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Don Burger

From: Marcus Carter [marcus@gunschool.com]
Sent: Tuesday, November 03, 2009 11:22 AM
To: Jeremy A. Morris
Subject: State v. Carter

Jeremy,
Greetings. I have just picked up your opening appellate brief in this matter. I started a move on October 1st with a change of address filed (with the post office) and completed the move on the 7th. I had been receiving mail at the new address since the 1st, however, your brief slipped through the cracks and was delivered to the Wicks End address on approximately the 10th of October as it was postmarked on the 9th. The package was held and not forwarded from that address.

Would you be so kind as to send me an electronic (MSWord) copy?
My updated contact information is:

Marcus Carter
[REDACTED]
Bremerton, WA 98310
Home: [REDACTED]
Cell: [REDACTED]
marcus@gunschool.com

Thank you, and I look forward to formally meeting you.

--
Marcus Carter - Executive Officer
Kitsap Rifle & Revolver Club
4900 Seabeck Hwy. N.W.
Bremerton, Washington 98312
USA
For Sport and National Defense
<http://www.GunSafety.org>
Range Phone - 360.373.1007

-----Original Message-----
From: Kevin Anderson [mailto:KMAnders@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 7:49 AM
To: Jeremy Morris
Cc: marcus@gunschool.com
Subject: Fwd: State v. Carter

So far I have escaped all the winter colds and flu. Knock on wood.

Jeremy Morris is the appellate counsel. His e-mail address should be part of this message.

>>> "Marcus Carter" <marcus@gunschool.com> 11/2/2009 11:40 PM >>>

Hello Andy,

I hope you are well. Could you please supply me with the name and email address of whoever is handling the appeal for your office?

I have had a change of address as of October 7 and would like to get the information to him.
Best regards and thank you,

--
Marcus Carter

[REDACTED]
Bremerton, WA 98310

[REDACTED]
marcus@gunschool.com

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Don Burger

From: Jeremy A. Morris [JMorris@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 12:04 PM
To: Marcus Carter
Subject: Re: State v. Carter
Attachments: Carter, marcus 20091008 coa Brief of appellant.pdf; Carter - State's Brief.DOC

I'm sorry that the brief just now made it to you. If you need to request an extension from the Court of Appeals, I certainly will not oppose it.

I have attached an electronic copy of the brief per your request. (I've included both a Word copy and a PDF).

We have met before, by the way. I was the prosecutor who made the oral argument in the last round at the Court of Appeals (back in 2006). I remember it well, as I was unfamiliar with the court's projection equipment and you were kind enough to show me how everything works.

Please let me know if you need anything else. My direct line is 360-337-7211.

Jeremy

>>> "Marcus Carter" <marcus@gunschool.com> 11/3/2009 11:22 AM >>>

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Home: ██████████

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Version: 8.5.423 / Virus Database: 270.14.45/2476 - Release Date: 11/02/09 19:39:00

NO. 39392-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

MARCUS CARTER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 99-1-01367-9

BRIEF OF APPELLANT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

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Port Orchard, WA 98366
(360) 337-7174

SERVICE

Marcus Carter
[REDACTED]
Port Orchard, WA 98367

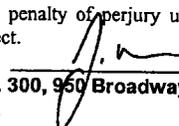
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 7, 2009, Port Orchard, WA 
Original +1 to the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402
Copy to Defendant, pro se, listed at left

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the present case as a matter of law pursuant to *State v. Knapstad* and in holding that the undisputed facts failed to establish a prima facie case against the Defendant.

2. The trial court erred in concluding as a matter of law that RCW 9.41.190's prohibition against possessing a machine gun did not apply to Carter.

3. The trial court erred in concluding as a matter of law that Carter's private possession of a machine gun qualified under RCW 9.41.190(2)(b)'s exception to the general prohibition against possession of machine gun.

4. The trial court erred in concluding as a matter of law that Carter was "licensed under federal law" as that phrase is used in RCW 9.41.190(2)(b).

5. The trial court erred in concluding as a matter of law that Carter was "engaged in the production, manufacture, repair, or testing of a machine" to be used or purchased by the armed forces or law enforcement as required under RCW 9.41.190(2)(b).

6. The trial court erred in concluding that RCW 9.41.190(2)(b) does not require technical compliance with federal law.

6. The trial court erred in concluding that RCW 9.41.190(2)(b) in any way authorized Carter to privately possess a machine gun.

7. The trial court erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun under RCW 9.41.190.

II. STATEMENT OF ISSUES

The defendant/respondent, Marcus Carter, brought a motion to dismiss the charge of possession of a machine gun. RCW 9.41.190(1) provides that is unlawful for any person to own, buy, or have in possession or under control, any machine gun. An exception to this general prohibition is outlined in RCW 9.41.190(2), which provides:

This section shall not apply to:

(a) Any peace officer in the discharge of official duty or traveling to or from official duty, or to any officer or member of the armed forces of the United States or the state of Washington in the discharge of official duty or traveling to or from official duty; or

(b) A person, including an employee of such person if the employee has undergone fingerprinting and a background check, who or which is exempt from or licensed under federal law, and engaged in the production, manufacture, repair, or testing of machine guns, short-barreled shotguns, or short-barreled rifles:

(i) To be used or purchased by the armed forces of the United States;

- (ii) To be used or purchased by federal, state, county, or municipal law enforcement agencies; or
- (iii) For exportation in compliance with all applicable federal laws and regulations.

The State's evidence demonstrated that Carter personally and privately possessed a machine gun. Although Carter contested that the weapon was machine gun, he never argued or asserted that the weapon did not belong to him personally or that anyone else had a possessory interest in the gun. The trial court concluded that Carter was exempt for prosecution for the charged offense and that he qualified under RCW 9.41.190(2)(b) exception to the statute. This conclusion, however, was contrary to the prohibition against the private possession of machine guns found both in RCW 9.41.190 and in Chapter 44, Title 18 U.S.C (the law under which Carter held a federal firearm license). The following issues are presented:

1. Whether the trial court erred in dismissing the present case as a matter of law pursuant to *State v. Knapstad* and in holding that the undisputed facts failed to establish a prima facie case against the Defendant?
2. Whether the trial court erred in concluding as a matter of law that RCW 9.41.190's prohibition against possessing a machine gun did not apply to Carter?
3. Whether the trial court erred in concluding as a matter of law

that Carter's private possession of a machine gun qualified under RCW 9.41.190(2)(b)'s exception to the general prohibition against possession of machine gun?

4. Whether the trial court erred in concluding as a matter of law that Carter was "licensed under federal law" as that phrase is used in RCW 9.41.190(2)(b)?

5. Whether the trial court erred in concluding as a matter of law that Carter was "engaged in the production, manufacture, repair, or testing of a machine" to be used or purchased by the armed forces or law enforcement as required under RCW 9.41.190(2)(b)?

6. Whether the trial court erred in concluding that RCW 9.41.190(2)(b) does not require technical compliance with federal law?

6. Whether the trial court erred in concluding that RCW 9.41.190(2)(b) in any way authorized Carter to privately possess a machine gun?

7. Whether the trial court erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun under RCW 9.41.190?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Marcus Carter was charged by amended information filed in Kitsap County Superior Court with possession of an unlawful firearm (a machine gun). Prior to trial, the Superior Court dismissed the charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).¹ This appeal followed.²

B. FACTS

The Supreme Court previously summarized the facts as follows:

Bruce Jackson and Frank Clark are criminal investigators with the Pierce County prosecutor's office. ... The defendant, Marcus Carter, was the chief instructor for Kitsap Rifle and Revolver Club and was certified by the Washington State Criminal Justice Training Commission to teach firearms training.

On May 15, 1999, Jackson and Clark attended a National Rifle Association certified firearms instructor class in Kitsap County taught by Carter. ... Carter brought out various firearms and set them on tables before the class. He

¹ As the trial court noted, however, Carter himself never characterized the motion as a *Knapstad* motion. See CP 159. Rather, Carter specifically denied that his motion was "tantamount to a *Knapstad* motion." CP 129. Carter explained that a *Knapstad* motion is an argument that the State's evidence is insufficient, but that this was "not what the Accused has argued for his motion." CP 129.

² The procedural history of the present case is lengthy. Although this case was charged in 1999, the matter has never actually made it to trial. Rather, the present appeal is the third appeal in this case. The first appeal occurred after the trial court dismissed the case (after it had granted Carter's motion to suppress). That dismissal, however, was eventually overturned by the Washington Supreme Court. *State v. Carter*, 151 Wn.2d 118, 130, 85 P.3d 887 (2004). When the case eventually returned to the Superior Court, the Court again dismissed the case, this time pursuant to *State v. Knapstad*, and ordered that the case was to be dismissed with prejudice. The State appealed, and this Court then held that although the dismissal was proper, the dismissal should have been without prejudice. *State v. Carter*, 138 Wash.App. 350, 157 P.3d 420 (2007). Upon remand, the trial court again dismissed the case pursuant to *State v. Knapstad*, although the basis for the motion was different. This appeal, the third appeal in this case, then followed.

asked the students to familiarize themselves with the firearm of their choice and prepare a demonstration during which they would describe the proper handling and safety functions of the firearm. Among the firearms was an AR-15 owned by Carter. Jackson was very familiar with the AR-15 and chose that weapon to demonstrate to the class.

The AR-15 rifle is the semiautomatic, civilian version of the automatic, military M-16 rifle. An automatic weapon will continue to fire as long as the trigger is held, and is commonly known as a machine gun. It is generally illegal to own an M-16. RCW 9.41.190.

Jackson noticed that the safety lever on the AR-15 rotated into a position that corresponds to the automatic fire selection on an M-16. The AR-15 safety lever cannot rotate into this position without having been modified. Jackson also noticed that the lever had the silver color and the finish of an M-16, rather than the traditional charcoal-black color of an AR-15. Jackson suspected that the AR-15 had been modified to allow it to fire automatically. He operated the firing mechanism and determined the weapon was capable of automatic fire. Jackson showed the gun to Clark, who concurred with Jackson's observations.

Jackson then opened the gun by removing a pin that allows the gun to pivot open. Jackson noticed immediately that a small aluminum block called an autosear had been added. An autosear, which prevents an automatic gun from jamming, is not available for purchase. Jackson asked Carter if the gun had been modified and Carter admitted that it had. As Jackson began to close the gun, Carter removed the autosear from the gun and put it in his pocket.

After class when the other students had left, Jackson and Clark approached Carter about the rifle. Carter admitted that he had put M-16 parts in the rifle to replace those AR-15 parts that were designed for semiautomatic operation, specifically identifying the bolt carrier, hammer, selector switch, and autosear. Carter admitted that the rifle could fire in fully automatic mode. With the gun still in their possession, Jackson and Clark told Carter that it was a felony to own such a weapon.

Carter then denied that the gun was illegal and insisted that the gun would not fire in a full-automatic mode. Carter wanted to demonstrate it to Jackson and Clark if they would let him take it to the range with a loaded magazine. Carter went to his car to collect some ammunition. Carter then engaged in what Jackson and Clark described as furtive movements. Carter began rummaging through items in the backseat of his car, and then returned to the classroom, and called out to another man that he needed a punch, a straight steel pin that would disable the autosear. Jackson told Carter that he would not be allowed to destroy or modify the autosear.

Jackson and Clark testified to feeling that the situation was quickly getting out of control and that Carter was very agitated and antagonistic. Carter grabbed the gun from Clark's hands and walked briskly back to his car. Jackson and Clark noticed a loaded 30-round magazine for the rifle in Carter's rear pocket. As Carter kneeled on the front seat in his car and fumbled with metal objects on the floor, Jackson saw that Carter had a loaded pistol under his shirt. Jackson told Carter that he felt Carter was posing a potentially lethal hazard to them. Jackson told Carter to turn around and bring his hands into view, which Carter failed to do. Jackson and Clark then gave Carter a choice: either he give them the rifle and autosear and they would give him a receipt for it and submit it for testing to the Washington State Patrol Crime Lab, or they would call the police. Carter delayed, so Clark placed a 911 call and asked that a deputy be sent. When Carter discovered the call had been made, he relinquished the rifle and autosear, and Jackson and Clark gave Carter a receipt. A deputy arrived, who asked Jackson and Clark to maintain custody of the AR-15. Jackson and Clark filed a report on the incident.

Carter, 151 Wn.2d at 122-24; *see also* CP 2, CP Exhibit 2 (pages 1-13). The weapon was also tested by the State to confirm that it did in fact operate as a fully automatic machine gun. CP Exhibit 5, 8.

Prior to trial Carter filed a motion to dismiss in which he challenged the court's jurisdiction and argued that he entitled by federal law to possess a machine gun. CP 54. Carter specifically argued that he held a firearms license which allowed him to possess or own a fully automatic weapon. CP 58.³ Carter then argued that RCW 9.41.190 states that it is not unlawful for a person to possess a machine gun if the person is licensed under federal law and engaged in the repair or testing of machine guns to be used or purchased by armed forces or law enforcement. CP 54-55.

The State filed a written response arguing that the facts alleged by Carter were insufficient to support a defense to the charged offense, and Carter submitted a reply brief. CP 69, 128.

On April 7, 2009, the trial court held a hearing on Carter's motion to dismiss. RP 4/07/09 1-53. At the hearing the State pointed out that page 8 of Exhibit 2 (the "summary report") stated that Carter had acknowledged that the rifle in question was his own personal rifle. RP 4/07/09 34, 36. The State also pointed out that Title 18 did not authorize Carter to privately own or possess a machine gun. RP 4/07/09 34, 36. The trial court denied Carter's motion on a different basis, noting that Carter had not shown that he was

³ Carter attached a copy of his license, which was a license issued pursuant to Chapter 44, Title 18, United States Code. CP 64. The license specifically states that the holder of the license is authorized to engage in business "within the limitations of Chapter 44, Title 18 United States Code." CP 64.

“engaged in the repair of machine guns for the armed forces or law enforcement.” RP 4/07/09 46-48.

On April 24, Carter filed a “supplemental” to his motion to dismiss which included two affidavits indicating that Carter had previously worked on machine guns for law enforcement and the military. CP 135-38. The State then filed a response incorporating the exhibits admitted at the April 7 hearing, and argued that although Carter had a firearms license under Chapter 44, Title 18 of the United States Code, 18 U.S.C. §922(o) specifically stated that it was unlawful for a person to privately possess a firearm, and that the State’s evidence showed that Carter privately possessed the gun at issue (as Carter had admitted this fact). CP 139. The State also pointed out that its evidence showed that Carter had also admitted that he did not possess a license to possess machine guns. CP 140. The State also pointed out that Carter’s affidavits did not claim that the gun at issue was owned by the armed forces or law enforcement. CP 140.

The trial court then addressed Carter’s motion at a hearing on May 1, 2009. See RP 5/01/09 6-21. At the hearing the State argued that Carter was not exempt from RCW 9.41.190 since Carter’s license did not allow him to privately possess a machine gun and that the gun at issue was not being worked on on behalf of the armed forces or law enforcement. RP 5/01/09 13-14.

The trial court ultimately issued a written memorandum opinion followed by an amended memorandum opinion. CP 148, 159. The trial court held that RCW 9.41.190(2)(b) does “not require technical compliance with federal law,” and that Carter was exempt from prosecution because he had a federal firearms license and had been engaged in the repair or testing of other machine guns for the armed forces or law enforcement. CP 163-64. The court rejected the State’s argument that the statute required Carter to be licensed to privately possess the actual machine gun at issue. CP 161-64. The court, therefore, granted Carter’s motion to dismiss. CP 154, 164.

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN CONCLUDING THAT RCW 9.41.190(2)(B) AUTHORIZES A PERSON TO PRIVATELY POSSESS A MACHINE GUN AS LONG AS THAT PERSON HAS A FEDERAL LICENSE OF SOME KIND AND HAS PREVIOUSLY WORKED ON A GOVERNMENT OWNED MACHINE GUN, AS THE TRIAL COURT’S INTERPRETATION VIOLATED THE LEGISLATURE’S INTENT, AS DEMONSTRATED THROUGH THE LANGUAGE OF THE STATUTE, TO MAKE IT UNLAWFUL FOR ANYONE TO PRIVATELY POSSESS A MACHINE GUN.

The trial court determined that Carter was exempt from prosecution for his private possession of a machine gun because he had a federal license allowing him to repair government owned machine guns and because he had

previously repaired government owned machine guns. CP 159-64. The trial court's construction of the statute, however, is contrary to the intent of the legislature, as demonstrated by the statute, to make it unlawful for a person to privately possess a machine gun. The dismissal should therefore be reversed.

Appellate courts review a trial court's statutory interpretation *de novo* as a question of law. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). Statutory construction begins by reading the text of the statute or statutes involved. *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196, 199 (2005). If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *Roggenkamp*, 106 P.3d at 199. Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be ambiguous. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute. *Roggenkamp*, 106 P.3d at 199. The Court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutes must be construed to effect their purpose and to avoid strained or absurd results. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

In the present case, Carter was charged with possessing a machine gun

in violation of RCW 9.41.190. In addition, Carter acknowledged that the gun in question was his personal rifle, and there has been no allegation that the gun ever belonged to a governmental agency. See, CP 62; Exhibit 2, page 8; Exhibit 3, page 72; Exhibit 4, page 21.

RCW 9.41.190(1) provides, *inter alia*, that it is unlawful for any person to manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any machine gun; or any part designed and intended solely and exclusively for use in a machine gun or in converting a weapon into a machine gun.

The general prohibition against the possession of machine guns, however, has several exceptions. First, RCW 9.41.190(2) provides that the general prohibition shall not apply to members of the armed forces or law enforcement officers in the discharge of their official duties. Secondly, RCW 9.41.190(2)(b) provides that the general prohibition shall also not apply to a person who “is exempt from or licensed under federal law, and engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency.⁴

The issue presented in Carter’s motion to dismiss, therefore, was

⁴ RCW 9.41.190(3) provides that it shall be an affirmative defense that the machine gun was acquired prior to July 1, 1994, and is possessed in compliance with federal law. Carter, however, has never made any claim that this section applies to his case.

whether Carter qualified under RCW 9.41.190(2)(b). The State argued below that the statute's plain language meant simply that it was not unlawful to possess a machine gun if a defendant had a federal license allowing him or her to privately possess a machine gun and if the defendant was engaged in the production, manufacture, repair, or testing of that machine gun to be used or purchased by the armed forces or a law enforcement agency.

The trial court, however, concluded that the statute meant that it was not unlawful to privately possess a machine gun as long as the defendant had a license allowing him to repair machine guns owned by the government and as long as the defendant had at some recent time been engaged in the production, manufacture, repair, or testing of some machine gun other than the machine gun in question. For the reasons outlined below, the trial court's interpretation was incorrect.

1. ***The language of RCW 9.41.190 demonstrates that the intent of the legislature was, among other things, to make it unlawful for a person to privately possess a machine gun.***

The legislative intent with respect to machine guns in RCW 9.41.190(1) is clear. In that section, the legislature stated that it is unlawful for any person to own, buy, possess or control a machine gun. At least one Washington court has previously addressed the legislative intent behind this statute. In *State v. Padilla*, 95 Wn. App. 531, 534, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999), the Court explained that the legislative

intent behind RCW 9.41 was clear:

The plain language of the prohibitions in RCW Chapter 9.41 demonstrates the Legislature's clear goals of keeping all firearms out of the hands of certain individuals and certain firearms out of the hands of all individuals.

Padilla, 95 Wn. App. at 534-35. This statutory intent is carried out by the plain language of the statute.

The legislature, however, crafted two very narrow exceptions to the general prohibition on the possession of machine guns. First, the legislature created an exception for law enforcement officers and members of the armed services in the discharge of their official duties (or traveling to their official duties). RCW 9.41.190(2)(a). Second, the legislature created an exception for those licensed under federal law who produce, manufacture, repair, or test machine guns for the armed forces or law enforcement. RCW 9.41.190(2)(b). It is this second exception that is at issue in the present case.

As the State argued below, the plain language of RCW 9.41.190 is amenable to only one reasonable interpretation; namely, that it is unlawful for a person to possess a machine gun unless: (1) that person is exempt or federally licensed to possess that machine gun; and (2) the possession is tied to that person's being engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency.

This common sense reading of the statute makes sense and effectuates the obvious legislative intent. For example, a gunsmith who is federally licensed to repair machine guns may physically possess a machine gun belonging to a law enforcement agency in his or her shop where the repairs are being made since both prongs of the above exception are met.

That same gunsmith, however, may not “borrow” that government owned machine gun, take it out of his shop, and use it for target shooting for his own pleasure (or use it to go hunting, etc). In such a scenario, the possession would be unlawful despite the federal license since by his or her engaging in a personal use of the machine gun that gunsmith could not in any way be properly characterized as being “engaged in the production, manufacture, repair or testing of machine guns.”

Similarly, a gunsmith who is not federally licensed to possess and/or repair a machine gun may not lawfully possess or repair a government owned machine gun (since the first prong of the test is not satisfied). Finally, a gunsmith who is not federally licensed to privately possess a machine gun may not privately possess such a firearm, since both prongs of the above test would not be satisfied.

The facts of the present case fall under this final scenario. Carter’s private possession of a machine gun violated the only reasonable

interpretation of RCW 9.41.190; namely, that it is unlawful for a person to possess a machine gun unless: (1) that person is exempt or federally licensed to possess that machine gun; and (2) the possession is tied to that person's being engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency. In short, Carter violated RCW 9.41.190 because Carter privately possessed a machine gun without a license authorizing him to privately possess a machine gun, and because Carter's private possession of a machine gun was not properly characterized as being an act that was engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency.

2. *Carter does not qualify under the RCW 9.41.190(2)(b) exception because Carter was not "exempt from or licensed under federal law" to privately possess a machine gun.*

Carter claimed below, and the State did not dispute, that at the relevant time Carter possessed a federal license under Chapter 44, Title 18 of the United States Code. CP 56, 64. Carter submitted a copy of this license as part of his motion to dismiss. CP 64. The license itself authorizes Carter to engage in the business of being a "dealer in firearms other than destructive devices," but the license itself plainly states that Carter is "licensed to engage in the business specified in this license, within the limitations of Chapter 44, Title 18, United States Code, and the regulations issued thereunder." CP 64.

Chapter 44, Title 18 of the United States Code contains a number of limitations. Most importantly for the present case, 18 U.S.C. § 922(o) makes it unlawful to privately possess a machine gun and states as follows:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Courts that have examined the scope of 18 U.S.C. §922(o) have applied its plain language and found that the statute prohibits the private possession of machine guns that were not lawfully possessed before May 9, 1986. *See e.g., Farmer v. Higgins*, 907 F.2d 1041 (11th Cir.1990)(“[S]ection 922(o) prohibits the private possession of machine guns not lawfully possessed before May 19, 1986); *U.S. v. Warner*, 5 F.3d 1378 (10th Cir. 1993)(same); *United States v. Aiken*, 974 F.2d 446, 449 (4th Cir.1992)(“Congress made it illegal for anyone other than government personnel to possess ... a machine gun in 1986, 18 U.S.C. § 922(o)(1)”). In short, the only relevant exception to 18 U.S.C. §922(o)’s general prohibition on the possession of machine guns is possession by (or under the authority of) the government. This exception

does not apply in the present case since Carter admitted that the weapon was his personal rifle.

The trial court below, however, held that “Carter has established that he maintained a Title 18 license which allowed him to deal in, i.e., repair machine guns.” While Carter’s federal license might have allowed him to repair government owned machine guns at the request of the government, it is indisputable that Carter’s license did not authorize him to privately possess a machine gun, since 18 U.S.C. 922(o) specifically prohibits the private possession of machine guns. Carter’s possession of a Title 18 license, therefore, was irrelevant, since the Title 18 license did not authorize the private possession of a machine gun.

The trial court’s reasoning, however, appears to be that the language of RCW 9.41.190(2)(b) only requires that a defendant possess a federal license of any kind, not an actual license to possess a private machine gun and that RCW 9.41.190(2)(b) does not require technical compliance with federal law. The trial court’s interpretation of RCW 9.41.190(2)(b) leads to absurd results. Under the trial court’s reasoning, possession of a federal driver’s license would be sufficient. Under any reasonable interpretation of the statute, the requirement that the defendant be “exempt from or licensed under federal law” cannot mean that the defendant is only required to be licensed to drive. Similarly, the fact that a defendant is licensed to repair

government owned machine guns does not establish that he or she is licensed to privately possess machine guns, especially when the same statute that the license is issued under specifically prohibits the private possession of a machine gun.

As Carter admitted that the rifle in question was his own private rifle, the evidence (when viewed in a light most favorable to the State) demonstrated that Carter unlawfully possessed a machine gun in violation of RCW 9.41.190. The fact that Carter held a license under Chapter 44, Title 18 of the United States Code was irrelevant, since 18 U.S.C. § 922(o) outlaws the private possession of machine guns.

3. ***Carter does not qualify under the RCW 9.41.190(2)(b) exception because Carter was not “engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency when he privately possessed a machine gun.***

In addition to requiring that a person be “exempt from or licensed under federal law,” the exception outlined in RCW 9.41.190(2)(b) also requires that a person be “engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency in order to qualify for the exception. Viewing the evidence in a light most favorable to the State, the evidence showed that Carter was not “engaged in the production, manufacture, repair, or testing of

machine guns” when he privately possessed the gun in question.

Carter argued below that he had at times repaired machine guns for governmental entities, and the State did not dispute this fact. Carter, however, did not allege that the gun in question belonged to a governmental entity or that he was repairing it or testing it for someone else; rather, Carter acknowledged that the gun in question was his own private rifle. CP 62; Exhibit 2, page 8; Exhibit 3, page 72; Exhibit 4, page 21.

The trial court below essentially interpreted the language RCW 9.41.190(2)(b) to authorize a person to privately own a machine gun as long as that person had, at some time, worked on some government owned machine other than the one he was charged with possessing. This conclusion, however, violates the legislative intent and leads to strained or absurd results.

For example, the language of RCW 9.41.190(2)(a) clearly provides that a member of armed services or law enforcement may only lawfully possess a machine gun in the discharge of official duties. Thus, a member of the armed forces or law enforcement may not take a government owned machine gun out hunting or target shooting for their own personal pleasure, nor may they privately possess a machine gun.

The trial court’s reading of the statutes would allow a gunsmith (who had a federal license of any kind and who occasionally works on machine

guns for the armed forces or law enforcement) to do exactly what members of the armed forces or law enforcement are not allowed to do: namely to take any machine gun, including a government owned machine out into the woods to hunt or shoot targets for recreation. Such a result makes no sense.

Rather, the only reasonable reading of RCW 9.41.190 is that it is unlawful to possess a machine gun except for two narrow exceptions. The first exception is for members of the armed forces or law enforcement who are discharging their official duties. Similarly, the second exception is for those people who possess a valid federal license allowing them to work on machine guns for the military or law enforcement and who are actually engaged in such work on a government owned machine gun. The statute does not create a blanket exception allowing such gunsmiths to privately possess machine guns, just as it does not allow members of the armed services or law enforcement to privately possess machine guns.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT THE STATE HAS THE BURDEN OF PROVING THE NON-EXISTENCE OF A VALID FEDERAL FIREARMS LICENSE IN ORDER TO PROVE THE CRIME OF POSSESSION OF A MACHINE GUN BECAUSE WASHINGTON COURTS HAVE LONG HELD THAT A DEFENDANT APPROPRIATELY BEARS THE BURDEN OF PROVING THE EXISTENCE OF A LICENSE THAT WOULD EXEMPT HIM OR HER FROM PROSECUTION.

The trial court also erred when it concluded that that the exception outlined RCW 9.41.190(2)(b) was an element of the offense as opposed to an affirmative defense. CP 2-5. The State argued below that the statutory exception was an affirmative defense because the issue of whether a defendant possessed a license is something “uniquely with the control and knowledge of the defendant.” RP 4/07/09 38. The trial court, however, reached the opposite conclusion. As this is an issue that is likely to arise on remand, the State asks this Court to also address this issue.

Washington courts have previously addressed the issue of whether or not a defense is properly characterized as an affirmative defense when a statute exempts a defendant from prosecution if the defendant is validly licensed to engage in the prohibited activity. For instance, in *City of Seattle v. Parker*, 2 Wash.App. 331, 467 P.2d 858 (1970), the defendant was charged with violating an ordinance that made it unlawful for anyone to “carry a pistol concealed on his person, except when in his place of abode or fixed place of

business, without a license therefor as provided in RCW Chapter 9.41.” *Parker*, 2 Wn.App at 331. On appeal, Parker contended that the burden on proving the lack of a license belonged to the prosecution. *Id* at 332. The Court of Appeals held that a similar question had been considered and resolved decades earlier in *State v. Shelton*, 16 Wash. 590, 48 P. 258, 49 P. 1064 (1897). *Parker*, 2 Wn.App at 332. The *Parker* court noted that in *Shelton*, the court had held that the burden in such cases was on the defendant. *Parker*, 2 Wn.App at 331.

As explained in *Parker*, this rule is referred to as a “balancing of convenience” by some authorities. *Parker*, 2 Wn.App at 332-33, citing *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934); *Brown v. United States*, 66 A.2d 491 (D.C.Mun.App.1949). Further, where the facts lie more immediately within the knowledge of the defendant, the onus probandi should be his. *Parker*, 2 Wn.App at 333, citing *Rossi v. United States*, 289 U.S. 89, 53 S.Ct. 532, 77 L.Ed. 1051 (1933).

The *Parker* court also rejected the defendant’s claim that the burden of proof on the license issue should remain on the prosecution because the ordinance in question did not specify that the burden of proof was on the defendant on this issue, yet the ordinance did specifically place the burden of proof on the defendant with respect to other specified defenses. *Parker*, 2 Wn.App at 335. The Court of Appeals, however noted that a similar

argument was disposed of in *State v. Harding*, 108 Wash. 606, 185 P. 579 (1919), where the court, relying upon *Shelton*, stated,

So that decision seems to be an answer to the contention of counsel for the appellant that the burden of proof in such cases as to such question does not rest upon the accused, when the exception which he invokes for his protection is found in the statutory definition of the offense, or, as sometimes said, in the enacting clause, rather than in a separate exception or proviso. We are quite unable to see that the exception here involved is of any different nature, in so far as we are concerned with the question of the burden of proof, than where there is involved the question of burden of proof as to the accused possessing a license rendering him immune from prosecution. It would seem that the rule, which is sometimes called a rule of necessity, in view of the ease with which an accused person could produce proof of the fact which renders him immune-it being within his own knowledge and involving proof of a negative on the part of the state-has even stronger reasons for its support as applicable to the exception here involved. It seems to us, therefore, that the decision in that case is controlling here, unless we are to overrule it, which we are not inclined to do.

Parker, 2 Wn.App at 335-36, citing *Harding*, 108 Wash. At 608. The *Parker* court thus concluded that,

Neither precedent nor the temper of the times warrants our abandoning the reasoning in *Shelton*. Those who choose to carry concealed pistols must be prepared to demonstrate that they are licensed or exempted from the licensing requirement.

Parker, 2 Wn.App at 337.

Although the issue has not been recently addressed by any

Washington courts, other jurisdictions have recently reached similar conclusions and have held that defendants bear the burden of showing the existence of a license that would exempt them from prosecution under similar statutes. *See, e.g., Deshazier v. State*, 877 N.E.2d 200 (Ind. Ct. App. 2007)(Proof that a defendant did not possess a valid license is not an element of carrying a handgun without a license but, rather, is a defense for which the defendant bears the burden of proof); *Newman v. State*, 751 N.E.2d 265 (Ind. Ct. App. 2001)(Once the state proves that the defendant carried a handgun on or about his person, away from his dwelling or business, the burden shifts to the defendant to establish that he possessed a valid license); *Commonwealth v. Colon*, 866 N.E.2d 412 (2007)(Defendant had burden of showing that he had license to possess firearm and firearm identification card, in prosecution for possession of a firearm without a license and possession of a firearm or ammunition without firearm identification card); *Commonwealth v. Anderson*, 834 N.E.2d 1159 (2005)(On charge of unlawful possession of firearm, burden is on the defendant to come forward with evidence of a license).

In the present case, the State argued that the burden of proof regarding the existence of a firearms license should be on Carter because the issue “revolved around things that are uniquely within the control and knowledge of the defendant in this case.” RP 4/07/09 at 38. The trial court, however,

concluded that the legislature must have intended that the non-existence of the exception outlined RCW 9.41.190(2) was an element of the offense. CP 160. The trial appears to have based this conclusion on the fact that the exception outlined in RCW 9.41.190(3) was specifically designated as an affirmative defense, but the exceptions in RCW 9.41.190(2) did not contain the “affirmative defense” language. See CP 160. The trial court thus concluded that this “notable difference” indicated that the burden was on the disprove the exception outlined in subsection (2)(b). CP 160.

The trial court’s analysis, however, overlooked the other “notable difference” between 9.41.190(2)(b) and 9.41.190(3): namely that 9.41.190(2)(b) deals with the existence of a license, while 9.41.190(3) does not. Pursuant, to *Parker*, a statutory exception premised on the existence of a license is properly characterized as an affirmative defense. Thus, the legislature did not need to include language that 9.41.190(2)(b) was an affirmative defense. Furthermore, as the exception outlined in 9.41.190(3) (which is specifically denoted as an affirmative defense) was not premised on the existence of a license, and it would not have fallen under the purview of *Parker*. Thus, the legislature was required to include the affirmative defense language in 9.41.190(3). Furthermore, the trial court’s rationale mirrored the defendant’s argument in *Parker*, which the court squarely rejected. See, *Parker*, 2 Wn.App at 335-36, citing *Harding*, 108 Wash. At 608.

In short, as *Parker* explained, Washington law has long held that a defendant appropriately bears the burden in firearm cases of demonstrating that he or she is “licensed or exempted from the licensing requirement.” *Parker*, 2 Wn.App at 337.

The trial court in the present case, therefore, erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun, and this Court should find that the statutory exemption outlined in RCW 9.41.190(2)(b) is an affirmative defense.

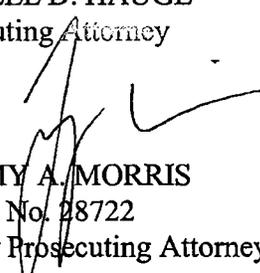
V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court’s decision finding that Carter was exempt or otherwise not subject to RCW 9.41.190’s prohibition against the private possession of machine guns, and to reverse the trial court’s order of dismissal in the present case. In addition, the State urges this Court to find that the trial court erred in concluding that the State was required to prove, as an element of the offense, that Carter was not licensed to possess the machine gun at issue.

DATED October 7, 2009.

Respectfully submitted,

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DOCUMENT1

NO. 39392-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

MARCUS CARTER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 99-1-01367-9

BRIEF OF APPELLANT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 7, 2009, Port Orchard, WA _____
Original +1 to the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402
Copy to Defendant, pro se, listed at left

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the present case as a matter of law pursuant to *State v. Knapstad* and in holding that the undisputed facts failed to establish a prima facie case against the Defendant.

2. The trial court erred in concluding as a matter of law that RCW 9.41.190's prohibition against possessing a machine gun did not apply to Carter.

3. The trial court erred in concluding as a matter of law that Carter's private possession of a machine gun qualified under RCW 9.41.190(2)(b)'s exception to the general prohibition against possession of machine gun.

4. The trial court erred in concluding as a matter of law that Carter was "licensed under federal law" as that phrase is used in RCW 9.41.190(2)(b).

5. The trial court erred in concluding as a matter of law that Carter was "engaged in the production, manufacture, repair, or testing of a machine" to be used or purchased by the armed forces or law enforcement as required under RCW 9.41.190(2)(b).

6. The trial court erred in concluding that RCW 9.41.190(2)(b) does not require technical compliance with federal law.

6. The trial court erred in concluding that RCW 9.41.190(2)(b) in any way authorized Carter to privately possess a machine gun.

7. The trial court erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun under RCW 9.41.190.

II. STATEMENT OF ISSUES

The defendant/respondent, Marcus Carter, brought a motion to dismiss the charge of possession of a machine gun. RCW 9.41.190(1) provides that it is unlawful for any person to own, buy, or have in possession or under control, any machine gun. An exception to this general prohibition is outlined in RCW 9.41.190(2), which provides:

This section shall not apply to:

(a) Any peace officer in the discharge of official duty or traveling to or from official duty, or to any officer or member of the armed forces of the United States or the state of Washington in the discharge of official duty or traveling to or from official duty; or

(b) A person, including an employee of such person if the employee has undergone fingerprinting and a background check, who or which is exempt from or licensed under federal law, and engaged in the production, manufacture, repair, or testing of machine guns, short-barreled shotguns, or short-barreled rifles:

(i) To be used or purchased by the armed forces of the United States;

- (ii) To be used or purchased by federal, state, county, or municipal law enforcement agencies; or
- (iii) For exportation in compliance with all applicable federal laws and regulations.

The State's evidence demonstrated that Carter personally and privately possessed a machine gun. Although Carter contested that the weapon was machine gun, he never argued or asserted that the weapon did not belong to him personally or that anyone else had a possessory interest in the gun. The trial court concluded that Carter was exempt for prosecution for the charged offense and that he qualified under RCW 9.41.190(2)(b) exception to the statute. This conclusion, however, was contrary to the prohibition against the private possession of machine guns found both in RCW 9.41.190 and in Chapter 44, Title 18 U.S.C (the law under which Carter held a federal firearm license). The following issues are presented:

1. Whether the trial court erred in dismissing the present case as a matter of law pursuant to *State v. Knapstad* and in holding that the undisputed facts failed to establish a prima facie case against the Defendant?
2. Whether the trial court erred in concluding as a matter of law that RCW 9.41.190's prohibition against possessing a machine gun did not apply to Carter?
3. Whether the trial court erred in concluding as a matter of law

that Carter's private possession of a machine gun qualified under RCW 9.41.190(2)(b)'s exception to the general prohibition against possession of machine gun?

4. Whether the trial court erred in concluding as a matter of law that Carter was "licensed under federal law" as that phrase is used in RCW 9.41.190(2)(b)?

5. Whether the trial court erred in concluding as a matter of law that Carter was "engaged in the production, manufacture, repair, or testing of a machine" to be used or purchased by the armed forces or law enforcement as required under RCW 9.41.190(2)(b)?

6. Whether the trial court erred in concluding that RCW 9.41.190(2)(b) does not require technical compliance with federal law?

6. Whether the trial court erred in concluding that RCW 9.41.190(2)(b) in any way authorized Carter to privately possess a machine gun?

7. Whether the trial court erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun under RCW 9.41.190?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Marcus Carter was charged by amended information filed in Kitsap County Superior Court with possession of an unlawful firearm (a machine gun). Prior to trial, the Superior Court dismissed the charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).¹ This appeal followed.²

B. FACTS

The Supreme Court previously summarized the facts as follows:

Bruce Jackson and Frank Clark are criminal investigators with the Pierce County prosecutor's office. ... The defendant, Marcus Carter, was the chief instructor for Kitsap Rifle and Revolver Club and was certified by the Washington State Criminal Justice Training Commission to teach firearms training.

On May 15, 1999, Jackson and Clark attended a National Rifle Association certified firearms instructor class in Kitsap County taught by Carter. ... Carter brought out various firearms and set them on tables before the class. He

¹ As the trial court noted, however, Carter himself never characterized the motion as a *Knapstad* motion. See CP 159. Rather, Carter specifically denied that his motion was "tantamount to a *Knapstad* motion." CP 129. Carter explained that a *Knapstad* motion is an argument that the State's evidence is insufficient, but that this was "not what the Accused has argued for his motion." CP 129.

² The procedural history of the present case is lengthy. Although this case was charged in 1999, the matter has never actually made it to trial. Rather, the present appeal is the third appeal in this case. The first appeal occurred after the trial court dismissed the case (after it had granted Carter's motion to suppress). That dismissal, however, was eventually overturned by the Washington Supreme Court. *State v. Carter*, 151 Wn.2d 118, 130, 85 P.3d 887 (2004). When the case eventually returned to the Superior Court, the Court again dismissed the case, this time pursuant to *State v. Knapstad*, and ordered that the case was to be dismissed with prejudice. The State appealed, and this Court then held that although the dismissal was proper, the dismissal should have been without prejudice. *State v. Carter*, 138 Wash.App. 350, 157 P.3d 420 (2007). Upon remand, the trial court again dismissed the case pursuant to *State v. Knapstad*, although the basis for the motion was different. This appeal, the third appeal in this case, then followed.

asked the students to familiarize themselves with the firearm of their choice and prepare a demonstration during which they would describe the proper handling and safety functions of the firearm. Among the firearms was an AR-15 owned by Carter. Jackson was very familiar with the AR-15 and chose that weapon to demonstrate to the class.

The AR-15 rifle is the semiautomatic, civilian version of the automatic, military M-16 rifle. An automatic weapon will continue to fire as long as the trigger is held, and is commonly known as a machine gun. It is generally illegal to own an M-16. RCW 9.41.190.

Jackson noticed that the safety lever on the AR-15 rotated into a position that corresponds to the automatic fire selection on an M-16. The AR-15 safety lever cannot rotate into this position without having been modified. Jackson also noticed that the lever had the silver color and the finish of an M-16, rather than the traditional charcoal-black color of an AR-15. Jackson suspected that the AR-15 had been modified to allow it to fire automatically. He operated the firing mechanism and determined the weapon was capable of automatic fire. Jackson showed the gun to Clark, who concurred with Jackson's observations.

Jackson then opened the gun by removing a pin that allows the gun to pivot open. Jackson noticed immediately that a small aluminum block called an autosear had been added. An autosear, which prevents an automatic gun from jamming, is not available for purchase. Jackson asked Carter if the gun had been modified and Carter admitted that it had. As Jackson began to close the gun, Carter removed the autosear from the gun and put it in his pocket.

After class when the other students had left, Jackson and Clark approached Carter about the rifle. Carter admitted that he had put M-16 parts in the rifle to replace those AR-15 parts that were designed for semiautomatic operation, specifically identifying the bolt carrier, hammer, selector switch, and autosear. Carter admitted that the rifle could fire in fully automatic mode. With the gun still in their possession, Jackson and Clark told Carter that it was a felony to own such a weapon.

Carter then denied that the gun was illegal and insisted that the gun would not fire in a full-automatic mode. Carter wanted to demonstrate it to Jackson and Clark if they would let him take it to the range with a loaded magazine. Carter went to his car to collect some ammunition. Carter then engaged in what Jackson and Clark described as furtive movements. Carter began rummaging through items in the backseat of his car, and then returned to the classroom, and called out to another man that he needed a punch, a straight steel pin that would disable the autosear. Jackson told Carter that he would not be allowed to destroy or modify the autosear.

Jackson and Clark testified to feeling that the situation was quickly getting out of control and that Carter was very agitated and antagonistic. Carter grabbed the gun from Clark's hands and walked briskly back to his car. Jackson and Clark noticed a loaded 30-round magazine for the rifle in Carter's rear pocket. As Carter kneeled on the front seat in his car and fumbled with metal objects on the floor, Jackson saw that Carter had a loaded pistol under his shirt. Jackson told Carter that he felt Carter was posing a potentially lethal hazard to them. Jackson told Carter to turn around and bring his hands into view, which Carter failed to do. Jackson and Clark then gave Carter a choice: either he give them the rifle and autosear and they would give him a receipt for it and submit it for testing to the Washington State Patrol Crime Lab, or they would call the police. Carter delayed, so Clark placed a 911 call and asked that a deputy be sent. When Carter discovered the call had been made, he relinquished the rifle and autosear, and Jackson and Clark gave Carter a receipt. A deputy arrived, who asked Jackson and Clark to maintain custody of the AR-15. Jackson and Clark filed a report on the incident.

Carter, 151 Wn.2d at 122-24; *see also* CP 2, CP Exhibit 2 (pages 1-13). The weapon was also tested by the State to confirm that it did in fact operate as a fully automatic machine gun. CP Exhibit 5, 8.

Prior to trial Carter filed a motion to dismiss in which he challenged the court's jurisdiction and argued that he entitled by federal law to possess a machine gun. CP 54. Carter specifically argued that he held a firearms license which allowed him to possess or own a fully automatic weapon. CP 58.³ Carter then argued that RCW 9.41.190 states that it is not unlawful for a person to possess a machine gun if the person is licensed under federal law and engaged in the repair or testing of machine guns to be used or purchased by armed forces or law enforcement. CP 54-55.

The State filed a written response arguing that the facts alleged by Carter were insufficient to support a defense to the charged offense, and Carter submitted a reply brief. CP 69, 128.

On April 7, 2009, the trial court held a hearing on Carter's motion to dismiss. RP 4/07/09 1-53. At the hearing the State pointed out that page 8 of Exhibit 2 (the "summary report") stated that Carter had acknowledged that the rifle in question was his own personal rifle. RP 4/07/09 34, 36. The State also pointed out that Title 18 did not authorize Carter to privately own or possess a machine gun. RP 4/07/09 34, 36. The trial court denied Carter's motion on a different basis, noting that Carter had not shown that he was

³ Carter attached a copy of his license, which was a license issued pursuant to Chapter 44, Title 18, United States Code. CP 64. The license specifically states that the holder of the license is authorized to engage in business "within the limitations of Chapter 44, Title 18 United States Code." CP 64.

“engaged in the repair of machine guns for the armed forces or law enforcement.” RP 4/07/09 46-48.

On April 24, Carter filed a “supplemental” to his motion to dismiss which included two affidavits indicating that Carter had previously worked on machine guns for law enforcement and the military. CP 135-38. The State then filed a response incorporating the exhibits admitted at the April 7 hearing, and argued that although Carter had a firearms license under Chapter 44, Title 18 of the United States Code, 18 U.S.C. §922(o) specifically stated that it was unlawful for a person to privately possess a firearm, and that the State’s evidence showed that Carter privately possessed the gun at issue (as Carter had admitted this fact). CP 139. The State also pointed out that its evidence showed that Carter had also admitted that he did not possess a license to possess machine guns. CP 140. The State also pointed out that Carter’s affidavits did not claim that the gun at issue was owned by the armed forces or law enforcement. CP 140.

The trial court then addressed Carter’s motion at a hearing on May 1, 2009. See RP 5/01/09 6-21. At the hearing the State argued that Carter was not exempt from RCW 9.41.190 since Carter’s license did not allow him to privately possess a machine gun and that the gun at issue was not being worked on on behalf of the armed forces or law enforcement. RP 5/01/09 13-14.

The trial court ultimately issued a written memorandum opinion followed by and amended memorandum opinion. CP 148, 159. The trial court held that RCW 9.41.190(2)(b) does “not require technical compliance with federal law,” and that Carter was exempt from prosecution because he had a federal firearms license and had been engaged in the repair or testing of other machine guns for the armed forces or law enforcement. CP 163-64. The court rejected the State’s argument that the statute required Carter to be licensed to privately possess the actual machine gun at issue. CP 161-64. The court, therefore, granted Carter’s motion to dismiss. CP 154, 164.

IV. ARGUMENT

- A. THE TRIAL COURT ERRED IN CONCLUDING THAT RCW 9.41.190(2)(B) AUTHORIZES A PERSON TO PRIVATELY POSSESS A MACHINE GUN AS LONG AS THAT PERSON HAS A FEDERAL LICENSE OF SOME KIND AND HAS PREVIOUSLY WORKED ON A GOVERNMENT OWNED MACHINE GUN, AS THE TRIAL COURT’S INTERPRETATION VIOLATED THE LEGISLATURE’S INTENT, AS DEMONSTRATED THROUGH THE LANGUAGE OF THE STATUTE, TO MAKE IT UNLAWFUL FOR ANYONE TO PRIVATELY POSSESS A MACHINE GUN.**

The trial court determined that Carter was exempt from prosecution for his private possession of a machine gun because he had a federal license allowing him to repair government owned machine guns and because he had

previously repaired government owned machine guns. CP 159-64. The trial court's construction of the statute, however, is contrary to the intent of the legislature, as demonstrated by the statute, to make it unlawful for a person to privately possess a machine gun. The dismissal should therefore be reversed.

Appellate courts review a trial court's statutory interpretation *de novo* as a question of law. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). Statutory construction begins by reading the text of the statute or statutes involved. *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196, 199 (2005). If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *Roggenkamp*, 106 P.3d at 199. Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be ambiguous. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute. *Roggenkamp*, 106 P.3d at 199. The Court's primary duty in interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutes must be construed to effect their purpose and to avoid strained or absurd results. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

In the present case, Carter was charged with possessing a machine gun

in violation of RCW 9.41.190. In addition, Carter acknowledged that the gun in question was his personal rifle, and there has been no allegation that the gun ever belonged to a governmental agency. See, CP 62; Exhibit 2, page 8; Exhibit 3, page 72; Exhibit 4, page 21.

RCW 9.41.190(1) provides, *inter alia*, that it is unlawful for any person to manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any machine gun; or any part designed and intended solely and exclusively for use in a machine gun or in converting a weapon into a machine gun.

The general prohibition against the possession of machine guns, however, has several exceptions. First, RCW 9.41.190(2) provides that the general prohibition shall not apply to members of the armed forces or law enforcement officers in the discharge of their official duties. Secondly, RCW 9.41.190(2)(b) provides that the general prohibition shall also not apply to a person who “is exempt from or licensed under federal law, and engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency.⁴

The issue presented in Carter’s motion to dismiss, therefore, was

⁴ RCW 9.41.190(3) provides that it shall be an affirmative defense that the machine gun was acquired prior to July 1, 1994, and is possessed in compliance with federal law. Carter, however, has never made any claim that this section applies to his case.

whether Carter qualified under RCW 9.41.190(2)(b). The State argued below that the statute's plain language meant simply that it was not unlawful to possess a machine gun if a defendant had a federal license allowing him or her to privately possess a machine gun and if the defendant was engaged in the production, manufacture, repair, or testing of that machine gun to be used or purchased by the armed forces or a law enforcement agency.

The trial court, however, concluded that the statute meant that it was not unlawful to privately possess a machine gun as long as the defendant had a license allowing him to repair machine guns owned by the government and as long as the defendant had at some recent time been engaged in the production, manufacture, repair, or testing of some machine gun other than the machine gun in question. For the reasons outlined below, the trial court's interpretation was incorrect.

1. The language of RCW 9.41.190 demonstrates that the intent of the legislature was, among other things, to make it unlawful for a person to privately possess a machine gun.

The legislative intent with respect to machine guns in RCW 9.41.190(1) is clear. In that section, the legislature stated that it is unlawful for any person to own, buy, possess or control a machine gun. At least one Washington court has previously addressed the legislative intent behind this statute. In *State v. Padilla*, 95 Wn. App. 531, 534, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999), the Court explained that the legislative

intent behind RCW 9.41 was clear:

The plain language of the prohibitions in RCW Chapter 9.41 demonstrates the Legislature's clear goals of keeping all firearms out of the hands of certain individuals and certain firearms out of the hands of all individuals.

Padilla, 95 Wn. App. at 534-35. This statutory intent is carried out by the plain language of the statute.

The legislature, however, crafted two very narrow exceptions to the general prohibition on the possession of machine guns. First, the legislature created an exception for law enforcement officers and members of the armed services in the discharge of their official duties (or traveling to their official duties). RCW 9.41.190(2)(a). Second, the legislature created an exception for those licensed under federal law who produce, manufacture, repair, or test machine guns for the armed forces or law enforcement. RCW 9.41.190(2)(b). It is this second exception that is at issue in the present case.

As the State argued below, the plain language of RCW 9.41.190 is amenable to only one reasonable interpretation; namely, that it is unlawful for a person to possess a machine gun unless: (1) that person is exempt or federally licensed to possess that machine gun; and (2) the possession is tied to that person's being engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency.

This common sense reading of the statute makes sense and effectuates the obvious legislative intent. For example, a gunsmith who is federally licensed to repair machine guns may physically possess a machine gun belonging to a law enforcement agency in his or her shop where the repairs are being made since both prongs of the above exception are met.

That same gunsmith, however, may not “borrow” that government owned machine gun, take it out of his shop, and use it for target shooting for his own pleasure (or use it to go hunting, etc). In such a scenario, the possession would be unlawful despite the federal license since by his or her engaging in a personal use of the machine gun that gunsmith could not in any way be properly characterized as being “engaged in the production, manufacture, repair or testing of machine guns.”

Similarly, a gunsmith who is not federally licensed to possess and/or repair a machine gun may not lawfully possess or repair a government owned machine gun (since the first prong of the test is not satisfied). Finally, a gunsmith who is not federally licensed to privately possess a machine gun may not privately possess such a firearm, since both prongs of the above test would not be satisfied.

The facts of the present case fall under this final scenario. Carter’s private possession of a machine gun violated the only reasonable

interpretation of RCW 9.41.190; namely, that it is unlawful for a person to possess a machine gun unless: (1) that person is exempt or federally licensed to possess that machine gun; and (2) the possession is tied to that person's being engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency. In short, Carter violated RCW 9.41.190 because Carter privately possessed a machine gun without a license authorizing him to privately possess a machine gun, and because Carter's private possession of a machine gun was not properly characterized as being an act that was engaged in the production, manufacture, repair or testing of machine guns to be used or purchased by the armed forces or a law enforcement agency.

2. *Carter does not qualify under the RCW 9.41.190(2)(b) exception because Carter was not "exempt from or licensed under federal law" to privately possess a machine gun.*

Carter claimed below, and the State did not dispute, that at the relevant time Carter possessed a federal license under Chapter 44, Title 18 of the United States Code. CP 56, 64. Carter submitted a copy of this license as part of his motion to dismiss. CP 64. The license itself authorizes Carter to engage in the business of being a "dealer in firearms other than destructive devices," but the license itself plainly states that Carter is "licensed to engage in the business specified in this license, within the limitations of Chapter 44, Title 18, United States Code, and the regulations issued thereunder." CP 64.

Chapter 44, Title 18 of the United States Code contains a number of limitations. Most importantly for the present case, 18 U.S.C. § 922(o) makes it unlawful to privately possess a machine gun and states as follows:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Courts that have examined the scope of 18 U.S.C. §922(o) have applied its plain language and found that the statute prohibits the private possession of machine guns that were not lawfully possessed before May 9, 1986. *See e.g., Farmer v. Higgins*, 907 F.2d 1041 (11th Cir.1990)(“[S]ection 922(o) prohibits the private possession of machine guns not lawfully possessed before May 19, 1986); *U.S. v. Warner*, 5 F.3d 1378 (10th Cir. 1993)(same); *United States v. Aiken*, 974 F.2d 446, 449 (4th Cir.1992)(“Congress made it illegal for anyone other than government personnel to possess ... a machine gun in 1986, 18 U.S.C. § 922(o)(1)”). In short, the only relevant exception to 18 U.S.C. §922(o)’s general prohibition on the possession of machine guns is possession by (or under the authority of) the government. This exception

does not apply in the present case since Carter admitted that the weapon was his personal rifle.

The trial court below, however, held that “Carter has established that he maintained a Title 18 license which allowed him to deal in, i.e., repair machine guns.” While Carter’s federal license might have allowed him to repair government owned machine guns at the request of the government, it is indisputable that Carter’s license did not authorize him to privately possess a machine gun, since 18 U.S.C. 922(o) specifically prohibits the private possession of machine guns. Carter’s possession of a Title 18 license, therefore, was irrelevant, since the Title 18 license did not authorize the private possession of a machine gun.

The trial court’s reasoning, however, appears to be that the language of RCW 9.41.190(2)(b) only requires that a defendant possess a federal license of any kind, not an actual license to possess a private machine gun and that RCW 9.41.190(2)(b) does not require technical compliance with federal law. The trial court’s interpretation of RCW 9.41.190(2)(b) leads to absurd results. Under the trial court’s reasoning, possession of a federal driver’s license would be sufficient. Under any reasonable interpretation of the statute, the requirement that the defendant be “exempt from or licensed under federal law” cannot mean that the defendant is only required to be licensed to drive. Similarly, the fact that a defendant is licensed to repair

government owned machine guns does not establish that he or she is licensed to privately possess machine guns, especially when the same statute that the license is issued under specifically prohibits the private possession of a machine gun.

As Carter admitted that the rifle in question was his own private rifle, the evidence (when viewed in a light most favorable to the State) demonstrated that Carter unlawfully possessed a machine gun in violation of RCW 9.41.190. The fact that Carter held a license under Chapter 44, Title 18 of the United States Code was irrelevant, since 18 U.S.C. § 922(o) outlaws the private possession of machine guns.

3. ***Carter does not qualify under the RCW 9.41.190(2)(b) exception because Carter was not “engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency when he privately possessed a machine gun.***

In addition to requiring that a person be “exempt from or licensed under federal law,” the exception outlined in RCW 9.41.190(2)(b) also requires that a person be “engaged in the production, manufacture, repair, or testing of machine guns” to be used or purchased by the armed forces or a law enforcement agency in order to qualify for the exception. Viewing the evidence in a light most favorable to the State, the evidence showed that Carter was not “engaged in the production, manufacture, repair, or testing of

machine guns” when he privately possessed the gun in question.

Carter argued below that he had at times repaired machine guns for governmental entities, and the State did not dispute this fact. Carter, however, did not allege that the gun in question belonged to a governmental entity or that he was repairing it or testing it for someone else; rather, Carter acknowledged that the gun in question was his own private rifle. CP 62; Exhibit 2, page 8; Exhibit 3, page 72; Exhibit 4, page 21.

The trial court below essentially interpreted the language RCW 9.41.190(2)(b) to authorize a person to privately own a machine gun as long as that person had, at some time, worked on some government owned machine other than the one he was charged with possessing. This conclusion, however, violates the legislative intent and leads to strained or absurd results.

For example, the language of RCW 9.41.190(2)(a) clearly provides that a member of armed services or law enforcement may only lawfully possess a machine gun in the discharge of official duties. Thus, a member of the armed forces or law enforcement may not take a government owned machine gun out hunting or target shooting for their own personal pleasure, nor may they privately possess a machine gun.

The trial court’s reading of the statutes would allow a gunsmith (who had a federal license of any kind and who occasionally works on machine

guns for the armed forces or law enforcement) to do exactly what members of the armed forces or law enforcement are not allowed to do: namely to take any machine gun, including a government owned machine out into the woods to hunt or shoot targets for recreation. Such a result makes no sense.

Rather, the only reasonable reading of RCW 9.41.190 is that it is unlawful to possess a machine gun except for two narrow exceptions. The first exception is for members of the armed forces or law enforcement who are discharging their official duties. Similarly, the second exception is for those people who possess a valid federal license allowing them to work on machine guns for the military or law enforcement and who are actually engaged in such work on a government owned machine gun. The statute does not create a blanket exception allowing such gunsmiths to privately possess machine guns, just as it does not allow members of the armed services or law enforcement to privately possess machine guns.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT THE STATE HAS THE BURDEN OF PROVING THE NON-EXISTENCE OF A VALID FEDERAL FIREARMS LICENSE IN ORDER TO PROVE THE CRIME OF POSSESSION OF A MACHINE GUN BECAUSE WASHINGTON COURTS HAVE LONG HELD THAT A DEFENDANT APPROPRIATELY BEARS THE BURDEN OF PROVING THE EXISTENCE OF A LICENSE THAT WOULD EXEMPT HIM OR HER FROM PROSECUTION.

The trial court also erred when it concluded that that the exception outlined RCW 9.41.190(2)(b) was an element of the offense as opposed to an affirmative defense. CP 2-5. The State argued below that the statutory exception was an affirmative defense because the issue of whether a defendant possessed a license is something “uniquely with the control and knowledge of the defendant.” RP 4/07/09 38. The trial court, however, reached the opposite conclusion. As this is an issue that is likely to arise on remand, the State asks this Court to also address this issue.

Washington courts have previously addressed the issue of whether or not a defense is properly characterized as an affirmative defense when a statute exempts a defendant from prosecution if the defendant is validly licensed to engage in the prohibited activity. For instance, in *City of Seattle v. Parker*, 2 Wash.App. 331, 467 P.2d 858 (1970), the defendant was charged with violating an ordinance that made it unlawful for anyone to “carry a pistol concealed on his person, except when in his place of abode or fixed place of

business, without a license therefor as provided in RCW Chapter 9.41.” *Parker*, 2 Wn.App at 331. On appeal, Parker contended that the burden on proving the lack of a license belonged to the prosecution. *Id* at 332. The Court of Appeals held that a similar question had been considered and resolved decades earlier in *State v. Shelton*, 16 Wash. 590, 48 P. 258, 49 P. 1064 (1897). *Parker*, 2 Wn.App at 332. The *Parker* court noted that in *Shelton*, the court had held that the burden in such cases was on the defendant. *Parker*, 2 Wn.App at 331.

As explained in *Parker*, this rule is referred to as a “balancing of convenience” by some authorities. *Parker*, 2 Wn.App at 332-33, *citing Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934); *Brown v. United States*, 66 A.2d 491 (D.C.Mun.App.1949). Further, where the facts lie more immediately within the knowledge of the defendant, the onus probandi should be his. *Parker*, 2 Wn.App at 333, *citing Rossi v. United States*, 289 U.S. 89, 53 S.Ct. 532, 77 L.Ed. 1051 (1933).

The *Parker* court also rejected the defendant’s claim that the burden of proof on the license issue should remain on the prosecution because the ordinance in question did not specify that the burden of proof was on the defendant on this issue, yet the ordinance did specifically place the burden of proof on the defendant with respect to other specified defenses. *Parker*, 2 Wn.App at 335. The Court of Appeals, however noted that a similar

argument was disposed of in *State v. Harding*, 108 Wash. 606, 185 P. 579

(1919), where the court, relying upon *Shelton*, stated,

So that decision seems to be an answer to the contention of counsel for the appellant that the burden of proof in such cases as to such question does not rest upon the accused, when the exception which he invokes for his protection is found in the statutory definition of the offense, or, as sometimes said, in the enacting clause, rather than in a separate exception or proviso. We are quite unable to see that the exception here involved is of any different nature, in so far as we are concerned with the question of the burden of proof, than where there is involved the question of burden of proof as to the accused possessing a license rendering him immune from prosecution. It would seem that the rule, which is sometimes called a rule of necessity, in view of the ease with which an accused person could produce proof of the fact which renders him immune-it being within his own knowledge and involving proof of a negative on the part of the state-has even stronger reasons for its support as applicable to the exception here involved. It seems to us, therefore, that the decision in that case is controlling here, unless we are to overrule it, which we are not inclined to do.

Parker, 2 Wn.App at 335-36, citing *Harding*, 108 Wash. At 608. The *Parker*

court thus concluded that,

Neither precedent nor the temper of the times warrants our abandoning the reasoning in *Shelton*. Those who choose to carry concealed pistols must be prepared to demonstrate that they are licensed or exempted from the licensing requirement.

Parker, 2 Wn.App at 337.

Although the issue has not been recently addressed by any

Washington courts, other jurisdictions have recently reached similar conclusions and have held that defendants bear the burden of showing the existence of a license that would exempt them from prosecution under similar statutes. *See, e.g., Deshazier v. State*, 877 N.E.2d 200 (Ind. Ct. App. 2007)(Proof that a defendant did not possess a valid license is not an element of carrying a handgun without a license but, rather, is a defense for which the defendant bears the burden of proof); *Newman v. State*, 751 N.E.2d 265 (Ind. Ct. App. 2001)(Once the state proves that the defendant carried a handgun on or about his person, away from his dwelling or business, the burden shifts to the defendant to establish that he possessed a valid license); *Commonwealth v. Colon*, 866 N.E.2d 412 (2007)(Defendant had burden of showing that he had license to possess firearm and firearm identification card, in prosecution for possession of a firearm without a license and possession of a firearm or ammunition without firearm identification card); *Commonwealth v. Anderson*, 834 N.E.2d 1159 (2005)(On charge of unlawful possession of firearm, burden is on the defendant to come forward with evidence of a license).

In the present case, the State argued that the burden of proof regarding the existence of a firearms license should be on Carter because the issue “revolved around things that are uniquely within the control and knowledge of the defendant in this case.” RP 4/07/09 at 38. The trial court, however,

concluded that the legislature must have intended that the non-existence of the exception outlined RCW 9.41.190(2) was an element of the offense. CP 160. The trial appears to have based this conclusion on the fact that the exception outlined in RCW 9.41.190(3) was specifically designated as an affirmative defense, but the exceptions in RCW 9.41.190(2) did not contain the “affirmative defense” language. See CP 160. The trial court thus concluded that this “notable difference” indicated that the burden was on the disprove the exception outlined in subsection (2)(b). CP 160.

The trial court’s analysis, however, overlooked the other “notable difference” between 9.41.190(2)(b) and 9.41.190(3): namely that 9.41.190(2)(b) deals with the existence of a license, while 9.41.190(3) does not. Pursuant, to *Parker*, a statutory exception premised on the existence of a license is properly characterized as an affirmative defense. Thus, the legislature did not need to include language that 9.41.190(2)(b) was an affirmative defense. Furthermore, as the exception outlined in 9.41.190(3) (which is specifically denoted as an affirmative defense) was not premised on the existence of a license, and it would not have fallen under the purview of *Parker*. Thus, the legislature was required to include the affirmative defense language in 9.41.190(3). Furthermore, the trial court’s rationale mirrored the defendant’s argument in *Parker*, which the court squarely rejected. See, *Parker*, 2 Wn.App at 335-36, citing *Harding*, 108 Wash. At 608.

In short, as *Parker* explained, Washington law has long held that a defendant appropriately bears the burden in firearm cases of demonstrating that he or she is “licensed or exempted from the licensing requirement.” *Parker*, 2 Wn.App at 337.

The trial court in the present case, therefore, erred in concluding that the State has the burden of proving the non-existence of a valid federal firearms license in order to prove the crime of possession of a machine gun, and this Court should find that the statutory exemption outlined in RCW 9.41.190(2)(b) is an affirmative defense.

V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court’s decision finding that Carter was exempt or otherwise not subject to RCW 9.41.190’s prohibition against the private possession of machine guns, and to reverse the trial court’s order of dismissal in the present case. In addition, the State urges this Court to find that the trial court erred in concluding that the State was required to prove, as an element of the offense, that Carter was not licensed to possess the machine gun at issue.

DATED October 7, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1

Don Burger

From: Alexis Foster [AFoster@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 12:28 PM
To: Eric M Fong
Cc: Kevin P. Kelly; mbender@cmpyd.com
Subject: Re: FW: Kyle Scharnhorst 09-1-01139-5

Eric,

I have talked to Marissa and Kevin and I have talked about this case extensively with the same information. He is not eligible for Drug Court and has been turned down several times after viewing. I also am not willing to dismiss the Man. count. It is my understanding that he is planning to plea this week and I will be asking for him to go into custody after entering his plea because I understand counsel is requesting a DOSA, to which we are objecting and do not think he qualifies for as there was not a small amount of drugs per the statute.

Alexis

Alexis T. Foster
Deputy Prosecuting Attorney
Felony Division
Kitsap County Prosecutor's Office
360-337-4910
afoster@co.kitsap.wa.us

>>> "Eric M Fong" <fong@rovangfong.com> 11/3/2009 12:19 PM >>>

Alexis, I just sent this email, but yours was bounced. Will you look into this? Also, with the Manuf of Mushrooms, he is looking at a year and a day. If drug court doesn't take him, could you please dismiss that count or do something so that he isn't looking at prison. In Kyle's case, he has learned his lesson; prison time won't help anyone or deter his future behavior. Thanks, Eric

From: Eric M Fong [mailto:fong@rovangfong.com]
Sent: Tuesday, November 03, 2009 12:07 PM
To: ' kkelly@co.kitsap.wa.us '; AWallace@co.kitsap.wa.us
Cc: ' mbender@cmpyd.com '
Subject: Kyle Scharnhorst 09-1-01139-5

Kevin, and Alexis, this is a case where the family has consulted with me, but practically speaking I don't feel right taking there money b/c I'm not sure I can justify it. Having said that, I would like to try and help him. He is a 20 year old college kid (at OC with financial aide) that has never been in trouble before. He recently started to grow mushrooms and sold MJ to a CI. He would otherwise be a perfect candidate for drug court, in fact his roommate was accepted (Alex Darley), except that there were guns stored in a safe in Kyle's room.

Kyle and his dad go hunting every year, he got his first deer when he was 8 yo with the 44 rifle that was seized, and is a marksman at the gun club. In any event, he isn't a big time drug dealer that uses the guns for enforcement; he is an addict that sells so he can smoke for free. He wants drug court, but the guns in the report apparently have precluded him.

I was wondering, b/c the guns are not his, but his dads, if there is any way around this problem. Kyle's dad can prove that the guns belong to him. His dad left the guns with Kyle b/c he is transient with his work (he is an occupational health and safety specialist that works on big jobs - SAFECO field, nuclear plants, underground transit, military bases etc.). Anyway, dad mostly hunts with son, so that is why the guns are there.

If he is convicted, as you know he will lose his financial aide and not able to continue with his education. Given this chance, I believe Kyle will make the most of it. Will drug court take Kyle? I talked to Casade about a diversion, but that was a no go for whatever reason, probably b/c of the guns. If you meet him, talked to him, and got to know him, I am sure you would be impressed. Thanks for your consideration, Eric

Ps he has court tomorrow.

Don Burger

From: Marcus Carter [marcus@gunschool.com]
Sent: Tuesday, November 03, 2009 1:55 PM
To: Jeremy A. Morris
Subject: RE: State v. Carter

Thank you for the response. I do now remember you Jeremy. I'll keep in touch and do look forward to seeing you again (though I must admit I wish it were under different circumstances).

Best regards,

--

Marcus

-----Original Message-----

From: Jeremy Morris [mailto:JMorris@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 12:04 PM
To: Marcus Carter
Subject: Re: State v. Carter

I'm sorry that the brief just now made it to you. If you need to request an extension from the Court of Appeals, I certainly will not oppose it.

I have attached an electronic copy of the brief per your request. (I've included both a Word copy and a PDF).

We have met before, by the way. I was the prosecutor who made the oral argument in the last round at the Court of Appeals (back in 2006). I remember it well, as I was unfamiliar with the court's projection equipment and you were kind enough to show me how everything works.

Please let me know if you need anything else. My direct line is 360-337-7211.

Jeremy

>>> "Marcus Carter" <marcus@gunschool.com> 11/3/2009 11:22 AM >>>

.....
Jeremy,

Greetings. I have just picked up your opening appellate brief in this matter. I started a move on October 1st with a change of address filed (with the post office) and completed the move on the 7th. I had been receiving mail at the new address since the 1st, however, your brief slipped through the cracks and was delivered to the Wicks End address on approximately the 10th of October as it was postmarked on the 9th. The package was held and not forwarded from that address.

Would you be so kind as to send me an electronic (MSWord) copy?

My updated contact information is:

Marcus Carter

██████████
Bremerton, WA 98310

Home: ██████████

Cell: ██████████

marcus@gunschool.com

Thank you, and I look forward to formally meeting you.

--

Marcus Carter - Executive Officer
Kitsap Rifle & Revolver Club
4900 Seabeck Hwy. N.W.
Bremerton, Washington 98312
USA
For Sport and National Defense
<http://www.GunSafety.org>
Range Phone - 360.373.1007

-----Original Message-----

From: Kevin Anderson [mailto:KMAnders@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 7:49 AM
To: Jeremy Morris
Cc: marcus@gunschool.com
Subject: Fwd: State v. Carter

So far I have escaped all the winter colds and flu. Knock on wood.

Jeremy Morris is the appellate counsel. His e-mail address should be part of this message.

>>> "Marcus Carter" <marcus@gunschool.com> 11/2/2009 11:40 PM >>>

Hello Andy,

I hope you are well. Could you please supply me with the name and email address of whoever is handling the appeal for your office?

I have had a change of address as of October 7 and would like to get the information to him.

Best regards and thank you,

--

Marcus Carter

[REDACTED]
Bremerton, WA 98310

[REDACTED]
marcus@gunschool.com

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.5.423 / Virus Database: 270.14.45/2476 - Release Date: 11/02/09 19:39:00

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.5.424 / Virus Database: 270.14.47/2478 - Release Date: 11/03/09 07:36:00

Don Burger

From: Jeremy A. Morris [JMorris@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 2:13 PM
To: Marcus Carter
Subject: RE: State v. Carter

Understood.

Give me a call if you need anything else.

Jeremy

>>> "Marcus Carter" <marcus@gunschool.com> 11/3/2009 1:54 PM >>>

Thank you for the response. I do now remember you Jeremy. I'll keep in touch and do look forward to seeing you again (though I must admit I wish it were under different circumstances).

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Home: [REDACTED]
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Marcus Carter - Executive Officer
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Checked by AVG - www.avg.com
Version: 8.5.424 / Virus Database: 270.14.47/2478 - Release Date: 11/03/09 07:36:00

Don Burger

From: Alexis Foster [AFoster@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 10:33 PM
To: fong@rovangfong.com
Cc: Kevin P. Kelly; mbender@cmpyd.com
Subject: RE: FW: Kyle Scharnhorst 09-1-01139-5

Eric,

No hard feelings taken. I am just doing my job, just as you are doing yours.

Alexis

Alexis T. Foster
Deputy Prosecuting Attorney
Felony Division
Kitsap County Prosecutor's Office
360-337-4910
afoster@co.kitsap.wa.us

>>> "Eric M Fong" <fong@rovangfong.com> 11/03/09 2:00 PM >>>

Alexis, why are you so hard on people? This is a good kid that made a mistake, he will learn from it, and he will grow. He isn't a monster that needs to be locked up so we can be safe from him. To take him into custody pending a DOSSA eval is pretty hardcore, don't you think? I can't imagine him not getting the DOSSA.

Anyway, just have to let you know how I feel, no hard feelings. Eric

-----Original Message-----

From: Alexis Foster [mailto:Afoster@co.kitsap.wa.us]
Sent: Tuesday, November 03, 2009 12:28 PM
To: Eric M Fong
Cc: mbender@cmpyd.com; Kevin Kelly
Subject: Re: FW: Kyle Scharnhorst 09-1-01139-5

Eric,

I have talked to Marissa and Kevin and I have talked about this case extensively with the same information. He is not eligible for Drug Court and has been turned down several times after viewing. I also am not willing to dismiss the Man. count. It is my understanding that he is planning to plea this week and I will be asking for him to go into custody after entering his plea because I understand counsel is requesting a DOSA, to which we are objecting and do not think he qualifies for as there was not a small amount of drugs per the statute.

Alexis

Alexis T. Foster
Deputy Prosecuting Attorney
Felony Division
Kitsap County Prosecutor's Office
360-337-4910
afoster@co.kitsap.wa.us

>>> "Eric M Fong" <fong@rovangfong.com> 11/3/2009 12:19 PM >>>

Alexis, I just sent this email, but yours was bounced. Will you look into this? Also, with the Manuf of Mushrooms, he is looking at a year and a day. If drug court doesn't take him, could you please dismiss that count or do something so that he isn't looking at prison. In Kyle's case, he has learned his lesson; prison time won't help anyone or deter his future behavior. Thanks, Eric

From: Eric M Fong [mailto:fong@rovangfong.com]
Sent: Tuesday, November 03, 2009 12:07 PM
To: 'kkelly@co.kitsap.wa.us'; AWallace@co.kitsap.wa.us
Cc: 'mbender@cmpyd.com'
Subject: Kyle Scharnhorst 09-1-01139-5

Kevin, and Alexis, this is a case where the family has consulted with me, but practically speaking I don't feel right taking there money b/c I'm not sure I can justify it. Having said that, I would like to try and help him. He is a 20 year old college kid (at OC with financial aide) that has never been in trouble before. He recently started to grow mushrooms and sold MJ to a CI. He would otherwise be a perfect candidate for drug court, in fact his roommate was accepted (Alex Darley), except that there were guns stored in a safe in Kyle's room.

Kyle and his dad go hunting every year, he got his first deer when he was 8 yo with the 44 rifle that was seized, and is a marksman at the gun club. In any event, he isn't a big time drug dealer that uses the guns for enforcement; he is an addict that sells so he can smoke for free. He wants drug court, but the guns in the report apparently have precluded him.

I was wondering, b/c the guns are not his, but his dads, if there is any way around this problem. Kyle's dad can prove that the guns belong to him. His dad left the guns with Kyle b/c he is transient with his work (he is an occupational health and safety specialist that works on big jobs - SAFECO field, nuclear plants, underground transit, military bases etc.). Anyway, dad mostly hunts with son, so that is why the guns are there.

If he is convicted, as you know he will lose his financial aide and not able to continue with his education. Given this chance, I believe Kyle will make the most of it. Will drug court take Kyle? I talked to Casade about a diversion, but that was a no go for whatever reason, probably b/c of the guns. If you meet him, talked to him, and got to know him, I am sure you would be impressed. Thanks for your consideration, Eric

Ps he has court tomorrow.

Don Burger

From: Josh W. Brown [JWbrown@co.kitsap.wa.us]
Sent: Saturday, November 07, 2009 11:56 PM
To: aesirus@[REDACTED]
Cc: Dana Daniels
Subject: Re: KRRC Land Sale

Julian, Kitsap County agreed to this transfer several months ago. I'm not sure if you required additional information. Best, Josh Brown -----Original Message-----

From: "Julian P." <aesirus@[REDACTED]>
To: Brown, Josh <JWbrown@co.kitsap.wa.us>
Cc: <info@gunsafety.org>

Sent: 5/11/2009 7:04:23 AM
Subject: KRRC Land Sale

NOW THEREFORE, be it resolved:

The Board of County Commissioners hereby authorizes the assignment and sale of the portion of the property acquired under the DNR/County land exchange, which is more specifically described in Exhibit A, attached hereto and incorporated herein, to the Kitsap Rifle and Revolver Club...

BE IT FURTHER RESOLVED:

The conveyance to KRRC shall take place as soon as is practicable after the property is conveyed to Kitsap County by DNR.

I and my family fully support this action. I've been to many ranges in Western Washington and none of them can compete with KRRC. Between the public events they hold, charity work, and youth education they are actually making a difference in our community. I've always viewed education as the key to empowerment and it is offered at KRRC.

Don Burger

From: Julian [aesirus@██████████]
Sent: Sunday, November 08, 2009 8:31 AM
To: Josh W. Brown
Subject: Re: KRRC Land Sale

I think my email is just acting strange. I have no idea why you were sent anything.

On Sat, Nov 7, 2009 at 11:55 PM, Josh Brown <JWbrown@co.kitsap.wa.us> wrote:
Julian, Kitsap County agreed to this transfer several months ago. I'm not sure if you required additional information. Best, Josh Brown

-----Original Message-----

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To: Brown, Josh <JWbrown@co.kitsap.wa.us>
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Don Burger

From: Veronica Garcia [VGarcia@co.kitsap.wa.us]
Sent: Monday, November 09, 2009 4:06 PM
To: Scott Diener
Subject: Wade Larson, t: 360-692-6741

Importance: High

This was one of the voicemail messages from earlier.

Mr. Larson has two issues to discuss:

1. The gun club. He said that he spoke to Larry in June and you about 1-2 weeks ago and is now following up about the gun club managers that were supposed to take care of certain issues pertaining to use of a gun club property.
2. The process for Kitsap County to create a park. Mr. Larson said that he spoke with some of the Commissioners at a work study awhile ago but would like to find out more about the process including whether it includes a public notification component.

If possible, he would really like a call back before the end of today.

Thanks,
Veronica

Don Burger

From: Gail and Kevin Gross [kevinandgail@[REDACTED]]
Sent: Tuesday, November 10, 2009 3:22 PM
To: Josh W. Brown
Subject: POSSIBLE SPAM! SCORE = 7.8 Newberry Hill Heritage Park

I live in the Whisper Ridge housing development near the new Newberry Hill Heritage Park. There are a number of us who plan on attending the Nov. 19th meeting at Klahowya Secondary School regarding this park. In talking to our neighbors, one issue that concerns us is the noise and rumored expansion of the Kitsap Gun Club (not sure of their exact name) who have a shooting range in the area of the park. The noise seems to have gotten worse and there is a concern for the safety of those who use the park and those who live nearby.

We appreciate an opportunity to give input to the process of the development of this new park.

Thank you,

Gail Gross
[REDACTED]
Bremerton, WA 98312
[REDACTED]

Don Burger

From: RICHARD BORGES [rborges66@██████████]
Sent: Wednesday, November 11, 2009 12:48 AM
To: Josh Brown; bgrimley@kitsapsun.com; Commissioners@co.kitsap.wa.us; tips@komo4news.com; Lori Raymaker; info@wildliferecreation.org; fisher_mark@██████████; klownprinze@██████████; info@rco.wa.gov; aaron.toso@dnr.wa.gov; brad.pruitt@dnr.wa.gov; cpl@dnr.wa.gov; peter.goldmark@dnr.wa.gov; jlang@evergreenmtb.org; goldmarktransition@██████████ mbrixey@ieway.com; info@votepetergoldmark.com
Subject: POSSIBLE SPAM! SCORE = 6.0 newberry heritage master plan meeting

Its odd i have not seen anything in the Kitsap Sun advertising this master plan meeting - although its on mark fishers site. Even though this stewardship is under your current projects its strange that under stewardship/volunteer committees -- this isn't listed, i guess just a choice of where to put it?

I would like to know who the members of the newberry heritage stewardship committee.

I noticed after emailing chip faver the pictures of kitsap mountain bike club building bridges over running water that Mr fisher suddenly resigned from the advisory board (where he gained all the info that the county was soon to acquire the land). The boardwalks were not there nor the intricate bridge built over running water?

Then i had a meeting after a lengthy email to chip and he resigned only 60 days later.

DNR said the trail building (specifically brad pruit who did nothing) was illegal, everybody said it was illegal - yet no charges were ever filed even though this was put into print in the kitsap sun and kgw news? Its evident what stewardship ability mr fisher has with his illegal activities he said, "they have bigger fish to fry than me." He may have been wrong about that as i am in work on something for him and commissioner brown. I just wanted to confirm the mark fisher is on the stewardship committee - i found it on the minutes of parks and recreation about him being on the stewardship committee for the park he illegally built (upon based on his insider information on the parks advisory board) on. Josh brown thanked the group for their enthusiasm in illegality - talk about turning the other cheek?

The pictures of intricate bridges and trails also have exif data on them showing that february 19th/20th is when they perpetrated the crime that brad pruit, commissioner brown, chip faver and higher up DNR all ignored even though illegal. I guess thats how DNR manages state land and the lands commissioner must agree with this policy of turn a blind eye??

The central kitsap greenways lie was land in trade to make the Josh Browns heritage park (north and south had theirs) - everything except two sentences in the grant was false and had nothing to do with the actual property - and the grant for the CKG was to protect the land and use for recreation, neither were the case or are now? the grant doesn't mention black tailed deer, black bear, coyotes, mountain lions or the eagles that fly around wildcat lake and in the trees. It mentions big beef and chico creek - not wildcat creek, not wildcat lake that feeds wildcat creek and eventually feeds into chico creek. There is an actual study i found on wildcat creek and the chum salmon, steelhead and silver salmon - it probably wasn't used because the report says if more logging occurs (and will by DNR) then that will change the sustainability of the fishery and possible effects on chico creek - but current levels are safe ---until DNR starts logging out the area -- the residents who didnt even know what was happening will love that?
[http://www.wildliferecreation.org/wwrp-projects/projects/Central Kitsap Greenway](http://www.wildliferecreation.org/wwrp-projects/projects/Central_Kitsap_Greenway) connects 15000 acres - however, they trade to DNR the same land granted so they are right back to where they started from - with the land disconnected by DNR logging/state tax land and no real greenway at all? I have all the maps, names of people who own the properties including the county, public works, seattle mountaineers etc.

I think between the WWRP/grants programs there is a violation here - The county never indented to use for recreation or to connect open spaces together like the grant was supposed to be used for -- and oh yeah, recreation/wildlife???

Stewardship – The requirements (and costs) associated with holding and protecting property to maintain the functions for which the property was acquired. “Stewardship” includes, but is not limited to, costs associated with statutorily required in-lieu property taxes, weed and pest control, fire protection, fence maintenance, cultural and archaeological site protection, basic research related to maintenance of natural area preserves and natural resource conservation areas, basic resource and environmental protection, and applicable legal requirements **(RCW 79A.20.010) Public Recreational Land.**

Under the WWRP the purpose of this land is for recreation and conservation and were its intended purpose - as applied for on the grant - to protect the wildlife of central kitsap and provide linkages to open spaces endnagered by growing urban areas????????????????????????????????

<http://www.wildliferecreation.org/aboutus/whatwedo>

What We Do

The Coalition founded the WWRP grant program in 1989 to address the need to preserve more land for outdoor recreation and wildlife habitat.

A state agency reviews, ranks, and distributes the grants through a competitive process that guarantees that only the best new park, habitat and farm projects are funded.

--- which they were lied to about big beef, chico creek and very limited animals it sought to protect - no eagles, bears, deer, coyotes, raccoons come on you lie better than that unless you are lazy and use other grant requests? I found the grant this was copied from before but it is in my stack of papers on this entire subject - I am just trying to figure out what property was being traded for the swampland so important to Mark Fisher and Josh Brown.

Greater Peninsula conservatory said they would anti up 500,000 to the CKG but never materialized because they were just there to add their name onto the plan because they knew the county would take my money and pay for the property - they never had the 500,000 and i can guarantee they didn't have it allocated in their budget. So kitsap county residents ate 655,000 dollars instead of 155,000 proposed - hell they only mismanaged 950,000 last year and it would have only made that 295,000 or so if they didn't illegally obtain land for trade.

I C everybody associated (except JOSH BROWN) with this ill gotten greenways (unlike the real one in hansville) has resigned, I don't even see matt keough on your roster anymore - he did all the dirty work and sold it as good.

Yeah mr fisher was advertising the newberry stewardship meetings on his website long before the march 18th meeting with DNR/Public - so it was nowhere i could find on the parks website - yet he already knows about it. Mr Fisher wasn't very smart after i told him i was coming and he left the pictures on his website of them saying look at us building illegally - they even covered some of their members faces as gnomes???

I have figured out everything else - but why mr fisher is that important is one thing that escapes me?? Hell everybody at the county says he didn't work for them - even matt keough after i exposed the CKG trade card for the newberry heritage park? yet he was an advisory board member, he knew the land deal info when nobody else did (except Greater Peninsula Conservatory who was going to throw in 1/2 million dollars?? yeah right), he then resigns for being enthusiastic and illegal activities and then i saw him on the stewardship committee for the same park he illegally built on --- it just goes to show you the county people arent toooooooooooooo smart?

speaking of pedestrian/bike paths and the great mosquito fleet trails --- i sure hope this newberry

heritage park works out alot faster than those two county programs!!!!!!! **greenways plan** - that's another joke chip took and made ordinances instead of making public works do their job -- and include poulsbo, hansville and several other cities who made a greenways plan to be added to the county's master plan that never happened. Its odd that bill panazcuk's office has the original pedestrian/bicycle plan and now its bicycle facilities plan, greenways plan and mosquito fleet trail collecting dust.

Chip said the illegal grant taking property stashing was all supposed to be over with newberry but i will watch the websites.

I would like to make an appointment to talk with you (lori raymaker)? about the stewardship committee for newberry heritage park - the bike and horse groups have already been given the master plan and the rest of the community left out - oh wait central Kitsap has done a good job of allowing the public to decide - and allowed resigned parks advisory board members who built on state tax land before a proposed land deal was completed - then we'll assign him to the stewardship committee for the land he illegally built on. Mr fisher must have donated to the josh brown campaign for him to take this many chances????

I would love to see who josh brown has assigned to the stewardship committee and see what the subjects/plans are besides the obvious bicycle courses and horse trails because parks has been briefing it for a long time. This master plan Josh says the public will decide on has already been in play for quite a while.

You think if the public was deciding it - it would be on the front cover of the Kitsap Sun?? Thats the way you get actual particiaption?

Rick Borges

The email i sent josh, he said it was hate mail but i only hate to think how he got elected not him or his electronic mails? Parks people are dropping like flies? But Josh Brown Runs it!!!!!!!

I told Chip Faver i would see him, fisher and brown gone because they have power they think they can abuse - for only so long. Its ironic i asked josh brown how to get rid of a county commissioner because it was not on the website, then that i thanked him for the nice website giving me soo much information?

Easy to find on mark fisher's website, cheers as mark would say

Newberry Hill Heritage Park Public Meeting - Master Plan kick-off

Wed, 2009-10-28 18:25 — Randy Kruzan

The day is fast-approaching!

The kick-off meeting for the Newberry Hill Heritage Park Master Plan will be held at Klahowya Secondary School on November 19th, from 6pm to 8pm. This event is open to the public and the community is encouraged to attend and get involved.

This meeting will:

- Introduce the team appointed by Commissioner Brown to guide the process
- Introduce the project time line through completion in 2010
- Craft principles to guide the park's future uses and character
- Begin the discussion about future activities at the park

- [Read more](#)

Thank you Lori Raymaker, I look forward to meeting with you at a mutually convenient time/date.

Steve's Hansville has a real greenway and a plan, and i am sure Charlottes Heritage Park wasnt paid for with illegal grant money/property never intended for its written and lying use and has a comprehensive plan not detailed/executed by a rogue bicycle group with insider information from Josh Browns CK heritage debacle that has left people resigning everywhere????

I would be some what remiss if i didnt thank Josh for selling the property to Kitsap Rifle and Revolver Club, sometimes you have to deal with the devil? Do you know peter goldmarks number? Its hidden well!!

I C again the best recreation kitsap county can provide to its citizens is drop in table tennis, stillllllllll

I C that its not important to have a recreation/wildlife plan for the Central Kitsap Greenways property - even though the county of Kitsap took 3/4 million dollars from washington residents, then paid 655,000 dollars (instead of the 155,00 projected on matt keoughs plan) to protect big beef and chico creek salmon, bobcats, salamanders, pond turtles - but gave it up to DNR to log in trade for a CK's heritage park (code named swamp) - it all doesn't seem to smart?

Table PR.3 Kitsap County Parks and Recreation Capital Facility Plan --- is wrong and lists CKG grants as 7,500,000 instead of 755,000 - thats an approved 6.8 million dollar error?? the property was 1.5 million dollars used to acquire the swamp lands/heritage park. Thats what they call and uncle sam sham - and josh brown is supposed to take norm dicks' spot???? Running a county district does not imply quality or quantity - one could run something into the ground as well.

I guess i will have to go to see what the public comes up with for a master plan???? because there isnt already a master plan??

I figured after serving 22 years in the Navy i owed the citizens of Kitsap county better than letting this drop - serving doesnt imply a quality or quantity but i assure you it was with honor, committment, courage and a few mistakes - none as under handed as the CKG grant for trade.

Happy Veterans Day

Mr Fisher has been listing the county owning 1000 acres of newberry hlll for over a year on evergreen mountain bike alliance, advertises the IMBA and isnt a member last time i checked, says he has support of the county and leaders of the community --- because he will build on state tax land for free? Yes the klownprinze

Cheers

Hotmail: Trusted email with Microsoft's powerful SPAM protection. [Sign up now.](#)

Don Burger

From: Wade Larson [wadelarson2@
Sent: Wednesday, November 11, 2009 6:42 AM
To: Open Line
Subject: complaint about Gun Club

Please forward to Larry Keeton.

Larry,

This is a list of the problems I had with the Gun Club property. These people were good neighbors back when they were there on a short-term lease, now they act like they own the place!

1. What permits were taken out to do the work that was done recently with the \$50,000.00 it got from the State? This has been spent on buildings, power, handicapped ramp, berm regrades and realignments etc. RCO grant projects #03-1156 and #09-1430.

2. What conditions of use were imposed on this property?

- a. times of use
- b. allowed uses
- c. is this strictly non-profit?
- d. clean-up measures and oversight
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- f. if a substantial increase in activity results in a noise issue, which it has, who will step up to abate it.
- g. what really is the clean-up procedure that is required, and who polices it? Here is a letter and report I got from the Health Dept.

INITIAL INVESTIGATION FIELD REPORT

ERTS # 613497
County Kitsap
Parcel # 362501-4-002-1006
FS ID #

SITE INFORMATION

Site Name (e.g., Co. name over door): Kitsap Rifle & Revolver Club	Site Address (including City and Zip+4): 4900 Seabeck Hwy NW, Bremerton, WA 98312	Site Phone: (360)373-1007 () -
Site Contact and Title (if any): Marcus Carter, Executive Officer	Site Contact Address (including City and Zip+4) if any: 4900 Seabeck Hwy NW, Bremerton, WA 98312	Site Contact Phone: (360)895-0724 () -
Site Owner: Kitsap Rifle & Revolver Club	Site Owner Address (including City and Zip+4): 4900 Seabeck Hwy NW, Bremerton, WA 98312	Site Owner Phone: (360)373-1007 () -
Site Owner Contact (if any): Bradford Smith, President	Site Owner Contact Address (including City and Zip+4) if any: 4900 Seabeck Hwy NW, Bremerton, WA 98312	Owner Contact Phone: (253)857-6069 () -

Previous/Additional Site Owner(s):	Previous/Additional Site Owner(s) Address (including City and Zip+4):	Phone: () - () -
Alternate Site Names:	Comments:	Is property > 10 acres? Yes No

Location: Quarter-Quarter: SE of SW Section: 36 Township: 25 Range: 1W
Latitude: N 47 degrees 36' 27.79"
Longitude: W 122 degrees 44' 50.13"

INSPECTION INFORMATION

Inspection Date: 6/24/2009	Time: 10:00 am pm	Entry Notice: Announced Unannounced
Photographs? Yes No		Weather: Clear Rain Temperature: 70 ° F
Samples? Yes No		Wind Direction: n Wind Speed: 5

RECOMMENDATION

No Further Action (due to):	ISIS ACTIONS (check all that apply):
Release or threatened release does not pose a threat	Site Hazard Assessment (MTCA List)
No release or threatened release	LUST List
Educational mailing	RCU (Reported Cleaned up)
Refer to program/agency ()	Comments:
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COMPLAINT (Brief summary of ERTS): Site is a gun range. Complainant concerned about management of the lead from shooting. Concerned that lead was going into the wetlands.
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Investigator: Grant A. Holdcroft Date Submitted: 7/24/2009

July 28, 2009

Donna Musa, TCP
Washington State Department of Ecology
3190 - 160th Ave. SE
Bellevue, WA 98008-5452

RE: INITIAL INVESTIGATION REPORT ERTS #613497 KITSAP RIFLE & REVOLVER CLUB

Dear Donna:

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Sincerely,

Grant A. Holdcroft, R.S.
Environmental Health Specialist
Solid & Hazardous Waste Program

cc: Project file

3. Does the Board of Commissioners have the right to change the use of a piece of land without a public notification process?

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Thaks again,
Wade Larson
wadelarson2@[REDACTED]
[REDACTED]
[REDACTED] cell

Don Burger

From: mark fisher [fisher_mark@██████████]
Sent: Wednesday, November 11, 2009 7:42 AM
To: Dorothy Leckner; Josh Brown
Subject: POSSIBLE SPAM! SCORE = 5.8 Fw: newberry heritage master plan meeting

?

I have no idea who this guy is. After helping with early meetings regarding a stewardship group, I have nothing to do with that, or anything else out there. Have not biked out there for close to a year. I've moved on.

His mailing list is interesting due to I see no names of the NB steward group on it.

----- Forwarded Message -----

From: RICHARD BORGES <rborges66@██████████>
To: lraymake@co.kitsap.wa.us; jwbrown@co.kitsap.wa.us; jlang@evergreenmtb.org; fisher_mark@██████████; bgrimley@kitsapsun.com; mbrixey@ieway.com; info@votepetergoldmark.com; brad.pruitt@dnr.wa.gov; commissioners@co.kitsap.wa.us; goldmarktransition@██████████; peter.goldmark@dnr.wa.gov; klownprinze@██████████; tips@komo4news.com; aaron.toso@dnr.wa.gov; cpl@dnr.wa.gov; info@rco.wa.gov; info@wildliferecreation.org
Sent: Wed, November 11, 2009 12:47:39 AM
Subject: newberry heritage master plan meeting

Its odd i have not seen anything in the Kitsap Sun advertising this master plan meeting - although its on mark fishers site. Even though this stewardship is under your current projects its strange that under stewardship/volunteer committees -- this isn't listed, i guess just a choice of where to put it?

I would like to know who the members of the newberry heritage stewardship committee.

I noticed after emailing chip faver the pictures of kitsap mountain bike club building bridges over running water that Mr fisher suddenly resigned from the advisory board (where he gained all the info that the county was soon to acquire the land). The boardwalks were not there nor the intricate bridge built over running water?

Then i had a meeting after a lengthy email to chip and he resigned only 60 days later.

DNR said the trail building (specifically brad pruit who did nothing) was illegal, everybody said it was illegal - yet no charges were ever filed even though this was put into print in the kitsap sun and kgw news? Its evident what stewardship ability mr fisher has with his illegal activities he said, "they have bigger fish to fry than me." He may have been wrong about that as i am in work on something for him and commissioner brown. I just wanted to confirm the mark fisher is on the stewardship committee - i found it on the minutes of parks and recreation about him being on the stewardship committee for the park he illegally built (upon based on his insider information on the parks advisory board) on. Josh brown thanked the group for their enthusiasm in illegality - talk about turning the other cheek?

The pictures of intricate bridges and trails also have exif data on them showing that february 19th/20th is when they perpetrated the crime that brad pruit, commissioner brown, chip faver and higher up DNR all ignored even though illegal. I guess thats how DNR manages state land and the lands commissioner must agree with this policy of turn a blind eye??

The central kitsap greenways lie was land in trade to make the Josh Browns heritage park (north and south had

theirs) - everything except two sentences in the grant was false and had nothing to do with the actual property - and the grant for the CKG was to protect the land and use for recreation, neither were the case or are now? the grant doesn't mention black tailed deer, black bear, coyotes, mountain lions or the eagles that fly around wildcat lake and in the trees. It mentions big beef and chico creek - not wildcat creek, not wildcat lake that feeds wildcat creek and eventually feeds into chico creek. There is an actual study i found on wildcat creek and the chum salmon, steelhead and silver salmon - it probably wasn't used because the report says if more logging occurs (and will by DNR) then that will change the sustainability of the fishery and possible effects on chico creek - but current levels are safe ---until DNR starts logging out the area -- the residents who didnt even know what was happening will love that?

[http://www.wildliferecreation.org/wwrp-projects/projects/Central Kitsap Greenway](http://www.wildliferecreation.org/wwrp-projects/projects/Central_Kitsap_Greenway) connects 15000 acres - however, they trade to DNR the same land granted so they are right back to where they started from - with the land disconncted by DNR logging/state tax land and no real greenway at all? I have all the maps, names of people who own the properties including the county, public works, seattle mountaineers etc.

I think between the WWRP/grants programs there is a violation here - The county never indented to use for recreation or to connect open spaces together like the grant was supposed to be used for -- and oh yeah, recreation/wildlife???

Stewardship – The requirements (and costs) associated with holding and protecting

property to maintain the functions for which the property was acquired. “Stewardship”

includes, but is not limited to, costs associated with statutorily required in-lieu property

taxes, weed and pest control, fire protection, fence maintenance, cultural and

archaeological site protection, basic research related to maintenance of natural area

preserves and natural resource conservation areas, basic resource and environmental

protection, and applicable legal requirements (**RCW 79A.20.010**) ***Public Recreational***

Land.

Under the WWRP the purpose of this land is for recreation and conservation and were its intended purpose - as applied for on the grant - to protect the wildlife of central kitsap and provide linkages to open spaces endnagered by growing urban areas????????????????????????????????

<http://www.wildliferecreation.org/aboutus/whatwedo>

What We Do

The Coalition founded the WWRP grant program in 1989 to address the need to preserve more land for outdoor recreation and wildlife habitat.

A state agency reviews, ranks, and distributes the grants through a competitive process that guarantees that only the best new park, habitat and farm projects are funded.

--- which they were lied to about big beef, chico creek and very limited animals it sought to protect - no eagles, bears, deer, coyotes, raccoons come on you lie better than that unless you are lazy and use other grant requests? I found the grant this was copied from before but it is in my stack of papers on this entire subject - I am just

trying to figure out what property was being traded for the swampland so important to Mark Fisher and Josh Brown.

Greater Peninsula conservatory said they would anti up 500,000 to the CKG but never materialized because they were just there to add their name onto the plan because they knew the county would take my money and pay for the property - they never had the 500,000 and i can guarantee they didn't have it allocated in their budget. So kitsap county residents ate 655,000 dollars instead of 155,000 proposed - hell they only mismanaged 950,000 last year and it would have only made that 295,000 or so if they didn't illegally obtain land for trade.

I C everybody associated (except JOSH BROWN) with this ill gotten greenways (unlike the real one in hansville) has resigned, I don't even see matt keough on your roster anymore - he did all the dirty work and sold it as good.

Yeah mr fisher was advertising the newberry stewardship meetings on his website long before the march 18th meeting with DNR/Public - so it was nowhere i could find on the parks website - yet he already knows about it. Mr Fisher wasn't very smart after i told him i was coming and he left the pictures on his website of them saying look at us building illegally - they even covered some of their members faces as gnomes???

I have figured out everything else - but why mr fisher is that important is one thing that escapes me?? Hell everybody at the county says he didn't work for them - even matt keough after i exposed the CKG trade card for the newberry heritage park? yet he was an advisory board member, he knew the land deal info when nobody else did (except Greater Peninsula Conservatory who was going to throw in 1/2 million dollars?? yeah right), he then resigns for being enthusiastic and illegal activities and then i saw him on the stewardship committee for the same park he illegally built on --- it just goes to show you the county people arent toooooooooooooo smart?

speaking of pedestrian/bike paths and the great mosquito fleet trails --- i sure hope this newberry heritage park works out allot faster than those two county programs!!!!!!! **greenways plan** - that's another joke chip took and made ordinances instead of making public works do their job -- and include poulsbo, hansville and several other cities who made a greenways plan to be added to the county's master plan that never happened. Its odd that bill panazcuk's office has the original pedestrian/bicycle plan and now its bicycle facilities plan, greenways plan and mosquito fleet trail collecting dust.

Chip said the illegal grant taking property stashing was all supposed to be over with newberry but i will watch the websites.

I would like to make an appointment to talk with you (lori raymaker)? about the stewardship committee for newberry heritage park - the bike and horse groups have already been given the master plan and the rest of the community left out - oh wait central Kitsap has done a good job of allowing the public to decide - and allowed resigned parks advisory board members who built on state tax land before a proposed land deal was completed - then we'll assign him to the stewardship committee for the land he illegally built on. Mr fisher must have donated to the josh brown campaign for him to take this many chances????

I would love to see who josh brown has assigned to the stewardship committee and see what the subjects/plans are besides the obvious bicycle courses and horse trails because parks has been briefing it for a long time. This master plan Josh says the public will decide on has already been in play for quite a while.

You think if the public was deciding it - it would be on the front cover of the Kitsap Sun?? Thats the way you get actual particiaption?

Rick Borges

The email i sent josh, he said it was hate mail but i only hate to think how he got elected not him or his electronic mails? Parks people are dropping like flies? But Josh Brown Runs it!!!!!!

I told Chip Faver i would see him, fisher and brown gone because they have power they think they can abuse - for only so long. Its ironic i asked josh brown how to get rid of a county commissioner because it was not on the website, then that i thanked him for the nice website giving me soo much information?

Easy to find on mark fisher's website, cheers as mark would say

Newberry Hill Heritage Park Public Meeting - Master Plan kick-off

Wed, 2009-10-28 18:25 — Randy Kruzan

The day is fast-approaching!

The kick-off meeting for the Newberry Hill Heritage Park Master Plan will be held at Klahowya Secondary School on November 19th, from 6pm to 8pm. This event is open to the public and the community is encouraged to attend and get involved.

This meeting will:

- Introduce the team appointed by Commissioner Brown to guide the process
- Introduce the project time line through completion in 2010
- Craft principles to guide the park's future uses and character
- Begin the discussion about future activities at the park

- [Read more](#)

Thank you Lori Raymaker, I look forward to meeting with you at a mutually convenient time/date.

Steve's Hansville has a real greenway and a plan, and i am sure Charlottes Heritage Park wasnt paid for with illegal grant money/property never intended for its written and lying use and has a comprehensive plan not detailed/executed by a rogue bicycle group with insider information from Josh Browns CK heritage debacle that has left people resigning everywhere????

I would be some what remiss if i didnt thank Josh for selling the property to Kitsap Rifle and Revolver Club, sometimes you have to deal with the devil? Do you know peter goldmarks number? Its hidden well!!

I C again the best recreation kitsap county can provide to its citizens is drop in table tennis, stillllllllll

I C that its not important to have a recreation/wildlife plan for the Central Kitsap Greenways property - even though the county of Kitsap took 3/4 million dollars from washington residents, then paid 655,000 dollars (instead of the 155,00 projected on matt keoughs plan) to protect big beef and chico creek salmon, bobcats, salamanders, pond turtles - but gave it up to DNR to log in trade for a CK's heritage park (code named swamp) - it all doesn't seem to smart?

Table PR.3 Kitsap County Parks and Recreation Capital Facility Plan --- is wrong and lists CKG grants as 7,500,000 instead of 755,000 - thats an approved 6.8 million dollar error?? the property was 1.5 million dollars used to acquire the swamp lands/heritage park. Thats what they call and uncle sam sham - and josh brown is supposed to take norm dicks' spot???? Running a county district does not imply quality or quantity - one could run something into the ground as well.

I guess i will have to go to see what the public comes up with for a master plan???? because there isnt already a master plan??

I figured after serving 22 years in the Navy i owed the citizens of Kitsap county better than letting this drop - serving doesnt imply a quality or quantity but i assure you it was with honor, committment, courage and a few mistakes - none as under handed as the CKG grant for trade.

Happy Veterans Day

Mr Fisher has been listing the county owning 1000 acres of newberry hill for over a year on evergreen mountain bike alliance, advertises the IMBA and isnt a member last time i checked, says he has support of the county and leaders of the community --- because he will build on state tax land for free? Yes the klownprinze

Cheers

Hotmail: Trusted email with Microsoft's powerful SPAM protection. [Sign up now.](#)

Don Burger

From: Open Line [openline@co.kitsap.wa.us]
Sent: Thursday, November 12, 2009 9:09 AM
To: Larry Keeton
Cc: Holly Anderson
Subject: Fwd: complaint about Gun Club
Attachments: complaint about Gun Club

Kitsap 1
360?337?5777
www.kitsapgov.com/pw

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Don Burger

From: Larry Keeton [LKeeton@co.kitsap.wa.us]
Sent: Thursday, November 12, 2009 2:18 PM
To: Kim Dunn; Steve Mount
Cc: David Lynam
Subject: Fwd: complaint about Gun Club

Kim,

Please start record.

Thanks,

Larry

>>> Wade Larson < wadelarson2@██████████ > 11/11/2009 6:41 AM >>>
Please forward to Larry Keeton.

Larry,

This is a list of the problems I had with the Gun Club property. These people were good neighbors back when they were there on a short-term lease, now they act like they own the place!

1. What permits were taken out to do the work that was done recently with the \$50,000.00 it got from the State? This has been spent on buildings, power, handicapped ramp, berm regrades and realignments etc. RCO grant projects #03-1156 and #09-1430.

2. What conditions of use were imposed on this property?

- a. times of use
- b. allowed uses
- c. is this strickly non-profit?
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- e. if a commercial venture is sited on this property, what liability insurance protections were required in the event of an accidental neighbor shooting, or other loss? Or the eventual water pollution issue.
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ERTS # 613497

County Kitsap

Parcel # 362501-4-002-1006

FS ID #

SITE INFORMATION

Site Name (e.g., Co. name over door):

Kitsap Rifle & Revolver Club

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(360)373-1007

() -

Site Contact and Title (if any):

Marcus Carter, Executive Officer

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Site Contact Phone:

(360)895-0724

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Site Owner:

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Site Owner Address(including City and Zip+4):

4900 Seabeck Hwy NW, Bremerton, WA 98312

Site Owner Phone:(360)373-1007

() -

Site Owner Contact (if any):

Bradford Smith, President

Site Owner Contact Address (including City and Zip+4) if any:

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Owner Contact Phone:

(253)857-6069

() -

Previous/Additional Site Owner(s):

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() -

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Alternate Site Names:

Comments:

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Unannounced

Photographs? Yes No Weather: Clear Rain

Temperature: 70° F

Samples? Yes No Wind Direction: n Wind

Speed: 5

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No Further Action(due to): ISIS ACTIONS(check all that apply):

Release or threatened release does not pose a threat Site

Hazard Assessment (MTCA List)

No release or threatened release

LUST List

Educational mailing

RCU (Reported Cleaned up)

Refer to program/agency () Comments:

Independent cleanup action completed (i.e., remediated)

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Site is a gun range. Complainant concerned about management of the lead from shooting. Concerned that lead was going into the wetlands.

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Investigator: Grant A. Holdcroft

Date Submitted: 7/24/2009

July 28, 2009

Donna Musa, TCP
Washington State Department of Ecology
3190 - 160th Ave. SE
Bellevue, WA 98008-5452

RE: INITIAL INVESTIGATION REPORT ERTS #613497 KITSAP RIFLE & REVOLVER CLUB

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Environmental Health Specialist
Solid & Hazardous Waste Program

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Thaks again,
Wade Larson

wadelarson2@
[REDACTED]

██████████ cell

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From: Kim Dunn [KDunn@co.kitsap.wa.us]
Sent: Thursday, November 12, 2009 2:18 PM
To: Larry Keeton
Subject: Re: Fwd: complaint about Gun Club

I will be out of the office beginning November 11th, 2009 and returning on November 16, 2009. If you have code compliance issues, please contact Steve Mount. For Fire Marshal issues please contact Jackie Blackwood. Thank you

Don Burger

From: Wade Larson [wadelarson2@██████████]
Sent: Thursday, November 12, 2009 3:49 PM
To: Larry Keeton
Subject: Fw: complaint about Gun Club

----- Forwarded Message -----
From: Wade Larson <wadelarson2@██████████>
To: openline@co.kitsap.wa.us
Sent: Wed, November 11, 2009 6:41:48 AM
Subject: complaint about Gun Club

PLease forward to Larry Keeton.

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Thaks again,
Wade Larson
wadelarson2@[REDACTED]
[REDACTED]
[REDACTED] cell

Don Burger

From: Chad Birkenfeld [CBirkenf@co.kitsap.wa.us]
Sent: Tuesday, November 17, 2009 9:14 PM
To: Marcus Carter
Subject: Re: POSSIBLE SPAM! SCORE = 5.1 KRRC Alert! 17 November 2009

away from deks until 8-17-09

Don Burger

From: Lori Raymaker [LRaymake@co.kitsap.wa.us]
Sent: Wednesday, November 18, 2009 3:47 PM
To: Regina Taylor
Subject: Public meeting for Newberry Hill Park master plan

Regina,
I just wanted to send you a quick email to make sure that you and the Gun and Rifle Club know of the public meeting this Thursday night regarding the master plan for Newberry Hill Heritage Park. The meeting will be at Klahowya School at 6:00 pm. Please pass this information onto the board of directors for the gun club. Feel free to contact me if you have any questions.

Thanks,
Lori

Don Burger

From: Wade Larson [wadelarson2@██████████]
Sent: Thursday, November 19, 2009 9:07 AM
To: Steve Bauer
Subject: Fw: Resending request for information

----- Forwarded Message -----

From: Wade Larson <wadelarson2@██████████>
To: jwbrown@co.kitsap.wa.us; sbauer@co.kitsap.wa.us; cgarrido@co.kitsap.wa.us
Sent: Mon, October 26, 2009 7:07:58 AM
Subject: Resending request for information

Park information and planning
Thu, October 8, 2009 11:35:09 AM

Wade Larson
From: <wadelarson2@██████████>
[View Card](#)
To: jwbrown@co.kitsap.wa.us

Commissioner Brown,

I have been asking for information from your office, and departments of the County about the Newberry Hill Heritage Park . I have not been getting any answers from most departments. I am asking you to look into the matter. These are the areas I am having trouble with.

Keith Grellner of the Health Department E-mailed me a report of a BKCHD sight visit at KRRC was available. I never received it after requesting it. Did you get one, and what follow-up have you done on the lead contamination issue have you done?

You stated that the land swap needed to be done "in a hurry" so the KRRC did not lose their grant money. Numerous requests of your office for what I assume was a public document in the file for that transaction was never given. Do you have this info or did you go on the say-so of someone? I would like to know what the grant was for, is it spent, and if so for what.

No one will talk about the reconveyance land in the middle of the Park. I am making a public records request for this information regarding that piece. Who is the owner? When was it put into DNR management?, how did the County (owner?) come into possession of it, and were there restrictions placed on it at that time?

There is presently brush harvesting going on in the south 520 acres. Are we (the County) getting paid for this, and is this allowed in the conservation easement?

The Gun Club has been making all forms of gunfire down there, and a number of complaints and questions have come up regarding this. A complaint about automatic weapon fire was reported to the Sherriff. Is there a report on file for this? A deputy came out to investigate, and said it was the military, and it was ok. Is this allowed in the restrictions, conditions of use your department imposed when you gave them the land? You, the Commissioners may have had the right to give the land away through a technicality, but you do not have the right to allow a change in use of the full acreage, or the KRRC parcel either. It has come to my attention that there is a for-profit enterprise being conducted down there,(Gun Club), which does constitute a change in use.

Please look into these issues or refer me to the people who are responsible for them.

You are in the process of planning the Park. At present, you are setting up a steering committee that has no one from the local area. You do not have the conservation easements in place. You do not have full possession of

the park as envisioned, yet you are putting in your hand picked people to steer the process, and “fast track” that effort also. There is no need to hurry this, and it is very important to include the locals (your constituents) in the planning

Wade Larson

Don Burger

From: Julian [aesirus@██████████]
Sent: Friday, November 20, 2009 12:47 PM
To: Newberryhill
Cc: marcus@gunschool.com
Subject: Newberry Hill Park

I would like to thank those involved in the first presentation on 11/19. I thought it was very well done. Thank you for offering such an open forum for public discourse. As a member of the Kitsap Rifle and Revolver Club I appreciate the spirit of cooperation fostered with Commissioner Brown and everyone. I do hope that relationship can continue and a symbiotic partnership will emerge. We're all living here and should do our best to conserve our wildlife habitats.

There are a few things I noticed that were consistently brought up as concerns at the meeting. One was access to the park. This is a concern from private property owners and those who use the park. As the KRRC executive officer brought up at the meeting, KRRC could provide Southern access and parking. And as a member I am willing to have my dues support this effort.

Another concern was cost. I thought it was very well presented as to the low cost of maintaining such a park. From what I've been told KRRC is currently seeking to acquire another 60 acres of land. I will readily admit I do not know the details of the transaction or where it stands. However, I have been shown the location of the acreage. It is well away from sensitive areas and also provides an opportunity for even better access to the park for responsible use.

I am not an executive officer but members do have a voice. I would fully support KRRC providing and maintaining a parking area at the southern end of the park. As a user of the park I also support the acquisition of the 60 acres by KRRC. Using your own slides as reference this would not only be the most cost effective solution to access but have the least amount of environmental impact.

Don Burger

From: Newberryhill [Newberryhill@co.kitsap.wa.us]
Sent: Friday, November 20, 2009 2:27 PM
To: Julian
Cc: marcus@gunschool.com
Subject: Re: Newberry Hill Park

Thank you for attending last night, and I'm glad you found the meeting useful.

I will add your comments to the list of desired uses/changes at the park. These will be considered when I create master planning options to be presented at the January meeting.

I recently assumed responsibility for this project, and I am unfamiliar with any plans to expand KRRC's land holdings or reduce the park's acreage. I will research the topic within our files. At this moment in time I am not planning on creating any master planning options for the January meeting that show a reduced footprint for the park boundary.

I'll also add your name to the email list to receive further information about the master planning process.

Thank you for your interest in Newberry Hill Heritage Park.

Martha

Martha J. Droge, AICP, ASLA, LEED AP
Park Projects Coordinator
Kitsap County Dept. of Parks & Recreation
614 Division Street MS-1
Port Orchard, WA 98366
360.337.5361 (o)
MDroge@co.kitsap.wa.us

>>> Julian < aesirus@ > 11/20/2009 12:47 PM >>>

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park I also support the acquisition of the 60 acres by KRRC. Using your own slides as reference this would not only be the most cost effective solution to access but have the least amount of environmental impact.

Don Burger

From: Kevin and Sheryl [the_amphibian@██████████]
Sent: Saturday, November 21, 2009 7:07 PM
To: Newberryhill
Subject: Newberry Park

.....Comments on the Newberry Hill Heritage Park.....

NO MOTORIZED vehicles. They tear up the trails. Mountain biking and road biking are becoming the fastest growing activities in the United States. Kitsap County needs to recognize this and stop promoting downtown Bremerton as the place to go.....i.e. the marina. Boats are affordable to a few but bikes are affordable to families everywhere.

Kitsap County could attract bikers with the right system of forest trails and good shoulders for great bike riding. People would come here and spend their money at local hotels and restaurants. We have outstanding scenery in Kitsap County. I know riders from outside the county and the state would come to here to ride and spend their money if the conditions were right. Look at Banner Forest. I rarely go there that the parking lot isn't full of cars with bikers, hikers and horse riders. It is a great park. Kitsap County has done a fantastic job of maintaining the park and it is one of the top riding places from here to Seattle. (By the way the parking lot does need some maintenance - huge potholes).

Kitsap County should be promoted as a biking mecca. Newberry Hill park is going to be a great place to ride, hike, or horse back ride. There is one problem with it. There you are riding on the trails...its peaceful....the birds are singing....you are one with nature and then "bang" "bang" "bang". A gun club in a park????????????? Could we work on that issue??
So....lots of trails for bikers, hikers, horse riders, and NO MOTOR VEHICLES.

Kevin and Sheryl Johnson

Don Burger

From: Dorothy Leckner [DLeckner@co.kitsap.wa.us]
Sent: Sunday, November 22, 2009 1:44 PM
To: Jim Dunwiddie
Subject: Parks

Jim,

Here are a few items I need to get you up to speed on or put on your radar screen:

Banner Forest Parking Lot and South Kitsap School District 4.0 acres.
Howe Farm Barn discussion with Commissioner Garrido. The request from the auditor email.
Chico Creek Road Maintenance Agreement.
WL and HL phone calls.
Anderson Landing grant proposal with volunteers.
Keyport Lights.
Point No Point Lighthouse repairs/status. Front doors.
Mike Kerr with South Kitsap Soccer Assoc. Called on the \$8,000., no response.
Point No Point Lighthouse Loan Agreement.
CK Babe Ruth.
Quarterly Reports to the BOCC.
Water Policy.
1/2 day workshop on water policy.
NKHP - Options property.
Veterans Field Agreement with SKSD - Nancy had asked Arvilla to work on this.
Park Codes Revisions.

Discussions with Sara Thirty Acres towards the Kitsap Rifle & Revolver Club. Wade Larson has filed a Public Disclosure Request to Kitsap County towards the Kitsap Rifle & Revolver Club. His claims, operating the range before and after hours. Encroaching onto park property during site development. Dori and Steve Mount from DCD - Code Enforcement will conduct a site visit the 1st week in Dec. Wade doesn't like the idea of the KR&R Club applying for a grant that will fund a restroom, utilities and lighting.

After payroll on Monday, can we go over these? I also sent you a couple emails over the weekend towards the Howe Farm site.

Thanks Dori

Dori Leckner
Parks Superintendent
Kitsap County Parks & Recreation
1200 NW Fairgrounds Rd.
Bremerton, WA. 98311
dleckner@co.kitsap.wa.us

(360) 337-5362 Work
[REDACTED] Cell
(360) 337-5385 Fax

Don Burger

From: Newberryhill [Newberryhill@co.kitsap.wa.us]
Sent: Monday, November 23, 2009 11:04 AM
To: Kevin and Sheryl
Subject: Re: Newberry Park

Thank you for your comments about suggested uses at the park. I will add your comments to the list of desired uses/changes at the park. These will be considered when I create master planning options to be presented at the January meeting.

As for the sounds from the Kitsap Rifle and Revolver Club (KRRRC), the Club owns their land and has occupied that site for over 50 years. The County will work with the Club on maintaining appropriate hours of operation. However, it is unlikely that the Club will cease operations. We know that it is an unusual pairing of uses, and one that has existed for more than half a century. KRRRC has indicated that it is dedicated to working with the County on projects of mutual benefit for their organization and the park.

I'll also add your name to the email list to receive further information about the master planning process.

Thank you for your interest in Newberry Hill Heritage Park.

Martha

Martha J. Droge, AICP, ASLA, LEED AP
Park Projects Coordinator
Kitsap County Dept. of Parks & Recreation
614 Division Street MS-1
Port Orchard, WA 98366
360.337.5361 (o)
MDroge@co.kitsap.wa.us

>>> Kevin and Sheryl < the_amphibian@ > 11/21/2009 7:06 PM >>>

.....Comments on the Newberry Hill Heritage Park.....

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So....lots of trails for bikers, hikers, horse riders, and NO MOTOR VEHICLES.

Kevin and Sheryl Johnson

Don Burger

From: Open Line [openline@co.kitsap.wa.us]
Sent: Tuesday, November 24, 2009 4:03 PM
To: Steve Abernathy; Steve Heacock; Steve Mount
Subject: Fwd: Gun Club CK (KRRC) Attn. Steve mount DCD

Hi was not sure what Steve Wade was emailing so sending to all.

Happy Thanksgiving!

Laura Knight
Kitsap 1

Kitsap 1
360?337?5777
www.kitsapgov.com/pw

>>> Wade Larson < wadelarson2@ > 11/24/2009 6:16 AM >>>

Steve,

In regards to the KRRC (gun club) what action has been taken on their failure to apply for a conditional use permit? Grading permit? Solve noise issues?

Wade Larson

Don Burger

From: Steve Heacock [SHeacock@co.kitsap.wa.us]
Sent: Tuesday, November 24, 2009 4:29 PM
To: Open Line
Subject: Re: Fwd: Gun Club CK (KRRC) Attn. Steve mount DCD

This is for Steve Mount

>>> Open Line 11/24/2009 4:03 PM >>>

Hi was not sure what Steve Wade was emailing so sending to all.

Happy Thanksgiving!

Laura Knight
Kitsap 1

Kitsap 1
360?337?5777
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Wade Larson

Don Burger

From: Open Line [openline@co.kitsap.wa.us]
Sent: Wednesday, November 25, 2009 9:18 AM
To: Steve Mount
Subject: Re: Fwd: Gun Club CK (KRRC) Attn. Steve mount DCD
Attachments: Re: Fwd: Gun Club CK (KRRC) Attn. Steve mount DCD

The Open Line
Kitsap County Public Works
(360) 337-5777
www.kitsapgov.com/pw

Don Burger

From: Open Line [openline@co.kitsap.wa.us]
Sent: Wednesday, November 25, 2009 9:18 AM
To: Steve Mount
Subject: Re: Fwd: Gun Club CK (KRRC) Attn. Steve mount DCD
Attachments: Re: Fwd: Gun Club CK (KRRC) Attn. Steve mount DCD

The Open Line
Kitsap County Public Works
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Don Burger

From: Wade Larson [wadelarson2@[REDACTED]]
Sent: Wednesday, November 25, 2009 12:56 PM
To: Scott Diener
Cc: Larry Keeton
Subject: Question about procedure

Scott,

As per our phone conversation yesterday, I am sending you my question in writing.

Can a department of the county perform it's own planning process?

If so can a department perform that process on a piece of land it does not have in it's inventory? Who oversees this process

In regards to a change in use of a piece of land, what is the required procedure to obtain approval for that change? Is there director(DCD) discretion allowed in this requirement? Please provide references to the resolution, code, or other relevant document.

In regards to the KRRC (gun club) what action has been taken on their failure to apply for a conditional use permit?

Does the county have wetland biologists on staff? Have they done an assessment on the new parcel near the gun Club? If this land becomes a Park, does an environmental impact study need to be done? Should this be done before the Park is planned?

Wade Larson

[REDACTED]
[wadelarson2@\[REDACTED\]](mailto:wadelarson2@[REDACTED])

Don Burger

From: Steve Mount [SMount@co.kitsap.wa.us]
Sent: Wednesday, November 25, 2009 2:31 PM
To: wadelarson2@[REDACTED]
Subject: KRRC

Mr. Larson,

I need to document who is effected by the noise. What is you address?

Also, if there are other neighbors that have complaints, I would be happy to hear from them.
Thank you for you information.

Stephen Mount
Kitsap County
Department of Community Development
(360) 337-4605
smount@co.kitsap.wa.us

Don Burger

From: Matt Sroka [matsroka@]
Sent: Sunday, November 29, 2009 3:12 PM
To: Newberryhill
Subject: Newberry Hill Heritage Park Master Plan Comments

Dear Ms. Droge:

Thank you for the excellent presentation regarding the planned Newberry Hill Heritage Park a couple Thursdays ago.

Here are some initial thoughts:

1. As a member of the Kitsap Rifle & Revolver Club, I endorse the idea of the Parks Dept. and our club mutually working on a parking solution for the south end of the park. I'm sure there are other tasks we can tackle together for the greater good of the community.
2. My first inclination is to leave the area as close as possible to its current, natural state except with some enhancements for better trail usage. This could open up the possibility of using that area for competitive orienteering.
3. I believe that the county already owns/manages enough sports facilities like ballparks and playing fields and many appear to go under-used for large portions of the year. I don't believe more playing fields are needed.
4. As an alternative, I believe a disc-golf course (like NAD Park in Bremerton) could be a nice addition in a portion of the land because those types of courses usually do a great job at preserving the natural surroundings with little additional impact.

I look forward to the additional upcoming meetings.

Sincerely,
Matt Sroka
East Bremerton (un-incorporated)

Don Burger

From: Newberryhill [Newberryhill@co.kitsap.wa.us]
Sent: Monday, November 30, 2009 9:58 AM
To: Matt Sroka
Subject: Re: Newberry Hill Heritage Park Master Plan Comments

Thank you for your comments about suggested uses at the park. I will add your comments to the list of desired uses/changes at the park. These will be considered when I create master planning options to be presented at the January meeting.

I'll also add your name to the email list to receive further information about the master planning process.

Thank you for your interest in Newberry Hill Heritage Park.

Martha

Martha J. Droge, AICP, ASLA, LEED AP
Park Projects Coordinator
Kitsap County Dept. of Parks & Recreation
614 Division Street MS-1
Port Orchard, WA 98366
360.337.5361 (o)
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Sincerely,
Matt Sroka
East Bremerton (un-incorporated)

Don Burger

From: Holdcroft, Grant [holdcg@health.co.kitsap.wa.us]
Sent: Monday, November 30, 2009 11:13 AM
To: Steve Mount
Subject: KRRC Maps
Attachments: KRRC site visit memo.doc; KRRC Ranges.jpg; KRRC Area Map.jpg

Steve:

See attached.

Grant A. Holdcroft, R.S.
Sr. Environmental Health Specialist
Solid & Hazardous Waste Program
Kitsap County Health District
holdcg@health.co.kitsap.wa.us
(360) 337-5605



SCOTT W. LINDQUIST, MD, MPH, DIRECTOR
345 6TH STREET, SUITE 300
BREMERTON, WA 98337-1866
(360) 337-5235

DATE: June 24, 2009

TO: Jan Brower
Kitsap Rifle & Revolver Club Initial Investigation File

FROM: Grant Holdcroft

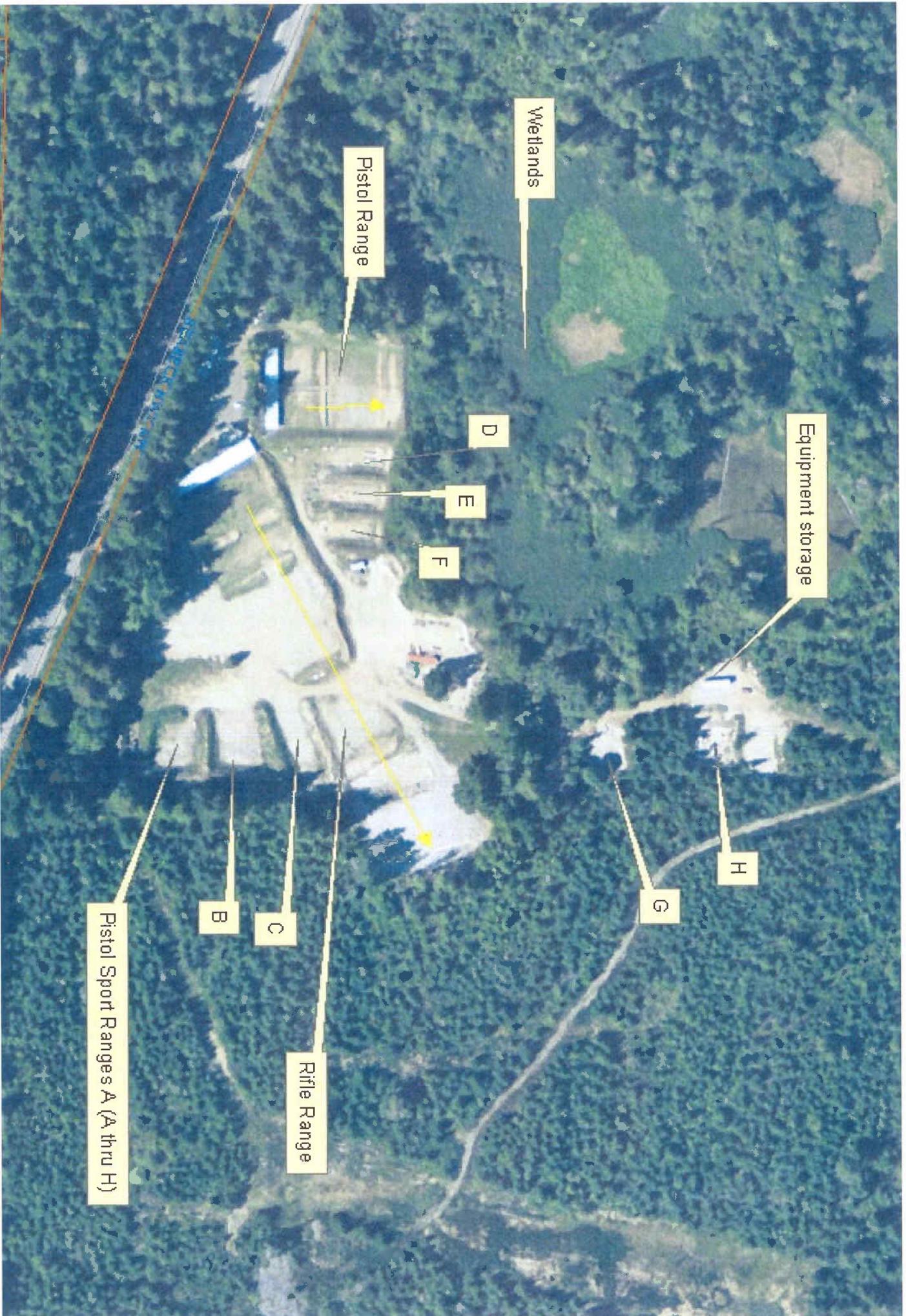
RE: INITIAL INVESTIGATION SITE VISIT KITSAP RIFLE & REVOLVER CLUB; ERTS
613497

On June 24, 2009, I visited the Kitsap Rifle & Revolver Club (KRRC) to conduct an Initial Investigation inspection. I had made an appointment. I arrived on site at 10 am and met with Marcus Carter, Brad Smith, Dan ?? and two other gentlemen that were officers of the club. I explained that I had received a complaint from Ecology on lead contamination at the range and I was investigating that concern. I also explained that the EPA BMP Guidance for ranges discusses range contamination issues. I asked if they were familiar with the document and they said Yes. Dan stated that he had a copy. I asked about lead recovery programs. I was told that KRRC has been doing lead recovery for at least 16 years (1993) . I asked about documentation. They said that they were starting to document as they just got title to the property but, that they could show that they have had lead recovery working parties through the club newsletter for many years.

We walked across all of the ranges. In general the areas of the property that we walked over were clean and well maintained. There is one large rifle range (200 yards), one large pistol range (50 yards), and about 10 small pistol ranges for competition shooting. All of the small ranges are backed by 8' to 10' high berms. Some trap and skeet shooting takes place on the rifle range. No shooting is allowed above the berms (except for some trap and skeet). Any rifle or pistol shooting above the berms immediately disqualifies the shooter. The impact zones of the ranges are all 95% or more sand. The pistol range is backed by a 10' to 12' high berm that has wetlands on the other side. There were no or little sign of rounds going over the berms on any of the ranges.

We spoke further after the walkthrough. I told the group that what I had seen of the KRRC looked good. I also said that the key points that I had gotten out of the EPA guidance manual was that the lead on the site must be kept within the boundaries of the ranges, a lead recovery program must be in place, and that they must document the lead recovery. Based on what I saw and learned while talking to them the first two items were taken care of appropriately. The documentation of the lead recovery needs to be active and ongoing. I told them that I believed that the complaint was without merit, but that I would make a note in my calendar to check back with them in 6 months to look at their documentation.

We discussed MTCA and the II process. We also talked about sampling. Whether or not I would be tasked by Ecology to sample, what I would sample for, what they could sample for, etc. Dan indicated that the club would be looking at sampling portions of the club for their own information. I left the site about 11 am.



Wetlands

Pistol Range

Equipment storage

D

E

F

H

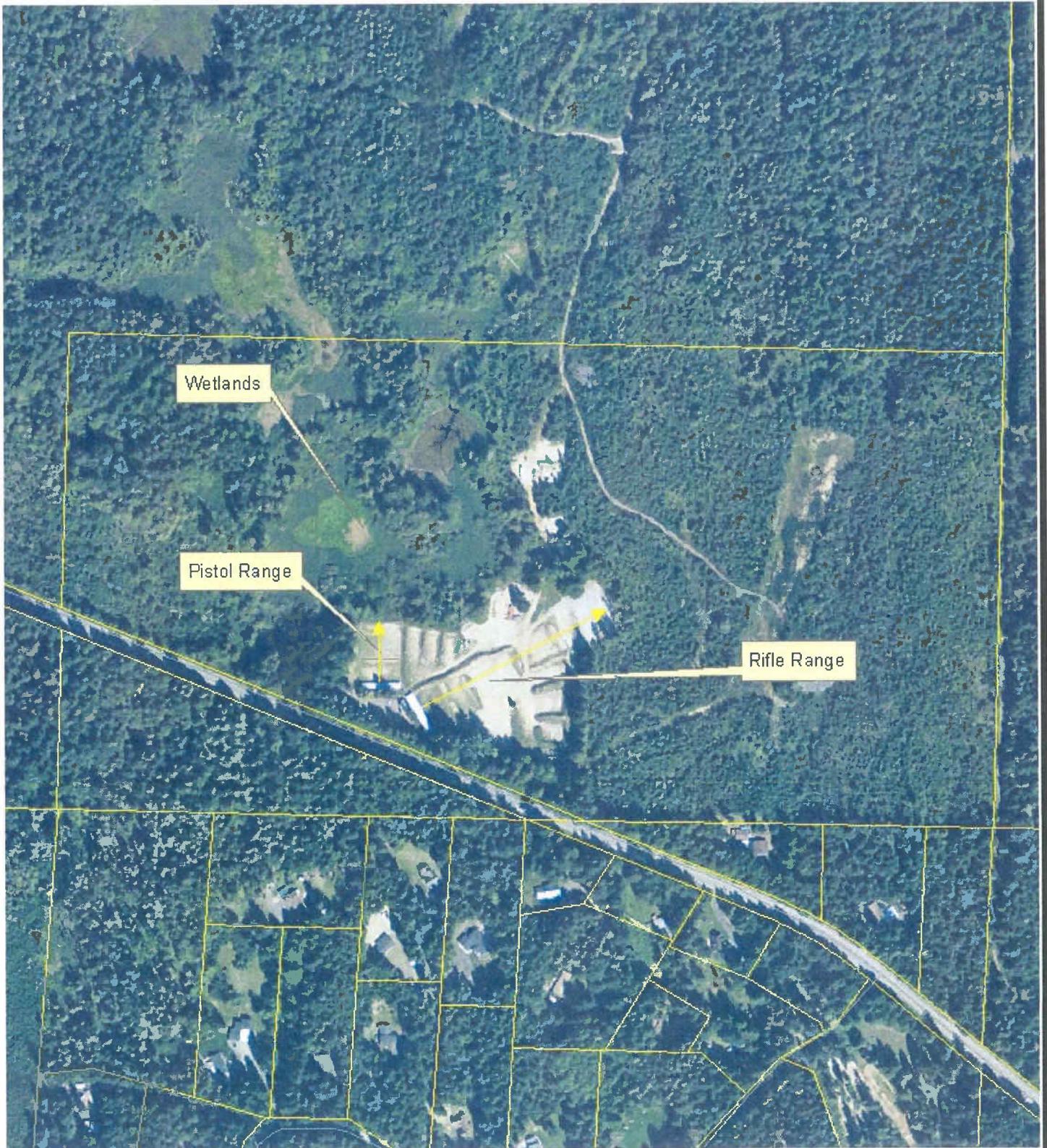
G

B

C

Rifle Range

Pistol Sport Ranges A (A thru H)



Kitsap Rifle & Revolver Club
 July 27, 2009



Legend

- road
- streams
- ▭ parcels_060109
- ▭ water
- waterbody_outline
- ▭ parcels_060109



Don Burger

From: Holdcroft, Grant [holdcg@health.co.kitsap.wa.us]
Sent: Monday, November 30, 2009 12:04 PM
To: Steve Mount
Subject: FW: Kitsap Rifle & Revolver Club

Steve:

As you can see there are plans for septic and water system improvements in the works.

Thanks,

Grant A. Holdcroft, R.S.

Sr. Environmental Health Specialist
Solid & Hazardous Waste Program
Kitsap County Health District
holdcg@health.co.kitsap.wa.us
(360) 337-5605

From: Wiggins, Tom
Sent: Monday, November 30, 2009 11:18 AM
To: Holdcroft, Grant
Cc: Grellner, Keith; Whitford, Stuart; Kiess, John; Quayle, Tim
Subject: RE: Kitsap Rifle & Revolver Club

They apparently have a \$50,000 grant for a new well and septic system. I met Brad Smith on 11-19 for a preliminary look at soils. Kerrie Crawford will probably be reviewing the application when it comes in as a commercial design.

From: Holdcroft, Grant
Sent: Monday, November 30, 2009 10:44 AM
To: SHW Staff; Whitford, Stuart; Kiess, John; Wiggins, Tom; Quayle, Tim
Cc: Grellner, Keith
Subject: Kitsap Rifle & Revolver Club

Gang:

If you should happen to get a complaint regarding the Kitsap Rifle & Revolver Club please let me know. I am working with them on some issues.

Thanks,

Grant A. Holdcroft, R.S.

Sr. Environmental Health Specialist
Solid & Hazardous Waste Program
Kitsap County Health District
holdcg@health.co.kitsap.wa.us
(360) 337-5605