95403-8

Court of Appeals No. 48781-1-II

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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

Defendant/Respondent,

v.

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

Plaintiffs/Appellants/Petitioners,

and

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

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PETITION FOR REVIEW

Brian D. Chenoweth, WSBA No. 25877
Brooks M. Foster (*pro hac vice)*, OSB No. 042873
Chenoweth Law Group, PC
510 SW Fifth Ave., Fifth Floor
Portland, OR 97204
Phone: (503) 221-7958
Email: brianc@northwestlaw.com
bfoster@northwestlaw.com

Attorneys for Petitioner

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A. IDENTITY OF PETITIONER

Petitioner Kitsap Rifle and Revolver Club (the "Club") requests that the Court accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. CITATION TO COURT OF APPEALS DECISION

The Club requests that the Court review the *Unpublished Opinion* of Division II of the Washington Court of Appeals, filed on November 21, 2017 (the "Opinion") in the matter of *Kitsap Cty. v. Kitsap Rifle & Revolver Club*, No. 48781-1-II (filed Nov. 21, 2017).

The Appendix to this petition includes copies of the following: (1) the Opinion (App. 1); (2) relevant portions of the trial court's *Findings of Fact, Conclusions of Law and Orders*, dated February 9, 2012 (App. 2); (3) relevant portions of the trial court's *Order Supplementing Judgment on Remand*, dated February 5, 2016 (App. 3); and (4) relevant portions of the Club's opening brief on the merits, *Brief of Appellant*, dated December 23, 2016. (App. 4); relevant portions of Respondent Kitsap County's (the "County") *Third Amended Complaint For Injunction, Declaratory Judgment and Abatement of Nuisance*, dated August 29, 2011 (App. 5); relevant portions of the County's *Trial Brief*, dated September 28, 2011 (App. 6).

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

C. ISSUES PRESENTED FOR REVIEW

1. Does the Opinion err in affirming the trial court's issuance of the "military training use" injunction where Washington law prohibits such vague, ambiguous, and overbroad injunctions?

2. Does the Opinion err in affirming the trial court's denial of the Club's motion to reopen the record during remand proceedings where the record did not contain the findings of fact necessary for the trial court to carry out the instructions of the Court of Appeals in the published opinion of *Kitsap Cty. v. Kitsap Rifle & Revolver Club* ("*KRRC*"), 184 Wn. App. 252, 337 P.3d 328 (2014)?

3. Does the Opinion err in affirming the trial court's denial of the Club's motion to reopen the record during remand proceedings where the County sought remedies on remand that it had not sought at the 2011 trial, where those remedies raised questions of fact, and where the Club's constitutional right to due process required the record to be reopened so that it could litigate those fact issues?

4. Does the Opinion err in affirming the trial court's granting of the County's motion to quash discovery where Washington law requires a party to be able to conduct discovery when that is necessary to effectively defend against a civil claim?

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

D. STATEMENT OF THE CASE

The Club has operated a shooting range at its present location in Bremerton since the Club was founded for "sport and national defense" in 1926. Op. at 2. As of 1993, the Club possessed a valid nonconforming use right for the property allowing it to operate as a shooting range. *Id.*

In 2011, Respondent Kitsap County (the "County") filed a complaint for injunctive and declaratory relief against the Club. *Id.* at 4. One of the County's claims was that the Club had unlawfully expanded its nonconforming use as a shooting range. *Id.* The trial court concluded that the Club had expanded its nonconforming use by (1) expanding its hours of operation, (2) allowing "commercial, for-profit use (including military training)," and (3) increasing sound levels "by allowing explosive devises [sic], higher caliber weaponry greater than [.]30 caliber and practical shooting." *Id.* (citing CP at 193–94).

The trial court permanently enjoined the Club from operating its shooting range until the Club applied for and obtained a conditional use permit. *Id.* at 4. The original trial decision also includes a second permanent injunction that reduces the Club's operating hours and prohibits the use of fully automatic weapons, "rifles greater than nominal .30 caliber," and exploding targets and cannons. App. 2 at 34 (CP (2016) at 203).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

In its appeal of the original trial decision, the Club sought reversal of the trial court's conclusion that the Club had unlawfully expanded. Op. at 5. In a published opinion, the Court of Appeals reversed the trial court's conclusion that the Club's increased hours of operation was an expansion, holding it was a permissible intensification. *Id.* at 7 (citing *KRRC*, 184 Wn. App. at 303). The court, however, affirmed that increased sound levels associated with the Club were an unlawful expansion of the Club's nonconforming use. *Id.* at 6 (citing *KRRC*, 184 Wn. App. at 274).

In addition, the Court of Appeals in *KRRC* vacated the trial court's permanent injunction prohibiting the Club from operating as a shooting range. *Id.* at 7 (citing *KRRC*, 184 Wn. App. at 303). This remedy was not authorized by law and violated the Club's nonconforming use rights, which included the right to intensify. *KRRC*, 184 Wn. App. at 300–03. The published opinion remanded the case with instructions for the trial court to fashion remedies to "specifically address[] the impermissible expansion of the Club's nonconforming use" and "reflect that 'some change in use—'intensification'—is allowed." *Id.* at 262, 301.

On remand, the Club issued interrogatories to the County to discover the new remedies it would be seeking and moved to reopen the record. Op. at 8. The County opposed reopening the record and moved to

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

quash discovery. *Id.* The trial court denied the motion to reopen the record and quashed discovery. *Id.* The trial court then permanently enjoined the Club's property from being used for "commercial, for-profit uses" or "military training uses" and prohibited "explosive devices," "weaponry greater than .30 caliber," and "practical shooting and uses" (collectively, "expansion injunctions"). *Id.* at 9.

The Club appealed, assigning error to the trial court's decisions to deny the Club's motion to reopen the record and grant the County's motion to quash discovery. *Id.* at 1. The Club also sought reversal of the expansion injunctions and the related declaratory judgment issued by the trial court on remand in support of those injunctions. *Id.*

The Court of Appeals issued its Opinion on November 21, 2017. The Opinion agreed with the Club that several of the expansion injunctions had to be vacated because they were "overbroad," "not narrowly tailored," "not properly tailored," "vague," and/or "not reasonably clear." *See id.* at 16–28 (vacating the terms of the injunction and declaratory judgment related to commercial, for-profit uses, use of explosive devices, use of high caliber weaponry greater than .30 caliber, and practical shooting and uses). The errors in the expansion injunctions and declaratory judgment constituted a reversible abuse of the trial court's discretion. *Id.* The Opinion therefore instructs the trial court, on second

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

remand, to refashion the expansion injunctions and declaratory judgment. *Id.* at 27–28.

The Opinion affirms the expansion injunction prohibiting "military training uses," the trial court's denial of the Club's motion to reopen the record, and its grant of the County's motion to quash discovery. *Id.* at 10–14, 27–28.

The Opinion affirmed the injunction against "military training uses" because the court held that *KRRC* "determined that the commercial, for-profit operation of firearms training courses primarily serving military personnel . . . constituted an impermissible expansion of the Club's nonconforming use" and the injunction was "tailored to remedy the Club's impermissible expansions of its nonconforming use." Op. at 19. The Opinion affirmed the trial court's refusal to reopen the record because the court held that *KRRC* did not expressly require the trial court to do so. Op. at 13. The Opinion affirmed the trial court's refusal to allow discovery because the court held that *KRRC* did not expressly "remand any factual questions for the trial court to consider, and the trial court determined that additional evidence was not necessary to fashion an appropriate remedy for the Club's impermissible expansions of use." Op. at 14.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

E. ARGUMENT

Pursuant to RAP 13.4(b)(4)–(6), the Club respectfully asks the Court to accept review of the issues presented because they identify portions of the Opinion that conflict with controlling law and are issues of public importance.

1. The Opinion Conflicts with Washington Law that Prohibits Vague and Overbroad Injunctions.

The Opinion affirms the trial court's injunction against "military training uses" of the Club's shooting range. Op. at 19, 28. This decision conflicts with applicable case law and CR 65(d), which require that "[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms;" and "shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained[.]" CR 65(d) (emphasis added).

"Federal Rule of Civil Procedure 65(d) is identical to CR 65(d) so cases interpreting the federal rule can be used for guidance." *All Star Gas, Inc., of Washington v. Bechard*, 100 Wn. App. 732, 736–37, 998 P.2d 367 (2000). The Ninth Circuit applied FRCP 65(d) in *Federal Election Comm'n v. Furgatch*, 869 F.2d 1256, 1263–64 (9th Cir. 1989), and held an injunction against "future similar violations of the Federal Election Campaign Act of 1971," was "susceptible to more than one interpretation"

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

and therefore failed to satisfy the "exacting requirements of Rule 65(d)[.]" *Id.* at 1264. The court remanded that case "for a statement of the precise conduct prohibited by the injunction." *Id.*

According to the U.S. Supreme Court,

> "the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood."

Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974).

Additionally, Washington appellate courts reverse or modify injunctions that are overbroad and not precisely tailored to prevent a specific harm without unnecessarily prohibiting lawful activities.

In *Chambers v. City of Mount Vernon*, the Washington Court of Appeals reversed the injunction to the extent it prohibited "any" quarry operations and affirmed to the extent it prohibited "conducting the quarry operation . . . in such a way as to constitute a public nuisance." 11 Wn. App. 357, 361–62, 522 P.2d 1184 (1974). There, an injunction shutting down an entire quarry operation was improper because the enjoined activities themselves were lawful so long as they did not cause a public nuisance. *Id.* The appellate court remanded that case for the trial court to modify the findings of fact, conclusions of law, and the decree to enjoin

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

only the quarry operations that were a nuisance while allowing other, lawful activities to continue. *Id.*

According to the Opinion, *KRRC* "determined that the commercial, for-profit operation of firearms training courses primarily serving military personnel was a fundamental change in the Club's use of its range and that this fundamental change constituted an impermissible expansion of the Club's nonconforming use." Op. at 19. The Opinion then affirms the trial court's broad injunction prohibiting all "military training uses" of the shooting range. *Id.*

Here, the trial court's injunction against "military training uses" fails to satisfy the exacting requirements of CR 65(d) and is inconsistent with applicable case law. The Opinion's failure to apply these legal standards provides grounds to reverse the military training expansion remedy and remand the case with instructions for a new remedy to be fashioned that is clear, specific, and narrowly tailored.

The remedy for the commercial military training expansion prohibits "[m]ilitary training uses," without defining this broad, vague, and ambiguous language. App. 3 at 3; CP (2016) at 1341. The dictionary provides several distinct definitions of "military," including "performed or made by armed forces military operations," "of or relating to soldiers, arms, or war," "of or relating to armed forces," and "supported by armed

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

force." *Military*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/military (last visited Dec. 20, 2017). The first would narrowly restrict the injunction to training sessions for on-duty military personnel organized and sponsored by a branch of the U.S. Armed Forces, which would be consistent with the determination in *KRRC* that "from 2002 through 2010 three for-profit companies regularly provided a variety of firearms courses at the Club's property, many for active duty Navy personnel." *KRRC*, 184 Wn. App. at 273.

The other definitions, however, go well beyond this, raising questions such as: (1) whether any military personnel, including reservists, could ever train at the Club, even while off duty and with no direct sponsorship or arrangements by a branch of the U.S. Armed Forces; (2) whether self-defense firearm training, training for hunting, training for competitive shooting, or any other training supported by the armed forces can take place at the Club; and (3) whether an individual could ever train at the Club, with or without firearms, for any purpose related to their existing, prospective, or potential military service. The vague and ambiguous injunction of all "military training uses" will prohibit activities that have little or no relationship to the official military training exercises that constituted an expansion of the nonconforming use.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

The Ninth Circuit applied FRCP 65 to reverse the injunction at issue in *Furgatch*, because it was susceptible to more than one interpretation, 869 F.2d at 1263–64. Likewise, because the injunction prohibiting all "military training uses" is susceptible to more than one interpretation, the Court of Appeals should have reversed it for violating CR 65(d). As in *Furgatch*, the Court of Appeals should have then remanded the issue "for a statement of the precise conduct prohibited by the injunction." *Id.* at 1264. This Court should accept review to correct the Court of Appeals' error in affirming the injunction of all "military training uses" at the Club.

2. *The Opinion Conflicts with Washington Law that Supports Reopening the Record on Remand.*

The Opinion affirms the trial court's denial of the Club's motion to reopen the record on remand. Op. at 10–13. This decision conflicts with *KRRC*'s instruction for the trial court to fashion remedies on remand that "reflect" the Club's right to intensify its nonconforming use. *KRRC*, 184 Wn. App. at 301. The record contains neither findings of fact delineating the Club's right to intensify its nonconforming use nor any findings from which it could be derived as a matter of law. The trial court, therefore, had to reopen the record and make new findings in order to fashion remedies that reflect the Club's right to intensify. By affirming the trial

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

court's decision to keep the record closed, the unpublished Opinion conflicts with the earlier, published opinion of *KRRC*. The Opinion also conflicts with controlling case law holding it is an abuse of discretion to deny a motion to reopen the record that would result in the introduction of decisive evidence.

The Washington Supreme Court held in *Rochester v. Tulp* that the trial court had abused its discretion when it refused to reopen the record to hear "apparently decisive evidence." 54 Wn.2d 71, 74, 337 P.2d 1062 (1959). The "decisive evidence" in *Rochester* showed the statute of limitations had not expired, which was an issue that was not resolved by the record at trial. *Id.*

KRRC instructed the trial court to fashion expansion remedies that "reflect the fact that some change in use—'intensification'—is allowed and only 'expansion' is unlawful." *KRRC*, 184 Wn. App. at 301. According to the Opinion, this meant the trial court had to fashion remedies for the Club's sound expansion that "reflect that only the more recent increases in noise levels" "emanating from the Club in the past five to six years" prior to the fall 2011 trial "constitute an expansion of use[.]" Op. at 24, 27–28.

The Opinion correctly holds, "the trial court did not make any findings regarding increased noise levels by high caliber weapons other

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

than fully and semiautomatic weapons." Op. at 22. In fact, the record contains no findings at all from which to identify the activities and conditions that existed at the Club prior to the sound expansion. Yet KRRC and the Opinion require the trial court to delineate those activities and conditions and not enjoin them. Thus, to fashion sound expansion remedies the trial court must hear new evidence and make new findings. It must weigh witness demeanor and other competing evidence regarding the activities and conditions associated with the Club before the onset of the sound expansion in 2005 or 2006. This evidence will decide the Club's right to intensify. Just as it was an abuse of discretion for the trial court to fashion sound expansion remedies that did not reflect the Club's right to intensify, it was an abuse of discretion for the trial court not to hear the decisive evidence delineating the Club's lawful intensification prior to the sound expansion. The Court must accept review to correct this error.

3. *The Opinion Conflicts with Constitutional Due Process Requirements that Require a Reopening of the Record When New Remedies Are Sought on Remand.*

The Opinion holds that the trial court did not abuse its discretion when it denied the Club's motion to reopen the record (Op. at 12), yet the opinion does not discuss the Club's argument that the record should have been reopened on remand because the County sought new remedies that it

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

had not sought at the original trial. Op. at 10–13; *see* App. 4 at 20–22, 30–31. These new remedies raised issues of fact that had not been litigated at trial because they were not then at issue. Under these circumstances, the Opinion's decision to affirm the trial court's decision to keep the record closed conflicts with constitutional law regarding due process rights.

"One of the most fundamental requirements of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Leticia Joy Arciniega v. James Clark*, B.A.P. No. CC-17-1154-SAKu, 2017 WL 6329748, at *10 (B.A.P. 9th Cir. Dec. 11, 2017) (unpublished opinion) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). In *Arciniega*, the Bankruptcy Appellate Panel of the Ninth Circuit held that, on second remand, the bankruptcy court was required to reopen the record and allow the respondent to offer evidence of his actual damages and whether they were proximately caused by the appellant because it was not until the first remand that the enforceability of a liquidated damages clause became an issue. *Id.*

The respondent in *Arciniega* brought a claim of fraud against the appellant in the appellant's bankruptcy proceeding. *Id.* at *3. The respondent's claim arose out of a contract that contained a liquidated damages clause on which the respondent exclusively relied for the

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

recovery of his damages. *Id.* at *2–3. The appellant made no arguments at trial to put the enforceability of the liquidated damages clause at issue, and thus the respondent never presented any evidence at trial of his actual damages. *Id.* at *3–4, 10. When the Ninth Circuit deemed the clause unenforceable during the second appeal of the case, it held that the respondent's due process rights would be violated if the record were not reopened on second remand to allow the respondent the opportunity to prove his actual damages and what proximately caused them. *Id.* at *10.

At the 2011 trial, the County sought and obtained a remedy for expansion that fully terminated the Club's nonconforming use right. App. 2 at 34; CP (2016) at 203. The County also obtained a public nuisance injunction. *Id.* That injunction does not prohibit "practical shooting" or use of "weaponry greater than .30 caliber." *Id.* The County did not request those remedies in its third amended complaint (which was the operative pleading at trial) or in its trial brief. App. 5 at 42; CP (2016) at 90, 106 (third amended complaint); App. 6 at 45; CP (2012) at 1910, 1942–44 (County's trial brief).

On remand, the County sought and obtained declaratory and injunctive relief prohibiting all practical shooting and all weaponry greater than .30 caliber. App. 2 at 34; CP (2016) at 203. Because the County had not sought those remedies at the original trial, the Club should have been

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

given an opportunity to obtain discovery and present evidence related to those remedies. The trial court erred in keeping the record closed, and the Opinion erred in affirming that decision. This Court should accept review to correct those errors.

4. *The Opinion Conflicts with Washington Case Law that Requires the Allowance of Extensive Discovery to Defend Against Civil Claims.*

The Opinion affirms the trial court's granting of the County's motion to quash all discovery during remand. Op. at 13–14. This decision conflicts with Washington case law that requires a civil litigant to be allowed to conduct discovery when necessary to defend against legal claims.

Washington places paramount value in a litigant's right to discovery. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782–83, 819 P.2d 370 (1991). In *Puget Sound Blood Center*, the Washington Supreme Court explained, "it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense." *Id.*

The Opinion affirms the trial court's determination that "additional evidence was not necessary to fashion an appropriate remedy for the Club's impermissible expansion of use." Op. at 14. This is puzzling because the Opinion also decided that the remedies issued by the trial

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

court were not appropriate and had to be vacated. The Opinion then instructed the trial court to fashion remedies that reflected the difference between conditions and activities that existed before the onset of the sound expansion in 2005 or 2006 and those that existed thereafter. As discussed above, the trial court cannot comply with these instructions without reopening the record.

Because the record must be reopened on remand, discovery must also be allowed. This is the only way for the Club to effectively defend itself against the expansion remedies sought by the County. This is particularly true in this case, where the County seeks remedies on remand it did not seek at trial. This Court should accept review so it can correct the Court of Appeals' error in affirming the trial court's decision to quash discovery on remand. The only

5. These Issues Are of Substantial Public Interest.

The presence of an issue of "substantial public interest" weighs in favor of the Court granting review. RAP 13.4(b)(4). Three criteria determine whether an issue is of substantial public interest:

> "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur."

Matter of McLaughlin, 100 Wn.2d 832, 838, 676 P.2d 444 (1984).

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

Here, the propriety of the injunction prohibiting all "military training uses" and the decision to keep the record closed on remand raise issues of a public nature because they affect the use of a shooting range that is open to the public. Injunctions can conceivably control almost any conduct and thereby shape public life in ways that money awards, divorce judgments, bankruptcy reorganizations, and other court orders do not.

The proper delineation of the Club's right to intensify its nonconforming use is a matter of substantial public interest. This issue pertains to land use rights, constitutional protections for property rights, and the constraints on nonconforming uses, which are rooted in each community's unique history.

A litigant's right to have decisive evidence heard and facts found in a judicial proceeding before a court decides their rights is of substantial public interest. This issue strikes at the heart of due process because the Club's right to intensify is at stake and the County is seeking new remedies to limit that right on remand that it did not seek during the original trial.

The Club's right to discovery on remand is of substantial public interest because an opportunity for discovery is necessary for any civil litigant to fairly and successfully defend or prosecute a claim in our justice system. Discovery allows the parties to develop relevant evidence from

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

which facts may be found and conclusions reached, and it allows them to prepare for trial. Without it, the truth cannot be effectively shown or found, and justice cannot be served. It is critical to the truth-finding function of any fact-dependent legal proceeding.

Issues raised in this petition are likely to recur because every injunction is subject to the requirements of CR 65, because every nonconforming use has a right to intensify that protects it from overbroad expansion remedies, and because there are few clear rules governing discovery and fact-finding procedures on remand. Some of these issues are likely to arise in this very case because the Opinion calls for a second remand to the trial court in which issues about discovery, reopening the record, and vague or ambiguous injunctions are bound to arise again.

This Court's authoritative determinations of the issues presented here would be highly desirable to guide judges and litigants in future cases. If such guidance already existed, perhaps this case would not have been remanded once, let alone a second time. This factor combined with the public nature of the questions presented and the likelihood that issues raised here will recur in this and other cases in the future weigh strongly in favor of granting review.

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CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

F. CONCLUSION

For the reasons stated above, the Club respectfully requests that the Court grant this petition for review and decide the assignments of error presented herein.

DATED: December 21, 2017

CHENOWETH LAW GROUP, P.C

/s/ Brooks M. Foster

Brian D. Chenoweth, WSBA No. 25877
Brooks M. Foster, OR Bar No. 042873
(pro hac vice)
510 SW Fifth Ave., Fifth Floor
Portland, OR 97204
Phone: (503) 221-7958
Of Attorney for Appellant

CHENOWETH LAW GROUP, PC
510 SW Fifth Avenue, Fifth Floor
Portland, OR 97204
Telephone: (503) 221-7958
Facsimile: (503) 221-2182
Email: brianc@northwestlaw.com

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

November 21, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KITSAP COUNTY, a political subdivision of the State of Washington, Respondent, v. KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington; and JOHN DOES AND JANE ROES I-XX, inclusive, Appellants. IN THE MATTER OF NUISANCE AND UNPERMITTED CONDITIONS LOCATED AT One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton, Washington,	No. 48781-1-II UNPUBLISHED OPINION

WORSWICK, J. — Kitsap Rifle and Revolver Club (Club) appeals the trial court's order on remand enjoining the Club from activities that constituted an impermissible expansion of its nonconforming use without first obtaining a conditional use permit and issuing a permanent injunction requiring the Club to obtain permits for site development activities. The Club argues that the trial court (1) abused its discretion by (a) denying its motion to reopen the trial record and (b) granting Kitsap County's (County) motion to quash discovery; (2) erred in ordering injunctive relief because the terms of the injunction are (a) overbroad and (b) vague; and (3) erred in entering declaratory judgment.

We vacate in part the trial court's injunction prohibiting "commercial, for-profit uses"; the "use of explosive devices including exploding targets"; the "use of high caliber weaponry greater than .30 caliber"; and "practical shooting uses, including organized competitions and practice." We remand the trial court's injunction in part with specific instructions to: fashion a remedy that reflects that the Club's allowance of commercial, for-profit businesses that provide firearms courses to primarily military personnel is an impermissible expansion of the Club's nonconforming use of its shooting range; fashion a remedy that implements its original permanent injunction prohibiting the use of "exploding targets and cannons;" clarify which weapons are prohibited because they create noise levels that constitute an impermissible expansion of the Club's nonconforming use; and clarify whether "practical use" includes only practical shooting practices and competitions or whether practical use includes other conduct. We also reverse in part and remand the trial court's declaratory judgment, but we otherwise affirm the trial court's Order Supplementing Judgment on Remand.[1]

FACTS

I. BACKGROUND

The Club has operated a shooting range in Bremerton since its founding in 1926. In 1993, the Kitsap County Board of Commissioners notified the Club that the County considered the Club's use of the shooting range to be a lawfully established nonconforming use. During and before 1993, the Club operated a rifle and pistol range. Club members and members of the general public used small caliber weapons, and shooting occurred only occasionally and for short

[1] Nothing in this opinion restricts the County from proceeding under its new ordinance, Kitsap County Code 10.25.

periods of time. The use of automatic weapons and rapid-fire shooting occurred infrequently. The US Navy had conducted firearms training at the Club on at least one occasion, but for-profit businesses did not conduct training at the range.

Later, the Club's use of the shooting range changed. The shooting range was frequently used for regularly scheduled practical shooting[2] practices and competitions, resulting in loud, rapid-fire shooting for several hours. For-profit businesses began conducting regular self-defense courses and active training exercises for active duty US Navy personnel at the shooting range. The Club also allowed the use of exploding targets and cannons.

The commercial and military use of the Club, use of explosive devices and higher caliber weaponry, and practical shooting practices and competitions increased the noise level of the Club's shooting activities. Shooting sounds became "clearly audible in the down range neighborhoods, and frequently loud, disruptive, pervasive, and long in duration." Clerk's Papers (CP) at 191.

The Club also developed portions of its shooting range without obtaining any type of County permit as required by the County's code. The Club extensively cleared, graded, and excavated wooded areas to create "shooting bays," removed trees and vegetation to create a rifle range, replaced a water course that ran across the rifle range with culverts, extended earthen berms along the rifle range that required excavation and refilling, and cut steep slopes in several locations on the range. CP at 178.

[2] In its original order, the trial court defined "practical shooting" as follows: "The Property is frequently used for regularly scheduled practical shooting practices and competitions, which use the shooting bays for rapid-fire shooting in multiple directions." CP at 188.

II. *KITSAP RIFLE*

In 2011, the County filed a complaint for an injunction, declaratory judgment, and nuisance abatement against the Club. The County sought declaratory judgment, declaring that the Club's changes in use of the shooting range were unlawful expansions of the Club's nonconforming use and requested an injunction enjoining the Club from operating its range.

The trial court conducted a lengthy bench trial and entered extensive findings of fact and conclusions of law. The trial court compared the Club's use of the shooting range from when the Club's nonconforming use was established in 1993 to the Club's present use of the range. The trial court concluded:

> The actions by [the Club] of
> (1) expanded hours;
> (2) commercial, for-profit use (including military training);
> (3) increasing the noise levels by allowing explosive devises [sic], higher caliber weaponry greater than [.]30 caliber and practical shooting
> significantly changed, altered, extended and enlarged the existing use.

CP at 193-94. As a result, the trial court concluded that these actions were expansions of use. The trial court also concluded that the Club violated various County code provisions by failing to obtain site development and conditional use permits for its extensive property development work. The trial court determined that the Club's developments of the shooting range were illegal uses of the property.

The trial court then issued a permanent injunction prohibiting the Club from operating its shooting range until it applied for, and the County issued, conditional use permits for the range. The trial court also issued a permanent injunction prohibiting the use of fully automatic firearms,

weaponry greater than .30 caliber, and exploding targets and cannons, and it restricted the Club's operating hours.[3]

The Club appealed the trial court's declaratory judgment and permanent injunctions to this court. *Kitsap County v. Kitsap Rifle & Revolver Club* (*Kitsap Rifle*), 184 Wn. App. 252, 266, 337 P.3d 328 (2014). While *Kitsap Rifle* was pending in this court, a commissioner of this court granted a stay of the trial court's injunction enjoining all shooting range activities on the Club's property. However, this court imposed conditions that prohibited the use of automatic weapons, cannons, and exploding targets at the shooting range.[4]

[3] The trial court issued an additional permanent injunction designed to abate the public nuisance conditions on the Club's shooting range. The public nuisance injunction enjoined the Club from the use of: fully automatic firearms, including but not limited to machine guns; rifles greater than .30 caliber; and exploding targets and cannons. The public nuisance injunction also prohibited the Club from operating its shooting range before 9:00 a.m. and after 7:00 p.m. In *Kitsap County v. Kitsap Rifle & Revolver Club* (*Kitsap Rifle*), 184 Wn. App. 252, 302, 337 P.3d 328 (2014), the court determined that the trial court did not abuse its discretion in issuing the public nuisance injunction. The public nuisance injunction is not at issue in this appeal, and nothing in this opinion should be read to mean that the Club is not still enjoined by that injunction.

[4] The commissioner's ruling imposed the following conditions:

> (1) Range safety officers must be present at all time[s] that shooting is occurring. Video recordings must be made while shooting is occurring.
> (2) [The Club] must allow officials from Kitsap County access to the property to monitor compliance with these conditions. It must allow those officials access to the video recordings.
> (3) Shooting must be restricted to between 8:00 A.M. to 8:00 P.M.
> (4) No fully automatic weapons may be fired.
> (5) No cannons may be fired, except on the Fourth of July, and no exploding targets may be used.

CP at 312.

A. *Expansions of Use*

In *Kitsap Rifle*, the Club did not assign error to any of the trial court's findings of fact regarding the Club's expansions of its nonconforming use. 184 Wn. App. at 267. As a result, the trial court's unchallenged findings were considered verities on appeal. 184 Wn. App. at 267. The *Kitsap Rifle* court determined that the trial court's unchallenged findings supported its legal conclusions that the Club's commercial and military use of the shooting range and the frequent and drastically increased noise levels were expansions of its nonconforming use. 184 Wn. App. at 273-74.

Additionally, the *Kitsap Rifle* court affirmed the trial court's rulings that the commercial use of the Club and its increased noise levels by allowing explosive devices, higher caliber weaponry, and practical shooting constituted an impermissible expansion of the Club's nonconforming use. 184 Wn. App. at 268. In concluding that the for-profit commercial and military use of the Club was an impermissible expansion, the court reasoned that "using the property to operate a commercial business primarily serving military personnel represented a fundamental change in use and was completely different in kind than using the property as a shooting range for Club members and the general public." 184 Wn. App. at 273.

The *Kitsap Rifle* court also determined that while the types of weapons and shooting patterns currently used at the range did not necessarily involve a different character of use than when the Club's nonconforming use was established in 1993, "the frequent and drastically increased noise levels found to exist at the Club constituted a fundamental change in the use of the property." 184 Wn. App. at 274. Therefore, the court held that the increased noise levels were an impermissible expansion of the Club's nonconforming use. 184 Wn. App. at 274.

Further, the court reversed the trial court's ruling that the Club's expansion of its operating hours constituted an impermissible expansion of its nonconforming use. 184 Wn. App. at 303. The *Kitsap Rifle* court reasoned that the Club's expansion of its operating hours constituted a permissible intensification of its nonconforming use because "increased hours of shooting range activities here do not effect a 'fundamental change' in the use and do not involve a use 'different in kind' than the nonconforming use." 184 Wn. App. at 273 (quoting *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979)).

B. *Permit Violations*

The *Kitsap Rifle* court noted that the Club did not deny that it had violated several provisions of the County's code by grading, excavating, and filling the land. 184 Wn. App. at 275. These violations of the County's code were unlawful uses of the Club's property. *See* 184 Wn. App. at 275. As a result, there was "no dispute that the Club's unpermitted development work on the property constituted unlawful uses." 184 Wn. App. at 275.

C. *Remedies*

The *Kitsap Rifle* court vacated the trial court's injunction prohibiting the Club from operating as a shooting range, holding that termination of the Club's nonconforming use status was improper. 184 Wn. App. at 303. The *Kitsap Rifle* court reasoned that the Club's use of the shooting range remained lawful. 184 Wn. App. at 300-01. As a result, the Club's unlawful expansion of its nonconforming use did not "trigger termination of the otherwise lawful nonconforming use." 184 Wn. App. at 298.

Instead, the *Kitsap Rifle* court instructed that "the appropriate remedy involves specifically addressing the impermissible expansion of the Club's nonconforming use and

unpermitted development activities while allowing the Club to operate as a shooting range." 184 Wn. App. at 262. Accordingly, the trial court's remedy on remand must reflect that "some change in use—'intensification'—is allowed and only 'expansion' is unlawful." 184 Wn. App. at 301. The court also noted that the County's code provided the appropriate remedy for the Club's permitting violations. 184 Wn. App. at 301.

III. REMAND

After this court remanded *Kitsap Rifle*, the Club served the County with interrogatories, and the County filed a motion to quash discovery. At a hearing on the County's motion to quash discovery, the trial court determined that discovery was not appropriate. The trial court reasoned that there was no need for discovery unless the record was reopened and that additional evidence was not needed to give effect to this court's instructions in *Kitsap Rifle*. Accordingly, the trial court granted the County's motion to quash discovery.

The Club also filed a motion to reopen the record. The Club sought to introduce evidence of the Club's operations during this court's stay order in *Kitsap Rifle*, including a study of the shooting range's noise levels during the stay. The Club argued that this evidence was necessary for the trial court to fashion a proper remedy on remand and for the trial court to resolve this court's factual questions in *Kitsap Rifle*. The trial court denied the Club's motion to reopen the record, stating that it "[did] not believe the Court of Appeals anticipated reopening the record" and that additional evidence was not necessary to determine the proper remedy for the Club's expansions of its nonconforming use. 2 Verbatim Report of Proceedings (VRP) at 45.

Later, the Club and the County presented argument regarding the proper remedy for the Club's expansions of its nonconforming use. The County proposed that the trial court enter an

amended judgment that incorporated its prior orders. The Club objected to an amended judgment and argued instead that the trial court should enter a supplemental judgment without incorporating or attaching documents from *Kitsap Rifle*.

The trial court entered an order supplementing judgment on remand. In its supplemental judgment, the trial court issued a declaratory judgment, declaring that

> activities and uses of the Property consisting of military training uses; commercial, for-profit uses; and uses increasing noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber and practical shooting, each constitute unlawful expansions of and changes to the nonconforming use of the Property as a shooting range.

CP at 1341.

In addition, the trial court issued a permanent injunction prohibiting the Club from commercial, for-profit uses; military training uses; the use of explosive devices, including exploding targets; the use of high caliber weaponry greater than .30 caliber; and practical shooting and uses, including organized competitions and practice sessions. The trial court determined that each of these uses constituted an impermissible expansion of the Club's use of the shooting range and should be enjoined until the County issues the Club a conditional use permit that specifically authorizes the expanded use. The trial court issued an additional permanent injunction, requiring the Club to "apply for and obtain site development activity permitting to cure violations of KCC [(Kitsap County Code)] Titles 12 and 19 found to exist on the Property in the original Judgment." CP at 1342. The Club appeals.

ANALYSIS[5]

I. REOPENING THE RECORD & DISCOVERY

The Club argues that the trial court abused its discretion by (a) denying its motion to reopen the trial record on remand and (b) granting the County's motion to quash discovery. We disagree.

A. *Motion To Reopen the Record*

The Club argues that the trial court abused its discretion by denying its motion to reopen the trial record on remand because the Club sought to admit additional, relevant evidence that was not reasonably available at the time of trial. We disagree.

We review the trial court's refusal to reopen the record for a manifest abuse of discretion. *Sweeny v. Sweeny*, 52 Wn.2d 337, 339, 324 P.2d 1096 (1958). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Hundtofte v. Encarnación*, 181 Wn.2d 1, 6, 330 P.3d 168 (2014). In determining whether to grant a party's motion to reopen the record, the trial court should consider whether the evidence is relevant to a material issue, is newly discovered, or could not have been offered at a reasonable time. 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 30.23, at 244 (2d ed. 2009). Evidence is relevant if it tends to make the existence of a fact that is

[5] As an initial matter, the County argues that we should not consider the Club's references to the "'Declaration of M. Carter in Support of Mot. to Stay'" because the declaration is outside the trial court's record. Br. of Resp't at 4. We do not review matters outside the record on appeal. *See City of Sumner v. Walsh*, 148 Wn.2d 490, 495, 61 P.3d 1111 (2003). "[A] record on appeal may not be supplemented by material which has not been included in the trial court record." *Snedigar v. Hodderssen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990). Because the declaration at issue is not part of the trial court record, we do not consider it.

of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

While *Kitsap Rifle* was pending in this court, this court stayed the trial court's order enjoining the Club from operating its shooting range but imposed certain conditions prohibiting the use of automatic weapons, cannons, and exploding targets. This court then decided *Kitsap Rifle*, holding that the Club's commercial and military use of the shooting range and the frequently and dramatically increased noise levels on the range constituted unlawful expansions of its nonconforming use. 184 Wn. App. at 273-74. The *Kitsap Rifle* court vacated the trial court's injunction precluding the Club from operating as a shooting range and remanded the case to the trial court to "fashion an appropriate remedy for the Club's unlawful expansion of its nonconforming use." 184 Wn. App. at 262.

In the Club's motion to reopen the record before the trial court, the Club sought to introduce evidence of its operations during this court's stay order, including a sound study conducted during the stay period. The trial court denied the Club's motion to reopen the record, determining that additional evidence was not necessary to fashion a proper remedy on remand.

The Club argues that its sound study was newly available evidence that would have shown that the Club had abated the increased noise levels on its shooting range. The Club argues that because it abated the impermissible expansion of its nonconforming use, injunctive relief was no longer necessary on remand. The Club's argument is unpersuasive.

The Club's sound study, and other proposed evidence, was obtained after trial, and it could not have been offered at a reasonable time during trial. But this fact alone does not mandate reopening the record.

The issue before the trial court on remand involved only the proper remedy for the Club's impermissible expansions of use. The *Kitsap Rifle* court did not say or suggest that factual questions remained on remand or that additional evidence was necessary to fashion an appropriate remedy. Whether the behavior of the Club, which was mandated by this court's interim order, was necessary or relevant was within the trial court's discretion. It is a reasonable conclusion that any change in the Club's use of the shooting range after trial did not make the fact that the Club had impermissibly expanded its nonconforming use, necessitating an appropriate remedy, any more or less probable.

Accordingly, the trial court's decision to deny the Club's motion to reopen the record on remand was based on tenable grounds and reasons. Therefore, the trial court did not manifestly abuse its discretion.

The Club also argues that the trial court violated the law of the case doctrine under RAP 2.5(c) because the *Kitsap Rifle* court's holdings required that the trial court reopen the record on remand and allow discovery. We disagree.

The law of the case doctrine is codified in RAP 2.5(c). *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 56, 366 P.3d 1246 (2015), *review denied*, 185 Wn.2d 1038 (2016). This doctrine stands for the proposition that "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

The *Kitsap Rifle* court affirmed the trial court's holdings that the Club's commercial use of its shooting range and dramatically increased noise levels were impermissible expansions of its nonconforming use. 184 Wn. App. at 261-62. The court ordered remand only "for the trial

court to fashion an appropriate remedy for the Club's unlawful expansion of its nonconforming use." 184 Wn. App. at 262. The *Kitsap Rifle* court did not address whether the record must be reopened on remand or whether the trial court must allow discovery.

While the Club cites the law of the case doctrine, it does not provide authority to support its contention that a trial court must reopen the record on remand absent direct instructions to do so. The *Kitsap Rifle* court did not hold that the trial court must reopen the record or allow discovery on remand. Because the trial court did not violate the *Kitsap Rifle* court's holdings on remand by denying the Club's motion to reopen the record, the trial court did not violate the law of the case doctrine. Thus, the Club's argument fails.

B. *Motion To Quash Discovery*

The Club also argues that the trial court abused its discretion by granting the County's motion to quash discovery because the Club was entitled to present evidence relevant to the factual questions raised on remand. We disagree.

We generally review a trial court's discovery order for an abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). The trial court is afforded broad discretion to manage the discovery process. *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 277, 191 P.3d 900 (2008). We reverse a trial court's discovery ruling "only 'on a clear showing' that the court's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *T.S.*, 157 Wn.2d at 423 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

After this court ordered remand in *Kitsap Rifle*, the Club served the County with interrogatories. The County then filed a motion to quash discovery, which the trial court granted

after concluding that discovery was not appropriate because the record would not be reopened on remand.

As discussed above, the *Kitsap Rifle* court affirmed the trial court's findings and conclusions that the Club's commercial use of its shooting range and the increased noise levels on the shooting range constituted an impermissible expansion of its nonconforming use. 184 Wn. App. at 273-74. The appellate court ordered remand for the trial court only to "fashion an appropriate remedy for the Club's unlawful expansion of its nonconforming use." 184 Wn. App. at 262. Accordingly, the *Kitsap Rifle* court did not remand any factual questions for the trial court to consider, and the trial court determined that additional evidence was not necessary to fashion an appropriate remedy for the Club's impermissible expansions of use. The Club fails to provide a clear showing that the trial court's decision granting the County's motion to quash discovery was based on untenable grounds or untenable reasons. Accordingly, the trial court did not abuse its discretion.

II. FORM & SCOPE OF THE INJUNCTION

The Club argues that the trial court erred in entering a permanent injunction enjoining (a) the Club's expansions of its nonconforming use and (b) site development activities because the terms of the injunctions are overbroad, vague, and prohibit the Club from engaging in the lawful use of its property. We agree in part, and we vacate in part and remand in part the trial court's injunction prohibiting "[c]ommercial, for-profit uses"; the "[u]se of explosive devices including exploding targets"; the "[u]se of high caliber weaponry greater than .30 caliber"; and "[p]ractical shooting, uses, including organized competitions and practice." CP at 1341.

A. *Legal Principles*

We review a trial court's decision to grant an injunction, and the terms of that injunction, for an abuse of discretion. *Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n*, 173 Wn. App. 778, 789, 295 P.3d 314 (2013). A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *Atwood v. Shanks*, 91 Wn. App. 404, 409, 958 P.2d 332 (1998). "Trial courts have broad discretionary power to fashion injunctive relief to fit the particular circumstances of the case before it," and we give the trial court's exercise of discretion great weight. *Hoover v. Warner*, 189 Wn. App. 509, 528, 358 P.3d 1174 (2015); *see Atwood*, 91 Wn. App. at 408-09.

CR 65(d) sets forth the form and scope of an injunction and provides that "[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Because Federal Rule of Civil Procedure 65(d) is identical to CR 65(d), we may look to cases interpreting the federal rule for guidance. *All Star Gas, Inc. of Washington v. Bechard*, 100 Wn. App. 732, 736-37, 998 P.2d 367 (2000).

Federal Rule 65(d) "'was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.'" *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1087 (9th Cir. 2004) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974)). As a result, Rule 65(d) requires that the language of an injunction be reasonably clear so that an ordinary person will know precisely what action is prohibited. *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985). Injunctions do not violate the requirements of

Rule 65(d) "unless they are so vague that they have no reasonably specific meaning." 762 F.2d at 726.

The scope of an injunction is decided on the facts of each case at the trial court's discretion. *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). The injunction "must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law." *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986). As a result, the trial court may not issue a more comprehensive injunction than is necessary to remedy proven abuses. *Whatcom County v. Kane*, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981).

B. *Injunction Enjoining Expansions of Use*

The Club argues that the trial court erred in entering a permanent injunction enjoining the expansions of its nonconforming use because the terms of the injunction are overbroad, vague, and prohibit the Club from engaging in the lawful use of its property. Specifically, the Club argues that the trial court erred in enjoining (1) commercial, for-profit uses; (2) military training uses; (3) use of explosive devices, including exploding targets; (4) use of high caliber weaponry greater than .30 caliber; and practical shooting and uses, including competitions and practice sessions. We agree in part and discuss each argument in turn.

1. Commercial, For-Profit Uses

The Club argues that the trial court's injunction enjoining "commercial, for-profit uses" is overbroad and is not narrowly tailored. We agree. Accordingly, we vacate this term of the injunction and remand with specific instructions to the trial court to fashion a remedy that reflects, consistent with this court's opinion in *Kitsap Rifle*, that the Club's operation of commercial, for-profit businesses that provide firearms courses to primarily military personnel is

an impermissible expansion of the Club's nonconforming use, not all commercial, for-profit uses.

In its original order, the trial court found that three different commercial, for-profit companies conducted regular self-defense courses and active training exercises for active duty military personnel at the Club's shooting range. When the Club's nonconforming use was established in 1993, commercial, for-profit businesses did not conduct firearms training at the range. The trial court concluded that the Club's use of the shooting range to operate commercial businesses primarily serving military personnel constituted an expansion of the Club's nonconforming use.

In *Kitsap Rifle*, the court determined that the operation of commercial, for-profit businesses that provided firearms courses at the Club's shooting range was an impermissible expansion of use. 184 Wn. App. at 273-74. The *Kitsap Rifle* court reasoned that the operation of commercial, for-profit businesses that conducted firearms training serving primarily military personnel was a fundamental change in the Club's use of its shooting range and was different in kind from the Club's operations at the time its nonconforming use was established. 184 Wn. App. at 273. On remand, the trial court entered a supplemental judgment that included an injunction prohibiting "[c]ommercial, for-profit uses" of the Club's shooting range. CP at 1341.

The injunction's prohibition of "commercial, for-profit uses" is not reasonably clear and is not tailored to remedy the Club's impermissible expansion of use by permitting the commercial and military use of its shooting range, as acknowledged in *Kitsap Rifle*. The trial court found that multiple commercial, for-profit companies conducted firearms training courses at the Club's shooting range. The *Kitsap Rifle* court determined that the commercial, for-profit

operation of these firearms training courses was a fundamental change in the Club's use of its range and that this fundamental change constituted an impermissible expansion of the Club's nonconforming use. In its supplemental order, the trial court enjoined "commercial, for-profit uses," but this term appears to prohibit all commercial, for-profit operations at the Club's shooting range. Further, the trial court's injunction is not limited to only commercial, for-profit businesses that provide firearms training primarily for military personnel. As a result, this term of the trial court's injunction is more comprehensive than necessary to remedy the Club's expansions of its nonconforming use.

Accordingly, the trial court abused its discretion in enjoining "commercial, for-profit uses." Thus, we vacate this term and remand with specific instructions to the trial court to fashion a remedy that reflects that the Club's operation of commercial, for-profit businesses that provide firearms courses to primarily military personnel is an impermissible expansion of the Club's nonconforming use of its shooting range.

2. Military Training Uses

The Club also argues that the trial court's injunction enjoining "military training uses" is overbroad and vague. We disagree.

The trial court found that the US Navy had conducted firearm exercises at the Club's shooting range on at least one occasion prior to 1993. The trial court also found that after 1993, multiple commercial, for-profit businesses conducted firearms training for military personnel and that US Navy personnel had performed firearm exercises. In its original order, the trial court concluded that the Club's military training uses were an impermissible expansion of its nonconforming use.

The *Kitsap Rifle* court determined that the commercial, for-profit operation of firearms training courses primarily serving military personnel was a fundamental change in the Club's use of its range and that this fundamental change constituted an impermissible expansion of the Club's nonconforming use. 184 Wn. App. at 273-74. On remand, the trial court entered an injunction enjoining "[m]ilitary training uses" of the Club's shooting range because it constituted an impermissible expansion of the Club's nonconforming use. CP at 1341.

The trial court's original order made clear that military exercises and firearms training were impermissible expansions of the Club's nonconforming use. The *Kitsap Rifle* court agreed that for-profit firearms training that primarily served military personnel was a fundamental change in the Club's use of its shooting range and that this use was an impermissible expansion of use. 184 Wn. App. at 273-74. As a result, the trial court's injunction enjoining "military training uses" is tailored to remedy the Club's impermissible expansions of its nonconforming use. Moreover, reading the trial court's original order and supplemental order together,[6] the trial court's injunction is specific in terms, and it is reasonably clear that operating military training is prohibited. Therefore, the trial court did not err in enjoining the Club from "military training uses."

3. Use of Explosive Devises

The Club also argues that the trial court's injunction enjoining the "use of explosive devices including exploding targets" is overbroad and vague. We agree. Thus, we vacate this

[6] To the extent that the Club argues that we cannot review the trial court's original order and its supplemental order together, we disagree. The supplemental order is a continuation of the trial court's original order. *See Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n*, 42 Wn.2d 648, 652, 257 P.2d 629 (1953) ("[S]upplemental proceedings are not a new and independent action but are merely a continuation of the original or main action and are auxiliary thereto.").

term of the injunction and remand with specific instructions to the trial court to clarify which explosive devices were found to create an impermissible expansion of the Club's nonconforming use.

In its original order, the trial court found that the Club allowed the use of exploding targets and cannons that increased the shooting range's sound levels and caused nearby homes to shake. The trial court also found that exploding targets and cannons were not commonly used by the Club when its nonconforming use was established in 1993 and concluded that their use constituted an impermissible expansion of use. The trial court's original permanent injunction prohibited the use of "exploding targets and cannons." CP at 203.

In *Kitsap Rifle*, the court held that "the frequent and drastically increased noise levels found to exist at the Club constituted a fundamental change in the use of the property." 184 Wn. App. at 274. As a result, the court concluded that the increased noise levels created, in part, by the Club's use of exploding targets and cannons were an expansion of the Club's nonconforming use. *See* 184 Wn. App. at 274. On remand, the trial court entered a supplemental judgment and enjoined the Club from the "[u]se of explosive devices including exploding targets." CP at 1341.

The trial court's injunction prohibiting the use of "explosive devices" is overbroad and prohibits more than necessary to remedy the increased noise levels at the shooting range. In its broadest terms, this would include a bullet because it is an explosive device. In its original order, the trial court found only that the use of exploding targets and cannons at the Club created loud booming noises and shook nearby homes. The *Kitsap Rifle* court agreed that the use of exploding targets and cannons contributed to the Club's drastically increased noise levels. The trial court's all or nothing prohibition of all explosive devices is too broad to remedy the noise

expansion created by the use of exploding targets and cannons. As a result, the trial court's prohibition of all explosive devices is more comprehensive than necessary to remedy the Club's impermissible expansions of use.

Therefore, the trial court abused its discretion in entering an injunction enjoining the "use of explosive devices including exploding targets." Accordingly, we vacate this term of the injunction and remand with specific instructions to the trial court to fashion a remedy that implements its original permanent injunction prohibiting the use of "exploding targets and cannons."

4. Use of High Caliber Weaponry

The Club also argues that the trial court erred in entering an injunction prohibiting the "use of high caliber weaponry greater than .30 caliber" because the term is overbroad and not properly tailored. We agree. Accordingly, we vacate this term of the injunction and remand to the trial court with specific instructions to clarify which weapons are prohibited because they create noise levels that constitute an impermissible expansion of the Club's nonconforming use.

In its original order, the trial court found that fully automatic weapons were regularly used more recently at the Club and that rapid-fire shooting occurred frequently. The trial court also found that the "[u]se of fully automatic weapons, and constant firing of semiautomatic weapons led several witnesses to describe their everyday lives as being exposed to the 'sounds of war.'" CP at 191. The trial court's original permanent injunction prohibited the use of "rifles of greater than nominal .30 caliber." CP at 203.

The *Kitsap Rifle* court held that the noise created by the use of fully and semiautomatic weapons created an impermissible noise expansion because it contributed to the shooting range's

dramatically increased noise levels. 184 Wn. App. at 274. On remand, the trial court entered an injunction that prohibited the "[u]se of high caliber weaponry greater than .30 caliber." CP at 1341.

Although the weapon's caliber may factor into the trial court's determination that certain activities constitute a nonconforming use, the term of the trial court's language enjoining the use of high caliber weaponry is overbroad. The trial court's original order determined that automatic weapons and rapid-fire shooting led to the Club's impermissible noise expansion. The permanent injunction at issue appears to restrict all weapons that are greater than .30 caliber, such as pistols and shotguns. However, the trial court did not make any findings regarding increased noise levels by high caliber weapons other than fully and semiautomatic weapons.

Moreover, the *Kitsap Rifle* court held that, on remand, the trial court's remedy must reflect that only expansion is unlawful. 184 Wn. App. at 301. In its original order, the trial court found that activities including higher caliber weaponry had caused "an increase in the noise level emanating from the Club in the past five to six years." CP at 192. The trial court's injunction prohibits weapons that were not found to constitute an impermissible expansion of use. As a result, the trial court's injunction is overbroad and is not tailored to remedy the Club's impermissible noise expansion. The trial court's remedy must reflect that only the more recent increases in noise levels constitute an expansion of use.

Accordingly, the trial court abused its discretion and violated CR 65(d) by enjoining the "use of high caliber weaponry greater than .30 caliber." Thus, we vacate this term of the injunction and remand to the trial court with specific instructions to clarify which weapons are

prohibited because they create noise levels that constitute an impermissible expansion of the Club's nonconforming use.

5. Practical Shooting

The Club also argues that the trial court erred in entering an injunction prohibiting "[p]ractical shooting, uses, including organized competitions and practice" because the term is not reasonably clear. Br. of Appellant at 48 [(quoting CP at 1341)].We agree. As a result, we vacate this term of the injunction and remand to the trial court with specific instructions to clarify whether "practical use" includes only practical shooting practices and competitions or whether practical use includes other conduct.

The trial court found in its original order that the Club's shooting range was frequently used for regular practical shooting practices and competitions. The trial court also found that the practical shooting practices and competitions resulted in rapid-fire shooting for a number of hours. The *Kitsap Rifle* court affirmed the trial court's conclusion that the Club's practical shooting practices and competitions increased the shooting range's noise levels and created an impermissible expansion of the Club's nonconforming use. 184 Wn. App. at 274. On remand, the trial court entered an injunction enjoining "[p]ractical shooting, uses, including organized competitions and practice." CP at 1341.

The injunction's prohibition of "practical shooting, uses, including organized competitions and practice" is not reasonably clear. The trial court's original order finds only that "regularly scheduled practical shooting practices and competitions" contributed to the increase in noise levels on the Club's shooting range. CP at 188. Reading the trial court's supplemental order and original order together, the trial court appears to prohibit more than only regularly

scheduled practical shooting practices and competitions. In its original order, the trial court found that activities including practical shooting competitions had caused "an increase in the noise level emanating from the Club in the past five to six years." CP at 192. The trial court's remedy must reflect that only the more recent increases in noise levels constitute an expansion of use.

Moreover, it is unclear what constitutes practical shooting uses, other than practical shooting practices and competitions, and what practical shooting uses are prohibited. Because the injunction's prohibition of practical shooting is not so reasonably clear that an ordinary person would know precisely what action is prohibited, it is so vague that is has no reasonably specific meaning. As a result, that term violates the specificity requirements in CR 65(d).

Consequently, the trial court abused its discretion in enjoining "practical shooting, uses, including organized competitions and practice." Accordingly, we vacate this term and remand to the trial court with specific instructions to clarify whether "practical use" includes only practical shooting practices and competitions or whether practical use includes other conduct.[7]

C. *Injunction Enjoining Site Development*

The Club also argues that the trial court erred in entering a permanent injunction enjoining site development activities at the shooting range because the terms of the injunction are vague. Specifically, the Club argues that the terms of the injunction are vague because the

[7] The trial court's remedy may impose limitations on the frequency and duration of practical shooting events to reflect that the more recent increases in noise levels from the Club's practical shooting competitions constituted an impermissible expansion of use.

injunction references an outside document, the court's original order, for meaning. We find the Club's argument unpersuasive.

On remand, the trial court issued an additional injunction that required the Club to "apply for and obtain site development activity permitting to cure violations of KCC Titles 12 and 19 found to exist on the Property in the original Judgment." CP at 1342. While CR 65(d) states that an injunction should not "reference to the complaint or other document, the act or acts sought to be restrained," we do not consider the trial court's original order to be a separate document under CR 65(d). The trial court's supplemental order on remand explicitly supplemented the trial court's original order. As a result, the supplemental order is a continuation of the trial court's original order. *See Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n*, 42 Wn.2d 648, 652, 257 P.2d 629 (1953) ("[S]upplemental proceedings are not a new and independent action but are merely a continuation of the original or main action and are auxiliary thereto."). Thus, the Club's argument fails.

III. DECLARATORY JUDGMENT

The Club also argues that the trial court erred in entering declaratory judgment because its legal conclusions regarding which actions were an expansion of the Club's nonconforming use conflict with this court's holdings in *Kitsap Rifle*. We disagree with the Club's argument but nonetheless reverse and remand the trial court's declaratory judgment in part.

In reviewing a declaratory judgment, we review whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d

369 (2003). Unchallenged findings of fact are verities on appeal. *Buck Mountain Owners' Ass'n v. Prestwich*, 174 Wn. App. 702, 714, 308 P.3d 644 (2013).

As discussed above, the law of the case doctrine binds this court to the prior appeal's holdings. *Humphrey Indus., Ltd. v. Clay St. Assocs.*, 176 Wn.2d 662, 669, 295 P.3d 231 (2013). Questions that were decided by the prior appellate decision, or that could have been decided if they had been raised on appeal, "'will not again be considered on a subsequent appeal if there is no substantial change in the evidence.'" *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)).

In *Kitsap Rifle*, the Club did not assign error to any of the trial court's findings of fact regarding the Club's expansions of its nonconforming use. 184 Wn. App. at 267. As a result, the trial court's unchallenged findings were considered verities on appeal. 184 Wn. App. at 267. The *Kitsap Rifle* court determined that the trial court's unchallenged findings supported its legal conclusions that the Club's commercial and military use of the shooting range and the frequent and drastically increased noise levels were expansions of its nonconforming use. 184 Wn. App. at 273-74. Accordingly, the *Kitsap Rifle* court affirmed the trial court's rulings that the commercial use and increased noise levels were impermissible expansions of use. 184 Wn. App. at 261-62.

On remand, the trial court granted Kitsap County a declaratory judgment, declaring that the Club's "military training uses; commercial, for-profit uses; and uses increasing noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber and practical shooting, each constitute unlawful expansions of and changes to the nonconforming use of the . . . shooting range." CP at 1341.

The *Kitsap Rifle* court affirmed the trial court's conclusions that the Club's commercial and military use of the shooting range, as well as its increased noise levels, were expansions of the Club's nonconforming use because the trial court's conclusions were supported by its unchallenged findings. Because this court affirmed these conclusions in *Kitsap Rifle*, the trial court's conclusions of law regarding the Club's expansions of its nonconforming use are the law of the case, and we are bound by those conclusions in this subsequent appeal. Moreover, the law of the case doctrine provides that we may not again consider whether the trial court's findings of fact support its conclusions of law. Because the law of the case prescribes that the trial court's conclusions of law are supported by its findings of fact, we do not review them here.

Despite this, the trial court erred in entering declaratory judgment because its declaratory judgment does not conform to its conclusions of law and is contrary to this court's opinion in *Kitsap Rifle*. As discussed above, the trial court's declaratory judgment and injunction prohibit more than was necessary to remedy the Club's expansions of its nonconforming use. Accordingly, we reverse in part and remand the trial court's declaratory judgment with instructions to comply with this court's instructions regarding the permanent injunction.

CONCLUSION

We vacate in part the trial court's injunction prohibiting "commercial, for-profit uses"; the "use of explosive devices including exploding targets"; the "use of high caliber weaponry greater than .30 caliber"; and "practical shooting, uses, including organized competitions and practice." We remand the trial court's injunction in part with specific instructions to: (1) fashion a remedy that reflects that the Club's allowance of commercial, for-profit businesses that provide firearms courses to primarily military personnel is an impermissible expansion of the Club's

nonconforming use of its shooting range; (2) clarify which explosive devices were found to create an impermissible expansion of the Club's nonconforming use; (3) fashion a remedy that implements its original permanent injunction prohibiting the use of "exploding targets and cannons;" and (4) clarify whether "practical use" includes only practical shooting practices and competitions or whether practical shooting includes other conduct. We also reverse in part and remand the trial court's declaratory judgment with instructions to comply with this court's instructions regarding the permanent injunction, but we otherwise affirm the trial court's Order Supplementing Judgment on Remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bridgewater, C.J.

Maxa, J.

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiff,

v.

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

Defendants,

and,

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

NO. 10-2-12913-3

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

THIS MATTER having come on regularly for trial before the undersigned Judge of the above-entitled Court, and the matter having been tried to the bench; presentation of preliminary motions and evidence commenced on September 28, 2011 and concluded on October 27, 2011; the Court allowed submission of written closing arguments and submissions of Findings of Fact

INJUNCTION (EFFECTIVE IMMEDIATELY UNLESS NOTED TO CONTRARY)

6. A permanent, mandatory and prohibitive injunction is hereby issued enjoining use of the Property as a shooting range until violations of Title 17 Kitsap County Code are resolved by application for and issuance of a conditional use permit for use of the Property as a private recreational facility or other use authorized under KCC Chapter 17.381. The County may condition issuance of this permit upon successful application for all after-the-fact permits required pursuant to Kitsap County Code Titles 12 and 19.

7. A permanent, mandatory and prohibitive injunction is hereby issued further enjoining the following uses of the Property, which shall be effective immediately:

a. Use of fully automatic firearms, including but not limited to machine guns;

b. Use of rifles of greater than nominal .30 caliber;

c. Use of exploding targets and cannons; and

d. Use of the Property as an outdoor shooting range before the hour of 9 a.m. in the morning or after the hour of 7 p.m. in the evening.

WARRANT OF ABATEMENT

8. The Court hereby authorizes issuance of a WARRANT OF ABATEMENT, pursuant to RCW 7.48.260, the detail of which shall be determined by the Court at a later hearing before the undersigned.

9. The costs of abatement shall abide further order of the Court.

10. This Court retains jurisdiction to enforce this order by all lawful means including imposition of contempt sanctions and fines.

COSTS AND FEES

11. Pursuant to KCC 17.530.030, Defendant Kitsap Rifle and Revolver Club shall pay the costs of the County to prosecute this lawsuit, in an amount to be determined by later order of the Court.

DATED this 9 day of February, 2012.

JUDGE SUSAN K. SERKO

FILED
DEPT. 14
IN OPEN COURT
FEB 09 2012
Pierce County Clerk
By DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

KITSAP COUNTY, a political subdivision of the State of Washington Plaintiff, v. KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE ROES I-XX, inclusive Defendants and IN THE MATTER OF NUISANCE AND UNPERMITTED CONDITIONS LOCATED AT One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton Washington	NO. 10-2-12913-3 ORDER SUPPLEMENTING JUDGMENT ON REMAND

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court for further proceedings upon remand from Division II of the Court of Appeals. The parties appeared through their attorneys of record Christine M. Palmer and Neil R. Wachter for the Plaintiff and Brian Chenoweth and Brooks Foster for the Defendant and submitted written briefs and proposed amended judgments to address the issue of a revised remedy. The Court considered the

TINA R. ROBINSON
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083

facts of this action.

III. ORDERS

A. The following orders will replace and supplement Orders No. 1 and 2, page 33 of the Judgment, and Order No. 6, page 34 of the Judgment:

DECLARATORY JUDGMENT

1. Kitsap County's request pursuant to Chapter 7.24 RCW for judgment declaring that activities and uses of the Property consisting of military training uses; commercial, for-profit uses; and uses increasing noise levels by allowing explosive devices, higher caliber weaponry greater than .30 caliber and practical shooting, each constitute unlawful expansions of and changes to the nonconforming use of the Property as a shooting range by operation of former KCC §17.455.060, KCC Chapter 17.460, KCC §17.100.030, and Washington common law regarding nonconforming uses, is hereby GRANTED.

6. **LAND USE INJUNCTION (EFFECTIVE IMMEDIATELY)**

a. A permanent, mandatory and prohibitive injunction is hereby issued enjoining each of the following expanded uses of the Property until such time that a conditional use permit is applied for and issued to specifically authorize the intended changed or expanded use(s):

1. Commercial, for-profit uses;

2. Military training uses;

3. Use of explosive devices including exploding targets;

4. Use of high caliber weaponry greater than .30 caliber; and

5. Practical shooting, uses, including organized competitions and practice sessions.

TINA R. ROBINSON
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083

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

B. The Court further orders that a WARRANT OF ABATEMENT may be authorized upon further application by the Plaintiff, in the event that the Defendant's participation in the County permitting process does not cure the code violations and permitting deficiencies on the Property.

DONE IN OPEN COURT this 5th day of February, 2016.

HON. SUSAN K. SERKO, JUDGE
PIERCE COUNTY SUPERIOR COURT

FILED
DEPT. 14
IN OPEN COURT
FEB 05 2016
Pierce County Clerk
By..... DEPUTY

Presented by:

NEIL R. WACHTER, WSBA No. 23278
Special Deputy Prosecuting Attorney
CHRISTINE M. PALMER; WSBA No. 42560
Deputy Prosecuting Attorney
Kitsap County Prosecutor's Office
Attorneys for Plaintiff Kitsap County

APPROVED FOR ENTRY:

BRIAN D. CHENOWETH, WSBA No. 25877
BROOKS FOSTER, Appearing *pro hac vice*
Attorneys for Defendant Kitsap Rifle and Revolver Club

TINA R. ROBINSON
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083

No. 48781-1 –II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Appellants,

and

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

BRIEF OF APPELLANT

Brian D. Chenoweth, WSBA No. 25877
Brooks M. Foster (*pro hac vice*), OSB No. 042873
Attorneys for Appellant

Chenoweth Law Group, PC
510 SW Fifth Avenue / Fifth Fl.
Portland, OR 97204
Telephone: (503) 221-7958

practical shooting events and competitions in detail.[5] In 2003, Club members participated in IPSC 3-gun competitions where participants fired up to 200 rounds of ammunition from handguns, rifles, and shotguns at different targets placed in different locations.[6] Other practical shooting events and competitions prior to 2005 involved participants firing high-powered pistols at targets placed in multiple directions.[7] These were the same type of shooting activities that had occurred at the property since the early 1990s.[8]

In spite of all this uncontroverted evidence, the trial court enjoined all "practical shooting, uses, including organized competitions and practice sessions" at the Club. CP (2016) at 1341. The trial court made no findings about the nature and scope of the Club's practical and action shooting activities before the sound expansion began in 2005 or 2006, made no effort to allow those activities to continue, and did not appear to have fashioned a remedy that reflected the Club's right to continue and intensify its nonconforming use. *Id.*

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[5] *See* CP (2016) at 1130–1258 (*Decl. of Kevin T. Gross* ("Gross Decl.") and attached exhibits 38–52 from preliminary injunction proceeding). The Court admitted these materials as part of the trial record. CP (2016) at 1070–71.

[6] *Id.* at 1172–73 (Gross Decl., Ex. 40); *id.* at 1051; *id.* at 1054 (Marcus Carter's testimony regarding USPSA three-gun competitions).

[7] *Id.* at 1213–14 (Gross Decl., Ex. 46).

[8] *Id.* at 1074 (testimony of Jeffrey Hayes regarding his participation in 1991 or 1992 USPA competition at Club); *id.* at 1207 (Gross Decl., Ex. 45) (referencing 1995 IPSC match at Club's property).

As an additional remedy for the sound expansion, the trial court enjoined the use of all "weaponry greater than .30 caliber" at the Club. *Id.* at 1341. Having been denied discovery and a factfinding hearing, the Club pointed out that rifles greater than "nominal .30 caliber" were already prohibited by the noise nuisance injunction and argued the Club's right to continue and intensify should include weaponry and calibers used before 2005 or 2006. *Id.* at 1037–38. The trial court again made no findings regarding sound or intensification and prohibited all "high caliber weaponry greater than .30 caliber." *Id.* at 1341.

In a motion for reconsideration, the Club presented the declaration of Executive Officer Marcus Carter attesting that the vast majority of firearms used at the Club since at least 1988 or 1989 had exceeded 30 caliber. *Id.* at 1357–59. The declaration also explained there is no direct relationship between the caliber of a firearm and the amount of sound it produces. *Id.* at 1357. The declaration discussed the many common handguns, shotguns, air rifles, and even arrows that appeared to be prohibited by the new ban on "weaponry greater than .30 caliber," including common firearms like the "30 ought 6" (aka "30-06"), "30-30," and "3 oh 8" (aka "308") rifles, in addition to .357, 45 caliber, and 9 millimeter pistols, all commonly owned and used by the public, law enforcement, and others. *Id.* at 1359. The motion for reconsideration also

objected that the County had never sought to enjoin all "weaponry greater than .30 caliber" prior to remand, which was an additional reason why the trial court should have reopened the record before fashioning any remedy, to allow the Club to present evidence in opposition. *Id.* at 1346. The trial court's order said the court had considered the uncontroverted declaration but denied reconsideration. *Id.* at 1363.

The third injunction issued on remand to remedy the sound expansion was the prohibition on all "explosive devices including exploding targets." *Id.* at 1341. The Club objected that this remedy violated the Club's nonconforming use rights, was improperly tailored, vague, ambiguous, overbroad, and inconsistent with the portion of the noise nuisance injunction that prohibited all "exploding targets," without using the confusing term "explosive devices." *Id.* at 1330–31, 1335–36. The trial decision had specifically found that "Use of cannons or explosives was not common at the Club in approximately 1993," correctly implying they were used, albeit infrequently, at that time. *Id.* at 192 (FOF 87). In spite of this, the trial court enjoined all "explosive devices including exploding targets," again offering no indication of how this injunction reflected the Club's right to continue and intensify its nonconforming use. *Id.* at 1341.

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The trial court's denial of the Club's motion to reopen the record prevented the Club from discovering and presenting new evidence from the four year period between the fall 2011 trial and the remand proceedings. Under the circumstances, this was an abuse of discretion.

When the case was remanded, the Club had operated for several years under limitations imposed by this Court as part of its April 2012 stay order that were very similar to the limitations in the second injunction. CP (2016) at 307, 312. There were also newly available facts surrounding a sound study conducted by a County expert while that stay order was in effect, who collected data from locations outside the Club while the Club's shooting bays were being used for a practical pistol and rifle shooting competition. *Id.* at 386.

This type of evidence was particularly relevant given that the "purpose of an injunction is not to punish a wrongdoer for past actions but to protect a party from present or future wrongful acts." *Agronic Corp. of America v. deBough*, 21 Wn. App. 459, 464–65, 585 P.2d 821 (1978). If the Club had proven the sound expansion was already abated, no additional expansion remedy should have been issued at all.

The circumstances supporting a reopening of the factual record also included the fact that the County was seeking new remedies it had never sought at trial. If the County had sought the same injunction

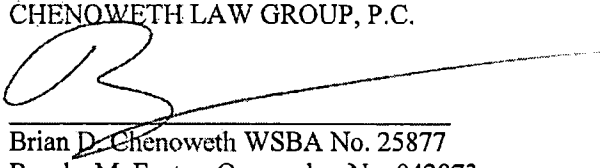
remedies at trial that it had sought on remand, the record might have already contained all relevant evidence and all of the operative questions of fact might have already been answered. That was not the case.

If the trial court had reopened the record, the Club's new evidence would have addressed the commercial military training expansion as well as the sound expansion. A declaration filed by the Club in support of its most recent motion to stay, for example, explains that the range relies on "third-party commercial or for-profit businesses to provide necessary services such as sanitary service, water service, firearms registration, and other management and educational services." Carter Decl. ¶ 16 (filed July 14, 2016). The Supplemental Judgment appears to prohibit those practices, and even appears to prohibit the Club from paying private firearm instructors to provide classes to Club members and guests, even though such use of the property has never been deemed an expansion.

Before granting any injunction, a court must balance the relative interests of the parties and the public. *Tyler Pipe Indus., Inc. v. State Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). A trial court abuses its discretion if it imposes a summary injunction without proper consideration of the fact-driven inquiries inherent in balancing the burdens on the parties. *Steury v. Johnson*, 90 Wn. App. 401, 407, 957 P.2d 772 (1998). Another fact issue raised by any injunction is whether it is

DATED: December 23, 2016.

CHENOWETH LAW GROUP, P.C.



Brian D. Chenoweth WSBA No. 25877
Brooks M. Foster, Oregon bar No. 042873
(*pro hac vice*)
Of Attorneys for Appellant
Kitsap Rifle and Revolver Club
510 SW Fifth Ave., Fifth Floor
Portland, OR 97204
(503) 221-7958

Hon. Susan Serko

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

KITSAP COUNTY, a political subdivision of the State of Washington Plaintiff, v. KITSAP RIFLE AND REVOLVER CLUB, a not-for-profit corporation registered in the State of Washington, and JOHN DOES and JANE ROES I-XX, inclusive, Defendants and IN THE MATTER OF NUISANCE AND UNPERMITTED CONDITIONS LOCATED AT One 72-acre parcel identified by Kitsap County Tax Parcel ID No. 362501-4-002-1006 with street address 4900 Seabeck Highway NW, Bremerton Washington	NO. 10-2-12913-3 THIRD AMENDED COMPLAINT FOR INJUNCTION, DECLARATORY JUDGMENT AND ABATEMENT OF NUISANCE

COMES NOW the Plaintiff, KITSAP COUNTY, and alleges as follows:

I. JURISDICTION AND VENUE

1. Pierce County Superior Court has jurisdiction over the parties pursuant to RCW

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083

X. THIRD CAUSE OF ACTION

Common Law Nuisance

77. Plaintiff re-alleges paragraphs 1 through 76 above as if fully set forth and incorporate those paragraphs by reference herein.

78. Plaintiff alleges that the Property and the above-described activities on the Property constitute an unlawful and abatable common law nuisance.

XI. FOURTH CAUSE OF ACTION

Violation of Zoning and Nuisance Ordinances

79. Plaintiff re-alleges paragraphs 1 through 78 above as if fully set forth and incorporate those paragraphs by reference herein.

80. Plaintiff alleges that the nuisance conditions and land use, development and building activities conducted by the Defendants without appropriate permits are unlawful under the Kitsap County Code.

XII. RELIEF REQUESTED

WHEREFORE the Plaintiffs pray for relief as follows:

Judgment

1. Enter judgment declaring that the Defendants are in violation of the Kitsap County Code prohibitions against public nuisances;

2. Enter judgment declaring that the conditions on the Property and the violations committed by the Defendants constitute a public nuisance;

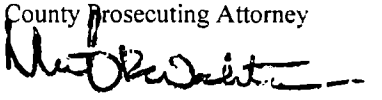
3. Enter judgment declaring that the Defendants by their acts and omissions have violated the Kitsap County Code, including building, critical areas, stormwater and zoning ordinances;

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083

11. For such other and further legal and equitable relief as the Court deems just and proper.

DATED this 1st day of February 2011.

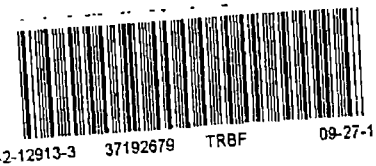
RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



NEIL WACHTER
WSBA No. 23278
Senior Deputy Prosecuting Attorney

Jennine E. Christensen
WSBA No. 38520
Deputy Prosecuting Attorney
Attorneys for Plaintiff

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney
614 Division Street, MS-35A
Port Orchard, WA 98366-4676
(360) 337-4992 Fax (360) 337-7083



Hon. Susan K. Serko
Dept. 14
September 28, 2011

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

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

Plaintiff,

v.

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

Defendants,

and,

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

NO. 10-2-12913-3

KITSAP COUNTY'S TRIAL BRIEF

Kitsap County brings this lawsuit as a civil public nuisance action and as a declaratory judgment action. This brief previews some of the County's evidence and discusses the legal theories under which the County will ask the Court to find and enjoin nuisance conditions and to

ORIGINAL

garage on their car and a cabinet. They contacted KRRC and spoke to Marcus Carter who visited them and told them that the damage appeared consistent with a high-powered rifle shot.[73]

- Terry Allison, who lives across the Seabeck Highway from KRRC, declared that he has found approximately a dozen bullets in his gutters and around his garage he recognizes as ricochets. He forbids his grandchildren from playing on the abutting side of his property when the range is in use.[74]

- Molly Evans filed a declaration that it is her belief a bullet shattered her kitchen skylight facing the Club property in the late 1990s.[75]

- Pamela Hughes has declared that in the mid-1980s a bullet struck the side of her house facing the Club property and lodged in the siding. A Sheriff's Deputy told her it appeared to be a .7 millimeter or 30.06 caliber bullet.[76]

- Deborah Slaton in July 2007 discovered a rifle bullet had perforated the exterior siding at the back of her house, come through the interior and came to rest lying on the floor. The Kitsap Sheriff's Office filed a report and collected a bullet but did not identify a suspect at that time. In May 2011, KCSO conducted a Total Station analysis of the bullet hole, which the Slatons had not altered. Recently the Washington State Patrol Crime Laboratory investigated the scene and Forensic Scientist Kathy Geil is expected to testify that the bullet was a .30 caliber rifle bullet, at the end of its range when it struck and originating from the direction of KRRC.

- Lee and Stacy Linton discovered a bullet lodged in the boards of their home's back deck in July 2011. Mr. Linton extracted the bullet and kept it in a plastic bag. The Linton's back deck faces south, in the general direction of the KRRC. When the Prosecutor's office learned of the incident in late August, it requested KCSO to investigate and the responding deputy was able to take the bullet into evidence. The bullet is believed to be a .357 Magnum.

IV. REMEDIES

A. ABATEMENT

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[73] See Declarations of Sharon Fairchild and Arnold Fairchild

[74] See Declaration of Terry Allison

[75] See Declaration of Molly Evans.

[76] See Declaration of Pamela Hughes

The Washington State Constitution authorizes counties to make and enforce "local police, sanitary and other regulations."[77] The State has given the counties the authority to "declare by ordinance what shall be deemed to be a nuisance within the county."[78] The State has also given counties, and any other affected party, the right to bring "an action for damages and other and further relief" from nuisances. Such state statutory authority also allows the county to seek warrants of abatement, pursuant to RCW 7.48.010:

> Actionable nuisance defined. The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or *whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.* (emphasis added).

State statute also grants to counties the authority to develop a process by which nuisance "buildings, structures, and premises or portions thereof" may be abated.[79] Kitsap County Code, in turn, declares that "any use, building or structure in violation of [Kitsap County Code Title 17] is unlawful, and a public nuisance" and has authorized the County to bring an action "for a mandatory injunction to abate the nuisance in accordance with the law."[80]

Kitsap County adopted a chapter entitled "Public Nuisances" in Chapter 9.56 of the Kitsap County Code.[81] While the enabling ordinance specifically cites RCW 35.80.010 as granting the county authority to adopt the chapter, as noted above, the county has 1) the authority to bring a civil, damages action and "other further relief" from nuisances pursuant to RCW 7.48.010 and 2) the authority to "declare and abate nuisances:" pursuant to RCW 36.32.120.

Chapter 9.56 of the Kitsap County Code provides for the abatement of public nuisances:

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[77] Article XI, Section 11 of the Washington State Constitution
[78] RCW 36.32 120(10).
[79] Chapter 35 80 RCW *et seq.*
[80] KCC 17 530 030
[81] Kitsap County Ordinance No 261 -2001

> This chapter provides for the abatement of conditions which constitute a public nuisance where premises, structures, vehicles, or portions thereof are found to be unfit for human habitation, or unfit for other uses, due to dilapidation, disrepair, structural defects, defects increasing the hazards of fire, accidents or other calamities, inadequate ventilation and uncleanliness, inadequate light or sanitary facilities, inadequate drainage, *or due to other conditions which are inimical to the health and welfare of the residents of Kitsap County.*[82]

B. INJUNCTIVE RELIEF

Injunctive relief for nuisances is authorized by RCW 7.48.020. RCW 7.48.200 provides that "the remedies against a public nuisance are: Indictment or information, a civil action, or abatement." RCW 7.48.220 provides "a public nuisance may be abated by any public body or officer authorized thereto by law." RCW 7.48.250; 260 and 280 provide for a warrant of abatement and allow for judgment for abatement costs at the expense of the defendants.

C. WARRANTS AND ENFORCEMENT

Kitsap County reserves this issue for briefing later in the trial.

V. AFFIRMATIVE DEFENSES

The Defendant has asserted a number of affirmative defenses in its Answer. These defenses include failure to state a claim upon which relief may be granted, accord & satisfaction, estoppel, waiver, unclean hands, laches, and statute of limitations. The Club is expected to claim at trial that the negotiated language of the Deed forgives all prior permitting violations and re-affirms its legal nonconforming status in light of the exact character of the range property and usage in 2009. In responding to the Club's affirmative defenses, the County will assert that the transfer of property ownership in 2009 did not relieve the Club of its legal obligations or bind the County from enforcing its laws.

A. Failure to State a Claim Upon Which Relief May be Granted

Federal Civil Rule 12(b)(6) allows a court to dismiss a case when there is a clear legal impediment to receiving any relief. "Typical examples are cases in which the plaintiff's claim is

[82] KCC 9 56.010 (emphasis added)

property, and/or by violating Kitsap County Code. The County requests the Court issue a warrant of abatement at the Defendant's expense and for Liens against the Property for such abatement. The County also seeks authorization for Kitsap County to enter upon the Property to inspect, survey, assess and remove public nuisance conditions and to direct or require restoration in areas protected by the Kitsap County Critical Areas Ordinance including but not limited to restoring wetlands and stream buffers to native conditions.

Respectfully submitted this 26th Day of September, 2011.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney

Neil R. Wachter, WSBA No. 23278
Senior Prosecuting Attorney
Jennine E. Christensen, WSBA No. 38520
Deputy Prosecuting Attorney
Attorneys for Plaintiff Kitsap County

CERTIFICATE OF SERVICE

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

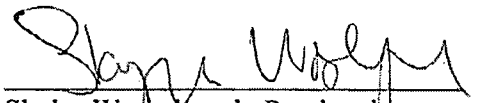
On the date given below, a copy of PETITION FOR REVIEW was served upon the following individuals by via email, pursuant to an e-service agreement between the parties, to the following:

Christine M. Palmer
Laura F. Zippel
Kitsap County Prosecutor's Office
Civil Division
614 Division St., MS-35A
Port Orchard, WA 98366
Email: cmpalmer@co.kitsap.wa.us
lzippel@co.kitsap.wa.us

I filed the PETITION FOR REVIEW electronically with the Court of Appeals, Division II, through the Court's online efiling system.

DATED: December 21, 2017

CHENOWETH LAW GROUP, PC



Skylar Washabaugh, Paralegal
swashabaugh@northwestlaw.com

CHENOWETH LAW GROUP, PC

December 21, 2017 - 4:54 PM

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5th Floor
Portland, OR, 97204
Phone: (503) 221-7958

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