likely that he had discussed legal issues relating to the appeal with  
21 Jefferson County Deputy Prosecuting Attorney David Alvarez after the hearing record had been  
22 closed but before Mr. Berteig issued his decision. He claimed that these discussions were  
23 attorney-client privileged and refused to answer questions about them. Mr. Alvarez does not

1 just represent Mr. Berteig, but also has represented the County with respect to proceedings  
2 against SSNW. The conversations between Mr. Alvarez and Mr. Berteig while the appeal was  
3 under advisement were not disclosed at any time until Mr. Berteig's deposition.

4 7. In the short time since Wednesday's depositions were concluded (I arrived back  
5 in Seattle at approximately 7:30pm), I have not found authority conclusively establishing that  
6 communications between Mr. Berteig and Mr. Alvarez (again, who also represented the  
7 County) are or are not *ex parte* communications that would vitiate any ruling by Mr. Berteig.  
8 That is an issue that should receive adequate attention before the court rules on the County's  
9 motion for summary judgment. Of course because Mr. Berteig refused to answer questions  
10 concerning what he and Mr. Alvarez discussed (he did state that he possessed, but refused to  
11 produce, emails exchanged between him and Mr. Alvarez), it is impossible for SSNW to state  
12 exactly what evidence would be placed before the court. But SSNW should be given the time  
13 and opportunity for this issue to be decided in an orderly fashion.

14 8. SSNW deposed John Fischbach, two County Councilmembers, and Fred Herzog  
15 in Port Townsend on December 5. The County's attorney was not available to continue the  
16 depositions past 5:00pm; the depositions of one other Councilmember, Fred Slota, and Molly  
17 Pearson (County code enforcement personnel) therefore have not yet occurred.

18 9. Mr. Herzog, in response to the subpoena duces tecum served on him, produced  
19 two disks of documents he believed were responsive to the subpoena. SSNW has not had an  
20 opportunity to review those documents to determine their relevance to the issues before the  
21 court, but should be allowed to do so.

22 10. Mr. Slota and Ms. Pearson are believed to have knowledge, as County code  
23 enforcement personnel, relating to the County's decision, against its written policy, to pursue

1 enforcement action rather than “voluntary compliance.” As noted at length in SSNW’s brief  
2 and supporting documents, the County’s actions in pursuing formal enforcement against SSNW  
3 rather than to pursue voluntary compliance dovetail precisely with pressure brought to bear by  
4 the Discovery Bay Alliance targeting SSNW’s shooting activities – even though shooting was  
5 at all times legal on the Gunstone property used by SSNW. At the least, SSNW should be  
6 permitted time in which to depose Mr. Slota, Ms. Pearson, as well as the third County  
7 Commissioner, about the County’s actions.

8 10. Upon service of the County’s motion, SSNW immediately set about noting and  
9 taking the deposition of Sam Parker, a key witness, and there was little time in which to  
10 schedule additional depositions.

11 11. To accommodate schedules and the looming holidays, a Rule 56(f) continuance  
12 of three months is not unreasonable.

13 I declare under penalty of perjury under the laws of the State of Washington that the  
14 foregoing is true and accurate.

15 Executed this 6th day of December, 2007.

16  
17   
18 Alan S. Middleton



# **APP. E**

Memo

Jefferson County  
Department of Community Development  
621 Sheridan Street  
Port Townsend, Washington 98368  
(360) 379-4450  
FAX (360) 679-4451

TO *Gov Bertling*

FROM *Melley Pearson*

DATE *November 22, 2005*

COMMENTS

*Gov,*

*Here are additional  
documents for the  
SSN W appeal file.*

*Let me know if you  
need anything else.*

*Melley*

*360 379-4458*

*mpearson@co.jefferson.wa.us*

# **APP. F**



1 DATED this 6th day of March, 2009.

2 Davis Wright Tremaine LLP  
3 Attorneys for Plaintiff

4 By   
5 Alan S. Middleton, WSBA No. 18118

6 The name and address of counsel for each party are listed below.

7 Counsel for plaintiff/appellant:

8 Alan S. Middleton  
9 Davis Wright Tremaine LLP  
10 Suite 2200, 1201 Third Avenue  
11 Seattle, WA 98101-3045  
12 Tel.: (206) 757-8103  
13 Fax: (206) 757-7103  
14 Email: [alanm Middleton@dwt.com](mailto:alanm Middleton@dwt.com)

15 Dennis D. Reynolds  
16 Law Offices of Dennis D. Reynolds  
17 200 Winslow Way W., Suite 380  
18 Bainbridge Island, WA 98110-4932  
19 Tel.: (206) 780-6777  
20 Fax: (206) 780-6865  
21 Email: [dennis@ddrlaw.com](mailto:dennis@ddrlaw.com)

22 Counsel for defendant/respondent:

23 Mark R. Johnsen  
Karr Tuttle Campbell  
1201 Third Avenue, Suite 2900  
Seattle, WA 98101-3284  
Tel.: (206) 223-1313  
Fax: (206) 682-7100  
Email: [mjohnsen@karrtuttle.com](mailto:mjohnsen@karrtuttle.com)



**ORDER DATED  
DECEMBER 7, 2007**

cc  
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2007 DEC -7 AM 10:45

Hearing Date: December 7, 2007  
Time: 9:00 a.m.

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SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

SECURITY SERVICES NORTHWEST, INC.,	)	
	)	
	)	NO. 07-2-00438-8
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
JEFFERSON COUNTY,	)	
	)	
Defendant.	)	
	)	

This matter having come before the Court upon Jefferson County's Motion for Summary Judgment, the Court having reviewed the files and records herein including the following:

- Complaint for Money Damages
- Motion for Summary Judgment;
- Declaration of Mark R. Johnsen;
- Memorandum in Opposition to Motion for Summary Judgment;
- Declaration of Joseph D'Amico in Opposition to Motion for Summary Judgment;
- Declaration of Alan Middleton in Opposition to Motion for Summary Judgment;
- Declaration of John Alden in Opposition to Motion for Summary Judgment;
- Declaration of Reed Gunstone;
- Plaintiff's Motion to Stay and/or For Additional Time Pursuant to CR 56(f);
- Declaration of Alan Middleton in Support of Plaintiff's Motion to Stay and/or For Additional Time Pursuant to CR 56(f);
- Jefferson County's Reply Memorandum in Support of Summary Judgment;
- Supplemental Declaration of Mark R. Johnsen;
- Jefferson County's Brief in Opposition to Motion to Stay;

- 1 • Declaration of Mark R. Johnsen;
- 2 • Supplemental Declaration of Joseph D'Amico in Opposition to Motion for Summary Judgment;
- 3 • Declaration of Mike McNickle; and
- 4 • Supplemental Declaration of Alan S. Middleton in Support of Plaintiff's Motion to Stay and/or For Additional Time Pursuant to CR 56(f).

5  
6 And the Court having determined that there is no genuine issue of material fact and that  
7 defendant Jefferson County is entitled to summary judgment as a matter of law, now  
8 therefore

9 It is hereby ORDERED:

- 10 1. That plaintiff's Motion for Stay is denied.
- 11 2. That Jefferson County's Motion for Summary Judgment is granted.
- 12 3. That all claims asserted herein and against Jefferson County for recovery  
13 under RCW 64.40 and 40 U.S.C. § 1983 are dismissed with prejudice.  
14

15  
16 DONE IN OPEN COURT this 7th day of December, 2007.  
17

18  
19  
20 Honorable Jay Roof Meadows Spearman

21  
22 Presented by:

23  
24 LS  
25 Mark R. Johnsen, WSBA #11080  
26 Karr Tuttle Campbell  
27 Attorneys for Defendant Jefferson County  
28

Approved as to form:  
LS  
Alan Middleton  
Attorney for P's NW

**ORDER DATED  
FEBRUARY 6, 2009**

am7

RECEIVED AND FILED  
IN OPEN COURT

Hearing Date: February 6, 2009  
Time: 9:00 a.m.

FEB - 6 2009

DAVID W. PETERSON  
KITSAP COUNTY CLERK

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SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

SECURITY SERVICES NORTHWEST,  
INC.,

Plaintiff,

v.

JEFFERSON COUNTY,

Defendant.

NO. 07-2-00438-8

ORDER

This matter having come before the Court upon the Motion of defendant Jefferson County for Summary Judgment, the Court having reviewed the files, records and pleadings herein, including the following documents:

- Jefferson County's Motion for Summary Judgment;
- Complaint for Money Damages;
- First Amended Complaint for Money Damages;
- Declaration of Mark R. Johnsen and exhibits thereto;
- Memorandum in Opposition to Motion for Summary Judgment;
- Amended Declaration of Joe D'Amico;
- Pleadings and declarations presented in connection with the December 7, 2007 Motion for Summary Judgment;

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➤ Declaration of Joe D'Amico, dated November 5, 2007, together with exhibits thereto;

➤ Declaration of John Alden, dated November 5, 2007, together with exhibits thereto;

➤ Declaration of Reed Gunstone, dated November 5, 2007;

➤ Declaration of Alan S. Middleton, dated November 5, 2007, together with exhibits thereto and;

➤ Reply Brief in Support of Motion for Summary Judgment  
➤ Declaration of Glenn Reynolds ➤ Supplemental Declaration of Mark R. Johnson  
And the Court having concluded that there is no genuine issue of material fact and

that Jefferson County is entitled to summary judgment as a matter of law, now, therefore

It is hereby ORDERED:

1. That Jefferson County's Motion for Summary Judgment is granted.
2. That all remaining claims against Jefferson County herein are dismissed with prejudice.
3. That SSNW's identical Complaint in Kitsap County Superior Court Cause No. 08-2-01423-3 shall also be dismissed with prejudice.

DONE IN OPEN COURT this 6 day of Feb, 2008

*[Signature]*  
Judge

Presented by:  
*[Signature]*  
Mark R. Johnson, WSBA #11080  
Karr Tuttle Campbell  
Attorneys for Jefferson County

Approved on to form  
*[Signature]*  
Alan S. Middleton, WSBA #18118  
Davis Wright Tremaine  
Attorneys for SSNW