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Court of Appeals No. 63242-6-I

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STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

MERCER ISLAND CITIZENS FOR FAIR PROCESS,
Petitioner,

v.

TENT CITY 4, an unincorporated Washington association;
SHARE/WHEEL, an advocacy organization comprised of the Seattle
Housing and Resource Effort ("SHARE") and the Women's Housing
Equality and Enhancement League (WHEEL"), a Washington non-
profit corporation; and Mercer Island United Methodist Church
(MIUMC), a Washington non-profit corporation, and the CITY OF
MERCER ISLAND, a Washington Municipal Corporation,

Respondents.

**RESPONDENT CITY OF MERCER ISLAND'S
ANSWER TO PETITION FOR REVIEW**

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Washington State

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I. INTRODUCTION

Petitioner's federal due process and Section 1983 claims are basely entirely on the allegation that the City of Mercer Island failed to follow its own land use code when it approved the TUA. The TUA, however, was clearly a "land use decision" under LUPA, and under LUPA and established case law, the City's adoption of the TUA became "final, valid, and binding" when no judicial challenge to its adoption was timely filed. Because Petitioner's federal due process and Section 1983 claims are based entirely on the legally unsustainable premise that the City's adoption of the TUA was *not* "final, valid, and binding," Petitioner's claims must fail as a matter of law. Petitioner's arguments about the interplay between LUPA, the federal constitution, and 42 USC § 1983 and its claims regarding the Court of Appeals' arguments are nothing more than straw men, set up to be easily knocked down.

The Petition for Review raises no issue of substantial public import, no issue of constitutional import, and nothing worthy of review by this Court. Accordingly, review is not warranted.

II. STATEMENT OF FACTS

A. Background of Litigation

On June 16, 2008, the Mercer Island City Council unanimously approved a Temporary Use Agreement ("TUA")¹ that authorized the Mercer Island Methodist Church to host a temporary homeless

¹ A copy of the Temporary Use Agreement ("TUA"), is at Appendix A.

encampment (Tent City) on the premises of its church. *See, Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010).² This approval was the result of more than two years of negotiations with the church and Tent City representatives, and extensive investigation and analysis into legitimate restrictions the City would impose on such a use of private property, particularly in light of the extensive litigation that has resulted from denial of permits for homeless encampments by other cities in the region. *Id., passim*. A group of residents who opposed the encampment formed “Mercer Island Citizens for Fair Process” (“Group”), and worked against the charitable efforts to establish a safe place for the homeless.³

B. Superior Court Lawsuit

On July 10, 2008 – 24 days after the TUA was approved by the City Council – the Group filed suit in King County Superior Court seeking an injunction and temporary restraining order. CP 1-9. The Group also asserted a nuisance claim,⁴ a constitutional due process claim, and a claim for damages under 42 USC § 1983. *Id.* The trial court denied the TRO, and the Group did not appeal that order. CP 79-86.⁵

² *See, Appendix B.*

³ Members of this group had campaigned against the temporary encampment, peppered City Hall with complaints and threats of litigation, and had attended – and testified at – various open public meetings where the idea was discussed. CP 539, 668, 679-698

⁴ The Group voluntarily dismissed with prejudice its nuisance claim, and reiterated in its summary judgment motion that “the only claims which it is now pursuing are its Due Process Claim and its § 1983 claim.” CP 182. Accordingly, the only claims remaining for potential review by this Court are the Petitioner’s due process claim, its §1983 damage claim and §1988 attorney fee claim.

⁵ *See, Appendix C, Court’s Order denying TRO.*

On August 28, 2008, the City moved for summary judgment, asking the trial court to dismiss the remaining due process and §1983 claims. The City's motion was based on two independent and alternative bases for dismissal: (1) that the Petitioner's failure/refusal to seek judicial review under LUPA of the City's decision approving the TUA barred their due process and §1983 claims as a matter of law (since the failure to seek review under LUPA rendered the City's decisions final, valid and binding); and (2) that the remaining due process and §1983 claims failed on their merits based on the undisputed record before the Court. *See, City's Motion for Summary Judgment*, CP 622-666. Regarding the City's argument that the Group's claims were barred as a matter of law due to its failure to seek review under LUPA – the City argued and the trial and appellate courts found – that under LUPA (RCW Ch. 36.70C), any party wishing to challenge a “land use decision” of a local governmental entity must file a LUPA petition within 21 days of when the decision was made. *See, e.g., Tent City 4*, 156 Wn. App. at 393. LUPA plainly defines “land use decision,” and clearly states that any “land use decision” not challenged within 21 days is deemed valid and binding as a matter of law and cannot be collaterally attacked. *See, e.g., Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (2000).⁶

⁶ The City argued that (1) the City's approval of the TUA was a “land use decision” under LUPA, (2) the Group failed to challenge the decision within LUPA's 21-day mandatory limitations period, and therefore (3) the TUA is deemed valid and binding as a matter of law. Since the decision is binding and valid as a matter of law, the Group's claims – all of which depended on finding the TUA illegal, or unauthorized or invalid – were precluded as a matter of law. *Tent City 4*, 156 Wn. App at 398.

Alternatively, the City also argued that, notwithstanding the Petitioner's failure to seek review of the City decisions under LUPA, its due process and §1983 claims failed on their merits.⁷ CP 622-666.

The trial court agreed with the City's arguments and dismissed the case. *See, Trial Court's Order on SJ*, attached as **Appendix D**.

C. Court of Appeals Decision

Following the grant of summary judgment, the Group appealed to Division 1 of the Court of Appeals, claiming that (1) approval of the TUA was not a "land use decision" under LUPA, and (2) failure to file a LUPA petition does not affect the ability to file a claim under 42 U.S.C. § 1983. The Court of Appeals rejected the Group's arguments and upheld the trial court's dismissal of the case. *See, Tent City 4, supra*. After exhaustively analyzing the statutes and case law at issue, and applying it to the facts of this case, the Court of Appeals held that adoption of the TUA by the City was indisputably a "land use decision" as defined by LUPA. *Id.* The Court also recognized that failure to file a petition under LUPA within 21 days meant the "land use decision" was deemed lawful, valid and unassailable as a matter of law. Consequently, any legal claim that challenged the underlying validity of the TUA, or the process to approve the TUA – such as the Group's due process and § 1983 claims – would

⁷ Based on the undisputed facts before the trial court, the Petitioner could not make out a *prima facie* due process violation. And, since the Petitioner could not prove a constitutional due process violation, there was no predicate basis for §1983 liability in any event. *See, e.g., CP 656 – 666*.

necessarily fail. *Id.* The Group then filed a motion for reconsideration with the Court of Appeals, which was denied.⁸

III. ARGUMENT

Petitioner has apparently now abandoned its claim that the TUA was not a “land use decision” under LUPA, and merely argues that its constitutional claims cannot be held to a 21-day “statute of limitation” under LUPA. However, this argument misconstrues the legal principles at issue, ignores the extensive law on this point (much of it from this Court), and misstates the reasons the trial court and Court of Appeals dismissed the Group’s constitutional and §1983 claims.

A. Petitioner Lacks a Basic Understanding of LUPA

The main problem with Petitioner’s argument here is the failure to recognize the legal and procedural implications of its admitted refusal (or failure) to pursue remedies under the Land Use Petition Act, RCW Ch. 36.70C (“LUPA”). Based on a clear understanding of the purpose and intent behind LUPA, as well as the legal and factual significance of failure to comply with LUPA’s requirements by this Court, the deficiencies in Petitioner’s arguments for review become readily apparent.

1. LUPA is Sole Method to Challenge Land Use Decisions

In 1995, the Legislature enacted LUPA to:

... reform the process for judicial review of land use

⁸ Petitioner’s reconsideration request did not address the holding that the TUA was a land use decision under LUPA; rather, it merely asked the Court to reconsider whether failure to file a LUPA petition foreclosed the other claims. Once again, the Court of Appeals rejected the Group’s arguments, and denied the motion for reconsideration. *See, Appendix B to Plaintiff’s Petition for Review.*

decisions made by local jurisdictions, by establishing *uniform, expedited appeal procedures* and *uniform criteria* for reviewing such decisions, in order to provide consistent, predictable, and *timely judicial review*.

RCW 36.70C.010 (emphasis added). With few enumerated exceptions (none applicable here), LUPA is the exclusive means of judicial review of land use decisions made by local government decision-makers, such as city councils and other officers or through other procedures or processes. RCW 36.70C.020(1) and .030(1). *See also, Nykreim v. Chelan County*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Samuels Furniture v. Ecology*, 147 Wn.2d 440, 449, 54 P.3d 1194 (2002).

Under the mandatory procedures established in LUPA, in seeking judicial review of a land use decision, a challenger can ask the Court to invalidate a land use decision, or to determine if a land use decision violated any party's constitutional rights, or was procedurally flawed or had the wrong procedure used to make the land use decision, or was otherwise substantively defective in various ways. *See, RCW 36.70C.130(1)*, which provides six alternative means to review and/or invalidate a land use decision.⁹ In short, because the Group failed to ever even attempt judicial review pursuant to the mandatory procedures in LUPA, the decision by the City became lawful, valid and unassailable

⁹ In the case before this Court, at least three of the standards in RCW 36.70A.130(1) are directly triggered by the Petitioner's specific claims asserted in the lawsuit: (1) that the Mercer Island City Council that approved the TUA ". . . engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;" (2) that the City Council's land use decision – approval of the TUA – was ". . . outside the authority or jurisdiction of the body or officer making the decision;" or (3) that the City Council's land use decision – the TUA – ". . . violates the constitutional rights of the parties seeking relief [the Mercer Island Citizens and Fair Process]."

after 21 days following the City Council's adoption of the TUA. From that point on, the Group lost the right to claim that the decision was invalid, unlawful, unauthorized or violated process or procedure.

2. **Land Use Decisions not Challenged Under LUPA are Presumed Lawful and Valid as Matter of Law**

LUPA establishes a mandatory 21-day deadline for appealing all land use decisions and actions of local government land use authorities. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005); *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 450, 54 P.3d 1194 (2002); *Wenatchee Sportsman v. Chelan Co.*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000) (Court is precluded from reviewing a land use decision that is not challenged through LUPA within the 21-day appeal period; once 21-day appeal period expires, the decision becomes "valid" and the opportunity to challenge it is no longer available). As the Court of Appeals noted in *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006):

To serve the purpose of timely review, LUPA provides ***stringent deadlines***, requiring that a petitioner file a petition for review within 21-days of the date of the Land Use Decision. RCW 36.70C.040(3).

Id., 132 Wn. App. 795 (emphasis added). Even illegal or unauthorized land use decisions must be challenged under LUPA within the 21-day time period; otherwise, the illegal land use decision becomes "valid."¹⁰ See,

¹⁰ This well-accepted rule applies equally to claims of procedurally defective land use decisions, or unauthorized decisions, or where notice was not given. See, e.g., RCW 36.70C.130(1)(a), (e) and (f); and *Habitat Watch v. Skagit County* (plaintiffs lost right to challenge county's wrongful issuance of land use decision once 21-day period passes with no LUPA challenge, even where no notice of the decision was provided to plaintiffs).

e.g., *Asche v. Bloomquist*, *supra*, 132 Wn. App. 795-796; *Habitat Watch v. Skagit Co.*; *Samuel's Furniture v. Ecology*, *supra*.

The underlying purpose of these stringent requirements for review of land use decisions is to carry out the explicit policy in Washington that favors finality in land use decision-making, and to avoid collateral claims or attacks on the land use decision through other means or theories. As this Court recently wrote in the case of *Twin Bridge Marine Park v. Department of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008):

The most important principle for our case is the legal effect of a party's failure to challenge a land use decision under LUPA. On this issue, Washington Courts could not be more clear: any land use decision not challenged under LUPA is ***presumed legally valid and unassailable as a matter of law***. This principle has been restated again and again.

Habitat Watch v. Skagit County,¹¹ is a perfect illustration of the preclusive and validating effect of a party's failure to seek review – or timely review – of land use decisions through the mandatory procedures under LUPA. This Court held that once the 21-day period passes with no LUPA challenge, the land use decision at issue is deemed valid and lawful. Consequently, “[a] land use decision becomes unreviewable by courts if not timely appealed under LUPA.” *Habitat Watch v. Skagit*

¹¹ In *Habitat Watch*, Skagit County approved various development permit extensions with no notice whatsoever to neighboring landowners. 155 Wn.2d 397 (2005). Plaintiffs sued, claiming that the permit extensions were improper and should be revoked for failure to provide the proper notice required by law. Importantly, plaintiffs also claimed the extensions – issued with no notice whatsoever – constituted a violation of their constitutional due process rights. *Id.* at fn. 8.

County, 155 Wn.2d at 406-07. Therefore, this Court not only upheld the issuance of the permits themselves, but dismissed the constitutional claims as well, because the permits at issue were deemed valid as a matter of law.

That specific section of the *Habitat Watch* opinion has been quoted by the Court of Appeals in several other nearly-identical cases. *See, e.g., Spice v. Pierce County*, 149 Wn. App. 461, 204 P.3d 254 (Div. 2 2009) (“a land use decision becomes unreviewable by the courts if not appealed to the superior court within LUPA's specified timeline.”); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 233 P.3d 1172 (2009) (a land use decision not timely appealed under LUPA is barred, and the decision becomes final and valid; a due process claim relating to a land use decision that is subject to LUPA is barred.¹²

Nor was this Court's decision in *Habitat Watch* somehow novel, or a departure from prior case law on this issue. For example, in *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000), the

¹² In *Nickum*, for example, the Court of Appeals, Division II, dismissed the Nickums' challenge to a City of Bainbridge Island decision to allow Verizon Wireless to construct a wireless communication facility on a Puget Sound Energy pole on a neighbor's parcel, and also dismissed a companion claim of due process violation. Over the Nickums' argument that they did not receive proper or timely notice of the building permit issued to Verizon, or that they otherwise were unaware of the authorization to Verizon to construct the wireless communication facility, the Court found that the Nickums' failure to administratively appeal the decision in a timely manner or to properly seek review under LUPA barred all claims for review of the decision as well as the Nickums' due process claims. *Id.*, 153 Wn. App. at 383. Noting that “numerous opinions confirm that the 21-day LUPA deadline is absolute,” the Court held: “The LUPA time-of-filing requirements control access to the superior court's substantive review of any LUPA decision and the failure to timely file an appeal prevents court access for such review; thus the Nickums' arguments urging equitable tolling cannot be considered.” The Court concluded that the Nickums' failure to file their LUPA petition within 21 days of their actual notice of the Verizon permit barred their due process claims. *Id.*, at 382-83.

County approved a rezone, and plaintiffs failed to appeal within 21 days as required by LUPA.¹³ The Court held: “If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with [other laws] is no longer reviewable.” *Id.* at 182.

In *Asche*, the County issued a permit for Plaintiffs’ neighbor to build a home. Several months later, Plaintiffs learned that the construction would block their view of Mt. Rainier, and sued to stop the project. They claimed the County had miscalculated the allowable building height on the neighbors’ lot, and should rescind the permit. They sued for public and private nuisance, mandamus, and also asserted constitutional due process claims as well. The trial court dismissed the case for failure to comply with LUPA, and Plaintiffs appealed. *Id.* On appeal, Plaintiffs claimed that even if LUPA barred direct challenge to the permit, their procedural due process and nuisance claims would nevertheless remain.¹⁴ However, the Court recognized that both the constitutional and nuisance claims would necessarily call into question the validity of the permit itself. In other words, “the Asches would need to have an interpretive decision regarding the [land use decision] declared improper to prevail.” *Id.* Since

¹³ When the plaintiffs eventually sued, they argued that LUPA’s 21-day period did not apply because their claims did not directly address the zoning decision. This Court disagreed, noting that in order for plaintiffs to prevail, the underlying zoning decision would necessarily have to be ruled invalid. Since that decision was already deemed valid as a matter of law (after the 21-day period), plaintiff’s claims failed.

¹⁴ These are precisely the same claims asserted by the Petitioner in this case. Indeed, here, the Petitioner voluntarily dismissed its nuisance claims before a decision on the City’s motion for summary judgment (CP 182), leaving only its due process claim as a predicate basis for its §1983 civil rights claim.

the decision was presumed valid as a matter of law, the associated damage claims would necessarily fail: “Having failed to file a land use petition within 21 days of the building permit’s issuance, they have lost the right to challenge its validity.” *Id.* at 799.

B. Petitioner Misconstrues the Holdings in This Case

The previously discussed rule, repeatedly recognized by this Court and the appellate courts of this State – that land use decisions not challenged under LUPA are deemed lawful, valid and unreviewable as a matter of law – is of central importance to this case, and demonstrates the fundamental misunderstanding driving Petitioner’s arguments.¹⁵ As the cases discussed above make clear, there is an important distinction between dismissing a claim for failure to comply with a “procedural rule” or “statute of limitations,” and dismissal for a party’s inability to prove that claim as a matter of law.¹⁶ That latter point is at issue here.

Neither the trial court nor the Court of Appeals held that the Petitioner was precluded from bringing a due process or §1983 claim because of the timing of the claim. Rather, both courts properly concluded that Petitioner could not prove its claims, because the legal basis for those

¹⁵ The Petitioner makes a variety of claims about the Court of Appeals decision, that it (1) applied a 21-day “statute of limitations” to a §1983 claims, and that it (2) dismissed a constitutional claim for failure to comply with a minor “procedural rule” as two examples. These claims, each of which seek to minimize the importance of the legal principles at play here, miss the point.

¹⁶ Since failure to file a LUPA petition results in the land use decision being deemed lawful and valid as a matter of law, dismissal of Petitioner’s due process and §1983 claim is more properly characterized as a *res judicata* ruling rather than a statute of limitations issue. This is an important difference.

claims – the alleged invalidity of the TUA and the process by which it was adopted – were determined to be lawful and valid. This result was not only consistent with, but mandated by the repeated pronouncements of this Court (*e.g.*, *Habitat Watch*, *Wenatchee Sportsman*, *Nykreim*) and the State’s appellate courts (*e.g.*, *Asche*, *Spice*, *Nickum*).¹⁷

In other words, Petitioner’s due process and §1983 claims were not dismissed because they were not pled in a LUPA petition, but because the decision they were challenging and which they were predicated upon was already deemed lawful, valid and unassailable. Our courts have consistently made it clear that LUPA petitions and claims for monetary damages are two separate categories of claims.¹⁸

This is exactly the issue decided in *Asche v. Bloomquist*, discussed above. The *Asche* Court recognized that “[c]laims that do not depend on

¹⁷ Damages claims can only proceed if the underlying land use decision has not already been deemed valid under LUPA: “If the petitioner loses the LUPA appeal – [or never files one in the first place] – the damages case is moot and the matter is over. However, if the plaintiff prevails at the LUPA hearing, the remaining compensation claim must be allowed to proceed to trial.” *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901, 37 P.3d 1255 (Div. 1 2002).

¹⁸ For example, suppose Petitioners had filed a LUPA petition within 21 days of the TUA’s adoption. In this hypothetical, adoption of the TUA would not be deemed valid as a matter of law, and appropriate damage claims – such as nuisance, negligence, due process, §1983, etc. – would remain available to Petitioner, even if those specific claims were not pled in the LUPA petition itself. So long as the LUPA petition was not abandoned or dismissed, Petitioner could bring their §1983 claim any time during the normal 3-year statute of limitation. Similarly, if Petitioners had brought a claim for damages that did not depend on a finding that adoption of the TUA was invalid or that the process used to adopt it was procedurally defective, unauthorized or otherwise flawed, failure to have filed a LUPA petition would be irrelevant, and the claim could proceed. This is not the case here, where the Petitioner’s due process and §1983 claims are directly predicated upon the City’s adoption of the TUA, authorization for the Tent City 4 encampment, and the process used to approve the TUA and authorize the encampment. *See, Tent City 4*, 156 Wn. App. at 401-02.

the validity of a land use decision are not barred,” then turned to the specific nature of plaintiff’s claims. In the end, the Court held that plaintiff’s claims failed because they did in fact depend on the validity of the underlying decision. *Asche, supra*; see also *Grundy v. Brack Family Trust*, 116 Wn. App. 625, 633, 67 P.3d 500 (Div. 2 2003) *reversed on other grounds*, 155 Wn.2d 1, 8, 117 P.3d 1089 (2005) (“We do not hold today that Grundy has no avenue of relief. We simply hold that Grundy cannot base her public nuisance claim on the County’s alleged improper granting of an exemption because the only way to challenge the propriety of that exemption was under LUPA, which Grundy failed to do.”)

The same is true here. The Court of Appeals exhaustively analyzed Petitioner’s Amended Complaint, and pointed out that each and every claim for monetary damages – including the due process claim and the §1983 cause of action – was based squarely on the alleged invalidity of the TUA and the process by which it was adopted.¹⁹

In this case, neither the trial court nor the Court of Appeals held (or

¹⁹ The Court noted, for example, that the following claims pled by the Petitioner were all based on issues that could, and should have been challenged under LUPA:

5.3 No provision in the Mercer Island City Code authorizes such an agreement, because the Mercer Island municipal code does not provide for Temporary Use Agreements; 5.4 By acting in an ad hoc arbitrary manner, in violation of the City Code, the City of Mercer Island has harmed the legitimate property interests of Plaintiff’s members; 5.5 While conducting negotiations regarding the Tent City 4 encampment, the City of Mercer Island violated the open meeting laws; 5.6 Because the City of Mercer Island violated its own municipal code in enacting the Temporary Use Agreement, the agreement should be declared void; and 5.8 It violates plaintiff’s right to due process for the City to fail to comply with its municipal code.

See *Tent City 4*, 156 Wn. App. at 401-02 (quoting verbatim from Petitioner’s claims in the Amended Complaint).

even implied) that Petitioner's §1983 claim failed because that claim was not brought within LUPA's 21 day time period. Rather, each Court held that failure to challenge the underlying land use decision – adoption of the TUA by the City Council – under LUPA within 21 days meant that decision and process leading up to it was lawful, valid and unassailable as a matter of law. Therefore, any claim calling that decision into question must necessarily fail.²⁰ Petitioner's claim that the Court applied a 21-day "statute of limitations" to its §1983 claim is false.

C. Petitioner's Miscellaneous, Redundant Arguments Lack Merit

Based on the discussion presented above, it is clear that the various arguments presented in the Petition for Review – all various iterations of the exact same theme – are misplaced and without merit. For example, Petitioner claims "[t]he trial court granted summary judgment on the grounds that the claims should have been submitted in a Land Use Petition Act ("LUPA") claim." *Petition*, p. 4. The trial court did nothing of the sort. As described above, Petitioner's due process and §1983 claims did not need to be included in a LUPA petition. The City has never argued, and none of the reviewing courts have held, that they did.²¹

²⁰ This would be nothing more than an unauthorized, collateral attack on an already conclusively valid and unassailable land use decision. As this Court noted in *Grunde v. Thurston County*, 155 Wn.2d 1, 117 P.3d 1089 (2005) is dismissing plaintiff's nuisance claim for failure to comply with LUPA: "By explicitly stating that LUPA is the 'exclusive means of judicial review of land use decisions,' RCW 36.70C.030(1), the legislature clearly did not intend for public nuisance actions premised on permit invalidity to 'end run' around Ch. 36.70C RCW." *Id.*, at 15.

²¹ See, .e.g, *Order Granting Summary Judgment (Appendix D)* and Court of Appeals' Decision, *passim* (Appendix A).

The same is true of Petitioner's similar arguments that "[t]he Court of Appeals held that the Section 1983 claim was subject to procedural requirements of LUPA." *Petition*, p. 5. Again, that is not the case here. Petitioner continuously fails to distinguish between its due process claim under the federal constitution, and its claim for monetary damages under 42 U.S.C. §1983. These are two separate and distinct claims, with distinct requirements for pleading in this context.²²

Petitioner also misinterprets and misapplies several important cases on this issue. For example, in addressing *Shaw v. City of Des Moines*, it claims "there is no language in *Shaw* supporting the premise that a successful LUPA case is a necessary procedural prerequisite to a §1983 claim." *Petition*, p. 15. In reality, that was exactly the point of *Shaw*. Dismissal of plaintiff's damages claim in that case was inappropriate because the LUPA proceeding was decided in plaintiff's favor. The Court explicitly held that "if the plaintiff prevails at the LUPA hearing, the remaining compensation claim must be allowed to proceed to trial." *Shaw v. City of Des Moines, supra*, 109 Wn. App. at 901.

²² As the Court of Appeals properly noted, RCW Ch. 36.70C explicitly requires compliance with LUPA procedures for any claim that "[t]he land use decision violates the constitutional rights of the party seeking relief." *Tent City 4*, 156 Wn. App at 402 (quoting RCW 36.70C.130(1)(f)). Petitioner's due process claim obviously falls into this category, and is therefore subject to LUPA's 21-day deadline for seeking review. In contrast, since the §1983 cause of action seeks monetary damages, it is expressly exempted from LUPA's 21-day time period. However, the mere fact that it is exempted from LUPA's 21-day filing requirement does not automatically mean it is not subject to *res judicata* or claim preclusion. Regardless of when it is filed, a §1983 claim must still be based on a governmental action that can be found invalid or improper.

Petitioner also claims that “the Court of Appeals decision ignores *Post* and *Berst*.” *Petition*, p. 15. This argument is particularly disingenuous since the Court of Appeals’ opinion contains a lengthy and in-depth discussion of *Berst*, including analysis of the facts and procedural detail, discussion of the holding, and application of *Berst* to the present case. *Tent City 4, supra*, 156 Wn. App at 403-404.

Moreover, Petitioner’s own reliance on *Post* and *Berst* is misplaced. In *Post*, this Court held that plaintiff’s due process claim could proceed because the governmental action at issue – issuance of notices of violations and assessment of penalties – were not “land use decisions” even covered by LUPA. Since the City’s adoption of the TUA is admittedly a land use decision – a fact recognized by the trial court and Court of Appeals, and not challenged here – the holding in *Post* is entirely irrelevant.²³ The same is true of *Berst*, which is inapplicable here because it “did not fall within any of the three categories of land use decisions” under LUPA and, therefore, “did not involve a challenge to a governmental approval of an application for land use.” *Id.* at 404.

Finally, Petitioner repeatedly alleges that dismissal of its §1983 claim constitutes an improper requirement to comply with administrative remedies. *Petition*, pp. 10-12. This argument fails because seeking review pursuant to the mandatory procedures of LUPA is not an

²³ Petitioners make various snide comments about the Court of Appeals decision that adoption of the TUA is a land use decision, but do not assign error to that holding, or otherwise address it in the Petition for Review.

“administrative” remedy – it is a state legislative requirement for judicial review, no court has ever held that the Petitioner’s §1982 claim was dismissed because it failed to “exhaust” anything, and even if Petitioner could legitimately claim their §1983 claim was dismissed for failure to exhaust such administrative remedies, this provides no basis for further review in this case. This and other courts have routinely held that compliance with state procedures can serve as valid prerequisites to certain types of challenges to governmental action, including claims of federal constitutional deprivation.²⁴

D. Irrespective of LUPA, Petitioner’s Due Process and §1983 Claims were Subject to Dismissal on Their Merits

This Court need not grant review here for another, equally important reason: Petitioner’s due process and §1983 claims failed on their merits based on the undisputed record before the trial court – irrespective of Petitioner’s failure to seek review under LUPA. As discussed at length in the City’s Motion for Summary Judgment, CP 622-666, Petitioner’s due process and §1983 claims failed on their merits for several reasons. First, the court’s unchallenged findings in denying the

²⁴ See e.g. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 337-38, 787 P.2d 907 (1990) (exhaustion of administrative remedies required before bringing constitutional taking claim); *Harrington v. Spokane County*, 128 Wn. App. 202, 114 P.3d 1233 (Div. 3 2005) (Due process and equal protection claims dismissed for failure to exhaust administrative remedies under the Shoreline Management Act); *Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 119 P.3d 325 (2005) (causes of action alleging federal takings, due process and §1983 claims dismissed where claimant fails to use State administrative procedures for challenging LID assessments; once time to challenge under State law has passed, LID assessments became lawful and valid, and “there is nothing left of Tiffany’s constitutional claims.” *Id.*, 155 Wn.2d at 238.

Petitioner's temporary restraining order barred the due process and §1983 claims. *See, Appendix C.*

Second, in order to establish a violation of due process, a party must first identify a specific property right that has been implicated. To hold otherwise would immediately incorporate virtually every regulation into the Constitution." *Shanks v. Dressel*, 540 F.3d at 1089 (*quoting, Clemente v. United States*, 766 F.2d 1358, 1364 (9th Cir.1985)). *See, also: First Assembly of God of Naples, Florida, Inc. v. Collier County, Fla.*, 20 F.3d 419, 422 (11th Cir. 1994). Here, while Petitioner repeatedly alleges that "the Association is entitled to due process protections," it never identified any substantive property right alleged to have been effected by adoption of the TUA.

Third, the reason Petitioner failed to ever identify a property right allegedly at stake here is because no such right exists, since "the violation of a state statute mandating procedure is not the equivalent of a federal Constitutional violation." *First Assembly of God, supra*, 20 F.3d at 422. Clearly, violation of state or local procedural statutes – such as the procedure for amending a city code – does not implicate any federal²⁵ rights; therefore there is no basis for a claim under procedural due

²⁵ Here, Petitioner repeatedly claims the City adopted the TUA without complying with the internal procedure for amending the City Code. However, they make no attempt to discuss how failure to follow the local procedure amounts to a federal constitutional violation. Neither State nor local procedural statutes define the process that is due under the Federal Constitution, and Petitioner's failure to ever identify any procedural deprivation sufficient to implicate the Constitution means it is unable to make the required showing for a claim under procedural due process.

process.²⁶ *Id.* at 422 (citing, *Harris v. Birmingham Board of Education*, 817 F.2d 1525, 1527-1528 (11th Cir.1987)).

The same is true here. Even assuming the City had no authority whatsoever to enter into the TUA without amending the City Code, the fact is that the resulting procedural deprivation does not rise to the level of a federal constitutional violation. Thus, there is no basis whatsoever on which to establish a due process violation.

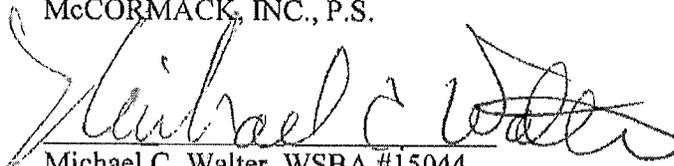
Given the absence of any legitimate due process violation, Petitioner's claim under 42 U.S.C. § 1983 – which required a predicate constitutional violation – necessarily failed. *See*, 42 U.S.C. §1983.

IV. CONCLUSION

The Petitioner's Petition for Review should be denied.

Respectfully submitted this 9th day of September, 2010.

KEATING, BUCKLIN &
McCORMACK, INC., P.S.



Michael C. Walter, WSBA #15044
Attorneys for Respondent/Appellee
City of Mercer Island

²⁶ Even if Petitioner *had* identified a substantive right, and even if it had pointed to a relevant procedural deprivation, the fact is that the City's adoption of the TUA fully complied with the necessary constitutional requirements. In *First Assembly of God*, for instance, the Court pointed out that the procedural due process protections of the Constitution merely require "that persons deprived of a right must be afforded notice and an opportunity to be heard." *Id.* In the end, the court held that the County's procedural shortcomings in adopting and codifying its zoning ordinances did not rise to the level of a federal claim.

Keating, Bucklin & McCormack,
Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861

OFFICE RECEPTIONIST, CLERK

To: Lynn Hazan
Cc: Michael C. Walter; katie.knight@mercergov.org
Subject: RE: Electronic Filing: Mercer Island Citizens for Fair Process v. Tent City 4, et al. - Supreme Court Cause No. 84975-5

Rec. 9-9-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lynn Hazan [mailto:lhazan@kbmlawyers.com]
Sent: Thursday, September 09, 2010 4:27 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Michael C. Walter; katie.knight@mercergov.org
Subject: Electronic Filing: Mercer Island Citizens for Fair Process v. Tent City 4, et al. - Supreme Court Cause No. 84975-5

Dear Clerk of the Court:

Attached for filing are **Respondent City of Mercer Island's Answer to Petition for Review and Proof of Service** in the matter entitled *Mercer Island Citizens for Fair Process v. Tent City 4, et al.*, Washington State Supreme Court Cause No. 84975-7. The appendices are not included with this electronic filing because the total number of pages exceeds 25. We will mail hard copies of the appendices to the Court.

The attached pleadings are filed on behalf of Respondent City of Mercer Island by:

Michael C. Walter, WSBA #15044
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
mwalter@kbmlawyers.com

Thank you.

Respectfully,

Lynn Hazan
Legal Assistant
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104-3175
206.623.8861
206-223-9423 fax
lhazan@kbmlawyers.com

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84975-7

Lynn Hazan

From: Lynn Hazan
Sent: Thursday, September 09, 2010 4:27 PM
To: 'supreme@courts.wa.gov'
Cc: Michael C. Walter; 'katie.knight@mercergov.org'
Subject: Electronic Filing: Mercer Island Citizens for Fair Process v. Tent City 4, et al. - Supreme Court Cause No. ~~84975-5~~
Attachments: Respondent City of Mercer Island's Answer to Petition for Review.pdf; Proof of Service.pdf

Dear Clerk of the Court:

Attached for filing are **Respondent City of Mercer Island's Answer to Petition for Review** and **Proof of Service** in the matter entitled *Mercer Island Citizens for Fair Process v. Tent City 4, et al.*, Washington State Supreme Court Cause No. 84975-7. The appendices are not included with this electronic filing because the total number of pages exceeds 25. We will mail hard copies of the appendices to the Court.

The attached pleadings are filed on behalf of Respondent City of Mercer Island by:

Michael C. Walter, WSBA #15044
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
mwalter@kbmlawyers.com

FILED
SUPREME COURT
STATE OF WASHINGTON
2010 SEP 09 P 1:49
BY RONALD R. CARRETER
CLERK
[Signature]

Thank you.

Respectfully,

Lynn Hazan
Legal Assistant
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104-3175
206.623.8861
206-223-9423 fax
lhazan@kbmlawyers.com

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Appendix A

Appendix A

TEMPORARY USE AGREEMENT

THIS AGREEMENT FOR TEMPORARY USE ("Agreement") is dated effective the 16th day of June, 2008 and is entered into between the City of Mercer Island, a Washington municipal corporation ("City") and the Seattle Housing and Resource Effort ("SHARE") a registered 501(c)(3) non-profit alliance and Women's Housing Equality and Enhancement League ("WHEEL"), a non-profit alliance ("SHARE/WHEEL") and Mercer Island United Methodist Church ("Church").

RECITALS

- A. The Seattle Housing and Resource Effort ("SHARE") and the Women's Housing Equality and Enhancement League ("WHEEL"), non-profit organizations experienced in operating and managing temporary encampments for homeless individuals, have collaborated to provide temporary housing on the Eastside of King County, under the designation "Tent City 4."
- B. Tent City 4 encampments operate under a strictly enforced Code of Conduct to protect the health and safety of Tent City 4 residents and to protect the host community from any negative effects of an encampment.
- C. Both the First Amendment to the United States Constitution and Article 1, Section 11 of the Washington State Constitution protect the free exercise of religion; further, the Religious Land Use and Institutionalized Persons Act of 2000 prohibits governments from imposing a land use regulation that unreasonably limits religious assemblies, institutions or structures. Court decisions hold that a church sponsoring a Temporary Homeless Encampment on its own property constitutes protected religious expression.
- D. The faith community of Mercer Island welcomes Tent City 4 to Mercer Island and pledges its support and assistance for a safe and positive experience for residents of both Tent City and the greater Mercer Island community.
- E. The Mercer Island United Methodist Church has extended a specific invitation for Tent City 4 to operate a Temporary Homeless Encampment on its property for a period not to exceed 93 days, beginning not earlier than August 5, 2008.
- F. Beginning in May 2004, Tent City 4 has had successful stays in several Eastside Cities including Bellevue, Bothell, Issaquah, Kirkland, Redmond, as well as in unincorporated communities in east King County including Finn Hill and Cottage Lake. Tent City 4 has accepted invitations to return to some of these jurisdictions after positive Tent City 4 experiences.
- G. The City of Mercer Island, its elected and appointed officials are committed to protect the health, safety and well-being of its citizens, as mandated by the State Constitution.

H. The Mercer Island City Code does not anticipate a Temporary Homeless Encampment such as that operated by SHARE/WHEEL, and none of the City's regulations or administrative procedures address this special use.

I. In keeping with the duties and responsibilities of municipal government, the City of Mercer Island must apply to the Tent City 4 encampment and the hosting Mercer Island United Methodist Church all the public safety, health and welfare protections routinely provided to Mercer Island citizens and visitors.

AGREEMENT

1. **Definitions.** For purposes of this Agreement, the following terms will have the following meanings:

"Temporary Homeless Encampment" shall mean a transient or interim gathering or community comprised of temporary enclosures (tents and other forms of portable shelter that are not permanently attached to the ground), which may include common areas designed to provide food, living and sanitary services to occupants of the encampment.

"Church" shall mean the United Methodist Church that has an agreement with SHARE/WHEEL to provide basic services and support for the residents of a Temporary Homeless Encampment and liaison with the surrounding community.

2. **Length of Stay.** SHARE/WHEEL and the Church will not host, sponsor or manage more than one Temporary Homeless Encampment in Mercer Island in any twelve month period, and the length of stay for such Temporary Homeless Encampment shall not exceed 93 days. No more than one Temporary Homeless Encampment will be maintained at any one time by SHARE/WHEEL within the city limits.

3. **Conditions.** SHARE/WHEEL and the Church will not host, sponsor or manage any Temporary Homeless Encampment on Mercer Island except in accordance with the following conditions and other provisions of this Agreement:
- (i) **20' Setback.** The Temporary Homeless Encampment shall be located a minimum of 20 feet from the property line of abutting residential properties.
 - (ii) **Sight obscuring fence or screen.** A sight obscuring fence, vegetative screen or other visual buffering shall be provided between the Temporary Homeless Encampment and any abutting residential property. The purpose of this fence or screen is to provide a reasonable degree of privacy and visual buffering among neighboring properties. The Code Official shall consider existing vegetation, fencing, topographic variations and other site conditions in determining compliance with this requirement.
 - (iii) **Exterior Lighting.** Exterior lighting must be directed downward, away from adjoining properties, and contained within the Temporary Homeless Encampment.
 - (iv) **Maximum Residents.** The maximum number of residents within the Temporary Homeless Encampment is 100. In exigent circumstances, this number may be exceeded if a person or persons seek shelter overnight.

(v) Parking. A minimum of twenty-six (26) off-street parking spaces shall be maintained on Mercer Island United Methodist Church property on Saturdays, Sundays and after 6:00 PM on weekdays. A minimum of eight (8) off-street parking spaces shall be maintained on Mercer Island United Methodist Church property at all other times. During occasional events or gatherings where this parking capacity will be exceeded, visitors will be directed to available public on-street parking and, if necessary, to the public parking lot at the Park on the Lid.

(vi) Proximity to Transit. The Temporary Homeless Encampment shall be located within reasonable walking distance of transit service. The Parties acknowledge that the nearest transit service is located immediately across the street from the Church.

(vii) Children Prohibited. No children under the age of 18 are allowed to stay overnight in the Temporary Homeless Encampment. In exigent circumstances, if a child under the age of 18 attempts to stay overnight at the Temporary Homeless Encampment, the Encampment managers will immediately contact SHARE/WHEEL, and SHARE/WHEEL will contact Child Protective Services.

(viii) Code of Conduct. SHARE/WHEEL requires its residents to comply with a Code of Conduct, attached hereto as Exhibit A and incorporated into this Agreement as though fully set forth herein.

(ix) Compliance with Codes. SHARE/WHEEL and the Church shall comply with lawful Washington State and City codes concerning but not limited to, drinking water connections, human waste, solid waste disposal, electrical systems, cooking and food handling and fire resistant materials.

(x) Identification. SHARE/WHEEL shall obtain verifiable identification from prospective encampment residents and use the identification to obtain sex offender and warrant checks from the appropriate agency. Warrant checks are done before someone is permitted to become an encampment resident. SHARE/WHEEL shall report any positive results of sex offender or warrant checks to the Mercer Island Police Department, and comply with all requirements of the Mercer Island Police Department related to prospective residents identified as sex offenders or as having outstanding warrants. SHARE/WHEEL shall not allow any person to reside in the Temporary Homeless Encampment who has not completed a warrant check and registered sex offender check from the appropriate agency.

(xi) Inspections. SHARE/WHEEL and the Church shall permit regular inspections by the City and/or King County Health Department to check compliance with the standards for encampments. The Mercer Island Fire Department shall do an initial fire inspection and safety meeting at the inception of the Temporary Homeless Encampment at the Church.

4. Notice and Permit Requirements for Temporary Homeless Encampments.

(i) Public Meeting. A minimum of 20 calendar days prior to opening date of Temporary Homeless Encampment, SHARE/WHEEL and the Church shall conduct a neighborhood public information meeting by providing written notice to owners and residents of property within 600 feet of the proposed site, and residents and tenants adjacent to the proposed site. The notice of the neighborhood public information meeting shall also be published in the Mercer Island Reporter not less than 14 days prior to the scheduled

meeting. The Mercer Island Reporter is published each Wednesday and submissions are due at noon the Thursday prior to publication.

The Church shall also provide a designated spokesperson to answer public inquiries, and will state the name and telephone contact information of the designated spokesperson in all public notices:

The purpose of the neighborhood public information meeting is to provide the surrounding community with information regarding the proposed duration and operation of the Temporary Homeless Encampment, conditions that will likely be placed on the operation of the Temporary Homeless Encampment, requirements of the Code of Conduct, and to answer questions regarding the Temporary Homeless Encampment.

(ii) Schools/Daycares. SHARE/WHEEL and the Church shall meet and confer with the administration of any public or private elementary, middle, junior high or high school within 600 feet of the boundaries of the proposed site, and shall meet and confer with the operators of any known child care service within 600 feet of the boundaries of the proposed site. SHARE/WHEEL and the Church shall make a good faith effort to reach agreement with the school administration and/or child care service operator upon any additional conditions that may be appropriate or necessary to address school and/or child care concerns regarding the location of a Temporary Homeless Encampment within 600 feet of such a facility. The Parties are not aware of any schools or child care services within 600 feet of the Church.

5. **Violation of Agreement.** Upon determination that there has been a violation of any term or condition of this Agreement, the City will give written notice to SHARE/WHEEL and the sponsoring Church describing the alleged violation. Within 14 days of mailing of notice of violation, SHARE/WHEEL and the Church will either cure the violation or the Temporary Homeless Encampment use will be terminated.
6. **Indemnification and Hold Harmless.** SHARE/WHEEL and the Church agree that the City is not responsible for the actions, inactions or omissions of SHARE/WHEEL or of any resident of the Temporary Homeless Encampment. SHARE/WHEEL and the Church agree to indemnify, defend and hold the City, its City Council members, employees, agents and volunteers, past and present, harmless from all losses, actions, liabilities for and against any liability for damages to persons or property as the result of: (a) the actions, inactions or omissions of SHARE/WHEEL or of any Encampment resident or of the Church; (b) the City, the Church and SHARE/WHEEL's entry into this Agreement; and (c) the City's entry into the Temporary Homeless Encampment to enforce this Agreement. Provided, however, that the agreement to indemnify, defend and hold harmless set forth herein shall not apply to damages caused by the negligence of the City.
7. **Notice to Parties.** Any written notices required by this Agreement shall be directed to the Parties as follows:

Pastor Leslie Ann Knight
Mercer Island United Methodist Church
7070 SE 24th Street
Mercer Island, Washington 98040

Scott Morrow, SHARE Managing Organizer
SHARE/WHEEL
P.O. Box 2548
Seattle, Washington 98111

Katie H. Knight, Interim City Attorney
9611 SE 36th Street
Mercer Island, Washington 98040

8. **Authority to Sign.** Each person signing this Agreement represents and warrants that he or she is duly authorized and empowered to execute and deliver this Agreement on behalf of the party for whom he or she signs.
9. **General Provisions.** This Agreement contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Agreement. No provision of the Agreement may be amended or modified except by written agreement signed by the Parties. This Agreement shall be binding upon and inure to the benefit of the Parties' successors in interest, heirs and assigns. Any provision of this Agreement which is declared invalid or illegal shall in no way affect or invalidate any other provision. In the event any of the Parties defaults on the performance of any terms of this Agreement or either Party places the enforcement of this Agreement in the hands of an attorney, or files a lawsuit, each Party shall pay all its own attorney fees, costs and expenses. The venue for any dispute related to this Agreement shall be King County, Washington. Failure of the Parties to declare any breach or default immediately upon the occurrence thereof, or delay in taking any action in connection with, shall not waive such breach or default. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

CITY:

CITY OF MERCER ISLAND

By: Richard M. Conrad

Richard M. Conrad, City Manager
9611 SE 36th Street
Mercer Island, WA 98040

SHARE/WHEEL:

**SEATTLE HOUSING AND
RESOURCE EFFORT**

By: _____
Name: _____

Pastor Leslie Ann Knight
Mercer Island United Methodist Church
7070 SE 24th Street
Mercer Island, Washington 98040

Scott Morrow, SHARE Managing Organizer
SHARE/WHEEL
P.O. Box 2548
Seattle, Washington 98111

Katie H. Knight, Interim City Attorney
9611 SE 36th Street
Mercer Island, Washington 98040

- 8. **Authority to Sign.** Each person signing this Agreement represents and warrants that he or she is duly authorized and empowered to execute and deliver this Agreement on behalf of the party for whom he or she signs.
- 9. **General Provisions.** This Agreement contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Agreement. No provision of the Agreement may be amended or modified except by written agreement signed by the Parties. This Agreement shall be binding upon and inure to the benefit of the Parties' successors in interest, heirs and assigns. Any provision of this Agreement which is declared invalid or illegal shall in no way affect or invalidate any other provision. In the event any of the Parties defaults on the performance of any terms of this Agreement or either Party places the enforcement of this Agreement in the hands of an attorney, or files a lawsuit, each Party shall pay all its own attorney fees, costs and expenses. The venue for any dispute related to this Agreement shall be King County, Washington. Failure of the Parties to declare any breach or default immediately upon the occurrence thereof, or delay in taking any action in connection with, shall not waive such breach or default. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

CITY:
CITY OF MERCER ISLAND

SHARE/WHEEL:
**SEATTLE HOUSING AND
RESOURCE EFFORT**

By: _____
Richard M. Conrad, City Manager
9611 SE 36th Street
Mercer Island, WA 98040

By: 
Name: SCOTT MORROW

APPROVED AS TO FORM:

Katie H. Knight
Katie H. Knight, Interim City Attorney

**WOMEN'S HOUSING EQUALITY
AND ENHANCEMENT LEAGUE**

By: _____
Name: _____

CHURCH:

**MERCER ISLAND UNITED
METHODIST CHURCH**

By: Leslie Ann Knight
Name: Leslie Ann Knight

By: Diana Blakney
Name: Diana Blakney

By: LeRoy C. Melberg
Name: LeRoy C. Melberg

APPROVED AS TO FORM:

Katie H. Knight, Interim City Attorney

WOMEN'S HOUSING EQUALITY
AND ENHANCEMENT LEAGUE

By: *Michelle Marzani*
Name: MICHELLE MARZANI

CHURCH:

MERCER ISLAND UNITED
METHODIST CHURCH

By: _____
Name: _____

By: _____
Name: _____

By: _____
Name: _____

EXHIBIT "A"

TENT CITY 4 CODE OF CONDUCT

WE, THE PEOPLE OF SHARE/WHEEL, IN ORDER TO KEEP A MORE HARMONIOUS COMMUNITY, ASK THAT YOU OBSERVE THE FOLLOWING CODE OF CONDUCT:

- SHARE/WHEEL'S TENT CITY 4 IS A DRUG AND ALCOHOL FREE ZONE. THOSE CAUGHT DRINKING OR USING DRUGS WILL BE ASKED TO LEAVE. SOBRIETY IS REQUIRED.
- NO WEAPONS ARE ALLOWED. KNIVES OVER 3-1/2 INCHES MUST BE CHECKED IN.
- VIOLENCE WILL NOT BE TOLERATED. PLEASE ATTEMPT TO RESOLVE ANY CONFLICT IN A CREATIVE AND NONVIOLENT MANNER.
- DEGRADING ETHNIC, RACIST, SEXIST OR HOMOPHOBIC REMARKS ARE NOT ACCEPTABLE. NO PHYSICAL PUNISHMENT, VERBAL ABUSE OR INTIMIDATION WILL BE TOLERATED.
- WE ARE A COMMUNITY. PLEASE RESPECT THE RIGHTS AND PRIVACY OF YOUR FELLOW CITIZENS.
- NO MEN IN THE WOMEN'S TENTS.
- NO WOMEN IN THE MEN'S TENTS.
- NO OPEN FLAMES.
- NO LOITERING OR DISTURBING NEIGHBORS.
- NO TRESPASSING.
- ATTENDANCE OF AT LEAST ONE OF THE SEVERAL COMMUNITY MEETINGS HELD THROUGH THE WEEK IS REQUIRED.
- DAYS AND TIMES WILL BE POSTED SO THAT YOU MAY WORK IT INTO YOUR SCHEDULE.

IF THESE RULES ARE NOT RESPECTED AND ENFORCED, TENT CITY 4 MAY BE PERMANENTLY CLOSED.

Exhibit "B"



**CITY COUNCIL MINUTES
REGULAR MEETING
JUNE 16, 2008**

CALL TO ORDER:

Mayor Jim Pearman called the meeting to order at 7:07 pm in the Council Chambers of City Hall, 9611 SE 36th Street, Mercer Island, Washington.

ROLL CALL:

Councilmembers Bruce Bassett, Mike Cero, Mike Grady, Steve Litzow, Deputy Mayor El Jahncke and Mayor Jim Pearman were present. Councilmember Dan Grausz was absent.

SPECIAL BUSINESS

Mayor Jim Pearman presented Jim Trombold with the 2007 Citizen of the Year award. Mr. Trombold was nominated and selected for the award for his dedication to Mercer Island as a noted physician, community activist, Rotarian who served as president from 2005 to 2006, as chair of the Planet Earth committee, an avid lover and defender of the MI parks system and fought to preserve and improve Mercerdale Park, including the establishment of a group native garden and has been involved in numerous parks projects, including pulling ivy. Mr. Trombold thanked the Council and Mercer Island for the recognition.

APPEARANCES:

There were none.

MINUTES:

- (1) It was moved by Councilmember Litzow; seconded by Councilmember Grady to:
Approve the Study Session and Regular Meeting Minutes of June 2, 2008 as written.
Motion passed 6-0.

CONSENT CALENDAR:

Councilmember Grady moved 4312: Kiwanis Fireworks Sales Permit to Regular Business. Councilmember Cero moved AB 4321: 2007 Year-End Transfer (Final) and AB 4316: Fire Apparatus Refurbishment to Regular Business

- (2) Payables: \$754,514.52 Payroll: \$575,202.86
- (4) AB 4318 40th Street Improvements Project Bid Award
Motion: Subject to authorization from the Washington State Transportation Improvement Board to award the construction contract, award Schedules 'A' and 'B' of the SE 40th Street Improvements to Construct Company, LLC in the amount of \$1,434,930.34, set the total project budget at \$1,993,680, appropriate an additional \$301,765 from the Street Fund and direct staff to administer the construction contract.
- (5) AB 4317 Basin Drainage Improvements Project Bid Award
Motion: Award schedule 'A' and 'B' of the Basin Drainage Improvements Project to Earthwork Enterprises, Inc. in the amount of \$150,738.28, set the total project budget at \$195,260 and direct staff to administer the construction contract.

- (6) AB 4313 Summer Celebration Fireworks Display Permit
Motion: Approve the Public Fireworks Display Permit application submitted by Western International Fireworks for a fireworks display on July 12th, 2008, near Luther Burbank Park, sponsored by Summer Celebration!

It was moved by Councilmember Litzow; seconded by Councilmember Grady to:
Approve the Consent Calendar and the recommendations contained therein.
Motion passed 6-0.

REGULAR BUSINESS:

- (3) AB 4321 2007 Year-End Transfer (Final)

It was moved by Deputy Mayor Jahncke; seconded by Councilmember Litzow to:
Suspend the City Council Rules of Procedure 5.2.
Motion passed 6-0.

It was moved by Deputy Mayor Jahncke; seconded by Councilmember Litzow to:
Adopt revised Ordinance No. 08-05, that includes \$1 million for Sewer Lake Line Design, amending the 2007-2008 Budget.
Motion passed 6-0.

- (9) AB 4323 First Hill Water Utility Property Future Use Options

Development Services Director Steve Lancaster provided history of the First Hill Water Utility Property at 2976 74th Avenue SE. He spoke about the range of feasible options for future use of the property that staff identified at the May 19, 2008 meeting.

Public Comment:

Carolyn Boatsman, read comments from Anne Fox as follows: A group of residents met on June 12th regarding the options for the property. They recommend that there not be a rezone of the property, that it be preserved as open space unless it is not feasible, and then allow a portion of the property to be sold for small homes to be built. Also develop a citizen review committee for covenants on the property regarding housing scale, tree preservation and Built Green 4-Star mandates.

Jackie Liebsohm, 3206 74th Place SE, read comments from Eileen & Larry Mitchell: do not change zoning, ideally one house on property (two as the limit), leave rest of lot open space, leave the trees on the property, sell the building portion of lot with covenants. Comments from Laura & Joe Killkelly: believe that decision to change neighborhood density should be decided by entire Mercer Island electorate with a clearly outlined plan. Comments from Bob Cohen: the property should remain zoned for single family use or be considered as a public park. Ms. Liebsohm commented that she agrees with these comments.

Baron Dickey, 6809 96th Ave SE, concerned about violations of zoning statutes in the Town Center, with the Accessory Dwelling Units ordinance and spot zoning on First Hill. He believes that the Council should put changes to property regulations before the property owners.

Susie Anschel, 3426 74th Ave SE, finished Anne Fox's statement: she believes Mercer Island needs a community process to discuss an innovative housing program, but it should not be on first hill lot. Ms. Anschel commented that she treasures the diversity of the neighborhood, and she is concerned about the large homes going up. She thinks it's a prime opportunity for the City to construct low-income housing as an obligation to the region.

Steve Bryan, 2426 70th Ave SE, would like to see a public process for the property to address need for smaller housing in our neighborhoods, without changing zoning and without increasing density.

Matt Leibsohm, 3206 74th Place SE, objects to changing zoning to accommodate greater housing zoning. He favors affordable housing for the workforce, increasing the diversity of the Island and setting a standard for more environmentally friendly, however not at the expense of the neighborhoods filled with single-family residences. He feels strongly that Mercer Island should maintain as much green and open space as possible.

Jessica Zwick, 7422 SE 32nd Street, would like the City to place covenant on the property to maintain the smaller housing scale and has environmental and sustainability requirements.

Barbara Shuman, 3434 74th Ave SE, spoke about the destruction of the canopy on Mercer Island and to see to see houses being torn down and trees as well. Her issue is to preserve tall trees on the property with a covenant.

Carrie Bell, 7440 SE 32nd Street, is highly opposed to rezoning on First Hill and is opposed to spot zoning in single housing family neighborhoods. She does not want density housing in single family neighborhoods.

Carolyn Boatsman, recommend that the Council continues the quest for housing alternatives on Mercer Island. She believes there is dissatisfaction with the size of houses in relation to lot size, which is jeopardizing trees. She would like the First Hill property to remain as open space.

Stephanie St. Mary, 7244 SE 32nd Street, agrees that most of the neighborhood wants the City to hang on to property or at least part of it for the public good. She sees a need for smaller homes on Mercer Island and for developers to have that option. She would like the First Hill property to stay open space or for the City to sell only the portion that is need for funding the emergency well.

Pauline Reiter, 3620 74th Ave SE, believes that Mercer Island is losing open space too quickly. She thinks the Council has an opportunity to set an example, by keeping as much of property as possible in the public domain.

Donna Buckingham, 7238 SE 32nd St, she believes that there is consensus in the neighborhood that the zoning should remain the same, that the property should not be considered a test project, and that if there is a way to fund the well by only selling one or two parcels and keep the third for open space, the Council should do so. She would like there to be a covenant regarding type of building that can be put on the property.

Paul Magnotto, 3204 72nd Ave SE, is opposed to density increase because of increased traffic and property value loss. He thinks the City should sell the property for the highest price for it to be developed properly

Lois Irwin, 2969 74th Ave SE, spoke about the history of the property. She doesn't think that having two to three houses in the area would be a problem, but open space would be nice too.

Scott Sims, 3230 74th Ave SE, He treasures the single-family neighborhood and believes that density housing should be in the business district not in residential areas.

Bob Medved, 7238 SE 32nd Street, stated that the neighborhood is dealing with different terms – affordable housing is one term, different from the concept of small scale housing and also different from density housing.

Callie Ridolfi, 3432 72nd Ave SE, stated that there are already lots of park and open space in the First Hill neighborhood, and she would like a demonstration housing project on the property that is of appropriate scale. As a Utility Board member she spoke about the expenses associated with the pump station and with the distribution system,

Following the discussion the Council agreed that:

- 1) There is a need to sell large portion to fund the emergency well project.
- 2) There will be no zoning change for the property.
- 3) Potential covenants for the property and their ramifications in relation to sustainability and house size should be researched.

- 4) The research should also include impacts of the covenants on the value of the land.

City Manger Rich Conrad stated that it will take time for staff to research this information and he clarified that the Council is linking the issues of funding the emergency well and the suprlusing all (or part) of the First Hill property to each other.

The Council also agreed that they would like to have the broader discussion of housing alternatives on Mercer Island in the future.

(10) AB 4319 Temporary Use Agreement with the Mercer Island Methodist Church and Tent City 4

Interim Deputy City Manager Linda Herzog presented information about Tent City 4. She recounted that in Spring 2007, the Mercer Island Clergy Association announced that the faith community intended to extend an invitation to Tent City 4 and in April 2008, the MI United Methodist Church made that invitation & it was accepted. Tent City 4 will be establishing an encampment, at the United Methodist Church the first week in August 2008 and will stay for a 3-month period.

Deputy City Manager Herzog stated that the First Amendment to the US Constitution and the Article I of the WA State Constitution protect the rights of religious freedom and within those rights, a religious congregation may offer assistance and shelter to the homeless on church property. She further stated that it is then the responsibility of municipal government to assure compliance with the ordinances and regulations that protect the health, safety and well-being of its citizens and visitors to its jurisdiction.

In collaboration, the City Manger's Office, the City Attorney's Office, Development Services, the Police Department and the Fire Department, presented a Temporary Use Agreement that recognizes the rights of the host church and the Tent City homeless encampment; protects the health, safety and well-being of the citizens of Mercer Island; assures that factual information will be available to neighbors and all the citizens of Mercer Island, and secures the commitment of the host church and the Tent City managers that they will comply with the land use and life safety regulations.

The Temporary Use Agreement requirements include:

- Verifiable identification of Tent City residents;
- Assurance that no sex offenders or individuals with an outstanding warrant may stay at the camp;
- An appropriate set-back, and sight-obscuring fencing that will protect the privacy of tent city inhabitants and the surrounding neighborhood;
- Restrictions on exterior lighting so neighbors will not be disturbed;
- A limit to the number of Tent City residents in the camp of 100;
- Prohibition against children staying overnight in the camp;
- Application of Tent City's own Code of Conduct, that prohibits alcohol or drug use, weapons, violence, intimidation, open flames, trespassing, and loitering, and requires regular attendance at camp governance meetings;
- Application of municipal codes relating to sanitation and life safety;
- Assurance of sufficient vehicle parking for the Church congregation at weekly worship services; and
- Permission for health, safety and code compliance officials to inspect the camp throughout its 3-month stay.

Public Comment:

Reverend Leslie Ann Knight, Pastor of the Mercer Island Methodist Church, spoke about the church's process in inviting Tent City 4 for three months and how the church is preparing for their arrival.

Tara Johnson, 2438 62nd Avenue SE, advocates for the homeless but feels that SHARE/WHEEL's goal is to exploit the poor for a political agenda. She thinks that dividing the homeless among the homes of the church members would be better than parading them around in public. She also would like background checks done by the Mercer Island Police Department

Jackie Leibsohm, 3206 74th Place SE, has personal experience with Tent City as a professor at Seattle U, as a former member of B'nai Torah and having served meals there. She believes in providing for homeless and that it would be good exposure for Mercer Island.

Susan Bannon, 4017 92nd Avenue SE, is a member Interfaith Task Force on Homelessness and belongs to a church in Seattle that hosted Tent City. Their experience was so positive that the Church has invited Tent City again. She believes it has been a chance for people to come together, children were present and she became friends with the residents. Tent City is self-regulating, it is clean and quiet, people have jobs and are seeking permanent housing and she welcomes Tent City to the community.

John Redifer, 2440 62nd Avenue SE, has worked hard to get here; he pays taxes and respects the laws. He disagrees with lack of notification and the misleading KING5 story. He asked about notification to residents outside of the 600 feet and notification of the Council meeting. He wants background checks done on all Tent City residents by the Mercer Island Police Department.

Barry Lewine, 19812 226th Avenue NE, Woodinville, Chair of Temple B'nai Torah Tent City 4 Taskforce, spoke in support of Tent City 4 on Mercer Island. He has been immersed in Tent City 4 issues for the last four months. He stated that while the permit process was difficult, the experience was ultimately positive.

Jackie Frank, 14040 224th Avenue SE, Woodinville, Congregation President of Temple B'nai Torah, he has been involved in both hostings of Tent City at Temple B'nai Torah. They have been safe and positive experiences because of they are self-governing board and they adhere to a very strict code of conduct. He emphasized the need to over-communicate within the congregation and community.

Jayne Judd, 2511 71st Avenue SE, stated that she was not notified of this meeting. She thanked the Council for taking the time to review the Tent City issue. Her family is compassionate about volunteering and giving to the community, but moving the homeless around is inhumane. She suggests that people of the clergy should take homeless into their own homes. She also very concerned about safety in the neighborhood.

Sal Tildon, 7015 SE 20th Street, has volunteered with Tent City through the VOICE program. He stated that they are not a threat and they are just as hard-working individuals as everyone else. For his Eagle Scout project he is organizing meals for Tent City.

Earl Jones, 410 Mt. Hubert Drive, Issaquah, lives ½ mile above where Tent City was located. He read a letter from John Rittenhouse, Issaquah City Council, about the community meetings and the regulations that were in place as well as the positive community response for Tent City. He read a letter from the minister of the Community Church of Issaquah stating that they would welcome them back any time and that any municipality that has the opportunity to host Tent City should do so.

Glo Ceteznik, 8425 SE 46th Street, stated that in response to the suggestion that church members should host the residents individually, that's not what they are asking for and that Mercer Island should respond with dignity and realize that they probably know best when they need.

Elizabeth Maupin, 100 Big Bear Place, Issaquah, Outreach Minister for the Community Church of Issaquah, spoke about the preschools located on the same site as Tent City and the way the community worked through potential concerns.

Chris Oaks, 2423 71st Avenue SE, is concerned that people who live in Tent City have profound dysfunction and as a mom of 3, she is worried about safety of children in the neighborhood. She wants to know who is responsible if something goes wrong.

Bruce Thomas, Camp Advisor and resident of Tent City 4, spoke about Tent City 4 and SHARE/WHEEL, its self-management system and that it is King County's largest supplier of shelters. He stated that the people who live in Tent City 4 are very different than the homeless who choose to self-medicate and have serious mental issues because of the extremely structure environment.

Nancy Chambers, 3637 93rd Avenue SE, a Presbyterian Minister, has been so pleased with the outreach of the religious communities to the homeless. She has only heard positive feedback about the exposure to Tent City.

Manny Batra, 2227 71st Avenue SE, does not believe that this is the proper process to impose Tent City on the neighborhood, he would like there to be input from the surrounding residents before a decision is made.

Karen McKee, 9233 SE 59th Street, she believes that many on Mercer Island try to protect children from things they don't need to be protected from. She believes that Mercer Island would benefit from the exposure to Tent City. She stated that the arguments for Tent City have come from actual experience and the arguments against seem to come from fear for trying to best for their neighborhood and from their children. She supports Tent City on Mercer Island.

Peggy Hotes, Bellevue, teacher at Carl Sandburg Elementary School, stayed in Tent City 4 one night a week for a year and every night for a year and half. She traveled with tent City to twelve different locations. She didn't see a need for extra security and she always felt safe in Tent City. She remains a volunteer for SHARE/WHEEL and Tent City since she has stopped staying there.

Steve Bryan, 2426 70th Avenue SE, needs an explanation to help understand the process that has taken place so far regarding notification. He looks forward to volunteering and participating in Tent City 4 and hopes the Mercer Island can learn from it.

Doug Byrkit, 2237 71st Avenue SE, did not expect to have to live next to the encampment when he bought his house two years ago. He does not think that housing 100 people in tents on a gravel property is a solution.

Morgan Schoenecker, 2256 71st Avenue SE, she has had opportunity to serve meals to two different tent cities. She believes the potential for compassion and learning far outweighs any negative aspects.

Morrie Loffman, MI resident, he believes that growing up on Mercer Island he has taken food, shelter and the sense of security for granted and that there is a basic moral obligation to help those who do not have the basic needs when you have them yourself.

Fred Beuthel, 2433 71st Avenue SE, not concerned about residents of Tent City, but he is concerned about the location because of high accessibility to Seattle and downtown bus lines. He stated that the neighborhood already gets casual crime and traffic and many people will be away for vacation during part of Tent City's stay.

Andy Johnson, 2438 62nd Avenue SE, hasn't been able to find any data that shows that Tent City is successful. He stated that he has heard from many that this is first time they have heard about Tent City on Mercer Island. He feels there was a concerted effort to keep it under wraps. He wants to know what is going to be done to protect citizens if anything happens.

Elma Borbe, 2438 71st Avenue SE, questions the substance and process of the proposal for Tent City. She is concerned about 100 people on one parcel in a single-family neighborhood and that there has not been enough notification. She thinks that the neighborhood should be given a chance to voice their concerns and ideas.

Susie Redifer, 2440 62nd Avenue SE, opposed to the SHARE/WHEEL program because believes it is not a compassionate or permanent solution. She insists that the Mercer Island Police Department runs background and sex offender checks, the church and Tent City holds private weekly meetings with the neighborhood, a church official escorts residents to the bus, church provide private security for 6 hours a day, daily checks by Police and Fire Department and church should take out \$1M insurance policy.

Following the closing of the public comment period, Police Chief Ed Holmes provided information on levels of crimes in the areas surrounding Tent Cities in comparison to Mercer Island crime statistics.

Rob Odle, Planning Director for the City of Redmond and Nick Sieber, Kirkland Police Lieutenant, both spoke about their experiences with Tent City in their jurisdictions.

After Council discussion the following motions were made:

It was moved by Councilmember Grady; seconded by Councilmember Bassett to:
Approve the Temporary Use Agreement with the Mercer Island United Methodist Church and SHARE/WHEEL committing the parties to manage the 2008 Tent City 4 encampment on Mercer Island in full accordance with City Codes and regulations.

It was moved by Deputy Mayor Jahncke; seconded by Councilmember Cero to:
Amend Section 2 of the temporary use agreement as follows:

2. Length of Stay. SHARE/WHEEL and the Church will not host, sponsor or manage more than one Temporary Homeless Encampment in Mercer Island in a twelve month period each calendar year and the length of stay for such Temporary Homeless Encampment shall not exceed 90 days. ~~When an encampment starts in one calendar year and ends in the following calendar year, such encampment shall be deemed to have occurred in the calendar year during which the greater number of days fall.~~ No more than one Temporary Homeless Encampment will be maintained by SHARE/WHEEL within the city limits at any one time.

Motion passed 6-0.

Main Motion passed 6-0.

(11) AB 4322 2007 Mercer Island Dashboard Report

This item was moved to a future agenda.

(7) AB 4312 Kiwanis Fireworks Sales Permit

Councilmember Grady asked about Kiwanis fundraiser.

It was moved by Councilmember Litzow; seconded by Deputy Mayor Jahncke to:
Approve permit to allow the sale of Class "C" Fireworks by the Mercer Island Kiwanis Club in conjunction with Independence Day 2008.

Motion passed 5-1 (Councilmember Grady dissented).

(8) AB 4316 Fire Apparatus Refurbishment

It was moved by Councilmember Jahncke; seconded by Councilmember Grady to:
Table this item.

Motion passed 4-2 (Councilmembers Litzow and Bassett dissented).

OTHER BUSINESS:

Councilmember Absences:

Councilmember Grausz' absence was excused.
Councilmember Jahncke will be absent July 21.

Planning Schedule:

The 2007 Mercer Island Dashboard Report will be moved to July 7, 2008

Board Appointments:

It was moved by Councilmember Jahncke, seconded by Councilmember Bassett to:
Confirm the Mayor's 2008-2009 Board & Commission appointments as follows:

Arts Council

Helen Martin, Position 4, Term 2012
Ellen Hochberg, Position 5, Term 2012
Sandra Schillin, Position 6, Term 2012
Susan Sears, Position 8, Term 2009

Building Board of Appeals

Roxanne Navrides, Position 1, Term 2011
David Chappelle, Position 2, Term 2011
Jon Friedman, Position 3, Term 2009

Design Commission

Suzanne Foster, Position 1, Term 2011
Ann Nielson, Position 2, Term 2012
Lucia Pirzio-Biroli, Position 4, Term 2012
Bert Loosmore, Position 6, Term 2009

Open Space Conservancy Trust

Don Cohen, Position 1, Term 2012
Tina Lanzinger, Position 6, Term 2012

Planning Commission

Marc Berejka, Position 3, Term 2012
Jon Friedman, Position 4, Term 2012

Utility Board

Benjamin Levie, Position 1, Term 2012
Joel Massman, Position 2, Term 2012
Motion Passed 6-0.

Youth & Family Services Advisory Board

Rachel Hyman, Position 6, Term 2010
Joyce Hedlund, Position 9, Term 2011
Karin Miller, Position 10, Term 2011
Kenneth Urman, Position 11, Term 2011
Kevin Boileau, Position 12, Term 2011
Victor Lau, Term 2010
Anna Franklin, Term 2010
Matthew Wiens, Term 2010
Leo Phillips, Term 2009
Hallea Tse, Term 2010
Daniel Drucker, Term 2010
Lauren Prince, Term 2010

Councilmember Reports:

Councilmember Grady spoke about a meeting with MISD and PSE regarding proposal to fund a staff person to be resource manager for the School District and the City for sustainability issues.
Councilmember Cero spoke about the Public Issues Committee meeting and the King County deficit.
Deputy Mayor Jahncke spoke about the "Really Big Idea Committee" meeting.

EXECUTIVE SESSION:

The Council adjourned to Executive Session at 10:54 pm to discuss collective bargaining agreements per RCW 42.30.140(4)(a) and for approximately 30 minutes.

ADJOURNMENT: 11:25 pm

Attest:

Jim Pearman, Mayor

Allison Spietz, City Clerk

Exhibit “C”

 **COPY**

RECEIVED

04 JUN 15 PM 1:53

Honorable Steven Scott

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF BOTHELL, a municipal
corporation,

Plaintiff,

v.

CORPORATION OF THE CATHOLIC
ARCHBISHOP OF SEATTLE, a
Corporation Sole, acting through St.
Brendan Parish; and SEATTLE HOUSING
AND RESOURCE EFFORT AND THE
WOMEN'S HOUSING, EQUALITY AND
ENHANCEMENT LEAGUE, a Washington
nonprofit corporation,

Defendants.

NO. 04-2-11578-7 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action came on for hearing on June 10, 2004 on a motion for a preliminary injunction brought by the Plaintiff City of Bothell. Michael Weight and Stephen R. King appeared on behalf of the City of Bothell. Rodney T. Harmon appeared on behalf of the Corporation of the Catholic Archbishop of Seattle, a corporation sole, acting through St. Brendan Parish. Theodore Paul Hunter appeared on behalf of Seattle Housing and

CITY OF BOTHELL
Legal Department
18305 101st Avenue NE
Bothell, WA 98011
(425) 480-4875 FAX (425) 480-4876

1 Resource Effort and the Women's Housing, Equality and Enhancement League, a
2 Washington nonprofit corporation (SHARE/WHEEL). The Court received evidence in
3 the form of the declarations of William Wiselogle, Forrest Conover, Drew Lewis,
4 Michael DeLack, Michael Weight, Sarah O'Shea, Thomas Kevin Blumberg, Susan
5 Bailes, Renee DeWolf, Father Lawrence Minder, John E. Meyer, Jeffrey L. Fong, and
6 Merrelle Stubbs. The parties, through counsel, have orally stipulated certain facts into
7 the record. The parties have submitted written argument in the form of the City's Motion
8 for Preliminary Injunction, SHARE/WHEEL's Response to Motion for Injunction, the
9 Memorandum of St. Brendan Parish in Opposition to City of Bothell's Motion for
10 Preliminary Injunction, and Plaintiff's Reply to Defendant's Response to Motion for
11 Preliminary Injunction. The parties waived the presentation of further testimony and oral
12 argument on the issue of whether the Court should order the defendants to cease and
13 desist from using or allowing the property of St. Brendan Parish to be used for Tent City
14 4, which the City characterizes as a campground and the defendants characterize as a
15 shelter for the homeless. The parties have not waived their right to seek review of the
16 Court's ruling on this issue. Now therefore, the Court hereby enters the following:
17

18 **FINDINGS OF FACT**

19 1. The City of Bothell is a municipal corporation, a political subdivision of
20 the State of Washington.

21 2. The Corporation of the Catholic Archbishop of Seattle is a corporation
22 sole. St. Brendan Parish is a parish of the Catholic Archdiocese of Seattle. Its borders
23 enclose Bothell, Woodinville, and parts of Kenmore and Kirkland.

24 The church, school, office and associated grounds of St. Brendan Parish are
25

1 located in Bothell, Washington in a residential area just north of downtown Bothell. The
2 parish property is owned by the Corporation of the Catholic Archbishop of Seattle, a
3 corporation sole. The grounds of St. Brendan Parish are located on a 10 acre site on the
4 south side of NE 195th Street, and a 1.8 acre site located on the north side of NE 195th
5 Street. The parish is allowing Tent City 4 to use this 1.8 acre site for 90 days,
6 specifically from May 17, 2004 until August 15, 2004.

7 3. Seattle Housing and Resource Effort and the Women's Housing, Equality
8 and Enhancement League, a Washington nonprofit corporation (SHARE/WHEEL) is a
9 nonprofit Washington corporation. SHARE/WHEEL operates shelters for the homeless.
10 SHARE/WHEEL is the organizer and operator of Tent City 4.

11 4. On May 14, 2004, the City of Bothell was informed that SHARE/WHEEL
12 would be locating Tent City 4, a temporary tent encampment for up to one hundred (100)
13 homeless persons, on the Subject Property.

14 5. On May 17, 2004, SHARE/WHEEL began erecting Tent City 4 on the
15 Subject Property without obtaining a permit from the City of Bothell.

16 6. St. Brendan Parish has granted Tent City 4 a temporary use of the
17 undeveloped portion of its property for the purpose of granting shelter to the homeless in
18 furtherance of the religious mission of the parish, without going through the City's permit
19 process. St. Brendan's sheltering of the homeless residents of Tent City is a sincere
20 exercise of the Church's religious beliefs.

21 7. Since Tent City 4 opened on May 17, 2004, the Bothell Police Department
22 has investigated a number of incidents and circumstances in and around Tent City 4.

23 8. The status of being "homeless" has not been shown to present a higher risk of
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1 harm to the safety, health and welfare of the public.

2
3 **CONCLUSIONS OF LAW**

4 1. This Court has jurisdiction over the parties and the subject matter of this
5 lawsuit.

6 2. King County is the proper venue for this lawsuit.

7 3. All proper and necessary parties are named and joined in this lawsuit.

8 4. The City of Bothell has the right to require St. Brendan Parish to comply
9 with the permit process. St. Brendan's has not complied with that process to this point.
10 The City has the right to require compliance with its zoning ordinances and have them
11 enforced.

12 5. St. Brendan's use of its property for the purpose of sheltering the homeless
13 constitutes the exercise of religion and is protected by the First Amendment of the United
14 States Constitution and Article I, Section 11 of the Washington State Constitution.

15 6. In order to justify an order that St. Brendan Parish cease and desist the use
16 of its property for Tent City 4, the City must establish a compelling governmental interest
17 that would suffice to overcome the Church's right to the free exercise of religion and that
18 a cease and desist order would be the least restrictive means of protecting the compelling
19 interests of the City.

20 7. The interest of the City of Bothell in the health, welfare and safety of the
21 public is a compelling interest; however, the City has not demonstrated that requiring the
22 defendants to stop using the property on a temporary basis as they are now using it is the
23 least restrictive means of protecting the City's compelling interests.
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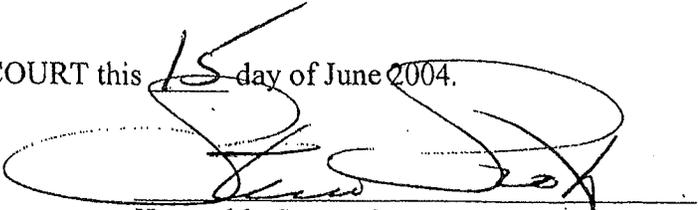
8. The City of Bothell has demonstrated that placing reasonable conditions on the operation of Tent City 4 are appropriate and should be ordered to adequately protect the legitimate and compelling governmental interests of the City of Bothell in the health, safety and welfare of the public, as well as its interests in requiring that its zoning code be enforced and complied with.

9. The City's request to require that Tent City residents to provide legal identification to the City of Bothell police in order for them to conduct a warrant and sex offender status check should be denied. When balancing the religious and privacy interests of defendants against the City's interests in utilizing the permit process to protect the health, safety and welfare of its citizens, the Court concludes that a requirement to provide legal identification is not the least restrictive means to protect the City's interests.

10. The Defendants have a duty to exercise reasonable care toward others in the City of Bothell. It is not appropriate for the court to determine preliminarily how best to do this. Thus, the City's request for conditions that would require a bond, liability insurance and paid security officers should be denied. Similarly, the request to require the Church to pay for overtime of police officers should be denied. The City has a duty to provide police protection within the City of Bothell, as determined to be appropriate by the City.

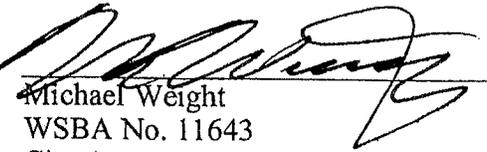
1 11. This Court should retain jurisdiction to hear any further motions or other matters
2 related to this matter.

3 DONE IN OPEN COURT this 15 day of June 2004.

4
5 
6 Honorable Steven Scott

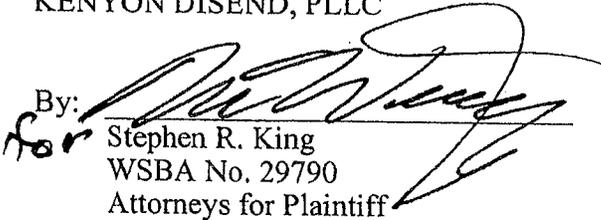
7 Presented by:

8 CITY OF BOTHELL

9 By: 

10 Michael Weight
11 WSBA No. 11643
12 City Attorney

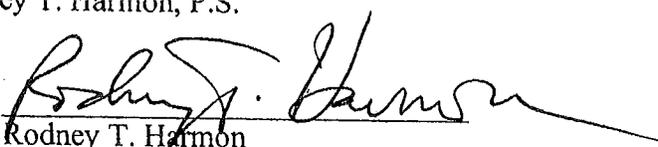
13 KENYON DISEND, PLLC

14 By: 

15 for Stephen R. King
16 WSBA No. 29790
17 Attorneys for Plaintiff

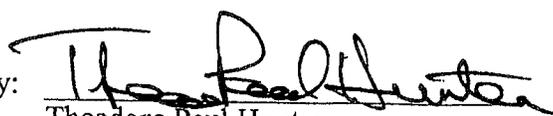
18 Notice of Presentation Waived;
19 Copy Received, Approved for Entry:

20 Rodney T. Harmon, P.S.

21 By: 

22 Rodney T. Harmon
23 WSBA No. 11059
24 Attorney for Defendant

25 Driscoll & Hunter

By: 

Theodore Paul Hunter
WSBA No. 8453
Attorney for Defendant

CITY OF BOTHELL
Legal Department
18305 101st Avenue NE
Bothell, WA 98011
(425) 489-4875 FAX (425) 489-4876

Appendix B

Appendix B

MERCER ISLAND CITIZENS FOR FAIR PROCESS, Appellant,

v.

TENT CITY 4, an unincorporated WASHINGTON association; SHARE/ WHEEL, an advocacy organization comprised of the Seattle Housing and Resource Effort ("SHARE") and the Women's Housing Equality and Enhancement League ("WHEEL"), a Washington non-profit corporation; MERCER ISLAND UNITED METHODIST CHURCH, a Washington non-profit corporation, and the CITY OF MERCER ISLAND, a Washington municipal corporation, Respondents

No. 63504-2-I

Court of Appeals of Washington, Division 1

June 1, 2010

OPINION

Grosse, J.

The failure to timely challenge a land use decision by means of a Land Use Petition Act (LUPA)[1] petition bars any further claims challenging that decision, including challenges to the process for approving that decision. Here, the city's approval of a temporary use agreement that permitted a church to use its property to host a homeless encampment was a land use decision within the meaning of LUPA because it was a decision on the church's application for government approval required by law of a property use. Thus, the plaintiff's failure to challenge that decision in a timely LUPA petition bars its due process claims, including its claims for damages under 42 U.S.C. 1983, because those claims are simply challenges to the approval of the temporary use agreement. Accordingly, we affirm.

FACTS

In the spring of 2006, the Mercer Island Clergy Association (MICA) approached the city of Mercer Island (City) about allowing a church to host "Tent City 4," a homeless encampment. Tent City 4 was organized and managed by a non-profit organization comprised of the Seattle Housing and Resource Effort and the Women's Housing Equality and Enhancement League (SHARE/WHEEL). Over the next two years, the City, MICA, and SHARE/WHEEL explored options for hosting Tent City 4.

In the spring of 2007, MICA announced its intent to have the Mercer Island United Methodist Church host the

encampment. The church is located in a single-family residential zone. The Mercer Island City Code (MICC) does not permit such temporary encampments in a single family residential area.[2]

The City acknowledged that the present code did not authorize such an encampment, but based on past litigation in other municipalities over similar church-sponsored homeless encampments, the City determined it was unlikely to prevent the church from hosting the Tent City 4 encampment. Rather than passing an ordinance authorizing the encampment and amending the city code as other municipalities had done, the City decided instead to enter into a binding "Temporary Use Agreement" (TUA), that would permit the church to host Tent City 4 and would ensure that all city code and regulatory requirements would be met.

In May 2008, MICA leadership invited city staff to meet with a newly-appointed Tent City 4 subcommittee and the pastor of the church. At that meeting, city staff discussed the specific terms of the proposed TUA. Over the next two weeks, the City drafted the TUA, which was signed by representatives of the church and SHARE/WHEEL.

On June 11, 2008, notice of a city council meeting to be held on June 16, 2008 was published in the newspaper *The Mercer Island Reporter* and noted that the council would consider the TUA. The agenda for the meeting was also posted on the city's website and included the council's consideration of the TUA. On June 16, 2008, the meeting was held and approximately 26 people testified about the TUA. The council then unanimously approved the TUA.

The TUA permitted the church to invite Tent City 4 to operate its homeless encampment on church property beginning August 5, 2008 for a period of up to 93 days. The TUA acknowledged that "[c]ourt decisions hold that a church sponsoring a Temporary Homeless Encampment on its own property constitutes protected religious expression," and that "[t]he [MICC] does not anticipate a Temporary Homeless Encampment such as that operated by SHARE/WHEEL, and none of the city's regulations or administrative procedures address this special use." The TUA then set forth a number of conditions on the encampment such as visual buffers, lighting, maximum number of residents, warrant and sex offender status checks on residents, parking, code of conduct, and compliance with state and city codes. The TUA also provided for notice and permit requirements before opening an encampment.

On July 10, 2008, a citizens group, Mercer Island Citizens for Fair Process (group), filed a complaint against the City, church, and SHARE/WHEEL and challenged the TUA, seeking an injunction and temporary

restraining order. The group also asserted claims alleging due process violations, nuisance, and violations under 42 U.S.C. section 1983. The court held a hearing on the motion for a temporary restraining order on July 28, 2009, and denied the motion on August 4, 2008, the day before the Tent City 4 encampment was scheduled to open on church property. The group did not appeal the court's denial of the temporary restraining order.

On August 28, 2008, the City moved for summary judgment, seeking dismissal of the group's remaining claims.[3] The City contended that the claims should have been asserted in a LUPA petition and that the 21-day limitation period for filing a LUPA claim had passed. The trial court granted the City's motion, dismissed the group's claims, and denied the group's cross-motion for summary judgment. The group appeals.

ANALYSIS

The group first contends that the TUA was not a land use decision and therefore the limitation period for challenging land use decisions under LUPA does not apply to bar its claims. We disagree.

LUPA provides the process for judicial review of land use decisions. The stated purpose of LUPA is

to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.[4]

"[T]he act quite clearly declares [the] legislative intent that chapter 36.70C RCW is to be 'the exclusive means of judicial review of land use decisions.'"[5]

Under RCW 36.70C.020(2), [6] LUPA defines "land use decision" as

a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real

property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.[7]

A land use decision becomes unreviewable by the courts if not appealed to the superior court within LUPA's specified 21-day timeline.[8] Once the 21-day period passes, a land use decision becomes final and binding and is deemed valid and lawful.[9] Thus, "even illegal decisions must be challenged in a timely, appropriate manner." [10]

The group contends that the TUA is not a land use decision because it does not fall within any of the categories specified in RCW 36.70C.020(2). The group first contends that the TUA is not "a project permit or other governmental approval required by law" under subsection (2)(a) because no city law authorized or described the temporary property use. The group notes that in fact the city code prohibits such temporary uses and provides that initial land use decisions are made by code officials, the planning commission, or the city hearing examiner, not the city council.

The City contends that the TUA amounts to "other governmental approval required by law" because it was the result of the church's request that the City approve its use of its property to host Tent City 4. The group argues that such approval was not required-and in fact prohibited-by the city code, but as the City contends, it is required by state law. In *City of Woodinville v. Northshore United Church of Christ*, the court held that the city's refusal to process a permit to allow a church to host a Tent City encampment "substantially burden[ed] the free exercise of the Church's religious 'sentiment, belief [or] worship,'" and recognized that the cities have authority to address impacts and "externalities" resulting from such homeless encampments.[11] Additionally, as recognized in the TUA's recitals, the City approved the TUA to protect the welfare of Mercer Island citizens as required by law:

G. The City of Mercer Island, its elected and appointed officials are committed to protect the health, safety and well-being of its citizens, as mandated by the State Constitution. . . .

I. In keeping with the duties and responsibilities of municipal government, the City of Mercer Island must apply to the Tent City 4 encampment and the hosting Mercer Island United Methodist Church all the public safety, health and welfare protections routinely provided to Mercer Island citizens and visitors.

Thus, the TUA was a determination on the church's application for government approval required by law of

its property use. It therefore falls within the category of "land use decisions" defined by subsection (2)(a). Accordingly, we need not address the group's additional arguments that the TUA does not fall within the other two categories defined by subsections (2)(b) and (c).

As a land use decision under RCW 36.70C.020(2)(a), the TUA was subject to LUPA and any challenges to it must have been made within the strict 21-day limitation. The group did not challenge the TUA until July 10, 2008, more than 21 days after the City approved it on June 16, 2008. The trial court therefore properly dismissed the group's complaint.

The group further contends that the trial court erred by concluding that its constitutional claims and claims based on 42 U.S.C. section 1983 (Section 1983 claims) were barred by its failure to seek relief under LUPA. The group asserts that these claims neither directly nor collaterally attack the TUA and therefore LUPA does apply to them.

But as the complaint makes clear, each of these claims was based on the alleged illegality of the TUA and challenged its approval process. The due process claim alleges:

5.2 Defendant City of Mercer Island has acted in an illegal fashion by entering into a Temporary Use Agreement regarding the Tent City 4 encampment.

5.3 No provision in the Mercer Island municipal code authorizes such an agreement, because the Mercer Island municipal code does not provide for Temporary Use Agreements.

5.4 By acting in an ad hoc arbitrary manner, in violation of the City Code, the City of Mercer Island has harmed the legitimate property interests of Plaintiff's members.

5.5 While conducting the negotiations regarding the Tent City 4 encampment, the City of Mercer Island violated the open meeting laws.

5.6 Because the City of Mercer Island violated its own municipal code in enacting the Temporary Use Agreement, the agreement should be declared void.

5.7 Principles of Due Process require a government agency to follow its own laws.

5.8 It violates plaintiff's right to due process for the City to fail to comply with its municipal code.

The Section 1983 claims incorporated the due process allegations and further alleged:

8.1 The City of Mercer Island, acting under color of law, has violated constitutional rights of the members of plaintiff to due process of law which is guaranteed by the United States Constitution.

8.3 Members of the plaintiff have suffered damages as a result of the City's unconstitutional conduct.

8.4 The City of Mercer Island is liable to members of the plaintiff under 42 USC Section 1983.

Each of these claims is contemplated by LUPA under RCW 36.70C.130(1), which provides that a court may grant relief under LUPA when

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

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

...

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

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

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

The case law also recognizes that failure to challenge a land use decision in a LUPA petition bars any claims that are based on challenges to that land use decision, including those alleging due process violations. In *Asche v. Bloomquist*, homeowners failed to file a timely LUPA petition challenging a building permit and the court held that the homeowners' due process claim failed because it was a challenge to the permit based on improper notice and therefore subject to LUPA.[12] As the court recognized, "LUPA applies even when the litigant complains of lack of notice under the procedural due process clause." [13] The court then concluded, "[W]e are constrained to hold that the Asches' due process challenge fails. Having failed to file a land use petition within 21 days of the building permit's issuance, they have lost the right to challenge its validity." [14] The court further held that LUPA precluded a nuisance claim because it depended entirely upon a finding that the challenged permit was invalid.[15] Likewise here, by failing to challenge the TUA in a timely LUPA petition, the group has lost its right to challenge the validity of the TUA in its due process claims and the Section 1983 claims, which are based solely on the alleged due process violations.[16]

The case cited by the group, *Berst v. Snohomish County*, [17] does not require a different result. In *Berst*, the court held that a county-imposed moratorium on the appellant's property under the Forest Practices Act of 1974 (FPA) was not a land use decision subject to LUPA.[18] The Bersts sought to short plat their lot into

two lots and as part of the pre-application process, the county inspected the site and concluded that clearing and logging had taken place on the site. As a result, the county imposed a six-year moratorium on all permits on the site as required by statute.[19] The Bersts decided not to apply for the short plat but instead applied for a permit for a larger mobile home to replace the home they had on the site. The county then waived the moratorium for the limited purpose of replacing the current home with another one of the same size and location and the Bersts did not appeal the decision that denied part of their permit application.[20] Rather, the Bersts sought a declaratory judgment that the FPA did not support the moratorium, challenging its imposition without prior notice or a hearing.[21]

The court concluded that under the plain language of RCW 36.70C.020(2), the imposition of the moratorium did not fall within any of the three categories of land use decisions, noting that the Bersts did not challenge the denial of any land use permits.[22] Thus, *Berst* did not involve a challenge to a governmental approval of an application for land use. But here, the group challenged the City's approval of the TUA, which, as discussed above, was a governmental approval of the church's application for a specific land use and therefore fell within the category of land use decisions defined in RCW 36.70C.020(2)(a).

The group further contends that its due process claims and Section 1983 claims are not subject to the LUPA time limitations because RCW 36.70C.030(1)(c) specifically excludes damage actions from the LUPA time limitations. That provision states:

Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.[23]

But as the case law recognizes, claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails.[24] Because all of the group's claims challenged the validity of the TUA and were therefore subject to LUPA, the group's failure to assert them within LUPA's time limitations requires dismissal of all the claims, including those for damages. Thus, the trial court did not err by dismissing the claims. Accordingly, we need not reach the remaining issues raised that address the merits of those claims.

We affirm.

Notes:

[1] Chapter 36.70C RCW.

[2] MICC 19.02.010.

[3] The group voluntarily dismissed its nuisance claim.

[4] RCW 36.70C.010.

[5] *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (quoting RCW 36.70C.030(1)).

[6] RCW 36.70C.020(2). This is the current codification as amended by Laws of 2009, ch. 419, § 1. It was previously codified at 36.70C.020(1).

[7] RCW 36.70C.020(2).

[8] *Habitat Watch*, 155 Wn.2d at 406-07; RCW 36.70C.040(3).

[9] *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (2000).

[10] *Habitat Watch*, 155 Wn.2d at 407.

[11] 166 Wn.2d 633, 644, 211 P.3d 406 (2009). As the City also notes, the Religious Land Use and Institutionalized Persons Act of 2000 is a federal law that bans land use and zoning regulations that place a "substantial burden" on the exercise of religion. 42 U.S.C. § 2000cc(a)(1).

[12] 132 Wn.App. 784, 133 P.3d 475 (2006).

[13] *Asche*, 132 Wn.App. at 798.

[14] *Asche*, 132 Wn.App. at 799.

[15] *Asche*, 132 Wn.App. at 801.

[16] *See Robinson v. City of Seattle*, 119 Wn.2d 34, 57-58, 830 P.2d 318 (1992) (recognizing that 42 U.S.C. § 1983 "does not create any new substantive rights, " but "allow[s] an avenue of redress to persons injured by the actions of government which violate federal constitutional rights").

[17] 114 Wn.App. 245, 57 P.3d 273 (2002).

[18] 114 Wn.App. at 253-54.

[19] *Berst*, 114 Wn.App. at 248-49.

[20] *Berst*, 114 Wn.App. at 249-50.

[21] *Berst*, 114 Wn.App. at 249-50.

[22] *Berst*, 114 Wn.App. at 254. The court further noted that the county did not argue that its decision fit within any of the categories defined in the statute.

[23] RCW 36.70C.030(1)(c).

[24] See *Shaw v. City of Des Moines*, 109 Wn.App. 896, 901-02, 37 P.3d 1255 (2002) (where LUPA petition challenging conditions imposed on building permit application included a claim for damages, court acknowledged: "If the petitioner loses the LUPA appeal, the damages case is moot and the matter is over."); *Asche*, 132 Wn.App. at 800 (LUPA precluded nuisance claim for damages because it depended entirely upon a finding that the challenged permit was invalid).

Appendix C

Appendix C

Counsel ~~is~~ Rising
shall promptly mail copies of this
order to all other counsel/parties

HONORABLE MICHAEL J. FOX

RECEIVED
AUG 06 2008

HELSELL FETTERMAN

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MERCER ISLAND CITIZENS FOR FAIR
PROCESS,

Plaintiff,

vs.

TENT CITY 4, an unincorporated
Washington association; SHARE/WHEEL,
an advocacy organization comprised of
the Seattle Housing and Resource Effort
("SHARE") and the Women's Housing
Equality and Enhancement League
("WHEEL"), a Washington non-profit
corporation; Mercer Island United
Methodist Church, a Washington non-
profit corporation; and the CITY OF
MERCER ISLAND, a Washington
municipal corporation.

Defendants.

NO. 08-2-23083-0 SEA

ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION

THIS MATTER, having come before the Court on the motion for a
Temporary Restraining Order and/or Preliminary Injunction filed by plaintiff

ORDER DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY
INJUNCTION - 1

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1 Mercer Island Citizens for Fair Process, and the Court having reviewed the
2 Complaint, Motion and Memorandum in Support of Injunctive Relief, Declaration
3 of Steve Oakes, Declaration of Tara Johnson, and Declaration of Jane Koler, with
4 attachments, as well as the Certificate Service filed by plaintiff on July 10, 2008,
5 the Notice of Appearance filed by defendant Mercer Island United Methodist
6 Church on July 14, 2008, the Supplemental Memorandum in Support of
7 Injunctive Relief, First Amended Complaint, Second Declaration of Tara Johnson,
8 Additional Authority, Supplemental Memorandum in Support of Injunctive
9 Relief, and Certificate of Service filed by plaintiff on July 17, 2008, the Response
10 in Opposition to Motion for Temporary Restraining Order, Declaration of
11 Reverend Leslie Ann Knight, and the Declaration of Mark F. Rising filed by
12 defendant Mercer Island United Methodist Church on July 25, 2008, and the
13 Response by Defendant City of Mercer Island To Motion for Injunctive Relief, the
14 Declaration of Katie H. Knight in Support of the City of Mercer Island's Response
15 to the Plaintiff's Motion for Injunctive Relief, the Declaration of Eileen Robinson
16 in Support of City's Response to Motion for Injunctive Relief, the Declaration of
17 Joyce Trantina in Support of City's Response to Motion for Injunctive Relief, and
18 Defendant City of Mercer Island's Objections to Evidence filed by the City of
19 Mercer Island on July 25, 2008, Defendant SHARE/WHEEL's Response to Request
20 for Injunction, the Affidavit of Scott Morrow, the Declaration of Deborah L.
21 Colley, the Declaration of Karisa L. Vaughn, the Declaration of Bruce Thomas, the
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1 Declaration of Daryl G. Shoop, the Declaration of David L. Shoop, the Declaration
2 of Ronald L. Foley, the Declaration of Ashton M. Green, the Declaration of Darryl
3 L. Jackson, the Declaration of Reese R. Murphy, the Declaration of Christopher L.
4 Stroud, the Declaration of Alvin W. Day, the Declaration of Michael C. Durr, the
5 Declaration of Kerry J. Husman, the Declaration of Alan H. Borden, the
6 Declaration of Benny Sepulveda, the Declaration of Shawn M. Dewitt, the
7 Declaration of David R. Peloquin, the Declaration of Randall G. Ennes, the
8 Declaration of Ricardo Rush II, the Declaration of Jeffrey S. Towle, the Declaration
9 of Teofanes Gayda, the Declaration of Julie R. Weaver, the Declaration of Ralf H.
10 Gilkyson, the Declaration of Tommie L. Kolacek, the Declaration of Robin L.
11 Karno, the Declaration of Joseph M. Minichini, the Declaration of Vanisha L.
12 Rush, the Declaration of Christina M. Lux, the Declaration of Mardiros M.
13 Hakimian, the Declaration of Mario A. Crane, the Declaration of Tae W. Suh, the
14 Declaration of Dennis P. Long, the Declaration of Stanley R. Thompson, the
15 Declaration Madelynn C. Bush, the Declaration of Christopher J. Cook, the
16 Declaration of Colt Star Jones, the Declaration of Shy Wit, the Declaration of
17 Randy G. Deguise, the Declaration of Leo M. Rhodes, the Declaration of Norman
18 N. Varain, the Declaration of Russell L. Jensen, the Declaration of Terry E.
19 Edwards, the Declaration of Robert M. Meeks, the Declaration of Mike D. Spivey,
20 the Declaration of Pamela S. Roberts, filed on July 25, 2008, and the Court having
21 heard argument of counsel for plaintiff Jane Ryan Koler, argument of counsel City
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1 of Mercer Island Katie H. Knight, argument of counsel for SHARE/WHEEL Sean
2 Russel, and argument of counsel for Mercer Island United Methodist Church Mark
3 f. Rising at a hearing on July 28, 2008; and having considered the foregoing
4 evidence and argument of counsel,

5 NOW THEREFORE, the Court makes the following Findings and
6 Conclusions:
7

8 1. The declarations submitted by plaintiff in support of its motion are
9 conclusory, argumentative, and speculative, and do not establish the kind of facts
10 regarding injury necessary to support a temporary restraining order or preliminary
11 injunction. The declarations submitted by many Tent City 4 residents show,
12 through individualized circumstances, how they would likely be adversely
13 affected if injunctive relief were granted preventing Tent City 4 from moving onto
14 church property pursuant to the June 16, 2008 Temporary Use Agreement.
15

16 2. Plaintiff has not shown a likelihood of prevailing on the merits on its
17 claims.
18

19 3. Plaintiff has not made a sufficient showing regarding the inconvenience
20 or injury its members would suffer compared to the inconvenience or injury that
21 residents of Tent City 4 would likely suffer if they are not allowed to move to the
22 property of Mercer Island United Methodist Church.
23

24 4. Plaintiff has not shown that the equities weigh in favor of its members
25 compared to the hardship residents of Tent City 4 would suffer if they were not

1 allowed to move to the property of Mercer Island United Methodist Church
2 pursuant to the June 16, 2008 Conditional Use Agreement.

3 5. Plaintiff has failed to show a well grounded fear of immediate invasion
4 of its members' legal rights or that they would suffer irreparable injury as a result
5 of an encampment pursuant to the June 16, 2008 Temporary Use Agreement
6 between defendants.
7

8 6. Plaintiff has failed to show that it would suffer substantial harm or
9 irreparable injury from the encampment established pursuant to the June 16, 2008
10 Temporary Use Agreement between defendants. Because Tent City 4 is being
11 placed in a gravel church parking lot, no natural flora or fauna will be disturbed.
12 Plaintiff has not shown that harm suffered would be substantial. Likewise,
13 because the proposed encampment is temporary, plaintiff has not shown that any
14 injury its members will suffer is permanent.
15

16 WHEREFORE, based on the foregoing Findings and Conclusions, the Court
17 DENIES plaintiff's Motion for a Temporary Restraining Order and/or Preliminary
18 Injunction. This order is made without prejudice to any other defenses asserted
19 to plaintiff's claims, and without prejudice to plaintiff's other claims.
20

21 Done in open Court this 4 ^{August} ~~July~~ th day of 2008.

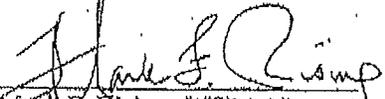
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24 Honorable Michael J. Fox

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Presented by:

HELSELL FETTERMAN LLP

By 
Mark F. Rising, WSBA No. 14096
Attorneys for Mercer Island United
Methodist Church

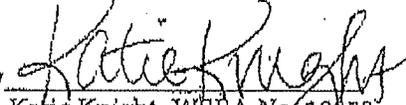
Presented by:

AHLERS & CRESSMAN PLLC

By 
Sean Russel, WSBA No. 34915
Attorneys for SHARE/WHEEL

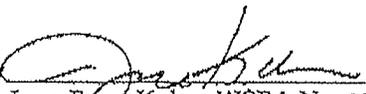
Presented by:

KATIE KNIGHT, INTERIM CITY ATTORNEY

By 
Katie Knight, WSBA No. 18058
Counsel for City of Mercer Island

Approved as to form;
Notice of Presentation Waived;

LAW OFFICE OF JANE RYAN KOLER

By 
Jane Ryan Koler, WSBA No. 18541
Attorneys for plaintiff

ORDER DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY
INJUNCTION - 6

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Presented by:

HELSELL FETTERMAN LLP

By Mark F. Rising
Mark F. Rising, WSBA No. 14096

Attorneys for Mercer Island United
Methodist Church

Presented by:

AHLERS & CRESSMAN PLLC

By _____
Sean Russel, WSBA No. 34915
Attorneys for SHARE/WHEEL

Presented by:

KATIE KNIGHT, INTERIM CITY ATTORNEY

By _____
Katie Knight, WSBA No. 18058
Counsel for City of Mercer Island

Approved as to form;
Notice of Presentation Waived:

LAW OFFICE OF JANE RYAN KOLER

By _____
Jane Ryan Koler, WSBA No. 18541
Attorneys for plaintiff

Appendix D

Appendix D

The Honorable MICHAEL FOX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MERCER ISLAND CITIZENS FOR FAIR
PROCESS, a Washington non-profit
corporation,

NO. 08-2-23083-0 SEA

Plaintiff,

~~[PROPOSED]~~ ORDER GRANTING
SUMMARY JUDGMENT TO
DEFENDANT CITY OF MERCER
ISLAND, DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, AND DISMISSING
LAWSUIT WITH PREJUDICE

v.

[CLERK'S ACTION REQUIRED]

TENT CITY 4, an unincorporated Washington
association; SHARE/WHEEL, an advocacy
organization comprised of the Seattle Housing
and Resource Effort ("SHARE") and the
Women's Housing Equality and Enhancement
League ("WHEEL"), a Washington non-profit
corporation; MERCER ISLAND UNITED
METHODIST CHURCH, a Washington non-
profit corporation; and the CITY OF MERCER
ISLAND, a Washington municipal corporation,

Defendants.

THIS MATTER CAME ON FOR HEARING pursuant to CR 56 upon Defendant
City of Mercer Island's Motion for Summary Judgment Re: All Remaining Claims dated
August 28, 2008 and the City of Mercer Island's request for Summary Judgment on the
merits as set forth in the City's Response brief in Opposition to Summary Judgment dated

ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 1

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
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PHONE: (206) 623-8881
FAX: (206) 223-9423

1 April 13, 2009, and on Plaintiff Mercer Island Citizens for Fair Process's Cross-Motion for
2 Summary Judgment dated September 15, 2008.

3 THE CITY OF MERCER ISLAND, the moving and responding party, appeared by
4 and through its associated counsel of record, Michael C. Walter of Keating, Bucklin &
5 McCormack, Inc., P.S. and Katie H. Knight, Mercer Island City Attorney. Plaintiff Mercer
6 Island Citizens for Fair Process, the responding and cross-moving party, appeared by and
7 through its attorney of record, Jayne Ryan Koler of the Law Offices of Jayne Ryan Koler,
8 PLLC. Defendant SHARE/WHEEL appeared by and through its attorneys of record,
9 Theodore Paul Hunter of Sound law Center PLLC and Sean Russel of Ahlers & Cressman.
10 Defendant Mercer Island United Methodist Church appeared by and through its attorney of
11 record, Mark Rising of Helsell Fetterman LLP.

12 THE COURT CONSIDERED the following pleadings, memoranda and briefs by
13 the parties:

- 14 1) *Plaintiff's Motion and Memorandum in Support of Injunctive Relief*, dated
15 July 10, 2008;
- 16 2) *Supplemental memorandum in Support of Injunctive Relief*, dated July 18,
17 2008;
- 18 3) *Defendant SHARE/WHEEL's Response to Request for Injunction*, dated July
19 25, 2008
- 20 4) *Defendant City of Mercer Island's Objections to Evidence*, dated July 25,
21 2008;
- 22 5) *Defendant City of Mercer Island's Response to Plaintiff's Motion for
23 Injunctive Relief*, dated July 25, 2008;
- 24 6) *Defendant City of Mercer Island's Motion for Summary Judgment*, dated
25 August 27, 2008;
- 26 7) *Defendant Mercer Island Methodist Church's Joinder in Motion for
27 Summary Judgment*, dated August 29, 2008;

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 2**

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- 1 8) *Plaintiff's Motion to Shorten Time to Consider Cross-Summary Judgment*
2 *Motion, dated September 11, 2008;*
- 3 9) *Plaintiff's Motion and Memorandum in Support of Cross-Motion for*
4 *Summary Judgment, dated September 15, 2008;*
- 5 10) *Plaintiff's Response to Defendant City of Mercer Island's Motion for*
6 *Summary Judgment, dated September 15, 2008;*
- 7 11) *Defendant City of Mercer Island's Response to Plaintiff's Motion to Shorten*
8 *Time, dated September 17, 2008;*
- 9 12) *Defendant Mercer Island United Methodist Church's Opposition to*
10 *Plaintiff's Motion to Shorten Time, dated September 17, 2008;*
- 11 13) *Plaintiff's Reply in Support of Motion to Shorten Time, dated September 17,*
12 *2008;*
- 13 14) *Defendant Mercer Island United Methodist Church's Objection and Motion*
14 *to File Sur-Reply, dated September 18, 2008;*
- 15 15) *Defendant City of Mercer Island's Motion to Shorten Time, dated September*
16 *22, 2008;*
- 17 16) *Defendant City of Mercer Island's Motion for Overlength Brief, dated*
18 *September 22, 2008;*
- 19 17) *Defendant City of Mercer Island's Reply on Summary Judgment, dated*
20 *September 22, 2008;*
- 21 18) *Defendant SHARE/WHEEL's Brief in Support of Summary Judgment*
22 *Motion, dated September 22, 2008;*
- 23 19) *Defendant Mercer Island United Methodist Church's Reply Brief in Support*
24 *of Motion for Summary Judgment Based on LUPA, dated September 22,*
25 *2008;*
- 26 20) *Order Denying Plaintiff's Motion to Shorten Time, dated September 22,*
27 *2008;*
- 21) *Letter from Plaintiff's Counsel to all Defense Counsel Re: New Hearing*
Date, dated December 30, 2008;
- 22) *Plaintiff's Motion to Continue, dated March 4, 2009;*
- 23) *Plaintiff's Amended Motion to Continue, dated March 4, 2009;*

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 3**

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- 24) *Plaintiff's Reply in Support of Amended Motion to Continue*, dated March 12, 2009;
- 25) *Order Granting Plaintiff's Motion to Continue Hearing and Setting Hearing for April 24, 2009*, dated March 16, 2009.
- 26) *Defendant City of Mercer Island's Response in Opposition to Plaintiff's Cross-Motion for Summary Judgment*, dated April 13, 2009;
- 27) *Declaration of Jane Ryan Koler in Support of Cross Motion for Summary Judgment and Response to City Motion for Summary Judgment*, dated March 31, 2009 [served on April 3, 2009];
- 28) *Response to Mercer Island United Methodist Church Motion for Summary Judgment and SHARE/WHEEL's Motion for Summary Judgment*, dated April 13, 2009;
- 29) *Defendant City of Mercer Island's objection to Plaintiff's Submission of Inadmissible Evidence and Untimely Papers*, dated April 20, 2009;
- 30) *Defendant Mercer Island United Methodist Church's Joinder in Defendant City of Mercer Island's Objection to Plaintiff's Submission of Inadmissible Evidence and Untimely Papers*, dated April 20, 2009;
- 31) *Plaintiff's Reply to City of Mercer Island's Response in Opposition to Plaintiff's Cross-Motion for Summary Judgment*, dated April 20, 2009;
- 32) *Defendant City of Mercer Island's objection to [Plaintiff's] Reply to City Response to Cross Motion for Summary Judgment and Fourth Declaration of Tara Johnson*, dated April 21, 2009;
- 33) *Plaintiff's Motion to Shorten Time to Hearing Motion to Allow Filing of Overlength Reply Brief to City's Response to Plaintiff's Cross-Motion for Summary Judgment*, dated April 21, 2009.
- 34) *Plaintiff's Motion to Allow Filing Overlength Reply Brief to City's Response to Plaintiff's Cross-Motion for Summary Judgment*, dated April 21, 2009;
- 35) *Plaintiff's Response to City of Mercer Island's Objection to Evidence*, dated April 23, 2009;
- 36) *Plaintiff's Additional Authority*, dated April 23, 2009;
- 37) *Plaintiff's Errata Sheet Corrections to March 31, 2009 Declaration of Jane Koler*, dated April 23, 2009;

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 4**

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- 1 38) *Plaintiff's Errata Sheet Corrections to Caption of Response to City of*
2 *Mercer Island's Motion for Summary Judgment, dated April 23, 2009; and*
3 39) *Plaintiff's Response to City of Mercer Island's Objection to Plaintiff's Reply*
4 *to City Response to Cross-Motion for Summary Judgment and Fourth*
5 *Declaration of Tara Johnson, dated April 23, 2009.*

6 THE COURT ALSO CONSIDERED the following affidavits, declarations and
7 evidentiary material, including exhibits appended to each:

- 8 1) *Declaration of Steve Oaks in Support of Plaintiff's Motion and*
9 *Memorandum in Support of Injunctive Relief (July 10, 2008);*
10 2) *Declaration of Tara Johnson in Support of Plaintiff's Motion and*
11 *Memorandum in Support of Injunctive Relief (July 10, 2008);*
12 3) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion and*
13 *Memorandum in Support of Injunctive Relief, and attachments thereto (July*
14 *10, 2008;*
15 4) *Second Declaration of Tara Johnson in Support of Plaintiff's Supplemental*
16 *Memorandum in Support of Injunctive Relief, and attachments thereto (July*
17 *18, 2008);*
18 5) *Affidavit of Scott Morrow in Support of Defendant SHARE/WHEEL's*
19 *Response to Plaintiff's Request for Injunction (July 25, 2008);*
20 6) *Declaration of Bruce Thomas in Support of Defendant SHARE/WHEEL's*
21 *Response to Plaintiff's Request for Injunction (July 25, 2008);*
22 7) *Declaration of Karisa Vaughn in Support of Defendant SHARE/WHEEL's*
23 *Response to Plaintiff's Request for Injunction (July 25, 2008);*
24 8) *Declaration of Deborah Colley in Support of Defendant SHARE/WHEEL's*
25 *Response to Plaintiff's Request for Injunction (July 25, 2008);*
26 9) *Declaration of Scott Briggs Morrow in Support of Defendant*
27 *SHARE/WHEEL's Response to Plaintiff's Request for Injunction, (July 25,*
2008);
10) *Declaration of Joyce Trantina in Support of the City of Mercer Island's*
Response to the Plaintiff's Motion for Injunctive Relief, and attachments
thereto (July 25, 2008);

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 5**

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- 11) *Declaration of Eileen Robinson in Support of the City of Mercer Island's Response to the Plaintiff's Motion for Injunctive Relief* (July 25, 2008);
- 12) *Declaration of Katie H. Knight in Support of the City of Mercer Island's Response to the Plaintiff's Motion for Injunctive Relief*, and attachments thereto [filed with the Court in conjunction with Plaintiff's TRO and Preliminary Injunction Motion] (July 25, 2008);
- 13) *Declaration of Linda Herzog in Support of Defendant City of Mercer Island's Motion for Summary Judgment Re: All Remaining Claims*, attachments thereto (August 25, 2008);
- 14) *Declaration of Allison Spietz in Support of Defendant City of Mercer Island's Motion for Summary Judgment Re: All Remaining Claims*, and exhibits thereto (August 26, 2008);
- 15) *Declaration of Reverend Leslie Ann Knight in Support of Defendant City of Mercer Island's Motion for Summary Judgment Re: All Remaining Claims* (August 27, 2008);
- 16) *Declaration of Laura K. Crowley in Support of Plaintiff's Motion to Shorten Time to Consider Plaintiff's Cross-Motion for Summary Judgment, or in Alternative, to Change/Extend Mercer Island's Summary Judgment Motion* (September 11, 2008);
- 17) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion and Memorandum in Support of Cross-Motion for Summary Judgment*, and attachments thereto (September 15, 2008);
- 18) *Third Declaration of Tara Johnson in Support of Plaintiff's Motion and Memorandum in Support of Cross-Motion for Summary Judgment*, and attachments thereto (September 15, 2008);
- 19) *Declaration of Jane Ryan Koler in Support of Plaintiff's Response to Defendant City of Mercer Island's Motion for Summary Judgment*, and attachments thereto (September 15, 2008);
- 20) *Declaration of Joy Johnston in Support of Defendant City of Mercer Island's Response to Plaintiff's Motion to Shorten Time* (September 17, 2008);
- 21) *Declaration of Michael C. Walter in Support of Defendant City of Mercer Island's Reply on Summary Judgment*, and attachments thereto (September 22, 2008);
- 22) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion to Continue*, and attachments thereto (March 4, 2009);

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 6**

- 1 23) *Declaration of Jeremy Culumber Re: Scheduling Summary Judgment Motion*
2 *Hearing (March 10, 2009);*
- 3 24) *Declaration of Jane Ryan Koler in Support of Response to Methodist Church*
4 *and SHARE/WHEEL's Motion for Summary Judgment (April 12, 2009);*
- 5 25) *Fourth Declaration of Tara Johnson (April 20, 2009);*
- 6 26) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion to Shorten*
7 *Time to Hear Plaintiff's Motion to Allow Filing of Overlength Reply Brief*
8 *(April 21, 2009);*
- 9 27) *Fifth Declaration of Tara Johnson, and attachments thereto (April 23, 2009);*
 and
- 10 28) The pleadings, papers and other evidence presently on file with the Court
 Clerk.

11 THE PARTIES' MOTIONS AND CROSS-MOTIONS were consolidated by the
12 Court on September 22, 2008, and were heard together. The Court decided these motions
13 after hearing argument by counsel for the parties on April 24, 2009, and considered that
14 argument in addition to and in conjunction with the foregoing pleadings, memoranda,
15 affidavits and other evidentiary materials.

16 BASED ON THE FOREGOING and pursuant to CR 56(c), the Court finds as
17 follows: (1) There are no disputed material facts with respect to Defendant City of Mercer
18 Island's Motion for Summary Judgment Re: All Remaining Claims dated August 28, 2008,
19 the City of Mercer Island's request for Summary Judgment on the merits as set forth in the
20 City's Response brief in Opposition to Summary Judgment dated April 13, 2009, or Plaintiff
21 Mercer Island Citizens for Fair Process's Cross-Motion for Summary Judgment dated
22 September 15, 2008; (2) that the issues presented the parties' motions are pure questions of
23 law, and that law is clear; (3) as a matter of law and based on the undisputed facts in the
24 record Plaintiff's Cross-Motion for Summary Judgment fails, and Plaintiff cannot establish
25 liability against the City of Mercer Island for a due process violation or for damages or
26 attorney's fees under 42 U.S.C. §1983 and §1988 or for any other relief and, therefore,

27 **ORDER GRANTING SUMMARY JUDGMENT
 TO DEFENDANT CITY, DENYING
 PLAINTIFF'S MOTION FOR S.J.,
 AND DISMISSING CASE WITH PREJUDICE.**

7 KEATING, BUCKLIN & MCCORMACK, INC., P.S.

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1 Plaintiff's Motion for summary judgment must be denied; and (4) that as a matter of law
2 and based on the undisputed facts in the record, Defendant City of Mercer Island is entitled
3 to dismissal of all claims against the City in the Plaintiff's First Amended Complaint and,
4 therefore, the City of Mercer Island is entitled to Summary Judgment pursuant to City's
5 Motion for Summary Judgment Re: All Remaining Claims dated August 28, 2008 and on the
6 merits of Plaintiff's remaining claims as set forth in the City's Response in Opposition to
7 Plaintiff's Cross-Motion for Summary Judgment dated April 13, 2009.

8 NOW, THEREFORE, IT IS HEREBY:

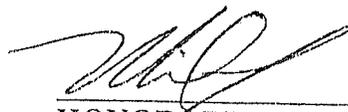
9 ORDERED, ADJUDGED AND DECREED that Defendant City of Mercer Island's
10 Motion for Summary Judgment Re: All Remaining Claims dated August 28, 2008, and the
11 City's request for Summary Judgment on the merits as set forth in its Response in
12 Opposition to Plaintiff's Cross-Motion for Summary Judgment dated April 13, 2009, is
13 hereby **GRANTED**; and, it is hereby further

14 ORDERED, ADJUDGED AND DECREED that the Plaintiff's Cross-Motion for
15 Summary Judgment dated September 15, 2008 is hereby **DENIED**; and, it is hereby further

16 ORDERED, ADJUDGED AND DECREED that all of the remaining claims and
17 causes of action in the Plaintiff's First Amended Complaint are hereby dismissed with
18 prejudice, and Plaintiff's First Amended Complaint is hereby dismissed in its entirety, and
19 without costs to the Plaintiff; and, it is hereby further

20 ~~ORDERED, ADJUDGED AND DECREED that the Defendant City of Mercer~~
21 ~~Island is the prevailing party on these motions and is, therefore, entitled to statutory~~
22 ~~attorneys' fees and costs.~~

23 DATED this 24 day of April, 2009.

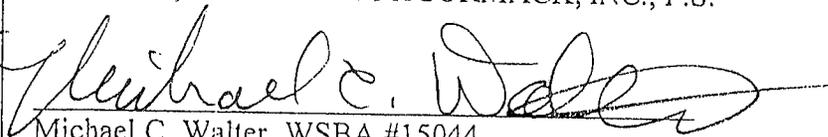
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HONORABLE MICHAEL FOX, JUDGE

27 **ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 8**

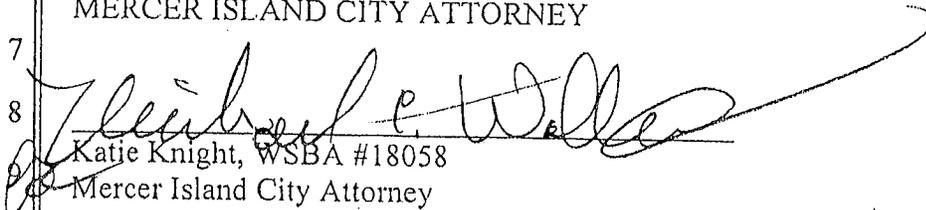
KEATING, BUCKLIN & MCCORMACK, INC., P.S.
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1 Presented by:

2 KEATING, BUCKLIN & McCORMACK, INC., P.S.

3
4 
5 Michael C. Walter, WSBA #15044
6 Attorneys for Defendant City of Mercer Island

7 MERCER ISLAND CITY ATTORNEY

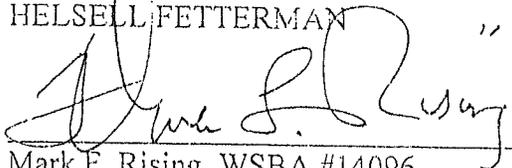
8 
9 Katie Knight, WSBA #18058
10 Mercer Island City Attorney

11 Notice of presentation acknowledged and waived;
12 Approved for entry:

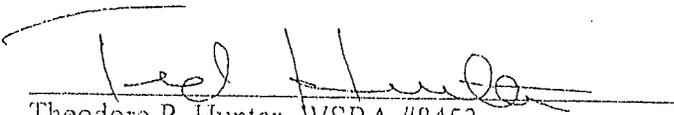
13 LAW OFFICES OF JANE KOLER

14 
15 Jane Ryan Koler, WSBA #13541
16 Attorneys for Plaintiff

17 HELSELL FETTERMAN

18 
19 Mark F. Rising, WSBA #14096
20 Attorneys for Mercer Island United Methodist Church

21 TED HUNTER, ATTORNEY AT LAW

22 
23 Theodore P. Hunter, WSBA #8453
24 Attorneys for SHARE/WHEEL

25
26
27 ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 9

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Sean Russell, *W. P. A.*
Sean Russell, WSBA #34915
Attorneys for SHARE/WHEEL

ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 10

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