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STATE OF WASHINGTON

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Court of Appeals Cause No. 58296-8-I

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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City of Woodinville, Respondent

v.

Northshore United Church of Christ, Petitioner

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**NORTHSHORE UNITED CHURCH OF CHRIST'S PETITION  
FOR REVIEW**

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**A. Identity of Petitioner**

Northshore United Church of Christ (“the Church”) asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

**B. Court of Appeals Decision**

The Church seeks review of the July 16, 2007 order in Court of Appeals Cause No. 58296-8-I. A copy of the decision is attached hereto in Appendix A.

**C. Issues Presented for Review**

First, the Court of Appeals improperly affirmed the trial court’s consolidation of Respondent City of Woodinville’s (“the City’s”) request for preliminary injunctive relief with a trial on the merits of all claims.

Second, the Court of Appeals improperly affirmed the trial court’s ruling that the City’s March 20, 2006 Ordinance No. 419 (the “Moratorium”) is constitutional and does not violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (“RLUIPA”).

Third, the Court of Appeals improperly affirmed the trial court’s ruling that the City’s actions were not arbitrary, capricious and unconstitutional.

Fourth, the Court of Appeals improperly disregarded the Church’s

claims under the Washington Constitution. The Court of Appeal's reliance on State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), was misplaced and in error.

Fifth, the Court of Appeals improperly affirmed the trial court's determination that Appellants breached a contract entitled "2004 Temporary Property Use Agreement."

Sixth, the Court of Appeals improperly affirmed the trial court's finding that a temporary homeless camp is not an allowed accessory use of the Church.

Seventh and finally, the Court of Appeals improperly affirmed the trial court's ruling that Tent City 4 violated the Moratorium, violated the Woodinville Municipal Code, and was a nuisance *per se*, and thus an actual harm.

#### **D. Statement of the Case**

Caring for the poor and homeless is a fundamental tenet of Christianity and an expression of the commandment to "love your neighbor as yourself." (CP 222-23; CP 229-31.) For example, in the Gospel of St. Matthew, Chapter 25, Jesus emphasizes that those who do not provide for the needy will go to "eternal punishment" rather than to "eternal life." (*Id.*) The Church's hosting of Tent City was an undeniable expression of this religious belief.

The Church is a private religious organization under Section 501(c)(3) of the Internal Revenue Code. The Church was founded in Woodinville in March of 1980, and since its inception, has practiced its ministry by aiding the homeless. (CP 222; 252-54.) For example, its members annually raise tens of thousands of dollars for the homeless, and frequently volunteer at soup kitchens and shelters. The Church also founded and staffs a food bank and a family and adult service center, and regularly teams with Habitat for Humanity to build homes. (Id.)

1. Tent City 4

SHARE/WHEEL sponsors a group commonly known as Tent City 4 (“TC4”), made up of homeless men and women who need temporary shelter and assistance with other necessities of life. (CP 221-24.) TC4 residents are “situationally” homeless, rather than “chronically” homeless, meaning the overwhelming majority are homeless only for a short period of time. (CP 214-15; 423 at ¶ 4.) Many of the residents are employed full-time; by living at TC4 with minimal overhead, they are able to save enough money to move into more permanent housing. (CP 221.) Some of the residents are married and thus cannot be accommodated at local shelters, which are uniformly single-sex. (Id.) A strict ban on alcohol and drugs is actively enforced, and anyone violating those restrictions is evicted from TC4. (Id.) Garbage is collected daily and there are adequate

portable toilets and washing facilities. (Id.)

Residents of TC4 provide 24-hour security for the encampment, and there have been no verified reports of physical violence or property damage linked to the camp. (CP 221; 422-24; 432-33; VRP June 6, 2006 at 51:19-24.) To the contrary, many people who have interacted with TC4 praise the camp and welcome the educational experience it provides. (CP 411-12; 420.)

Many places of worship have hosted TC4, generally for a 90-day stay. (CP 220-24; 415-17; 427-29; 431-33.) The 90-day stay is important for two distinct reasons. First, it is expensive to move the camp, and moving requires camp members and hosts to take time off of work. Second, the length of the stay allows the congregants to develop friendships with the residents, which often leads to assistance with transportation and employment. (CP 223-24.)

## 2. The 2004 Stay in Woodinville

In 2004, the Church was asked to host TC4. The Church and the City staff worked together to quickly process a temporary use permit application. (VRP June 5, 2006 at 11-18.) At the City's suggestion, the camp was sited on vacant land designated for a future city park instead of on Church property. SHARE, the Church and the City entered into an agreement governing the terms of the 2004 stay entitled "2004 Temporary

Property Use Agreement” (“2004 Temporary Use Agreement” or “Agreement”). (CP 159-174.)

There were no significant problems with TC4 during the 2004 stay. The City reported that “[p]olice experience was that the camp behaved well and was easily manageable from a law enforcement perspective. By contrast, a rowdy, poorly managed apartment house requires more police presence.” (CP 298.) As a gesture of appreciation, TC4 residents volunteered more than 143 hours towards City projects during the 2004 stay. (CP 307.)

### 3. The Moratorium

The Church is located in the R-1 zone of Woodinville. On March 20, 2006, the City passed Ordinance No. 419 (“Moratorium”), a six month moratorium governing the R-1 zone.<sup>1</sup> (CP 113.) The Moratorium provides:

The City hereby imposes a moratorium upon the receipt and processing of building permit applications, land use applications, and any other permit application for the ***development, rezoning or improvement of real property*** within the R-1 Zoning District...

(CP 116; emphasis added.)

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<sup>1</sup> On September 11, 2006, the City extended the Moratorium for an additional six months. From a recent review of the City’s website, it appears that the restrictions in the Moratorium have been extended through at least September 11, 2007. See [http://www.ci.woodinville.wa.us/Documents/News/Sustainable Development/SusDev\\_WorkSchedule\\_Council.pdf](http://www.ci.woodinville.wa.us/Documents/News/Sustainable%20Development/SusDev_WorkSchedule_Council.pdf) (last visited August 9, 2007).

The stated purpose of the Moratorium is to freeze applications for permits that “will *irreversibly alter* the character and physical environment of these areas” until the City best determines how to process such applications. (Id.; emphasis added.) Despite these stated goals, the Moratorium allows for continued permanent development in the R-1 zone to continue, including the expansion of single family and multi-family structures as well as any construction relating to publicly owned structures. (Id.) Thus, the actual impact of the Moratorium is largely borne by the Church and any commercial enterprises in the R-1 zone.

The Moratorium does not contain an express prohibition on the consideration of temporary use permits that do not “irreversibly alter” property. While the Moratorium prohibits “land use applications ... for the development, rezoning or improvement of real property,” “land use applications” is not a defined term in the Moratorium or Woodinville Municipal Code. Nonetheless, the City interprets the Moratorium as precluding acceptance of *all* temporary use permit applications. (CP 374; VRP June 1, 2006 at 10:20-25; 26:25-27:5.)

4. The Church’s Attempts to Apply for a Temporary Use Permit in 2006

In April 2006, the Church learned that TC4’s planned host for a stay beginning in May 2006 might be unable to meet its commitment to

the camp. The Church was asked if it would consider serving as a fallback host for May, or, in the alternative, as a host beginning in August. (CP 249-251.) This was an urgent request, as there is a dramatic disparity between the number of shelter beds in King County (2,500) and the number of homeless individuals in King County (8,300), and King County's shelters are unable to house TC4's numerous married residents. (CP 221; VRP June 7, 2006 at 27:6-12.)

The Church immediately contacted the City staff to see what it needed to do to obtain the City's permission to serve as a host. (CP 249.) The Church met with the City staff on April 24, 2006, and was instructed to fill out Temporary Use Permit applications for the Church site and, in the alternative, for the City property used during the 2004 stay for either May or August 2006. (CP 249-50.) The Church brought both applications to the City the next morning, but the City refused to accept the application for the Church site even though it had requested that application the day before. (Id.) The City cited the Moratorium (*not* the 2004 Temporary Use Agreement) as the basis for refusing to consider the application. Indeed, the director of the City's planning department testified that while he was aware of the Agreement, it was not a bar to the 2006 application. (VRP June 1, 2006 at 14:21-15:6.)

The City demanded an application fee to be filed with the permit

request to use the City property, and the Church submitted the application and paid the fee. (VRP June 6, 2006 at 22:20-25.) However, the City subsequently told the Church not to move forward with the application that it had submitted, and instead advised the Church to write a letter to the City Council asking permission to use the City land. (CP 250.) The Church immediately wrote such a letter. (Id.)

Over the next two weeks, the City staff asked the Church to help prepare the City land to host Tent City, and the Church did so. (Id.) Everything the City asked the Church to do, it did. The City staff recommended that the City Council approve the Church's request to use the City land. (CP 287-291.) Unexpectedly, at a City Council meeting late on a Tuesday night – not quite four days before the camp was scheduled to leave its Bellevue host and move to Woodinville – the City Council denied the Church's request to use the vacant City land. (CP 250.)

The City's refusal to consider the Church's application to host TC4 on private Church property, combined with the City's refusal to allow TC4 to use the same City property it successfully used in 2004, placed the Church on the horns of a dilemma. (CP 250-251.) The Church has a long and vibrant history of ministering to the poor, and sees such ministry as central to its faith. Nonetheless, the Church did not immediately invite

TC4 onto its property. (CP 346.) Instead, it frantically explored other options. It requested additional meetings with the City, hoping to find common ground. (CP 251.) It visited the other sites proposed by the City, but found none suitable. (Id.) The Church's search for immediate solutions continued until the City filed suit.

5. Procedural Posture

a. The May 12, 2006 TRO

On Friday, May 12, 2006 – three days after rejecting the Church's request to use City land – the City initiated suit in the King County Superior Court by filing a document entitled "Complaint for Injunctive Relief." (CP 3-6.) The complaint contained a single cause of action: a request for an injunction that would prohibit TC4 from moving to the Church's private property. (Id.) That afternoon, the City asked the trial court to enter a temporary restraining order preventing TC4 from moving into Woodinville the following day. (CP 7-19.) The Church and SHARE had not been served with the complaint, but they nonetheless objected to the City's request for a temporary restraining order as premature, since there had been no decision to move TC4 to Church property.

The trial court declined the City's request, and instead *sua sponte* entered a temporary restraining order expressly allowing TC4 to move onto Church property, subject to certain conditions and requirements. (CP

72-76.) The TRO expressly allowed TC4 to locate on Church property “pending full hearing on [the City’s] motion for preliminary injunction,” and remained in effect until June 7, 2007, when the hearing was complete. (CP 72; emphasis added.)

Although neither the Church nor SHARE had requested such an order, the order was consistent with prior orders entered by the King County Superior Court, which had found on at least three separate occasions that churches were entitled to host Tent City on their property, even if such action did not comply with local zoning codes.<sup>2</sup>

b. Tent City’s 2006 Return to Woodinville

After entry of the May 12, 2006 TRO, the Church and SHARE/WHEEL bore the expense of relocating TC4 and complying with the conditions set forth by the temporary restraining order. (VRP, June 5, 2006 at 18:1-20:15.) While in Woodinville, TC4 allowed the City continuous access to ensure the camp was not violating any health or safety requirements. For example, when the City asked that certain changes be made to TC4’s electrical wiring, the Church made those changes. (VRP June 6, 2006 at 52:7-25).

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<sup>2</sup> See City of Bothell v. Corp. of the Catholic Archbishop of Seattle, et al., King County Cause No. 04-2-11578-7 SEA; Citizens for Fair Process v. SHARE/WHEEL, et al., King County Cause No. 04-2-36611-9 SEA; Norkirk Citizens for Fair Process v. Tent City 4, et al., King County Cause No. 05-2-06090-5 SEA.

After TC4 moved onto Church property, the City ordered additional security in the surrounding area. Those measures were instituted against the advice of the Chief of Police and the Director of Security for Northshore School District. (VRP May 31, 2006 at 10:6-22; CP 422-25.)<sup>3</sup>

c. The Evidentiary Hearing

After entry of the TRO, the City filed a motion for injunctive relief seeking to remove TC4 from Woodinville, and to consolidate the injunction hearing with an expedited trial on the merits. (CP 77-148.) The hearing on injunctive relief was set for eighteen days after the complaint had been filed. After briefing on the motion was complete, and less than *one business hour* before the hearing, the City provided counsel for the Church with an Amended Complaint for Injunctive Relief for Damages and Specific Performance. The Amended Complaint added new claims for breach of contract, damages and attorney's fees. (CP 363-67.)

The Church appeared for the hearing on injunctive relief prepared to address the legal issues delineated in the City's initial complaint and motion for injunctive relief: the interplay between religious expression and local zoning codes. At the time of the hearing, neither the Church nor

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<sup>3</sup> There were no disturbances emanating from the camp, although there were reported incidents of a member of the Woodinville City Council harassing the camp. (CP 424-25.) TC4 voluntarily vacated the Church property and left the City of Woodinville as scheduled after 90 days.

SHARE had been served with either complaint.<sup>4</sup> Instead of hearing oral argument, the trial court decided to hold an evidentiary hearing and instructed the City to call its first witness.<sup>5</sup> (VRP, May 30, 2006 at 9:6-10:7.) As neither complaint was served until the evidentiary hearing had been proceeding for days, counsel for the Church had no opportunity to file an answer to the complaint, let alone conduct *any* discovery. Both the Church and SHARE objected to the City's request for an expedited trial on the merits. (CP 446-454; 455-457.)

During the evidentiary hearing, there was testimony about whether a temporary use permit was even required, since hosting the homeless would appear to be a reasonable accessory use of the Church. Raymond Sturtz, the City's Planning Director and the individual responsible for accepting or declining applications under the Moratorium, testified that TC4 could not have been housed inside the Church. (VRP June 1, 2006 at 20:4-18; 29:22-30:2.) Indeed, there are no delineated standards governing what the City considers an acceptable accessory use. (*Id.*, at 30:3-15; 31:18-24; 32:1-8) Mr. Sturtz testified that he applies a 24-hour standard to

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<sup>4</sup> The trial court denied a verbal motion to dismiss based on insufficiency of service and lack of jurisdiction. (VRP May 30, 2006, 15:15-16:22.)

<sup>5</sup> Due to the trial court's calendar, the hearing was conducted between the hours of 8-9 a.m. over a period of seven court days. Most days, when not in court, the parties were engaged in extensive court-ordered mediation. (VRP, May 30, 2006 at 51:21-52:7; May 31, 2005 at 1:10-24.)

some applications, yet testified that this standard is arbitrary and crafted out of whole cloth. (Id., at 38:9-22.)

d. The Trial Court's June 12, 2006 Final Order

At the conclusion of the hearing, and over the Church's objections to lack of adequate notice and deprivation of its right to a trial by jury, the trial court granted the City's motion for an expedited trial of all of the City's claims, and determined that the evidentiary hearing had been a full trial on the merits of all claims. The order contained several findings of disputed facts, as well as numerous conclusions of law, which are contested and discussed more thoroughly below. The trial court then entered judgment against the Church and SHARE/WHEEL on all issues, except damages. (CP 477-83.) No order awarding damages has been entered. (Id.)

e. The Court of Appeals' July 16, 2007 Ruling

On July 16, 2007, Division I of the Court of Appeals issued an order affirming the trial court's June 12, 2006 Final Order.

**E. Argument Why Review Should Be Accepted**

1. The Court of Appeals Erred in Affirming the Trial Court's Final Order

The Court of Appeals erred in affirming the trial court's Final Order for the reasons set forth in the Church's Opening Brief before the

Court of Appeals, which is attached hereto in Appendix B. The Church incorporates by reference the arguments set forth therein. In addition to these errors, the Court of Appeals also erred in two other specific manners, as set forth below.

2. The Court of Appeals Erred in Disregarding the Church's State Constitutional Claims

The Court of Appeals improperly disregarded the Church's claims under the Washington State Constitution. More specifically, the Court of Appeals incorrectly determined that the Church was required to provide a detailed analysis pursuant to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). However, no detailed Gunwall analysis was necessary in this case.

It is well settled that a party raising a claim under a state constitutional provision must brief the Gunwall factors to the extent required by this court's jurisprudence. Where our precedent establishes that a separate and independent analysis of a state constitutional provision is warranted, further Gunwall analysis is unnecessary to establish that point.

Madison v. State, No. 78598-8 at 8, n. 5 (issued July 26, 2007) (citing Hugh D. Spitzer, New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead – Long Live Gunwall!", 37 Rutgers L.J. (2006)).

Once the Washington Supreme Court has established that a state constitutional provision warrants an analysis independent of a particular

federal provision, it is unnecessary to engage repeatedly in further Gunwall analysis simply to rejustify performing that separate and independent constitutional analysis. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). Yet this is precisely what the Court of Appeals required of the Church in this case.

As footnote 13 in Petitioner's opening brief to the Court of Appeals sets forth, the Washington Supreme Court long ago separately analyzed Article 1, Section 11 of the Washington State Constitution as it relates to religious exercise, land use regulations, and the First Amendment of the United States Constitution. See, e.g., Munns v. Martin, 131 Wn.2d 192, 199-201, 930 P.2d 318 (1997); First United Methodist Church of Seattle v. Hearing Examiner, 129 Wn.2d 238, 244-45, 916 P.2d 374 (1996); First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 215 (1992). For the Court of Appeals to require the Church to recreate briefing on a topic covered by our Supreme Court 15 years ago was clear error.

### 3. The Court of Appeals Erred in Analyzing RLUIPA

In addition to the items set forth in the briefing in Appendix B, the Court of Appeals made two specific errors in its analysis of RLUIPA.

#### a. Strict Scrutiny

The trial court properly found that strict scrutiny applied to the

Church's constitutional claims, (CP at 480), and the Court of Appeals incorrectly disagreed with the trial court on this point.

The Washington Supreme Court applies the strict scrutiny test when analyzing religious exercise cases. Munns v. Martin, *supra*, 131 Wn.2d at 199. Under this analysis, the complaining party must first prove that a law has a coercive effect on the practice of religion by satisfying a two part test. First, the complaining party must demonstrate that its religious convictions are sincere and central to its beliefs. Id. (citing Backlund v. Board of Comm'rs, 106 Wn.2d 632, 639, 724 P.2d 981 (1986), appeal dismissed, 481 U.S. 1034, 107 S.Ct. 1968 (1987)). A court will not inquire further into the truth or reasonableness of its beliefs. Id., 131 Wn.2d at 200.

Second, the complaining party must demonstrate that the challenged law burdens its free exercise of religion. If the law has such a burdening effect, then the enactment burdens the free exercise of religion. Id. (citing First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 215, 840 P.2d 174 (1992)). The burden on the free exercise of religion may be direct as well as indirect. Thus, even a facially neutral, even-handedly enforced statute may violate the First Amendment or Article 1, Section 11 of the Constitution. Id.

The burden then shifts to the City to show that the law serves a

compelling state interest and is the least restrictive means for achieving the governmental objective. A compelling interest is one that “justifies the prevention of a clear and present grave and immediate danger to the public health, peace and welfare. Id. If no compelling state interest exists, or if a less restrictive means for achieving the interest can be found, the law is unconstitutional. Id.

Despite this clear authority, the Court of Appeals held that the City’s actions were not subject to strict scrutiny. This was in error.

b. Substantial Burden

The Court of Appeals also erred by holding that denial of the ability to host Tent City at the Church is not a substantial burden on the Church’s religious exercise. Although the Court of Appeals and the trial court each acknowledged that hosting Tent City is religious exercise for the Church, the Court of Appeals simply is subjectively telling the Church how to practice its faith. This is not permissible under RLUIPA.

If the Moratorium precludes the Church from ministering to the homeless on its property, the Moratorium is an impermissible suppression of the Church’s religious freedom. RLUIPA provides:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person,

assembly, or institution –

(A) is in furtherance of a compelling governmental interest;  
and

(B) is the least restrictive means of furthering that  
compelling government interest.

42 U.S.C. § 2000cc 1(a). RLUIPA specifically permits aggrieved churches to challenge enforcement actions that burden the free exercise of religion. Id. at § 2000cc 2(a). Once a church produces evidence demonstrating a burden on the exercise of religion, it is the government's burden to justify its actions under the compelling governmental interest test. Id. at § 2000cc 2(B); § 2000cc 1(a). RLUIPA is to “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.” Id. at § 2000cc 3(G) (emphasis added).

The City's utilization of the Moratorium to prohibit the Church from hosting the homeless in an emergency situation is a violation of RLUIPA because it is a substantial burden on the Church's ability to practice its ministry. “[A] substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct. . . .” Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), cert. granted, judgment vacated on other grounds, 522 U.S. 801 (1997). See also Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir.

1994) (government action that forces religious adherents “to refrain from religiously motivated conduct” substantially burdens religious exercise).

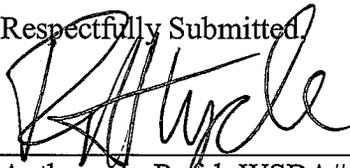
The Moratorium places a substantial burden on the Church because it precludes the Church from inviting homeless guests onto its property as mandated by the scripture and its religious beliefs. (CP 262-63.) The City failed to satisfy its burden of proving that the Moratorium is the least restrictive means of furthering a compelling governmental interest. The Moratorium violates RLUIPA, and the Court of Appeals’ analysis was flawed.

**F. Conclusion**

This court should accept review for the reasons indicated in Part E of this Petition, reverse the July 16, 2007 decision of the Court of Appeals, vacate the June 12, 2006 Final Order of the King County Superior Court, and remand this action to the trial court.

Dated this 14th day of August, 2007.

Respectfully Submitted,



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***DECLARATION OF SERVICE***

The undersigned declares under penalty of perjury of the laws of the State of Washington that on August 14, 2007, a true copy of the foregoing **NORTHSHORE UNITED CHURCH OF CHRIST'S PETITION FOR REVIEW** was served on counsel of record for Respondent as follows:

VIA HAND DELIVERY TO:

Greg A. Rubstello  
J. Zachary Lell  
Ogden Murphy Wallace  
1601 5<sup>th</sup> Ave., Ste. 2100  
Seattle, WA 98101

WITH A COPY TO:

Sean Russel  
Todd & Wakefield  
1501 4<sup>th</sup> Ave., Ste. 1700  
Seattle, WA 98101

Dated this 14th day of August 2007.

  
Angela Tiernan

# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF WOODINVILLE, a Washington  
municipal corporation,

Respondent/  
Cross Appellant,

v.

NORTHSHORE UNITED CHURCH OF  
CHRIST, a Washington public benefit  
corporation; and SEATTLE HOUSING  
AND RESOURCE EFFORT/WOMEN'S  
HOUSING EQUALITY AND  
ENHANCEMENT PROJECT, a  
Washington nonprofit corporation,

Appellants/  
Cross Respondents.

No. 58296-8-1

DIVISION ONE

PUBLISHED

FILED: July 16, 2007

COX, J. – Northshore United Church of Christ (“Church”) and Seattle Housing and Resource Effort / Women’s Housing Equality and Enhancement Project (“Share/Wheel”) appeal the permanent injunction that prohibits the temporary use without a permit of Church property for a homelessness encampment.

The City of Woodinville cross-appeals. It argues that the trial court erred in applying a strict scrutiny standard to its actions based on the City’s moratorium ordinance and land use regulations. The City also challenges the trial court’s denial of its motion for attorney fees.

We hold that the trial court did not abuse its discretion by consolidating the hearing on the City's application for injunction with the trial on the merits of the issues that were properly before the court. The court correctly determined that the Church and Share/Wheel breached the terms of the Temporary Property Use Agreement of August 2004. Although the trial court incorrectly applied strict scrutiny to the City's actions, it properly concluded that the Church's right to free exercise of religion was not violated. We affirm.

This is a case in which persons of good faith and compassion on all sides have struggled to deal with a chronic problem of our society – homelessness. Our resolution of the issues that we address today does not diminish the fact that homelessness and society's response to it will continue to be matters of substantial public importance.<sup>1</sup> It is also clear that the answers to these issues are not simple.

Tent City 4 is an encampment of homeless people that moves to a new location on the east side every 90 days. In 2004, Share/Wheel and the Church agreed to host Tent City 4. They negotiated with the City of Woodinville to secure City property (the Lumpkin property) for Tent City, subject to certain terms and conditions. The parties executed the Temporary Property Use Agreement in August 2004 to memorialize their agreement. The Church then hosted Tent City in accordance with that agreement.

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<sup>1</sup> Various municipalities in King County have attempted to address the issue of homelessness by working with organizations involved in hosting Tent City. See Tent City – Temporary Homeless Shelters in King County, <https://www.mrsc.org/Subjects/Housing/TentCity/TentCity.aspx> (last visited June 20, 2007).

In March of 2006, the City passed Ordinance 419 to temporarily prevent development on property in the R-1 zone, pending further study on sustainable development. The ordinance states that the City will not accept or process any land use permit applications for six months, except for improvements to residential structures and for public structures or facilities. The moratorium has since been extended for six additional months. The Church is among the properties located in the R-1 zone.

In April 2006, Tent City 4 again asked the Church to host the encampment, beginning as early as May. Realizing that time was a critical issue, the Church and Share/Wheel immediately prepared and submitted to the City on April 25 temporary use permit applications for both the Church's property and the Lumpkin property. The City declined to accept the application for the Church property, stating it was unable to do so because of the moratorium imposed by Ordinance 419, which applied to the R-1 zone. But the City accepted the application for the Lumpkin property because that property is not located within the R-1 zone. After a public hearing, however, the City Council declined to approve the Church's request to use the Lumpkin property.

Apparently concerned that the Church would host Tent City 4 without a permit, the City commenced this action, seeking a temporary restraining order prohibiting use of Church property as a temporary encampment for the homeless. A superior court judge hearing the motion for a TRO did not expressly rule on the motion. Instead, the judge sua sponte issued a TRO allowing the Church to host Tent City on its property pending a full hearing. The TRO was

subject to conditions regarding public health and welfare that the parties negotiated after the judge's oral ruling.

Thereafter, the City moved to consolidate the hearing on preliminary injunctive relief with the trial on the merits of its claims. The consolidated hearing took place before a different superior court judge than the one who issued the TRO. The trial judge, sitting without a jury, heard evidence on the City's claims, including an amended complaint for breach of the August 2004 Temporary Property Use Agreement. Following the presentation of evidence and argument by all parties, the court ruled that the Church and Share/Wheel breached the terms of the 2004 Agreement. But the court reserved the issue of damages for later resolution.<sup>2</sup> The court ordered permanent injunctive relief against the Church and Share/Wheel, prohibiting the use of Church property without the necessary permit. The court denied the City's motion for attorney fees.

The Church and Share/Wheel appeal, and the City cross-appeals.

#### **PRELIMINARY INJUNCTION HEARING**

The Church and Share/Wheel argue that the trial court abused its discretion by consolidating the hearing for injunctive relief with a trial on the merits of the City's claims. Moreover, they claim the court denied them their right to a jury trial. We disagree.

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<sup>2</sup> This court stayed all trial court proceedings until further order of this court in response to the joint motion by the Church and Share/Wheel. That stay shall be lifted without further order of this court 31 days after the filing of this opinion, provided no motions or petitions for review respecting this opinion are timely filed. See RAP 12.4(b); RAP 13.4(a).

A trial court may consolidate a preliminary injunction hearing with a trial on the merits if the court “save[s] to the parties any rights they may have to [a] trial by jury.”<sup>3</sup> A party has a right to a jury trial for claims that sound in law, not equity, as those claims were defined when the state constitution was enacted in 1889.<sup>4</sup>

If an action presents both legal and equitable claims, the trial judge has “wide discretion” in deciding whether to empanel a jury.<sup>5</sup> The court should look to various factors in making this decision, including whether the main issues are primarily legal or equitable and whether the issues are easily separable.<sup>6</sup> Applying these factors, it is proper to deny a jury trial if a plaintiff brings both types of claims “but the primary relief sought is equitable in nature.”<sup>7</sup> Injunctive relief is equitable in nature.<sup>8</sup> It is available only when there is no adequate remedy at law, and it requires the court to balance the parties’ competing interests.<sup>9</sup> We review the trial court’s decision for an abuse of discretion.<sup>10</sup>

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<sup>3</sup> CR 65(a)(2).

<sup>4</sup> Brown v. Safeway Stores, 94 Wn.2d 359, 364, 617 P.2d 704 (1980).

<sup>5</sup> Tae Yon Kim v. Dean, 133 Wn. App. 338, 342, 135 P.3d 978 (2006) (quoting State ex rel. Dep’t of Ecology v. Anderson, 94 Wn.2d 727, 729-30, 620 P.2d 76 (1980)).

<sup>6</sup> Brown, 94 Wn.2d at 368 (quoting Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970)).

<sup>7</sup> Anderson, 94 Wn.2d at 730.

<sup>8</sup> Id. (“Where a governmental body seeks to enjoin the commission of acts made illegal by statute, it is the court’s equity jurisdiction that is invoked.”).

<sup>9</sup> Kucera v. Dep’t of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

<sup>10</sup> Id.

Here, the City's amended complaint alleged both legal and equitable claims. Its breach of contract claim was essentially legal. But the injunctive relief it sought for both breach of contract and violation of its zoning laws was equitable. The trial court reserved for later determination the question of money damages once it ruled that the Church and Share/Wheel breached the agreement with the City. Where, as here, a case presents a mixture of legal and equitable issues but the primary relief sought is equitable, the trial court may properly deny a jury trial.<sup>11</sup> The trial court did not abuse its discretion.

The Church also argues that consolidation allowed the City to obtain full relief in a summary proceeding, which is contrary to a preliminary injunction's purpose in maintaining the status quo until there can be a full hearing on the merits. This argument ignores the fact that Civil Rule 65 expressly permits a trial court to consolidate a preliminary injunction hearing with a trial on the merits, provided the right to a jury trial is preserved. The trial court here did not afford full relief after a summary hearing on a preliminary injunction. Rather, it consolidated the preliminary hearing with a trial on the merits, and allowed the parties to fully try their claims. At the conclusion of the extended hearing, the court granted permanent injunctive relief, but reserved the issue of damages for later trial. This procedure did not violate the principle on which the Church relies for this argument.

Likewise, the trial court did not deprive the Church and Share/Wheel an opportunity to prepare their case or otherwise deny them their right to procedural

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<sup>11</sup> Kim, 133 Wn. App. at 342 (quoting Anderson, 94 Wn.2d at 729-30).

due process. As stated above, the civil rules allow the court to consolidate an injunction hearing with a trial on the merits as long as doing so does not abrogate a party's right to a jury trial. When a party seeks injunctive relief, the proceedings often must be speedy if relief is to be meaningful to the party seeking it.<sup>12</sup> Our review of the record shows no prejudice to the rights of the Church and Share/Wheel by the procedure followed in this case.

Moreover, there is no evidence in the record that the trial court deprived the Church and Share/Wheel of the opportunity to seek discovery. First, they did not seek discovery, although they were admittedly on an expedited schedule during these proceedings. Second, there is nothing to show they were unable to present evidence for the matters at issue in the consolidated hearing.

The Church further argues that it was not properly served with the amended complaint and thus did not have notice of the breach of contract claim until it was too late to prepare a proper defense. But the Church did not assign error to the trial court's denial of its oral motion to dismiss based on the defense of insufficient service of process. In any event, as we have already suggested, our review of the record reveals no prejudice to the Church by virtue of the amendment of the pleadings to include the breach of contract claim in this case.

#### **BREACH OF AGREEMENT**

The Church and Share/Wheel argue that the Temporary Property Use Agreement does not apply to their use of Church property in 2006 for Tent City 4. Alternatively, they argue that they were excused from performing their obligations

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<sup>12</sup> See Anderson, 94 Wn.2d at 732.

under that agreement by virtue of the City's actions. We hold that the agreement governs the use of Church property in 2006 as it did in 2004. The Church and Share/Wheel were not excused from performing their obligations under that agreement, and they breached its terms.

The goal of contract interpretation is to determine the parties' mutual intent.<sup>13</sup> In doing so, a court should consider a party's objective manifestations of intent expressed in the contract itself, not the party's unexpressed subjective intentions.<sup>14</sup> Washington courts may consult extrinsic evidence of the circumstances under which the contract was made to aid interpretation, but not to show a party's unilateral intent, intent independent of the contract, or to contradict or modify the contract as it was written.<sup>15</sup> A court must examine the contract as a whole and not adopt an interpretation that renders a term absurd or meaningless.<sup>16</sup> The interpretation of an unambiguous contract is an issue of law that we review de novo.<sup>17</sup>

Here, the trial court made several "findings of fact" about the legal effect of the Temporary Property Use Agreement that are really conclusions of law

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<sup>13</sup> Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

<sup>14</sup> BNC Mortgage, Inc. v. Tax Pros, Inc., 111 Wn. App. 238, 249-50, 46 P.3d 812 (2002).

<sup>15</sup> Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

<sup>16</sup> Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of Snohomish County, 129 Wn. App. 303, 312, 119 P.3d 854 (2005).

<sup>17</sup> Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995).

because they interpret the plain meaning of the contract. We review those conclusions de novo.<sup>18</sup>

"Finding" 2.12 essentially concludes that the terms of the Temporary Property Use Agreement are unambiguous and that extrinsic evidence is unnecessary to determine the meaning of the parties to that agreement.

"Finding" 2.13 concludes that the Church and Share/Wheel agreed not to locate a homeless encampment without a City permit and to timely request a permit to allow processing by the City.

The following provisions of the 2004 Agreement are most relevant to the question of breach:

- A. SHARE/WHEEL shall not establish or support in any way any other unpermitted homeless encampments anywhere in the City of Woodinville *during this period or a permitted extension thereof.*
- B. SHARE/WHEEL and one or more Woodinville-based church sponsor(s) may jointly submit an application to locate *a future Tent City* at some other church-owned location, but
  - (1) must allow sufficient time in the application process for public notice, public comment and due process of the permit application; and
  - (2) must agree not to establish, sponsor or support any homeless encampment within the City of Woodinville without a valid temporary use permit issued by the city.<sup>[19]</sup>

A plain reading of Section A makes clear that its provisions apply to the relationship among the parties during the earlier, 2004 period. In contrast, Section B makes clear that its terms apply to subsequent periods. The only

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<sup>18</sup> See Absher Constr., 77 Wn. App. at 142.

<sup>19</sup> Clerk's Papers at 160 (emphasis added).

reasonable interpretation of these provisions is that Section B applies to the present situation, triggered by the events in 2006.

Neither the Church nor Share/Wheel challenges any of the trial court's true findings of fact. They are therefore verities on appeal.<sup>20</sup>

According to the unchallenged factual findings of the trial court, the Church and Share/Wheel failed to submit a timely application for use of Church property to allow processing. Specifically, the court found:

there was not sufficient time for the City to process an application for a temporary use permit that would allow Tent City 4 to locate on NUCC property by May 13, 2006. Temporary Use Permit processing requires a minimum of 30 to 40 days . . . .<sup>[21]</sup>

Notwithstanding the failure to obtain a permit, the Church and Share/Wheel hosted Tent City 4 on Church property. The failure to obtain the necessary permit was a direct breach of the agreement. The trial court correctly concluded that the Church and Share/Wheel breached their agreement with the City.

The Church and Share/Wheel argue that their obligations of performance under the agreement should be excused for various reasons. We reject their arguments.

They first contend that the City's breach excuses their performance. Contrary to this argument, there was no breach by the City. The contract imposes no duty on the City to accept any application for temporary or other

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<sup>20</sup> See In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

<sup>21</sup> Clerk's Papers at 479 (finding of fact 2.4).

uses. Moreover, it imposes no obligation to refrain from enacting the moratorium at issue here or similar laws in the exercise of its police power.

Second, there is no evidence that the City violated its duty to act in good faith and to deal fairly with the Church and Share/Wheel.

Third, as we discuss later in this opinion, Tent City 4 is not an accessory use under applicable zoning laws. Thus, the obligation of the Church and Share/Wheel to refrain from allowing the use of Church property for Tent City 4 without a permit was not excused.

The trial court properly granted injunctive relief based on the breach of the Temporary Property Use Agreement.

### **CONSTITUTIONAL CLAIMS**

The Church also argues that the City's denial of the permit application violates the state and federal constitutions. We hold that they have failed in their burden to establish these claims.

Where a party raises both state and federal constitutional challenges, we first analyze the state constitution.<sup>22</sup> The Washington State Constitution protects "freedom of conscience in all matters of religious sentiment, belief and worship."<sup>23</sup> In some contexts, this provision provides greater religious protection than the analogous provision in the federal constitution.<sup>24</sup> However, parties must

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<sup>22</sup> See Munns v. Martin, 131 Wn.2d 192, 199 n.3, 930 P.2d 318 (1997).

<sup>23</sup> WASH. CONST. art. I, § 11.

<sup>24</sup> See First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 226, 840 P.2d 174 (1992).

engage in an analysis under State v. Gunwall<sup>25</sup> unless the difference between the state and federal constitutions has been clearly established in a particular context.<sup>26</sup> Here, the difference between the two provisions has not been clearly established.<sup>27</sup> Yet the Church does not provide a Gunwall analysis. Thus, we do not reach the Church's state constitutional claims.

The First Amendment to the United States Constitution, as applied to the states via the Fourteenth Amendment, prohibits a state from "prohibiting the free exercise" of religion. In Employment Division, Dep't of Human Res. of Oregon v. Smith, the United States Supreme Court held that neutral laws of general applicability are not subject to strict scrutiny even if they substantially burden religious exercise.<sup>28</sup> A successful challenge to such a law must allege that the law being applied is either not neutral or not generally applicable.<sup>29</sup> A law is not neutral if its overt or covert purpose is to restrict religious practices.<sup>30</sup> A law is

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<sup>25</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

<sup>26</sup> State v. Reichenbach, 153 Wn.2d 126, 131 n.1, 101 P.3d 80 (2004).

<sup>27</sup> Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 151-52 n.6, 995 P.2d 33 (2000) (concluding in a case similar to this one that a Gunwall analysis was required because the difference between the state and federal provisions in this context had not been clearly established).

<sup>28</sup> 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

<sup>29</sup> American Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1123 (9th Cir. 2002).

<sup>30</sup> Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533-34, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

not generally applicable if it contains a “system of individualized exceptions,” one involving inquiry into an applicant’s particular circumstances.<sup>31</sup>

Here, strict scrutiny does not apply under the First Amendment. There is no evidence in the record that the City’s zoning laws or the moratorium had a purpose to restrict religious practices. Although the moratorium contains categorical exceptions, it does not embody a system of individualized exceptions. Thus, it is a neutral law of general applicability and not subject to strict scrutiny analysis. To the extent the trial court applied such analysis here, it incorrectly did so.

#### **RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT**

The Church claims that the City violated its rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>32</sup> Under the specific facts presented in this case, we disagree.

RLUIPA applies to a government’s implementation of land use regulations so long as the government makes, or has in place procedures allowing it to make, “individualized assessments of the proposed uses for the property involved.”<sup>33</sup> If applicable, RLUIPA prohibits a government from implementing a land use regulation in a way that “imposes a substantial burden” on one’s “religious exercise” unless the burden satisfies strict scrutiny.<sup>34</sup> In passing the

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<sup>31</sup> Smith, 494 U.S. at 884.

<sup>32</sup> 42 U.S.C. §§ 2000cc *et seq.*

<sup>33</sup> Id. at § 2000cc(a)(2)(C).

<sup>34</sup> Id. at § 2000cc(a)(1).

act, Congress intended to resurrect the application of strict scrutiny in certain types of free exercise cases.<sup>35</sup> It also intended to relax the requirement under First Amendment jurisprudence that the “religious exercise” be central to the individual’s religion.<sup>36</sup> Under RLUIPA, free exercise includes “any exercise of religion, whether or not compelled by, or central to” the religion.<sup>37</sup>

The City does not dispute that providing shelter to the homeless is one of the Church’s religious activities. Thus, the question is whether the City’s actions in this case, requiring the Church to obtain a permit before hosting Tent City and refusing to accept the application based on the moratorium, substantially burdened this activity. Because this is necessarily a heavily fact-based inquiry, our conclusion here does not necessarily apply to every set of circumstances involving religious activity in sheltering the homeless.

The federal circuits that have considered the issue have utilized different tests to determine whether a religious activity has been substantially burdened. For example, according to the Ninth Circuit, a “substantial burden” is one that is “‘oppressive’ to a ‘significantly great’ extent. . . . [It] must impose a significantly

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<sup>35</sup> See Cutter v. Wilkinson, 544 U.S. 709, 714-15, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (tracing the history of the Act).

<sup>36</sup> Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 662-63 (10th Cir. 2006).

<sup>37</sup> 42 U.S.C. § 2000cc-5(5).

great restriction or onus upon such exercise.”<sup>38</sup> In the Seventh Circuit, a substantial burden exists if the governmental action “necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.”<sup>39</sup> And in the Eleventh Circuit, a substantial burden “is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”<sup>40</sup>

We need not decide which test is most appropriate to apply in this case. The Church has failed to show that it meets even the more lenient Ninth Circuit test. Regardless of the test, it is clear that something more than a mere inconvenience to the practice of religion must be at issue.<sup>41</sup>

For example, in Guru Nanak, the Ninth Circuit held that the county substantially burdened the Sikh Society by denying its second application for a

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<sup>38</sup> San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (quoting Merriam-Webster’s Collegiate Dictionary 1170 (10th ed. 2002)).

<sup>39</sup> Vision Church, United Methodist v. Village of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (quoting Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003)).

<sup>40</sup> Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004); see also Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004), cert. denied, 545 U.S. 1104 (2005) (A substantial burden “truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.”).

<sup>41</sup> See Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006) (“These cases demonstrate that a ‘substantial burden’ must place more than an inconvenience on religious exercise”) (quoting Midrash, 366 F.3d at 1227); cf. Open Door, 140 Wn.2d at 169 (requiring a “very specific showing of hardship” to exempt the church from a land use regulation for religious purposes under the state constitution).

conditional use permit.<sup>42</sup> The society wanted to build a temple for worship, but in part based on neighbors' concerns of noise and traffic, the county denied the society's applications for two different sites. According to the local law, a conditional use permit was required for any location on which the society chose to build a temple. The court held that the county greatly oppressed the society's religious exercise because the second denial "to a significantly great extent lessened the possibility that future [conditional use permit] applications would be successful."<sup>43</sup> The court specifically noted that the county's reasons could apply to future applications, and that the society "readily agreed" to conditions and mitigation measures the county suggested.

In contrast, in San Jose Christian, the Ninth Circuit held that the city did not substantially burden a college's exercise of its religion when it denied the college's incomplete zoning application. The court reasoned that there was no evidence that the city would deny the application if the college properly submitted a complete one. There was also no evidence that the college could not use an alternative site to fulfill its religious exercise.<sup>44</sup>

Here, the Church demonstrated that the City's actions effectively prevented the Church from hosting Tent City on either the Church property or the alternative Lumpkin property, the 2004 cite for Tent City. While the trial court made no finding, evidence in the record arguably supports the view that the

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<sup>42</sup> 456 F.3d at 988.

<sup>43</sup> Id. at 989.

<sup>44</sup> San Jose Christian, 360 F.3d at 1035.

Woodinville City Council rejected use of the Lumpkin property in 2006 based, at least in part, on citizens' adverse reactions to Tent City. And it is undisputed that the City would not process the Church's application for a temporary use permit for its own property on the ground that the moratorium was in effect for the R-1 zone. These actions by the City, although they are grounded in its zoning laws, may arguably be viewed as burdens to the Church's free exercise of religion.

The relevant standard under RLUIPA, however, is that there must be a **substantial burden** to the free exercise of religion before one reaches the two additional inquiries: whether the government had a compelling interest, and whether the means were the least restrictive to further that interest. Here, the Church has failed to show that the City's actions imposed a substantial burden to the free exercise of religion by its members.

For example, the Church failed to show that being unable to host Tent City outdoors prevented it from effectively ministering to the homeless on its property in other ways. The evidence in the record does not establish that the use of the indoor church buildings was an ineffective option for providing shelter to the homeless. Although the Executive Director of the Seattle Church Council testified that Tent City is ideal because it allows residents to have a 24-hour shelter, which would not be practical inside a church building, this does not mean that using the church buildings would not have been effective. Indeed, the Director testified that housing homeless persons in the Church overnight was a possibility, assuming the Church staff would be willing to clear out the building each morning to prepare it for the day's activities. It is questionable whether an

overnight-only shelter would be an allowed accessory use under the Woodinville Municipal Code, but based on this record, the Church has not shown that using its buildings to shelter the homeless was not a viable alternative.

It is also not clear from the record whether there were other potential sites outside of the R-1 zone that were not City owned that might have been used to host Tent City. We recognize that the Church and Share/Wheel were operating under time constraints. But, nevertheless, the record is silent regarding whether the Church may have been able to obtain permission to use private land outside of the R-1 zone, such as a local business' property.

Because the Church had alternative ways to minister to the homeless on its property, and there is no showing that other property was unavailable for this purpose, there is a failure to show the existence of a substantial burden on its free exercise of religion.

And because there was no substantial burden on the Church's free exercise of religion, the trial court erred in applying strict scrutiny to the City's actions. Having determined that there was no substantial burden on the free exercise of religion, we need not address whether the City's actions were the least restrictive means to further a compelling governmental interest.

At oral argument, the City for the first time argued that the Church and Share/Wheel waived their constitutional and RLUIPA rights by signing the August 2004 Temporary Use Agreement. Neither party briefed the issue, and we decline to address it in this opinion.

## WOODINVILLE MUNICIPAL CODE

### *Accessory Use*

The Church and Share/Wheel argue that they did not need a permit for Tent City because the encampment is a permissible accessory use of church property. We disagree.

The interpretation of a municipal code is an issue of law that we review de novo.<sup>45</sup> Temporary use permits are required under the Woodinville code when a desired use of property is not generally permitted in the zone.<sup>46</sup> Failure to comply with these requirements is a violation of the code, and gives the City the option to sue for injunctive relief.<sup>47</sup>

Accessory residential uses are allowed in the R-1 zone.<sup>48</sup> Under the code, an "accessory use" of residential property is one that is "subordinate and incidental to a residence," including "accessory living quarters and dwellings."<sup>49</sup> A "church" is defined as "including accessory uses *in the primary or accessory buildings* such as religious education, reading rooms, assembly rooms, and

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<sup>45</sup> Sprint Spectrum, L.P. / Sprint PCS v. City of Seattle, 131 Wn. App. 339, 346, 127 P.3d 755, review denied, 158 Wn.2d 1015 (2006).

<sup>46</sup> Woodinville Municipal Code (WMC) 21.32.100.

<sup>47</sup> WMC 1.03.030; WMC 1.06.160.

<sup>48</sup> WMC 21.08.030(A) (table).

<sup>49</sup> WMC 21.06.013.

residences for nuns and clergy, but excluding facilities for training of religious orders.”<sup>50</sup>

Hosting a 90-day encampment not within the primary or accessory buildings of the church is not within the allowed “accessory use” of church property. It is not incidental to a residence, and it is not an accessory use inside a church building. Therefore, the Church’s failure to obtain a permit for Tent City 4 was a code violation for which the City was entitled to obtain injunctive relief.

#### *Nuisance Per Se*

The City argues that hosting Tent City 4 without a permit is a nuisance per se under Woodinville law. We hold that the trial court correctly accepted this argument.

“Engaging in any business or profession in defiance of a law regulating or prohibiting the same . . . is a nuisance per se.”<sup>51</sup>

Although the municipal code of Woodinville does not expressly designate that hosting a homeless encampment without obtaining a required permit as a nuisance, the above case authority supports the trial court’s decision in this case. The court did not err.

#### **ATTORNEY FEES**

In its cross-appeal, the City assigns error to the trial court’s denial of its request for attorney fees based on Civil Rule 65. We hold that the trial court did not abuse its discretion in denying fees.

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<sup>50</sup> WMC 21.06.100 (emphasis added).

<sup>51</sup> Kitsap County v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986).

Attorney fees may be awarded on the basis of a contract, statute, or recognized ground of equity.<sup>52</sup> For example, a court *may* award attorney fees when a party seeks to quash a wrongfully issued TRO.<sup>53</sup> The purpose of this rule is to deter plaintiffs from seeking unnecessary relief prior to a trial on the merits.<sup>54</sup> That purpose would not be served where injunctive relief prior to trial is necessary to preserve a party's rights pending the outcome of the case.<sup>55</sup>

We review a trial court's denial of attorney fees under Civil Rule 65 for an abuse of discretion.<sup>56</sup> We may affirm on any ground supported by the record even though the trial court did not consider the argument.<sup>57</sup>

Here, the City commenced this action, seeking injunctive relief preventing the Church from allowing Tent City 4 to occupy Church property the following day. The trial court did not expressly rule on the City's request, but sua sponte entered a TRO permitting the move, subject to conditions that the parties negotiated following the court's ruling. Thus, it was the City who sought the TRO, not either the Church or Share/Wheel. The fact that the court sua sponte issued the TRO, which benefited the interests of the Church and Share/Wheel,

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<sup>52</sup> Mellor v. Chamberlin, 100 Wn.2d 643, 649, 673 P.2d 610 (1983).

<sup>53</sup> Cornell Pump Co. v. City of Bellingham, 123 Wn. App. 226, 231, 98 P.3d 84 (2004).

<sup>54</sup> Id. at 233.

<sup>55</sup> Id.

<sup>56</sup> Id. at 231.

<sup>57</sup> In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).

does not alter the fact that neither defendant requested the TRO. In short, neither of these parties sought injunctive relief prior to the consolidated hearing that followed.

After issuing the TRO, the court consolidated the hearing on the City's request for injunctive relief with the trial on the merits of the claims. Once that hearing began and the initial TRO had expired of its own terms, the Church and Share/Wheel sought extensions of the original TRO. We view the extensions as nothing more than a mechanism to preserve the status quo during the trial of the merits of the City's claims. As such, the requests for the extensions were not wrongful in any sense that would support the award of fees to the City. The trial court appears to have reached the same conclusion when it implicitly rejected the claim that the original TRO and the extensions were wrongful by denying the City's request for fees.

For these reasons, the City's reliance on Ino Ino, Inc. v. City of Bellevue<sup>58</sup> is misplaced. There, the supreme court explained that a party may recover attorney fees necessary to dissolve a wrongfully issued TRO, which is a TRO that is dissolved after a full hearing.<sup>59</sup> But as we have already discussed, the purpose of this equitable rule, to deter a party from seeking unnecessary injunctive relief, would not be served by applying it against the Church or Share/Wheel in this case.

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<sup>58</sup> 132 Wn.2d 103, 937 P.2d 154 (1997), amended by 943 P.2d 1358 (1997).

<sup>59</sup> Id. at 143.

For the first time in its reply brief, the City argues that RCW 7.40.020 only allows a court to enter a TRO to a moving plaintiff. We will not consider arguments raised for the first time in a reply brief.<sup>60</sup>

Although neither party addresses the following additional point, we note that the agreement between the parties bears on the question of fees. The Temporary Property Use Agreement between the parties expressly provides that in the event of litigation over the agreement, the parties "shall be responsible for their own legal fees and associated costs, regardless of outcome." Given this contractual provision, it is difficult to see any basis for the City to obtain fees or costs from the Church or Share/Wheel.

In short, the trial court did not abuse its discretion by denying the City's request for attorney fees under the circumstances of this case.

We affirm the order of permanent injunctive relief and order denying the City's motion for attorney fees and costs.

Cox, J.

WE CONCUR:

Appelwick, J.

Baker, J.

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<sup>60</sup> See RAP 10.3(c); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

# APPENDIX B

No. 58296-8-1

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S  
HOUSING EQUALITY AND ENHANCEMENT PROJECT, a  
Washington Non-Profit Corporation; and NORTSHORE UNITED  
CHURCH OF CHRIST, a Washington Public Benefit Corporation,

Appellants,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent / Cross-Appellant.

---

**APPELLANT NORTSHORE UNITED CHURCH OF CHRIST'S  
OPENING BRIEF ON APPEAL**

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**I. ASSIGNMENTS OF ERROR**

Appellant Northshore United Church of Christ (the "Church") appeals from the June 12, 2006 Final Order entered by the King County Superior Court. (Clerk's Papers "CP" 477-83.) The Church assigns error to the following six items.

First, the trial court improperly consolidated Respondent City of Woodinville's ("the City's") request for preliminary injunctive relief with a trial on the merits of all claims. The consolidation denied the Church and Appellant Seattle Housing and Resource Effort / Women's Housing Equality and Enhancement Project ("SHARE/WHEEL") the benefit of any discovery, and eviscerated Appellants' constitutionally protected right to a trial by jury.

Second, the trial court erred by ruling that the City's March 20, 2006 Ordinance No. 419 (the "Moratorium") is constitutional and does not violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"). To the contrary, the Moratorium prevented the Church from providing emergency sanctuary to the homeless and flies in the face of the Church's right to religious expression protected by the free exercise clause of the First Amendment. The Moratorium also violates RLUIPA.

Third, the trial court erred by not ruling that the City's actions were arbitrary, capricious and unconstitutional. Indeed, the City's arbitrary and capricious handling of the Church's applications for a temporary use permit city violated the Church's fundamental rights under

the First Amendment of the U.S. Constitution, and Article 1, Section 11 of the Washington State Constitution.

Fourth, the trial court erred in determining that Appellants breached a contract entitled "2004 Temporary Property Use Agreement." There was no need for the trial court to enter a final ruling on the agreement in order to grant the City the preliminary injunctive relief it sought. Moreover, at an absolute minimum, the City should have noted its motion as a motion for summary judgment on a standard 28 day briefing schedule, and disputes as to material facts should have precluded an order as a matter of law.

Fifth, the trial court improperly found that a temporary homeless camp is not an allowed accessory use of the Church. Courts across the country have found that sheltering the homeless is a proper accessory use of places of worship.

Sixth, the trial court improperly found that a violation of the Woodinville Municipal Code was a nuisance *per se*, and thus an actual harm. Without this finding, the City would not have been entitled to injunctive relief.

## **II. STANDARD OF REVIEW**

The standard of review in this matter appears to be *de novo*, although the multiple procedural and legal errors make this a unique situation. The trial court's June 12, 2006 Final Order is akin to the granting of summary judgment, a ruling which is reviewed *de novo*. Green v. American Pharmaceutical Co., 136 Wn.2d 87, 94, 960 P.2d 912

(1998). Additionally, the trial court's June 12, 2006 Final Order rules on issues of law, which also are reviewed de novo to determine if the decisions made were contrary to law. Clayton v. Grange Ins. Ass'n, 74 Wn.App. 875, 877, 875 P.2d 1246 (1994); State v. Pierce County, 65 Wn.App. 614, 617-18, 829 P.2d 217 (1992).

While it is well-established that issues of law are reviewed de novo, issues of fact are ordinarily reviewed to ensure that they are supported by substantial evidence. State v. Pierce County, 65 Wn.App. at 619. When determining whether substantial evidence exists, appellate courts review the evidence in the light most favorable to the party prevailing before the highest tribunal with fact-finding authority. Isla Verde Int'l Holdings, Inc. v. City of Camas, 99 Wn.App. 127, 134, 990 P.2d 429 (1999) (citing Schofield v. Spokane County, 96 Wn.App. 581, 586, 980 P.2d 277 (1999), aff'd on other grounds, 146 Wn.2d 740 (2002); Davidson v. Kitsap County, 86 Wn.App. 673, 680, 937 P.2d 1309 (1997)). However, this should not be the standard applied in this appeal. As discussed infra, any findings of fact made by the trial court were made before Appellants had an opportunity to conduct even the barest of discovery. Moreover, the trial court's fact finding eviscerated Appellants' timely jury demand. There is no reason for deference to the fact finding, as such fact finding was both procedurally and legally improper.

### **III. STATEMENT OF THE CASE**

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

The Church was founded in Woodinville in March of 1980 and has

been a member of the Church Council of Greater Seattle since 1981.<sup>1</sup> (CP 222.) Since its inception, the Church has practiced its ministry by aiding the homeless. (CP 252-54.) Over the decades it has combined its religious beliefs with action. Its members have annually raised tens of thousands of dollars for the homeless. The Church founded and staffs a food bank and a family and adult service center, extensively volunteers at soup kitchens and shelters, teams with Habitat for Humanity to build homes, and has done everything in its power to provide dignity and respect to the homeless in our region. (Id.)

1. Tent City 4 and Religious Expression

SHARE/WHEEL sponsors a group commonly known as Tent City 4 ("TC4"), made up of homeless men and women who need temporary shelter and assistance with other necessities of life. (CP 221-24.) Tent City is not a recreational campground. It is a sanctuary for homeless people who are struggling for survival and would otherwise sleep on the streets and under bridges. (Id.) The residents of TC4 encamp as a group to increase their safety and provide mutual support. TC4 residents are "situationally" homeless, rather than "chronically" homeless, meaning the overwhelming majority are homeless only for a short period of time. (CP 214-15; 423 at ¶ 4.) Many of the residents are employed full-time, and by living at TC4 with minimal overhead are able to save enough money to move into more permanent housing. (CP 221.) Some of the residents are

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<sup>1</sup> The Church Council was a founding member of the Committee to End Homelessness in King County and represents the King County faith-based community on that committee. (CP 221-22.)

married and thus cannot be accommodated at local shelters, which are single-sex. (Id.) A strict ban on alcohol and drugs is actively enforced, and anyone violating those restrictions is evicted. (Id.) Garbage is collected daily and there are adequate portable toilets and washing facilities. (Id.)

Residents of TC4 provide 24-hour security for the encampment. (Id.) There have been no verified reports of physical violence or property damage linked to the camp. (CP 422-24; 432-33; VRP June 6, 2006 at 51:19-24.)<sup>2</sup> To the contrary, many people who have interacted with Tent City praise the camp and welcome the educational experience it provides. (CP 411-12; 420.)

Since Tent City's inception, it has been hosted by numerous places of worship, generally for 90 days per stay. (CP 220-24; 415-17; 427-29; 431-33.) The 90 day stay is important for two distinct reasons. First, it is expensive to move the camp, and moving requires camp members and hosts to take time off of work. Second, the length of the stay allows the congregants to develop friendships with the residents, which often leads to assistance with transportation and employment. (CP 223-24.)

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<sup>2</sup> In the July 19, 2006 order denying Respondent's motion for accelerated review, Commissioner Verellen set forth an accelerated case schedule with dates somewhere in between the schedule set forth in the Court's June 29, 2006 case schedule and the dates requested by Respondent. September 22, 2006 was set as the due date for both for the Verbatim Report of Proceedings and the Church's opening brief. This created a difficulty in citation format, as the three court reporters who transcribed the proceedings below were preparing the Verbatim Report while this brief was being drafted. Because no sequential Verbatim Report was available to the Church during the drafting of this brief, the Church cites herein to the pages of the transcript by day of testimony.

Caring for the poor and homeless is a fundamental tenet of Christianity and an expression of the commandment to “love your neighbor as yourself.” (CP 222-23; CP 229-31.) The Gospel of St. Matthew, Chapter 25, quotes Jesus on this subject, emphasizing that those who do not provide for the needy will go to “eternal punishment” rather than to “eternal life.” (Id.)

2. The 2004 Stay in Woodinville

In 2004, the Church was asked to host TC4. The Church and the City staff worked together to quickly process a temporary use permit application. (VRP June 5, 2006 at 11-18.) At the City’s suggestion, the camp was sited on vacant land designated for a future city park instead of on Church property. Appellants and Respondent entered into an agreement governing the terms of the 2004 stay entitled “2004 Temporary Property Use Agreement” (“2004 Temporary Use Agreement” or “Agreement”). (CP 159-174.)

There were no significant problems with TC4 during the 2004 stay. The City reported that “[p]olice experience was that the camp behaved well and was easily manageable from a law enforcement perspective. By contrast, a rowdy, poorly managed apartment house requires more police presence.” (CP 298.) As a gesture of appreciation to the City, TC4 residents volunteered more than 143 hours towards City projects during the 2004 stay. (CP 307.)

3. The Moratorium

The Church is located in the R-1 zone of Woodinville. On March

20, 2006, the City passed Ordinance No. 419 ("Moratorium"), a six month moratorium governing the R-1 zone.<sup>3</sup> (CP 113.) The stated purpose of the Moratorium is to "preserve the current status quo" and determine how best to process the "numerous permit applications for development activity within the City's residential neighborhoods" that "will irreversibly alter the character and physical environment of these areas." (Id.; emphasis added) The Moratorium provides:

The City hereby imposes a moratorium upon the receipt and processing of building permit applications, land use applications, and any other permit application for the development, rezoning or improvement of real property within the R-1 Zoning District as defined by Chapter 21.04 WMC and further delineated by the City's Official Zoning Map.

(CP 116.) Despite the stated goals of the Moratorium, it allows for permanent development in the R-1 zone to continue, including the expansion of single family and multi-family structures as well as any construction relating to publicly owned structures. (Id.) Thus, the actual impact of the Moratorium is largely borne by any commercial enterprises in the R-1 zone and by the Church. The Moratorium does not contain an express prohibition on the consideration of temporary use permits that do not "irreversibly alter" property. While the Moratorium prohibits "land use applications ... for the development, rezoning or improvement of real property," land use applications is not a defined term in the Moratorium or Woodinville Municipal Code. Nonetheless, the City interprets the

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<sup>3</sup> On September 11, 2006, the City extended the Moratorium for an additional six months.

Moratorium as precluding acceptance of all temporary use permit applications. (CP 374; VRP June 1, 2006 at 10:20-25; 26:25-27:5.)

4. The Church's Attempts to Apply for a Temporary Use Permit in 2006

In April 2006, the Church learned that TC4's planned host for a stay beginning in May 2006 might be unable to meet its commitment to the camp. The Church was asked if it would consider serving as a fallback host for May, or, in the alternative, as a host beginning in August. (CP 249-251.) This was an urgent request, as there is a dramatic disparity between the number of shelter beds in King County (2,500) and the number of homeless individuals in King County (8,300), and King County's shelters are unable to house TC4's numerous married residents. (CP 221; VRP June 7, 2006 at 27:6-12.) Many residents of TC4 would have found themselves on the street if a host for the camp could not be secured. The Church immediately contacted the City staff to see what it needed to do to obtain the City's permission to serve as a host. (CP 249.)

The Church met with the City staff on April 24, 2006, and was instructed to fill out Temporary Use Permit applications for the Church site and, in the alternative, for the City property used during the 2004 stay for either May or August 2006. (CP 249-50.) Appellants brought both applications to the City the next morning. The City then refused to accept the application for the Church site that it had requested the day before. (Id.) The City cited the Moratorium (not the 2004 Temporary Use Agreement) as the basis for refusing to consider the application. Indeed, the director of the City's planning department testified that while he was

aware of the Agreement, it was not a bar to the 2006 application. (VRP June 1, 2006 at 14:21-15:6.)

The City demanded an application fee with the application for the City property, and the Church submitted the application and paid the fee. (VRP June 6, 2006 at 22:20-25.) However, the City subsequently told the Church not to move forward with the application that it had submitted, and instead advised the Church to write a letter to the City Council asking permission to use the City land. (CP 250.) The Church immediately wrote such a letter. (Id.)

Over the next two weeks, the City staff asked the Church to help prepare the City land to host Tent City, and the Church did so. (Id.) Everything the City asked the Church to do, it did.

The City staff recommended that the City Council approve the Church's request to use the City land. (CP 287-291.) At a City Council meeting late on a Tuesday night – not quite four days before the camp was scheduled to leave its Bellevue host and move to Woodinville – the City Council denied the Church's request to use the vacant City land. (CP 250.)

After the City refused to consider the Church's application to host Tent City on private Church property, and after the City refused to allow Tent City to come onto City property, the Church was in a quandary regarding how best to proceed. (CP 250-251.) The Church has a long and vibrant history of ministering to the poor, and sees such ministry as central to its faith. Nonetheless, in the face of religious challenge, it did not

unilaterally invite TC4 onto its property. (CP 346.) Instead, it frantically explored other options. It requested additional meetings with the City, hoping to find common ground. (CP 251.) It visited the other sites proposed by the City, but found no aid. (*Id.*) The Church's search for immediate solutions continued until the City filed suit.

**B. Procedural Posture**

1. The May 12, 2006 TRO

Three days after rejecting the Church's request to use City land, on Friday, May 12, 2006, the City initiated suit in the King County Superior Court by filing a document entitled "Complaint for Injunctive Relief." (CP 3-6.) The complaint contained a single cause of action: a request for an injunction that would prohibit TC4 from moving to the Church's private property. (*Id.*)<sup>4</sup> That afternoon, the City asked the trial court to enter a temporary restraining order preventing Tent City from moving into Woodinville the following day.<sup>5</sup> (CP 7-19.) Appellants' had not been served with the complaint, but nonetheless objected to the City's request for a temporary restraining order as premature, since there had been no decision to move TC4 to Church property.

The trial court declined the City's request, and instead *sua sponte*

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<sup>4</sup> The City has also instituted multiple actions in King County District Court, East Division (Redmond), against the Men's Organizer for SHARE/WHEEL, Scott Morrow, for "encouraging" an illegal encampment with associated fines of \$250 per day. The matters are pending under case numbers I00001012-I100001040.

<sup>5</sup> The Church pastor would have advised against hosting TC4 if the City's request had been granted. (VRP June 6, 2006 at 21:21-22:18.)

entered a temporary restraining order expressly allowing TC4 to move onto Church property, subject to certain conditions and requirements. (CP 72-76.) Although neither Appellant had requested such an order, the order was consistent with prior orders entered by the King County Superior Court, which had found on at least three separate occasions that churches were entitled to host Tent City on their property, even if such action did not comply with local zoning codes. See City of Bothell v. Corp. of the Catholic Archbishop of Seattle, et al, King County Cause No. 04-2-11578-7 SEA; Citizens for Fair Process v. SHARE/WHEEL, et al., King County Cause No. 04-2-36611-9 SEA; Norkirk Citizens for Fair Process v. Tent City 4, et al, King County Cause No. 05-2-06090-5 SEA.

2. Tent City's Return to Woodinville

After entry of the temporary restraining order expressly authorizing TC4 to move onto Church property, the Church and SHARE/WHEEL bore the expense of relocating TC4 and complying with the conditions set forth by the temporary restraining order. (VRP, June 5, 2006 at 18:1-20:15.) While TC4 was in Woodinville, the City was allowed continuous access to ensure the camp was not violating any health or safety requirements. For example, when the City asked that certain changes be made to TC4's electrical wiring, the Church made those changes. (VRP June 6, 2006 at 52:7-25).

The temporary restraining order allowed TC4 to locate on Church property "pending full hearing on Plaintiff's motion for preliminary injunction," and expired the day Plaintiff's motion for preliminary

injunction was calendared. (CP 72; emphasis added.) Since the hearing lasted longer than anticipated, the trial court extended the temporary restraining order through the duration of the hearing. The order was extended for short periods of time on four separate occasions: May 30, 2006, June 2, 2006 (filed June 6, 2006), June 6, 2006 (filed June 9, 2006), and June 7, 2006 (filed June 9, 2006).

After TC4 moved onto Church property, the City ordered additional security in the surrounding area. Those measures were instituted against the advice of the Chief of Police and Director of Security for Northshore School District. (VRP May 31, 2006 at 10:6-22; CP 422-25.) There were no disturbances emanating from the camp, although there were reported incidents of a member of the Woodinville City Council harassing the camp. (CP 424-25.) TC4 voluntarily vacated the Church property and left the City of Woodinville as scheduled after 90 days.

### 3. The Evidentiary Hearing

After entry of the temporary restraining order, the City filed a motion for injunctive relief removing TC4 from Woodinville, and sought to consolidate the injunction hearing with an expedited trial on the merits. (CP 77-148.) The hearing on injunctive relief was set for eighteen days after the complaint had been filed. After briefing on the motion was complete, and less than one business hour before the hearing, the City provided counsel for the Church with an Amended Complaint for Injunctive Relief for Damages and Specific Performance, which added new claims for breach of contract, damages and attorney's fees. (CP 363-

67.)

The Church appeared for the hearing on injunctive relief prepared to address the legal issues delineated in the City's initial complaint and motion for injunctive relief: the interplay between religious expression and local zoning codes. At the time of the hearing, neither Appellant had been served with either complaint.<sup>6</sup> Instead of hearing oral argument, the trial court decided to hold an evidentiary hearing and instructed the City to call its first witness.<sup>7</sup> (VRP, May 30, 2006 at 9:6-10:7.) Given that the 2004 Temporary Use Agreement referenced in the City's Amended Complaint was not an original exhibit to the City's motion for injunctive relief, the Church was surprised at the evidentiary hearing when the City largely ignored the law governing religious expression and instead argued breach of contract, its witnesses testified about the 2004 Temporary Use Agreement, and the Appellants' witnesses were cross-examined about general contract law. As neither complaint was served until the evidentiary hearing was well underway, counsel for the Church had no opportunity to file an answer to the complaint, let alone conduct *any* discovery. Appellants objected to the City's request for an expedited trial on the merits. (CP 446-454; 455-457.)

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<sup>6</sup> The trial court denied a verbal motion to dismiss based on insufficiency of service and lack of jurisdiction. (VRP May 30, 2006, 15:15-16:22.)

<sup>7</sup> Due to the trial court's calendar, the hearing was conducted between the hours of 8-9 a.m. over a period of seven court days. Most days, when not in court, the parties were engaged in extensive court-ordered mediation. (VRP, May 30, 2006 at 51:21-52:7; May 31, 2005 at 1:10-24.)

During the evidentiary hearing, there was testimony about whether a temporary use permit was even required, since hosting the homeless would appear to be a reasonable accessory use of the Church. Raymond Sturtz, the City's Planning Director and the individual responsible for accepting or declining applications under the Moratorium, testified regarding accessory use issues. At times Mr. Sturtz went so far as to imply that the code provided no allowable accessory uses of the church property:

THE COURT: So speaking hypothetically at this point, if this encampment were to move inside ....

THE WITNESS: No, sir. The code does not speak to that type of accessory use. It talks about commercial industrial accessories. It talks about residential accessories. It does not talk about the church accessory use. That's why we have a temporary use permit process.

\* \* \*

Q. [I]f the church wanted to invite the residents of Tent City into its property as an accessory use to sleep in, say buildings for 90 days, you would not see that as an acceptable accessory use?

A. No.

(VRP June 1, 2006 at 20:4-18; 29:22-30:2.)

There are no delineated standards governing what the City considers an acceptable accessory use. (Id., at 30:3-15; 31:18-24.) Mr. Sturtz responded to one hypothetical scenario of the Church youth group camping on Church property by suggesting that the duration of activities of that nature would have to be limited to 24 hours:

Q. What about if the church wanted to invite its youth group to spend a week learning about humility and lived under minimal financial conditions for one week. Is that

something that the church could do?

A. That goes beyond 24 hours. That would probably require a temporary use permit.

Q. That would not be a permitted accessory use of the church property?

A. Yes.

(Id., at 32:1-8.) Mr. Sturtz then went on to testify that his 24-hour standard was arbitrary and crafted out of whole cloth:

Q. ... Where are you getting the 24-hour standard?

A. I'm looking for the impact, again. ... Do we start having activity that starts requiring parking in the neighborhoods, for instance, or parking on the, you know, lawn area and maybe the treed area? ... But again it's a judgment call where, you know, very often it's such a limited duration that I don't even care about it. I don't even know that it happens.

(Id., at 38:9-22.) There was no evidence that TC4 had a significant impact on the neighborhood or on neighborhood parking.

Mr. Sturtz' determinations as to what activities are acceptable "church activity," and therefore a possible accessory use, vary wildly. For example, in Mr. Sturtz' view a temporary shelter in the form of a crèche might sometimes be an allowed accessory use of Church property:

Q. Would the same hold true if the church wished to put up a full-sized Nativity display on its property?

A. That's part of the church activity.

\* \* \*

Q. ... So it would be religious to put up a Nativity [display], but not to host a bake sale to fund church programs; is that your testimony?

A. It's not a religious activity. It's a bake sale.

\* \* \*

Q ... Does that mean a bake sale would not be a permitted accessory use? ...

A. It's not a religious accessory use. It's not religious. When you say religious, to me, I mean, in my faith, my Christian upbringing. ...

(Id., at 31:8-10; 31:15-18; 37:2-9; 37:20-38:2.)

4. The Trial Court's June 12, 2006 Final Order

At the conclusion of the hearing, and over the Church's objections to lack of adequate notice and deprivation of its right to a trial by jury, the trial court granted the City's motion for an expedited trial of all of the City's claims, and determined that the evidentiary hearing had been a full trial on the merits of all claims. The order contained several findings of disputed facts, as well as numerous conclusions of law, which are contested and discussed more thoroughly below. The trial court then entered judgment against the Church and SHARE/WHEEL on all issues, except damages. (CP 477-83.) No order awarding damages has been entered. (Id.)

IV. ARGUMENT

A. **The Trial Court Erred by Ordering Consolidation.**

The Church first assigns error to the trial court's consolidation of the preliminary injunction hearing with a trial on the merits. The trial court erred in three separate ways by ordering consolidation of the trial on the merits with the City's request for preliminary injunctive relief. First, consolidation denied the Church its right to a trial by jury. Second, consolidation improperly allowed the City to obtain all of its requested relief without giving the Church a reasonable opportunity to mount a

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defense. Third, consolidation deprived the Church of its ability to prepare its case.

1. Consolidation Deprived the Church of Its Constitutionally-Protected Right to a Trial by Jury

CR 65(a)(2) provides that a trial court may consolidate a trial on the merits with a hearing on a preliminary injunction. However, the rule warns that “[t]his subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury.” The trial court failed to heed this limitation, and deprived the Church of its right to have a jury determine the merits of the action.

The Church filed a written objection to the City’s request for consolidation on June 5, 2006, and filed a jury demand that same day. Despite CR 65(a)(2) and the Church’s timely jury demand and written objection, the trial court ruled on the ultimate issues, thereby depriving the Church of its constitutionally-protected right to have a jury decide the merits of this case. See, e.g., Boise Cascade Intern., Inc. v. Northern Minnesota Pulpwood Producers Ass’n, 294 F.Supp. 1015, 1017 (D. Minn. 1968) (holding that where action entitled either party to demand jury trial, trial on merits could not be consolidated with proceeding on application for preliminary injunction, since any finding on merits of request for injunctive relief would deprive either or both parties of right to jury trial; noting that “None of the parties should be bound as though there had been a trial on the merits at the preliminary hearing had before this court.”); Rutter Group, Civil Procedure Before Trial § 13:171 (2005) (“Where live testimony is being allowed ... the court may be particularly inclined to

consolidate the hearing with a hearing on the merits. However, jury-triable issues will have to be heard by a jury (assuming timely jury demand).”<sup>8</sup>

The trial court incorrectly entered several important findings of fact on disputed issues. For example, although the allegation was not pleaded in the Amended Complaint, the Final Order ruled that part of the harm caused by TC4 was “damage to the environment with respect to, *inter alia*, the identified wetland on the church property.” (CP 481.) As demonstrated in Trial Exhibit 10, there is no visible wetland near the camp, TC4 was not located inside the area of alleged concern, and the City presented no testimony on whether TC4 actually damaged or harmed the alleged wetland. The trial court also found that “there was not sufficient time for the City to process an application for a temporary use permit that would allow Tent City 4 to locate on NUCC property.” (CP 479.) However, there was disputed testimony on this subject, since the City processed a temporary use permit application in 2004 in less time than was available in 2006. (VRP June 5, 2006 at 10:11-18.)

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<sup>8</sup> Because there is no Washington case law interpreting the exact meaning of this portion of CR 65(a)(2), it is appropriate to look to federal authority interpreting Fed.R.Civ.P. 65(a)(2), as the relevant portions of the two rules are identical. See, e.g., Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992) (looking to federal decisions interpreting Fed.R.Civ.P. 11 in interpreting CR 11); American Discount Corp. v. Saratoga West, Inc., 81 Wn.2d 34, 37, 499 P.2d 869 (1972) (construing CR 24 in light of Fed.R.Civ.P. 24); Moore v. Wentz, 11 Wn. App. 796, 799, 525 P.2d 290 (1974) (“To analyze CR 6(b) we look to the Federal Rules of Civil Procedure, where the roots of our civil rules found their beginning.”).

2. Consolidation Improperly Allowed the City to Obtain all the Relief It Sought In a Summary Proceeding

It is well-established in Washington that “[t]he purpose of a preliminary injunction is to preserve the status quo of the subject matter of a suit until a trial can be had on the merits.” McLean v. Smith, 4 Wn. App. 394, 399, 482 P.2d 798 (1971) (citing Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968)).<sup>9</sup> “A preliminary injunction should not give the parties the full relief sought on the merits of the action.” Id. (emphasis added) (citing Dorfmann v. Boozer, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969)); accord State ex rel. Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 532, 98 P.2d 680 (1940) (“Ordinarily, where the issuance of a preliminary injunction would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will not be granted.”) (citation and internal quotation marks omitted); Selchow & Righter Co. v. Western Printing & Lithographing Co., 112 F.2d 430, 431 (7th Cir. 1940) (“where the granting of a preliminary injunction would give to a plaintiff all the actual advantage which could be obtained by the plaintiff as a result of a

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<sup>9</sup> The law governing preliminary injunctions is analogous to other areas of Washington law allowing for expedited relief on certain issues while other issues remain on the normal litigation track. For example, RCW ch. 59.12 provides a limited summary proceeding to provide an expedited method for resolving the right to possession of property, but generally precludes other claims, which must be converted into general civil actions. See First Union Management, Inc. v. Slack, 36 Wn. App. 849, 679 P.2d 936 (1984) (finding that the Superior Court had no jurisdiction to hear the defendant’s breach of contract counterclaim brought in an unlawful detainer action).

final adjudication of the controversy in favor of the plaintiff, a motion for preliminary injunction ordinarily should be denied”).

Here, over the Church’s objection and contrary to established law, the trial court allowed the City to improperly try the merits of its claims – including its last minute breach-of-contract claims – during the hearing on its request for preliminary injunctive relief. The trial court erred by allowing the City to obtain the ultimate relief it sought in this action through a summary hearing.

3. Consolidation Deprived the Church of Its Ability to Fully Prepare Its Defenses and Counterclaims

Consolidation also denied the Church the ability to fully prepare its case on the merits. See Rutter Group, Civil Procedure Before Trial § 13:174 (2005) (“Consolidation should not be ordered if it would deprive either party of a full opportunity to engage in discovery and present all their evidence.”) (collecting cases).

Here, the City asserted a claim for breach of contract after all briefing on the request for preliminary injunctive relief had been submitted, yet the Church was never afforded the benefit of even the barest discovery.<sup>10</sup> For the first time during the evidentiary hearing, the City argued that the application was not timely filed and did not satisfy

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<sup>10</sup> In motions before this Court, the City has argued that the case was analogous to a motion for summary judgment. (City’s Response to Emergency Stay Pending Appellate Review at 10-11.) Crucially, there is no finding from the Final Order “that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Nor were the parties provided with a 28 day briefing schedule as mandated by CR 56(c).

SEPA concerns. These are factual assertions that the Church should be allowed to investigate. Without such discovery and factual investigation, the trial court improperly entered permanent relief without full consideration of the case. Shishko v. Whitley, 64 N.C.App. 668, 671, 308 S.E.2d 448 (1983) (“A permanent injunction is an extraordinary equitable remedy and may only properly issue after a full consideration of the merits of a case.”); New Orleans Federal Sav. and Loan Ass’n v. Lee, 425 So.2d 947, 948 (La.App. 1983) (“The issuance of a permanent injunction, however, takes place only after trial on the merits, in which the burden of proof must be founded on a preponderance of the evidence, rather a prima facie showing.”).

Consolidation also prevented the Church from adequately analyzing potential affirmative defenses, some of which may have barred the City’s claims, or from asserting potential counterclaims based on the City’s unreasonable and unconstitutional acts (for example, a claim under 42 U.S.C. § 1983). Yet the trial court entered judgment on all issues before the Appellants had an opportunity to answer the complaint. Appellants were denied basic due process.

**B. The City Violated the Church’s Constitutional Rights and Its Actions Are Subject to Strict Scrutiny.**

The City violated the Church’s constitutional rights in at least two ways. First, the Moratorium itself is unconstitutional. The trial court agreed with the City that the Moratorium “prohibits the City from accepting or processing new land use applications for permanent or temporary uses in the R-1 zoning district.” (CP 479.) If the Moratorium

prevents the City from considering applications for a camping permit, the Moratorium is overly broad and insufficiently tailored to have a minimal impact on the Church's religious freedom. Second, the City acted in an arbitrary and capricious manner. It declined to accept an application for a temporary use permit application, despite the possibility that the application may not have been precluded by the Moratorium, and failed to analyze whether there were less restrictive means of accomplishing the City's goals.

The Church next assigns error to the trial court's rulings regarding the Moratorium and RLUIPA.

The trial court properly found that strict scrutiny applied to the Church's constitutional claims. (CP at 480.) The Washington Supreme Court has traditionally applied the strict scrutiny test when analyzing religious exercise cases. Munns v. Martin, 131 Wn.2d 192, 199, 930 P.2d 318 (1997). Under the practice affirmed by the Washington Courts, the complaining party must first prove that a law has a coercive effect on the practice of religion by satisfying a two part test. The first element is that the complaining party's religious convictions are sincere and central to its beliefs. Id. (citing Backlund v. Board of Comm'rs, 106 Wn.2d 632, 639, 724 P.2d 981 (1986), appeal dismissed, 481 U.S. 1034, 107 S.Ct. 1968 (1987)). A Court will not inquire further into the truth or reasonableness of its beliefs. Id., 131 Wn.2d at 200.

The second element is whether the challenged law amounts to a burden on the free exercise of religion. If the law has such a burdening

effect, then the enactment burdens the free exercise of religion. Id. (citing First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203, 215, 840 P.2d 174 (1992)). The burden on the free exercise of religion may be direct as well as indirect. Thus, even a facially neutral, even-handedly enforced statute may violate the First Amendment or Article 1, Section 11 of the Constitution. Id.

The burden then shifts to the City to show: That the law serves a compelling state interest and is the least restrictive means for achieving the governmental objective. A compelling interest is one that “justifies the prevention of a clear and present grave and immediate danger to the public health, peace and welfare. Id. If no compelling state interest exists, or if a less restrictive means for achieving the interest can be found, the law is unconstitutional. Id.

**C. The Trial Court Erred by Ruling that the Moratorium is Constitutional and Does Not Violate RLUIPA.**

The Moratorium at issue is not neutral and of even application.<sup>11</sup> The ordinance only impacts property in the residential zone. Yet it exempts all “permit applications for the remodeling, expansion, restoration or refurbishment of existing single-family and multi-family residential structures, or ... permit applications for publicly-owned structures and facilities.” (CP 116.) If the purpose of the Moratorium is to preclude permanent development in the residential zone while sustainable development is evaluated, yet single family and multi-family structures

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<sup>11</sup> This section relates to the Church’s second assignment of error.

may continue to expand and publicly owned structures are not impacted, the Moratorium leaves room for an enormous amount of development in the residential zone. Prior to trial, the Church did not have an opportunity to conduct discovery in this matter to determine if the ordinance has a disproportionate impact on the Church, but on its face, it appears the Moratorium likely has a greater impact on the Church than on the majority of buildings in the residential zone.

1. The Moratorium Violates the First Amendment

Multiple federal courts have held that the free exercise clause of the First Amendment prevents zoning or ordinances barring places of worship from providing food or sanctuary to the homeless. For example, in Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2nd Cir. 2002), the Second Circuit upheld a preliminary injunction preventing the City of New York from dispersing homeless individuals sleeping by invitation on the Church's landings and steps. Persons taking advantage of the Church's invitation to sleep on its outdoor property were given a list of rules, which included instructions to clean up after themselves and a prohibition on begging, loud music, disruptive behavior, and foul language. See id., 293 F.3d at 572. The Court held that "absent a demonstration that a neutral law of general applicability justifies the City's actions, the City must assert a compelling interest in preventing the homeless from sleeping on Church property that would suffice to overcome the Church's free exercise rights, and that the means it has

adopted to fulfill that interest are narrowly tailored." *Id.*, at 575 (emphasis added) (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972)).

Similarly, in Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia, 946 F. Supp. 1225 (E.D. Va. 1996), the City of Richmond's Zoning Administrator found that a partnership of six churches of different Christian denominations that ministered to the poor and homeless violated a section of the Richmond City Zoning Ordinance. The ordinance limited homeless feeding and housing programs at churches to no more than 30 individuals for a maximum of seven days during certain months. The court granted the churches' motion for a temporary restraining order against the city, finding that the city's determination that the conduct violated the zoning code was a clear violation of the churches' right to practice their religion. The Court noted:

Testimony by one witness showed that the feeding of the urban poor in Richmond is an extension of their morning worship, which has been an ongoing tradition for many years. . . . Another witness testified that one of the most important facets of her religion is sharing in the Eucharist, which is the equivalent of sharing in a meal with God and the congregation. Sharing a meal with the homeless is a natural extension of this practice. Finally, a witness, who qualified as an expert in Christian theology, testified that feeding the poor is central to the Christian teachings of all denominations comprising Stuart Circle Parish. The witness pointed to passages in the Bible in both the Old and New Testament, including the Sermon on the Mount and the sharing of the loaves and fishes, demonstrating the centrality of this teaching. Some of these passages show that, for the plaintiffs, the feeding of those less fortunate constitutes methods of obtaining a blessing and the means to redemption ....

\* \* \*

Clearly, then, plaintiffs have given strong evidence that the Meal Ministry is motivated by their religious belief and that their participation in the Meal Ministry constitutes the free exercise of religion.

Id., at 1236-37. The court held that the city failed to meet its burden under the compelling governmental interest test, and that the city's conclusory assertions were insufficient:

Defendants failed to show that there was a compelling state interest in restricting the conduct of the Meal Ministry in its present format and to its present extent. Indeed, they showed only that several complaints had been made over a period of a few days about noise, unruly behavior and urination on private property. . . . Preventing a singular occurrence of noise, unruly behavior and unsightly conduct simply would not constitute a compelling state interest where, as here, a substantial burden on the free exercise of religion has been shown. There has been no allegation in this case that the Meal Ministry jeopardizes the public safety, nor that the program has caused acts or threats of violence against neighbors. There has not even been a showing that the program causes traffic jams.

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Absent a showing of compelling state interest, it is not possible to accurately assess whether the Code sections constitute the least restrictive means of achieving that compelling state interest. . . . Thus, the Court finds that plaintiffs have raised serious, substantial questions respecting whether the Code is the least restrictive means of burdening the free exercise of religion.

Id., at 1229-30 (emphasis added).

State courts have reached similar decisions. In The Jesus Center v. Farmington Hills Zoning Board of Appeals, 215 Mich.App. 54, 544 N.W.2d 698 (1996), the zoning board refused to allow a homeless shelter on church property. The trial court reversed the zoning board, finding that the municipality could not prevent the church from "its religious

activity of housing the homeless.” The Jesus Center, 215 Mich.App. at 60. On appeal, the court accepted the zoning board’s factual findings that shelter recipients were trespassing on neighbors’ property, urinating in public and creating a nuisance to residents of the surrounding area. Id., at 61. Nevertheless, the court upheld the trial court’s decision, holding that a summary closure of the shelter violated the church’s free exercise rights and that the “least restrictive means” test under the First Amendment required that the government work with the church to address compelling governmental interests:

Beginning with its application to the Zoning Board, at the Board hearing, and throughout the court proceedings that followed, The Jesus Center has contended that its provision of shelter services flows from its religious beliefs and is an exercise of those beliefs. We are not at liberty to question this position. “Determining that certain activities are in furtherance of an organization’s religious mission ... is ... a means by which a religious community defines itself.” It is not the job of the courts to second guess “what activities are sufficiently ‘religious’” to qualify for “free exercise” protection.

However, we note that The Jesus Center’s argument that its shelter program is an expression of its faith is certainly not unique or otherwise difficult to believe. The Bible, which The Jesus Center professes to follow, is replete with passages teaching that the God of the Bible is especially concerned about the poor, that believers must also love the poor, and that this love should result in concrete actions to deal with the needs of the poor. Many of these biblical provisions, found in the Old Testament, are adhered to by Jews and Christians alike. In fact, “the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions.” The specific act of charity at issue here, providing shelter of sanctuary to the needy, has been part of the Christian religious tradition since the days of the Roman Empire.

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The relocation of the shelter program would certainly create an economic burden for The Jesus Center, requiring the lease or purchase of another facility. Further, in contrast to secular organizations providing shelter services, The Jesus Center's program flows out of and is a witness to the love of God for the poor. By serving the homeless at the same location where The Jesus Center adherents worship their God, this witness is greatly facilitated.

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Societal needs change over time and the ways in which churches respond to those needs are "a means by which a religious community defines itself." It is substantially burdensome to limit a church to activities and programs that are commonly practiced by other churches rather than allowing it to follow its faith even in unique and novel ways.

Id., at 63-65, 66, 67-68 (emphasis added; internal citations and footnotes omitted).

The case of St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J.Super. 414, 479 A.2d 935 (1983), likewise involved a city seeking to close a homeless shelter run on church property. Noting the centuries old tradition of church sanctuary for the homeless, the Court granted a preliminary injunction prohibiting the city from closing the shelter:

The primary issue, not previously determined in this State, is whether a municipality may through its zoning laws constitutionally prohibit a church from operating a shelter for the homeless on its premises. My ruling is that the municipality may not.

\* \* \*

The facts set forth by Rev. Felske strongly support the plaintiff's position that using the church as a sanctuary for the poor is a religious use "customarily incident" to the "principal uses."

\* \* \*

In view of the centuries old church tradition of sanctuary for those in need of shelter and aid, St. John's and its parishioners in sheltering the homeless are engaging in the free exercise of religion. Hoboken cannot constitutionally use its zoning authority to prohibit that free exercise.

\* \* \*

The harm here is obvious, imminent and severe. If the shelter is closed its occupants will be left without food or shelter. Government alone is not presently able to cope with this grave social problem. . . . St. John's represents the only bulwark these homeless people have. To tear that bulwark away would be a travesty of justice and compassion. Any inconvenience to the City of Hoboken and its other residents pales into insignificance when contrasted with what the occupants of the shelter would have to face if turned out into the city streets in winter weather.

Plaintiffs have a strong case factually and legally. Irreparable harm will occur if a preliminary injunction is not issued. The equities, when balanced, are clearly in favor of the plaintiffs. Hence, a preliminary injunction will issue restraining the defendants from closing the shelter pending final hearing or further order of this court.

St. John's Evangelical Lutheran Church, 195 N.J. Super. at 417, 418, 420-21 (emphasis added). The Court then addressed the constitutional requirement that compelling government interests in regulating health and safety in a reasonable manner:

A second matter at issue involves health and safety requirements. Plaintiffs [the church] agree that the shelter must comply with appropriate health and safety laws and regulations, including reasonable occupancy requirements. The requirements should be appropriate to a shelter for the homeless. The church should not have to meet health and safety requirements imposed upon a commercial establishment such as a hotel. Moreover, the laws and regulations should be interpreted in a reasonable and common sense manner bearing in mind that overly strict enforcement might force the shelter to close, leaving its

occupants in a far worse state than remaining in a crowded shelter.

Id. at 421 (emphasis added).

Ministering to the homeless is a central tenant of Christianity that may not be casually prevented. State and federal courts agree that under the First Amendment that there must be a compelling interest in order for the government to regulate religious behavior. This compelling interest must be weighed against the “obvious, imminent and severe” harm that if a “shelter is closed its occupants will be left without food or shelter.” Id. at 417. Laws and regulations should be interpreted in “a reasonable and common sense manner” to benefit the shelter’s occupants. Id. at 421. A temporary campground does not derail the governmental interest in regulating urban sprawl and permanent development with the Moratorium.

If the Moratorium precludes the City from considering temporary use permits for religious activities, the Moratorium violates the First Amendment. The City failed to satisfy its burden of demonstrating a compelling governmental interest sufficient to trump the Church’s constitutional rights. While the Court may reasonably find that the City’s attempt to formulate a development plan for residential property is a compelling governmental interest, refusing to consider an application for a Temporary Use Permit that has no long-term impact on the property does not support the Moratorium’s goal. The burden of satisfying these standards is on the City, and the City has failed to meet this burden. The City made no effort to narrowly tailor the Moratorium. The Church filed

out the permits requested by the City, and sought permission to use alternate property suggested by the City, but the City denied all of the Church's requests.

2. The Moratorium Violates Article 1, Section 11  
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The Moratorium is also unconstitutional under Article 1, Section 11 of the Washington State Constitution. The Washington State Constitution provides more religious protections than the First Amendment. Free religious exercise is the rule, and any burden on that exercise must be the exception. Munns v. Martin, 131 Wn.2d at 200 (citing First Covenant Church of Seattle v. City of Seattle, 120 Wn.2d 203 (1992)).<sup>12</sup> The Washington State Constitution "absolutely protects the free exercise of religion, extends broader protection than the first amendment to the federal constitution." First Covenant Church, 120 Wn.2d at 226 (emphasis added).<sup>13</sup> This guarantee of free exercise "is 'of vital

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<sup>12</sup> Respondent may rely on two facially distinguishable cases. First, Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 995 P.2d 33 (2000), where the court hinged its decision on the fact that the church refused to apply for a conditional use permit in order to develop a church on the property. Despite being given every opportunity to apply for a permit, the church in Open Door Baptist declined to do so. Second, in North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County, 118 Wn.App. 22, 74 P.3d 140 (2003), the church proposed to build a 40,000 square foot five-state regional headquarters in agriculturally zoned land. The building did not meet the county definition of a church because the vast majority of the building was administrative offices. The primary burden claimed by the church was the loss of a highly visible and convenient location.

<sup>13</sup> A State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis is not necessary if the court has previously agreed on the (continued...)

importance.” Id.

In the First Covenant case, the Washington Supreme Court determined that if the “coercive effect of [an] enactment” operates against a party “in the practice of his religion,” it unduly burdens the free exercise of religion. 120 Wn.2d at 226. A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate Article 1, section 11, if it *indirectly* burdens the exercise of religion. Id.; Bolling v. Superior Court for Clallam County, 16 Wn.2d 373, 385-86, 133 P.2d 803 (1943). State action is constitutional under the Washington State Constitution only if the action results in *no* infringement of a citizen’s right, or if a *compelling* state interest justifies the burden on the free exercise of religion. First Covenant Church of Seattle, 120 Wn.2d at 226; First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Preservation Bd., 129 Wn.2d 238, 244-45, 916 P.2d 374 (1996) (an onerous financial burden was imposed by landmark nomination which constructively prevented United Methodist from either remodeling its sanctuary or selling the church property and was thus a burden on free exercise).

Government is especially limited when it attempts to regulate what a place of worship does with its private land. The Washington Supreme Court held that a city cannot restrict the modification of a church building:

We hold that the City’s interest in preservation of esthetic

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(. . . continued)  
differences between the state and federal constitutions. State v. White,  
135 Wn.2d 761, 769, 958 P.2d 982 (1998)

and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.

... [W]e conclude that applying the City's preservation ordinances to First Covenant's church violates the church's right to freely exercise religion under the First Amendment.

First Covenant Church of Seattle, 120 Wn.2d at 223. See also Munns v. Martin, 131 Wn.2d at 200 (city's demolition permit ordinance, which had potential to cause 14-month delay in Catholic bishop's plans to demolish school building and construct pastoral center, violated Article 1, Section 11). Similarly, the City does not have the right to preclude the Church from temporarily using its property to shelter the homeless, absent an interest more compelling than the Moratorium.

### 3. The Moratorium Violates RLUIPA

If the Moratorium precludes the Church from ministering to the homeless on its property, the Moratorium is an impermissible suppression of the Church's religious freedom. The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), provides:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc 1(a). RLUIPA specifically permits aggrieved churches to challenge enforcement actions that burden the free exercise of religion. Id. at § 2000cc 2(a). As under the constitutional standard, once a church produces evidence demonstrating a burden on the exercise of religion, it is the government's burden to justify its actions under the compelling governmental interest test. Id. at § 2000cc 2(B); § 2000cc 1(a)). The Ninth Circuit recently upheld RLUIPA in Guru Nanak v. County of Sutter, 456 F.3d 978, 985-86 (9th Cir. 2006) (finding that RLUIPA is constitutional and that the act prohibits the government from imposing substantial burdens on religious exercise unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest).

RLUIPA is to "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." Id. at § 2000cc 3(G) (emphasis added). The Act broadly defines the term "land use regulation" to mean any "zoning . . . law, or the application of such a law, that limits or restricts a claimant's use . . . of land." Id. at § 2000cc 5(5) (emphasis added). RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Id. at § 2000cc 5-1(a).

The City's utilization of the Moratorium to prohibit the Church from hosting the homeless in an emergency situation is a violation of RLUIPA because it attempted to preclude the Church from practicing its

ministry. “[A] substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct. . . .” Mack v. O’Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), cert. granted, judgment vacated on other grounds, 522 U.S. 801 (1997). See also Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir. 1994) (government action that forces religious adherents “to refrain from religiously motivated conduct” substantially burdens religious exercise).

The Moratorium places a substantial burden on the Church because it cannot invite homeless guests onto its property as mandated by the scripture and its religious beliefs. (CP 262-63.) The City failed to satisfy its burden of proving that the Moratorium is the least restrictive means of furthering a compelling governmental interest. The Moratorium violates RLUIPA.

**D. The City’s Actions Were Arbitrary, Capricious and Unconstitutional.**

The Church next assigns error to the trial court’s failure to find the City’s actions arbitrary, capricious and unconstitutional.

On April 25, 2006, the Church presented itself at the City with its application for a Temporary Use Permit to host the homeless on its property. The City acted in an arbitrary and capricious manner when it declined to accept the Church’s application.<sup>14</sup> This refusal to accept the application was a state action governed by the First Amendment and

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<sup>14</sup> Examples of the arbitrary nature of the City’s decisions can be seen through the testimony of the head of its zoning department, Ray Sturtz, supra.

Washington State Constitution that is subject to strict scrutiny since the City's behavior singled out the Church.<sup>15</sup>

Here, there was a possibility that the application was not governed by the Moratorium since the term "land use permit" is not defined in the Woodinville Municipal Code (VRP, June 1, 2006 at 28:2-11) and a temporary use permit does not meet the intent of the Moratorium. The City failed to accept and analyze the application, weighing the City's interests against the Church's religious expression. Had it conducted such an analysis, it would have realized that the TC4 did not impact the goals of the Moratorium and that the Church's religious expression was wrongly being interfered with. Indeed, once a city has permitted the construction of a church in a particular locality, absent *extraordinary* circumstances, the city may not regulate the church's religious conduct. Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia, 862 F. Supp. 538, 546 (D.D.C. 1994):

Article 1, Section 11 of the Washington State Constitution ensures "absolute freedom of conscience in all matters of religious sentiment, belief and worship" and guarantees that "no one shall be molested or disturbed in person or property on account of religion." Washington Courts have been vigilant about protecting religious expression:

One of the corner stones of our system of government is

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<sup>15</sup> As discussed *supra*, this may also be a zoning decision violating RLUIPA. See, e.g., Guru Nanak, 456 F.3d at 986 ("RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use").

religious toleration, which is established by our fundamental law. . . . It is one of the most important duties of our courts to ever guard and maintain our constitutional guarantees of religious liberty, and to see to it that these guarantees are not narrowed or restricted because of some supposed emergent situation, or because it may be considered that the enforcement of some law or regulation circumscribing religious liberty would be of little consequence as possibly affecting only a few persons, or because the consequences of the impingement upon the constitutional guarantees may appear insignificant.

Bolling, 16 Wn.2d 373, 385-86, 133 P.2d 803 (1943) (declining to enforce law mandating that school children recite the Pledge of Allegiance).

“A ‘compelling interest’ is one that has a ‘clear justification . . . in the necessities of national or community life’, that presents a ‘clear and present, grave and immediate’ danger to public health, peace and welfare.” First Covenant, 120 Wn.2d at 226-27, 840 P.2d at 187 (citations omitted; emphasis added). The interest must be “paramount.” Sherbert v. Verner, 374 U.S. 398, 406 (1963) (cited with approval by First Covenant, 120 Wn.2d at 210). The government “must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available.” First Covenant, 120 Wn.2d at 227.

The refusal to consider the Church’s application also violated the First Amendment. The United States Constitution precludes governmental action that infringes on the ability of churches to exercise the mandates of their faith. See U.S. Const. Amend I. An instructive case is Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia, 862 F. Supp. 538 (D.D.C. 1994), where the Western

Presbyterian Church sued the District of Columbia Zoning Administrator in federal court after the Administrator found that the city's zoning code prohibited the church's homeless feeding program. The court found "particularly troubling" the government's failure to consider and address the church's free exercise of religion claim. *Id.*, 862 F. Supp. at 543. At summary judgment, the court granted an injunction against the District of Columbia taking any enforcement action against the church, since the church adequately demonstrated that its feeding program was motivated by sincere religious belief:

If a law or governmental action is found to substantially burden the free exercise of religion, the government must demonstrate that it has a compelling governmental interest in such a burden and that the interest could not be protected by a less restrictive means. The District of Columbia concedes that "it has no compelling governmental interest in prohibiting Western Presbyterian from conducting its feeding program at 2401 Virginia Avenue, N.W., so long as appropriate controls are in place." Instead, the defendants take the position that the Court should dismiss the complaint because the zoning regulations do not substantially burden the plaintiffs' free exercise of their religion. Accordingly, the issue left for the Court to decide is whether the District of Columbia zoning regulations, as interpreted by the zoning administrator and the BZA and applied to the Church's program to feed the homeless at the Virginia Avenue site, substantially burden the plaintiffs' free exercise of religion in violation of the First Amendment.

\* \* \*

Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion.

\* \* \*

The plaintiffs here seek protection for a form of worship their religion mandates. It is a form of worship akin to prayer. If the zoning regulations cannot be applied to ban prayer in a church, they cannot be used to exclude this type of religious activity. The Church may use its building for prayer and other religious services as a matter of right and should be able, as a matter of right, to use the building to minister to the needy. To regulate religious conduct through zoning laws, as done in this case, is a substantial burden on the free exercise of religion.

Id. at 544-547 (emphasis added). The District of Columbia was permanently enjoined from using zoning regulations or ordinances to prevent the church from administering its program to feed the homeless on the church's premises "so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance." Id. at 547.

The plain language of the Moratorium demonstrates that it is targeted at development that will "irreversibly alter" the character of residential property. (CP 116.) A Temporary Use Permit for camping on private land does not irreversibly alter property and is therefore not subject to the Moratorium. The City's failure to evaluate the Church's request was an arbitrary and capricious decision not required by the Moratorium. The City's failure to accept and consider the application violated the First Amendment and Article 1, Section 11.

**E. The Trial Court Erred By Ruling that the Church Violated the 2004 Temporary Property Use Agreement.**

The Church next assigns error to the trial court's rulings regarding the 2004 Temporary Property Use Agreement.

As a preliminary matter, the 2004 Temporary Use Agreement is irrelevant to the review of the City's unconstitutional acts. The City

rejected the Church's application because of the Moratorium; not because of the 2004 Temporary Use Agreement. (VRP June 1, 2006 at 14:21-15:6; CP 249, 285.) The City cannot retroactively attempt to undo its unconstitutional acts. Even assuming it is relevant, however, the trial court's rulings regarding the Agreement are erroneous.

A prime object of contract interpretation is to ascertain and give effect to the parties' intent. In re Marriage of Litowitz, 146 Wn.2d 514, 528, 48 P.3d 261, 53 P.3d 516 (2002), cert. denied, 537 U.S. 1191, 123 S.Ct. 1271 (2003). In reviewing a contract, a court should consider:

“[T]he contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”

Id. (quoting Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc., 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993)).

1. The Agreement Applied Only to the 2004 Stay on City Property

By its plain language, the 2004 Temporary Use Agreement was intended to govern the 2004 stay. The lead sentence of the agreement states, “this agreement for temporary use of City property is hereby executed by and between” the parties (CP 159; emphasis added.) The 2004 camp was hosted on the City property; the 2006 camp was not. Similarly, every recital on the first page pertains only to the 2004 stay.

Despite the plain language of the 2004 Temporary Use Agreement, the trial court found as a matter of law that Section 2 applied to the 2006 camp. The trial court relied on the following language:

SHARE/WHEEL and one or more Woodinville-based church sponsor(s) may jointly submit an application to locate a future Tent City at some other church-owned location, but

(1) must allow sufficient time in the application process for public notice, public comment and due process of the permit application; and

(2) must agree not to establish, sponsor or support any homeless encampment within the City of Woodinville without a valid temporary use permit issued by the City.

(CP 160.) However, Section 2 cannot stand in a vacuum, but must be read in conjunction with the rest of the Agreement. The first section of the Agreement is entitled "Temporary Use of City Property Authorized." (Id.) The second section (containing the disputed language) is entitled "Conditions." (Id.) The third section is entitled "Duration of Stay on City Property." (Id.) The title selected for section two was not "future consideration," but "conditions," which, when read in context, can be logically interpreted to mean the conditions of the 2004 stay on City property.

The first line of Section 2 reads, "SHARE/WHEEL's use of the property pursuant to this Agreement is expressly subject to the following terms and conditions." (Id.; emphasis added.) The term "property" is a defined term in the Temporary Use Agreement, identified as the City park property that was the site of the 2004 stay. Since the stay in 2006 was not on that property, the stay was not subject to the terms and conditions. Moreover, it is logical for the 2004 Temporary Use Agreement to have referred to applications for future stays in 2004, since the parties did, in fact, extend the 2004 stay.

However, if the contract is ambiguous, any ambiguity should be interpreted against the City. There was no opportunity for discovery on this issue, but on the final morning of the hearing, the City provided a Declaration of Michael Huddleston claiming that he was the drafter of the disputed provision and discussing his intent. Washington law provides that ambiguities in contracts should be interpreted against the drafter. See, e.g., Jacobs v. Greys Harbor Chair and Mfg. Co., 77 Wn.2d 911, 918, 468 P.2d 666 (1970) (if contract is equally susceptible to two or more interpretations, it should be construed against the drafter); State v. Lathrop, 125 Wn. App. 353, 104 P.3d 737 (2005) (ambiguities in contracts are resolved against the drafter); State v. Skiggn, 58 Wn. App. 831, 838, 795 P.2d 169 (1990) (same).

Even the minimum testimony elicited from the City at trial supports the position that the Agreement expired in 2004. The City Manager testified at trial that the City's interpretation of the document included the modification to Section 1 to "extend the agreement through November 22, 2004." (VRP, May 31, 2006, 7:14-8:5.) That the agreement expired in 2004 is further reflected in the City's notes that "no application or request was received by S/W to establish a homeless encampment within Woodinville City limits during its contractual or permitted duration." (CP 294; emphasis added.) At a minimum, the City's notes raise a question of fact about the proper interpretation of the contract, precluding judgment as a matter of law.

2. The City's Acts Excused Performance by the Church

Even if the 2004 Temporary Use Agreement for use of City land governed the 2006 stay on Church land, which it did not, the Church more than satisfied any obligation to obtain a permit when the City refused to accept or consider its application for such a permit. The Church did not extend an offer to TC4 to move onto the Church property until after the temporary restraining order expressly allowing it to do so was entered. (CP 346; VRP June 5, 2006 at 17:12-18:3.)

The first party's breach excuses the second party's performance. See, e.g., Lovric v. Dunatov, 18 Wn.App. 274, 281, 567 P.2d 678 (1977) ("The failure to make timely payments was a material breach of the contract and excused the plaintiffs from performance of their work pursuant to the contract schedule."); Kreger v. Hall, 70 Wn.2d 1002, 1009, 425 P.2d 638 (1967) ("It is the law that one who is ready, able and willing to tender performance of a contract is relieved of his duty to tender when the other contracting party has by word or act indicated that he will not perform his duties under the contract.") (citing McCormick v. Tappendorf, 51 Wn. 312, 99 P. 2 (1909) (where a party to a contract indicates that he cannot or will not perform, the other party will not be bound by the contract)). The City's failure to accept the application excused any obligation of the Church to obtain a permit.

Additionally, the City breached the implied covenant of good faith and fair dealing. "In every contract there is an implied covenant of good faith and fair dealing which obligates each party to cooperate with the

other so that [each] may obtain the full benefit of performance.” Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986) (citing Lonsdale v. Chesterfield, 99 Wn.2d 353, 357, 662 P.2d 385 (1983); Miller v. Othello Packers, Inc., 67 Wn.2d 842, 844, 410 P.2d 33 (1966)) (quotation marks omitted). The City’s refusal to accept the application excuses the Church’s obligations under the Agreement.

Finally, since the camp is an allowed accessory use of the property, as discussed infra, a temporary use permit was not required, and there was no obligation to obtain one under the 2004 Temporary Use Agreement.

**F. The Trial Court Erred by Ruling that TC4 Is Not an Allowed Accessory Use.**

The Church next assigns error to the trial court’s rulings on accessory use.

The Church should not be required to apply for a permit to host a temporary homeless encampment, since sheltering the homeless is a permitted accessory use for the Church’s facility under existing Woodinville law. The Woodinville Municipal Code defines a church as:

[A] place where religious services are conducted and including accessory uses in the primary or accessory buildings such as religious education, reading rooms, assembly rooms, and residences for nuns and clergy, but excluding facilities for training of religious orders; including uses located in NAICS Industry No. 81311. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

WMC 21.06.100 (emphasis added). The Code then defines an “accessory use” in a residential zone, such as the R1 zone where the Church is located, as including:

(1) A use, structure, or activity which is subordinate and incidental to a residence including, but not limited to, the following uses:

(a) Accessory living quarters and dwellings; . . .

WMC 21.06.013 (emphasis added). "Accessory living quarters" are defined by the Code as:

[Li]ving quarters in an accessory building for the use of the occupant or persons employed on the premises, or for temporary use of guests of the occupant. Such quarters have no kitchen as defined in the International Building Code and are not otherwise used as a separate dwelling unit. (Ord. 375 § 2, 2004; Ord. 175 § 1, 1997)

WMC 21.06.005 (emphasis added).

The tents and structures occupied by TC4 residents are accessory buildings used to benefit Church guests. The trial court erred when it found that hosting TC4 on Church property was not an accessory use of the Church property.<sup>16</sup> Case law is replete with examples of homeless shelters allowed as accessory uses of churches. For example, the Ohio Supreme Court held:

The court of appeals concluded, and we agree, that "social programs of a church, such as the ones in this case, are accessory uses in that they are customarily incidental to the principal use." (Emphasis added.) The character of uses and structures that courts have deemed accessory to religious uses has varied widely. . . . Several courts have specifically permitted residential accommodations in church buildings as accessory uses. . . . Most recently, the Twelfth District Court of Appeals determined that a home for unwed pregnant teenage girls, which included prenatal

<sup>16</sup> The City also testified that the Church would not be allowed to host TC4 inside the Church as an accessory use. (VRP, June 1, 2006 at 20:4-18; 29:22-30:2.) Thus, under the City's interpretation of the zoning code, sheltering the homeless is never an allowed accessory use of the Church.

care, life skills training, and a spiritual education, was an integral part of a church's missionary purposes. ...Based on the foregoing, we agree with the court of appeals that Beatitude House would be "customarily incidental" to the principal use of the diocesan property as a Catholic church and would satisfy Article I's definition of "Accessory Use or Building."

Henley v. City of Youngstown Board of Zoning Appeals, 90 Ohio St.3d 142, 149, 735 N.E.2d 433 (2000) (allowing transitional apartments for the homeless on church property) (emphasis in original; internal citations omitted). Accord Allen v. City of Burlington Bd. of Adjustment, 100 N.C.App. 615, 397 S.E.2d 657 (1990) (building inspector was justified in determining that offices were permissible accessory use to church's operation of homeless shelter and adult day care center); Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 146 Misc.2d 500, 550 N.Y.S.2d 981 (1989) ("Therefore, it is clear that the Church's temporary homeless shelter sanctuary program is, as a matter of law, a permissible 'accessory use' of the Church which is a protected activity under ... the Zoning Resolution .... Accordingly, plaintiffs' argument that the use of Church property as an emergency temporary shelter for the homeless violates the applicable Zoning Resolution and its Certificate of Occupancy is without merit."); St. John's Evangelical Lutheran Church v. Hoboken, 195 N.J. Super. 414, 479 A.2d 935 (1983) (shelter for homeless was accessory use); Havurah v. Norfolk Zoning Bd. Of Appeals, 177 Conn. 440, 418 A.2d 82 (1979) (unrestricted overnight accommodations in synagogue was accessory use).

Courts across the nation have recognized that feeding the hungry

and sheltering the homeless are core religious activities. The Church is permitted as a church in a residential zone. When tent city moved onto its property, the Church established subordinate living quarters for the temporary use of the guests of the Church. The plain language of the Woodinville Municipal Code allows for this use. The Church did not need a Temporary Use Permit to host TC4.

**G. Tent City Is Not a Nuisance Per Se.**

The Church's final assignment of error is to the trial court's rulings regarding nuisance.

The trial court incorrectly determined that the City was entitled to preliminary and permanent injunctive relief because TC4 constituted a nuisance *per se*, and was thus a harm to the City. The trial court found that this "harm" entitled the City to injunctive relief. (CP 477-83 at ¶¶ 3.6 & 3.7.) The City primarily based its argument in support of TC4 constituting a nuisance *per se* on City of Mercer Island v. Steinmann, 9 Wn.App. 479, 513 P.2d 80 (1973). (CP 84; 369-71.)

However, Steinmann is factual distinct because the court recognized that the Mercer Island Code specifically dictated that property uses contrary to the code are nuisances. Id. at 485 ("Injunctive relief is available against zoning violations which are declared by ordinance to be nuisances ... The Mercer Island code states that any use of property contrary to the ordinance is a public nuisance which the city may abate by an action in the superior court."). Glaringly absent from the City's argument is a citation to similar provisions in the Woodinville Municipal

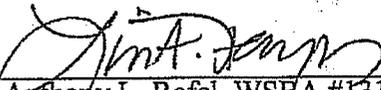
Code. The reason for this failure is simple – Woodinville has no such provision, and TC4 does not fit within the Woodinville Municipal code definition of “nuisance.” The trial court erred when it found a nuisance *per se* and granted injunctive relief.

V. CONCLUSION

For the foregoing reasons, Appellant Northshore United Church of Christ respectfully requests that the June 12, 2006 Final Order of the King County Superior Court be vacated, and that this action be remanded to the trial court.

DATED this 22nd day of September, 2006.

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