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**FILED**  
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CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 63504-2-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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MERCER ISLAND CITIZENS FOR FAIR PROCESS,

Petitioners,

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.

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2010 AUG 11 AM 11:54

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**MERCER ISLAND CITIZENS FOR FAIR PROCESS  
PETITION FOR REVIEW**

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JANE RYAN KOLER  
W.S.B.A. No. 13541  
Attorney for Petitioners

Law Office of Jane Ryan Koler, PLLC  
5801 Soundview Drive, Suite 258  
P.O. Box 2509  
Gig Harbor, WA 98335

ORIGINAL

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## **I. IDENTITY OF PETITIONER**

Petitioner Mercer Island Citizens for Fair Process (“Citizen Association”) seeks review of the published Court of Appeals decision designated in Section II of this petition.

## **II. COURT OF APPEALS DECISION**

This Court should review the June 1, 2010, published decision of the Court of Appeals Division I (“Decision”). A copy of the Decision is attached as Appendix A. The Decision has been published at 156 Wn.App. 393, 232 P.3d 1163 (2010). Petitioners filed a motion for reconsideration which was denied on July 13, 2010. A copy of the order denying the motion is attached as Appendix B.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Does the Court of Appeals’ imposition of Land Use Petition Act deadlines on claims under 42 U.S.C. § 1983 warrant review because it violates federal preemption under the United States Constitution and conflicts with decisions of this Court?
2. Does the Court of Appeals’ subjection of damages claims to LUPA deadlines warrant review because it conflicts with decisions of this Court and the laws of Washington?
3. Does the Court of Appeals’ imposition of a 21-day statute of limitations for constitutional rights violation claims under 42 U.S.C. § 1983 warrant review because it is an issue of substantial public interest?

#### IV. STATEMENT OF THE CASE

**A. 42 U.S.C. § 1983 provides redress for violation of Constitutional Rights by government actors.**

42 U.S.C. § 1983 (“Section 1983”) provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, ...subjects, ... any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law... or other proper proceeding for redress[.]

42 U.S.C. § 1983.<sup>1</sup> Section 1983 provides “an avenue of redress to persons injured by the actions of government which violate federal constitutional rights.” *Robinson v. City of Seattle*, 119 Wn.2d 34, 58, 830 P.2d 318 (1992). “Section 1983 has been used often as a means of redress when government land use regulation infringes upon federal constitutional ...rights through violations ... of due process.” *Id.* It allows recovery of money damages when a person shows he or she was deprived of a federal right. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765 (1992).

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<sup>1</sup> A copy of 42 U.S.C. § 1983 is attached as Appendix C.

**B. The Citizen Association brought suit under Section 1983 to address violations of the United States Constitution by the Mercer Island City Council.**

On June 16, 2008, the Mercer Island City Council approved a temporary use agreement (“TUA”) with the Mercer Island United Methodist Church and Tent City to open and operate Tent City 4, a temporary encampment for homeless individuals. *See* CP 171-77<sup>2</sup>. The Mercer Island Municipal Code (“MIMC”) 19.02.010<sup>3</sup> does not authorize such an encampment in a single-family residential zone, yet the TUA was granted. The city granted the TUA after two years of discussion between the above-named respondents in which the terms and contents of the TUA were worked out. The Mercer Island City Code does not authorize a temporary use agreement of any kind.

The Citizen Association filed a complaint against the City and Tent City and the United Methodist Church on July 10, 2008. CP 9. The Citizen Association claimed that the City of Mercer Island violated its right to due process by (1) failing to give citizens adequate notice of the City Council meeting at which it considered the temporary use agreement; (2) engaging in arbitrary conduct when it misrepresented facts about the encampment to citizens at the public meeting; and (3) authorized an encampment prohibited by the City Code without amending the City Code

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<sup>2</sup> A copy of selected cited Clerk Papers is attached as Appendix D.

<sup>3</sup> A copy is attached as Appendix E

to authorize the encampment. CP 1-9. The Citizen Association asserted claims alleging due process violation, nuisance, ultra vires, and sought damages under Section 1983. *Id.* It also sought an injunction and temporary restraining order against the TUA. The court denied the motion for the temporary restraining order. CP 79-84.

On August 29, 2008 the City moved for summary judgment to dismiss the remaining claims of the Citizen Association. The Citizen Association told the trial court that it was taking a voluntary non-suit on both its ultra vires claim and its nuisance claim and that it was not appealing the temporary use contract but was solely seeking relief based on its request for declaratory judgment on its due process claim and its Section 1983 claim.<sup>4</sup> CP 182. The trial court granted the City summary judgment on the grounds that the claims should have been submitted in a Land Use Petition Act (“LUPA”) claim. CP 315-23; *see generally* RCW 36.70C.<sup>5</sup> The Citizen Association brought timely appeal of this decision.

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<sup>4</sup> It should be noted that the Citizen Association’s due process claim was expanded beyond the scope of their initial complaint. See CR 15(b) (“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings”). On cross-motion for Summary Judgment, the Citizen Association argued an expanded due process claim which was not objected to by Respondents. *See Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766-768, 733 P.2d 530 (1987). They expanded their due process claims because they filed their initial complaint in a virtual information vacuum before the Association had been provided with public records about the encampment.

<sup>5</sup> Selected portions of LUPA are attached as Appendix F. LUPA requires appeals to be brought within 21 days of the land use decision. RCW 36.70C.040(3).

**C. The Court of Appeals held that the Section 1983 claim was subject to the procedural requirements of LUPA.**

The Court of Appeals held in *Mercer Island Citizens for Fair Process v. Tent City*, 156 Wn.App. 393, 232 P.3d 1163 (2010), that the trial court had properly dismissed the Citizen Association's Section 1983 claim because the Citizen Association had failed to challenge the agreement between Tent City and the City of Mercer Island through a LUPA appeal. It cited no authority which supported the proposition that the assertion of a LUPA appeal is a necessary prerequisite to filing a federal damage claim based on Section 1983. *See* CP 201-05.

Despite the Mercer Island Municipal Code prohibiting temporary uses such as the encampment, *see* MIMC 19.02.010, and not authorizing any city official, including the City Council, to approve temporary use agreements, the Court of Appeals first held that the TUA was a land use decision subject to RCW 36.70C.020(2) which addresses "approvals required by law" by the highest government official charged with making the decision. 156 Wn.App. at 398-99. The Court of Appeals failed to identify what law authorized the City Council to approve an outdoor encampment that violated the zoning code.

Although the Citizen Association told the trial court that it was taking a voluntary non-suit on both its ultra vires claim and its nuisance

claim and that it was not appealing the temporary use contract but was solely seeking relief based on its request for declaratory judgment on its due process claim and its Section 1983 claim, CP 182, the Court of Appeals concluded that the Citizen Association was challenging the City decision approving a temporary use contract with Tent City and that the failure to do so in a LUPA appeal precluded its due process claim as well as the Section 1983 damage claim. 156 Wn.App. at 401-03.

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**A. Summary of Argument**

This Court should accept review of this case because the Court of Appeals' requirement of filing a successful LUPA claim as a prerequisite for a Section 1983 claim clearly conflicts with established law. The Court of Appeals articulated this requirement without any support from legal authorities; its decision directly contradicts the United States Constitution, federal case law, Washington case law, and the clear language of the LUPA statute. Further, such a requirement frustrates the purpose of Section 1983 and robs the public of the ability to vindicate constitutional rights.

First, the supremacy clause of the United States Constitution does not allow state procedural requirements such as a LUPA appeal to interfere with vindication of federal constitutional rights. Both federal and

state courts have consistently held that such local procedural requirements must yield in Section 1983 actions.

Second, the Court of Appeals' requirement of filing a LUPA appeal and the subjection of the Section 1983 claim to LUPA deadlines clearly conflicts with the text of the LUPA statute. Neither the terms of LUPA, Washington cases interpreting LUPA, nor Washington Supreme Court cases such as *Post v. City of Tacoma* support the Court of Appeals' conclusion that the failure to assert a LUPA claim precludes assertion of a Section 1983 claim. To the contrary, courts have consistently held that damages claims are not subject to LUPA deadlines. The Court of Appeals reached its erroneous conclusion by reliance on out-of-context dictum. Its decision creates a dangerous and absurd situation whereby the public is unable to seek vindication for constitutional violations in actions touching and concerning land unless a Section 1983 claim is filed within 21 days of such violation.

**B. Legal Standard for Evaluating a Petition for Review**

The Rules of Appellate Procedure provide that this Court may review a Court of Appeals decision if any one of four standards is satisfied:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision

of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). In this matter, all four of these standards are met.

**C. The Court of Appeals erroneously allows state procedures to preempt vindication of federal rights in conflict with United State Constitution and caselaw.**

The Court of Appeals' requirement of a state procedural filing — the filing of a successful LUPA appeal<sup>6</sup> — interferes with and frustrates vindication of Petitioner's rights under Section 1983. It is the purpose of Section 1983 "to provide a remedy to be broadly construed against all forms of official violation of federally protected rights." *Monnell v. Dept. of Social Serv's*, 436 U.S. 658, 700-701, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1987). As the United States Constitution<sup>7</sup> and case law provides that state law procedures cannot interfere with the vindication of federal rights under Section 1983, any state procedures, including those in LUPA, that

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<sup>6</sup> Inexplicably, the Court of Appeals found that the TUA was a land use decision under RCW 36.70C.020(2) as it was an "application for ...governmental approval required by law." *Mercer Island Citizens* at 1166. The court held this despite MIMC provisions which explicitly disallow temporary encampments. *See* MIMC 19.02.010. Further, the MIMC 19.15.010E lists land use decisions and that code list does not identify a temporary use agreement as being a land use decision. Thus, an action the City was barred from doing was found to be "required by law" because the City was seeking to avoid lawsuit from those involved with Tent City, but wished at the same time to avoid the political difficulties of amending the MIMC. All of the decisions defined by LUPA as being land use decisions must be based on adopted local laws. Any other construction of LUPA robs it of the predictability which the legislature intended to build into the land use appeal process by enacting LUPA.

<sup>7</sup> The applicable Article has been attached as Appendix G.

interfere with vindication of petitioner's rights under Section 1983 must yield. Any requirement otherwise conflicts with established law.

**1. The Court of Appeals conflicts with the supremacy clause of the United State Constitution.**

The Court of Appeals, by requiring Petitioner to have a successful LUPA claim before asserting a claim under Section 1983, places a state procedural requirement above federal law in violation of the supremacy clause. The proper result is dictated by the United States Constitution's supremacy clause, which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby..." U. S. Const. Art. VI, Clause 2. Section 1983 provides "an avenue of redress to persons injured by the actions of government which violate federal constitutional rights". *Robinson*, 119 Wn.2d at 58.

The Court of Appeals has improperly created the additional step of a successful state LUPA claim when a citizen pursues remedy for violation of his or her constitutional rights. Thus, the Decision causes a state procedural requirement to unlawfully preempt federal law.

**2. The Decision conflicts with federal and state cases interpreting the United States Constitution.**

The Court of Appeals decision ignores United States Supreme Court caselaw holding that state law procedures cannot interfere with the

vindication of federal rights under Section 1983. *Felder v. Casey*, 487 U.S. 131, 138, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). In *Felder*, the Court found that a state notice of claim requirement interfered impermissibly with an individual's right to assert a Section 1983 claim and that the state claim statute was pre-empted by Section 1983 by virtue of the supremacy clause. 487 U.S. at 138. The Court has

disapproved the adoption of state statutes of limitation that provide only a truncated period of time within which to file [a Section 1983] suit, because such statutes inadequately accommodate the complexities of federal civil rights litigation, and are thus inconsistent with Congress' compensatory aims.

*Id* at 139-40. Further, Section 1983 preempts state procedures that frustrate its purpose "to provide a remedy to be broadly construed against all forms of official violation of federally protected rights." *Monnell*, 436 U.S. at 700-701; *See* Motion for Reconsideration.<sup>8</sup>

This Court has also held that it is improper to require the pursuit of administrative remedies for violation of constitutional rights. *Sintra, Inc.*, 119 Wn.2d at 21 (exhaustion of administrative remedies was not required under Section 1983 for due process claims).

Requiring a valid and timely LUPA claim for this Section 1983 action is akin to requiring pursuit of an administrative remedy. The constitutional rights that have been violated in this instance do not require

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<sup>8</sup> A copy of the Motion for Reconsideration has been attached as Appendix H.

a valid LUPA claim in order for the violation to be remedied; Section 1983 provides an appropriate avenue for Petitioner to pursue remedies. The Court of Appeals' proposition that Petitioner must assert such a LUPA claim ignores the supremacy clause and that the right to seek redress for violations of federal constitutional rights pre-empts and prevents any local statute or state procedures which frustrate the purpose of Section 1983.

The Court of Appeals incorrectly interprets *Asche v. Bloomquist*, 132 Wn.App 784, 233 P.3d 475 (2006), as dispositive of Petitioner's Section 1983 claims. Although the plaintiff in *Asche* claimed lack of notice, there is no indication in the case that the plaintiff was seeking damages under Section 1983 or that there was pursuit of monetary damages outside of the challenge to an issued permit. *Id* at 796-99. Further, as the court recognized in *Asche*, "[c]laims that do not depend on the validity of a land use decision are not barred." *Id* at 800. The Court of Appeals ignores this clear statement of law in *Asche* and wrongly applied the case to bar Petitioner's Section 1983 claims.

The Court of Appeals ignores these principles of law and instead requires pursuit of a state statutory remedy in order to preserve the ability to vindicate federal constitutional rights under Section 1983. This Court should accept review of this case because the decision below violates the

supremacy clause of the United States Constitution and cases decided by this Court. No actual authority supports the Court of Appeals' decision that the failure to challenge the temporary use contract with Tent City barred the Citizen Association from asserting a damage claim based on Section 1983.

**D. The Court of Appeals erroneously subjects damage claims under Section 1983 to LUPA deadlines in conflict with existing law and against the interest of the public.**

Unlike LUPA, which is subject to a 21-day period of limitations, Section 1983 claims are governed by a three-year statute of limitations. *Robinson*, 119 Wn.2d at 86. The Court of Appeals has deprived Petitioner of that three-year period of limitation and requires it to assert a Section 1983 claim within a 21-day period despite clear language in the LUPA statute which requires otherwise. It was not the intent of the legislature to impose such a requirement; the LUPA statute clearly specifies that damage actions are not subject to LUPA or its period of limitations and the courts have consistently upheld this interpretation. As a matter of practice, subjecting Section 1983 claims to a mere 21-day period of limitations thwarts the right to assert such claims.

**1. The Court of Appeals decision conflicts with the plain language of RCW 36.70C.030.**

The Court of Appeals' requirement that an action for damages under Section 1983 must follow the deadlines set in LUPA directly contradicts a plain reading of LUPA. The statute clearly states:

This chapter ... does not apply to... [c]laims 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.

RCW 36.70C.030(1)(c). Despite this clear law, the Court of Appeals held that Petitioner's claim for damages under Section 1983 was reliant upon Petitioner's assertion of a valid LUPA claim. *Mercer Island Citizens*, 156 Wn.App. at 405. As the language of the statute shows, it was not the intent of the legislature to impose such a requirement. By holding that a claim for damages is subject to the deadlines of LUPA, the Court of Appeals' decision directly conflicts with the plain terms of the statute.

**2. The Court of Appeals erroneously supplants established caselaw with conflicting dictum.**

Beyond the text of the statute, case law further affirms that damage claims are not subject to the restrictions and deadlines set forth in LUPA. The Court of Appeals' decision clearly conflicts with and disregards the cases decided by this Court.

The Court recently affirmed that damage claims are not subject to LUPA. *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009). In *Post*, this Court held that the system of fines and penalties used by a municipality's building code violated a citizen's right to due process as there was no meaningful method to review the penalties. *Id* at 314. The Court recognized that a claim for damages is not controlled by the deadlines and standards of LUPA "even when a claim pertains to a 'land use decision,' if the remedy sought is for money damages or compensation..." *Id* at 312.

Further, appellate courts have held that LUPA does not apply to actions which do not challenge land use decisions. *Berst v. Snohomish County*, 114 Wn.App. 245, 57 P.3d 273 (2003), *review denied*, 150 Wn.2d 1015 (2003). In *Berst*, the court held that LUPA deadlines did not preclude a due process challenge to a moratorium; as the challenge did not directly attack the county refusal to issue a building permit, the court held that LUPA did not apply and the due process challenge could proceed. 114 Wn.App at 277. Similarly, the current case does not involve a challenge of the tent city contract but rather is related to constitutional violations and thus should not be subject to the requirements of LUPA. As such, the Court of Appeals' decision conflicts with the reasoning of *Berst*.

The Court of Appeals' decision ignores *Post* and *Berst*, and relies on dictum found in *Shaw v. City of Des Moines*, 109 Wn.App. 896, 37 P.3d 1255 (2002), to find that "claims for damages based on a LUPA claim must be dismissed if the LUPA claims fails." *Mercer Island Citizens*, 156 Wn.App. at 405. The *dictum* from *Shaw* upon which the Court of Appeals relied states: "If the petitioner loses the LUPA appeal, the damages case is moot and the matter is over." *Shaw*, 109 Wn.App. at 901-02. This proposition, however, had no bearing upon the outcome of *Shaw* and *Shaw* cites no authority for it. *Shaw* was not enunciating a new legal premise; it merely described how a computer-generated case schedule was issued and followed when both LUPA and damages claims are asserted in a single complaint. *Id.* The Court of Appeals' reliance on a description of computer-generated case schedules improperly uses *Shaw* to justify its erroneous holding that Section 1983 claims are subject to LUPA deadlines and ignores the terms of the LUPA statute RCW 36.700.030(1)(C). Further, *Shaw* dealt ultimately with a party's failure to enter a proposed order after a successful LUPA challenge. *Id.* at 898-99. There is no language whatsoever in *Shaw* supporting the premise that a successful LUPA case is a necessary procedural prerequisite to a Section 1983 claim.

Although the validity of the alleged land use decision may not be challenged, this does not require the forfeiture of a right of action for violation of constitutional rights under Section 1983. An appeal of the temporary use contract under LUPA should be treated as separate from a claim for damages for violation of petitioner's constitutional rights. This is the type of situation mentioned in *Post*, in which a "claim [which] pertains to a 'land use decision,'" seeks remedy of monetary damage and thus is not subject to LUPA deadlines. *See Post*, 167 Wn.2d at 312. As such, the *dictum* found in *Shaw* is not controlling or applicable in the current case and should not be allowed to overrule the clear language of LUPA, *Post*, or *Berst*. The Court of Appeals erred in basing its decision upon it.

The Court of Appeals, by making the assertion of a Section 1983 claim dependent on the assertion of a valid LUPA claim, further ignores that an action for constitutional injury accrues the moment that the injury occurs. Thus, at that moment, a plaintiff is entitled to nominal damages. *See Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252 (1978). The success of an ancillary LUPA appeal cannot dictate whether an independent Section 1983 claim for damages is allowed. Case law does not support the Court of Appeals' conclusion that

the right to seek vindication of federal rights and federal constitutional rights only accrues after assertion of a valid LUPA claim.

**3. The Court of Appeals' decision conflicts with the public's interest in vindicating Constitutional rights.**

Finally, the Court of Appeals, by imposing a 21-day period of limitations, creates a situation whereby the public would be unable to successfully protect its constitutional rights. By the expiration of the 21-day LUPA period of limitations, it is doubtful that a litigant would have sufficient time to properly plead a Section 1983 claim. Certainly, in that limited period, it is unlikely that a litigant would have enough time to obtain and examine all the public records in a particular case which would disclose the involvement of various public officials in a constitutional violation.<sup>9</sup> Reading extra requirements into the assertion of a Section 1983 claim undermines the broad remedial purpose of the statute to give citizens a remedy for constitutional violations and to deter government officials from committing such violations. The Court of Appeals' decision frustrates the remedial purposes of Section 1983. *See Felder*, 487 U.S. at 145-146 (four-month period in which Section 1983 claims had to be asserted would not leave victims enough time to comprehend violations of their rights). If "victims will frequently fail to recognize within the 4-

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<sup>9</sup> Here for example, the Citizen Association did not understand full scope of its due process claim until it had the opportunity to examine public records.

month statutory period that they have been wronged at all”, *Id* at 146 n. 3, then certainly they will not comprehend the violation of their rights within 21 days.

There is simply no language in LUPA which suggests that the Washington State Legislature was attempting to limit the rights of citizens to seek vindication of their federal constitutional rights; LUPA should not be interpreted to create a procedural requirement permitting a government agency to insulate itself from liability for unconstitutional actions and deprive citizens of the ability to seek redress for constitutional violations. The Court of Appeals’ requirement that citizens must file a Section 1983 claim for damages within the 21-day LUPA period of limitations directly conflicts with statutory and case law. Such a result is not in the public’s interest as it strips citizens of the ability to seek redress for violation of their constitutional rights.

## VI. CONCLUSION

The Court of Appeals errs in requiring a successful LUPA claim as a prerequisite for a Section 1983 claim. Such a holding directly conflicts with established constitutional jurisprudence. Further, the imposition of the 21-day LUPA deadline upon a Section 1983 claim is barred by the express language of the statute and by the decisions of this Court, as well as multiple divisions of the Court of Appeals. No actual authority

supports the Court of Appeals' decision that the failure to challenge the temporary use agreement issued to Tent City barred the Citizen Association from asserting a damage claim based on Section 1983. For these reasons, Petitioners respectfully request that the Court grant this Petition for Review.

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Dated this 9 day of August, 2010.

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Respectfully submitted,

By:   
JANE RYAN KOLER, WSBA 13541  
Attorney for Mercer Island Citizens for  
Fair Process, Petitioner

# **APPENDIX A**

Court of Appeals of Washington,  
Division 1.  
MERCER ISLAND CITIZENS FOR FAIR PROC-  
ESS, Appellant,

v.

TENT CITY 4, an unincorporated Washington asso-  
ciation; Share/Wheel, an advocacy organization  
comprised of the Seattle Housing and Resource Ef-  
fort ("SHARE") and the Women's Housing Equality  
and Enhancement League ("WHEEL"), a Washing-  
ton non-profit corporation; Mercer Island United  
Methodist Church, a Washington non-profit corpora-  
tion, and the City of Mercer Island, a Washington  
municipal corporation, Respondents.

No. 63504-2-1.

June 1, 2010.

**\*\*1164** Jane Ryan Koler, Law Office of Jane Ryan  
Koler PLLC, Gig Harbor, WA, for Appellant.

Kathleen H. Knight, City of Mercer Island, WA,  
Michael Charles Walter, Keating Bucklin McCormack  
Inc. PS, Seattle, WA, for Respondent, City of  
Mercer Island.

Ted Paul Hunter, Attorney at Law, Seattle, WA, Sean  
Adam Russel, Stokes Lawrence Velikanje Moore &  
Shore, Yakima, WA, for Respondent, Share Wheel.

Ted Paul Hunter, Attorney at Law, Seattle, WA,  
Mark. F. Rising, Helsell Fetterman LLP, Seattle,  
WA, for Respondent, United Methodist Church.

GROSSE, J.

**\*395** ¶ 1 The failure to timely challenge a land use  
decision by means of a Land Use Petition Act  
(LUPA) <sup>FN1</sup> petition bars any further claims challeng-  
ing 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 prop-

erty use. Thus, the plaintiff's failure to **\*396** chal-  
lenge 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 sim-  
ply challenges to the approval of the temporary use  
agreement. Accordingly, we affirm.

FN1. Chapter 36.70C RCW.

## FACTS

¶ 2 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 Ef-  
fort and the Women's Housing Equality and En-  
hancement League (SHARE/WHEEL). Over the next  
two years, the City, MICA, and SHARE/WHEEL  
explored options for hosting Tent City 4.

¶ 3 In the spring of 2007, MICA announced its intent  
to have the Mercer Island United **\*\*1165** 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. <sup>FN2</sup>

FN2. MICC 19.02.010.

¶ 4 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 deter-  
mined 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 re-  
quirements would be met.

¶ 5 In May 2008, MICA leadership invited city staff  
to meet with a newly-appointed Tent City 4 sub-

committee and \*397 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.

¶ 6 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.

¶ 7 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.

¶ 8 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 \*398 encampment was scheduled to open on church property. The group did not appeal the court's denial of the temporary restraining order.

¶ 9 On August 28, 2008, the City moved for summary judgment, seeking dismissal of the group's re-

maintaining claims.<sup>FN3</sup> 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.

FN3. The group voluntarily dismissed its nuisance claim.

## ANALYSIS

[1] ¶ 10 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.

\*\*1166 ¶ 11 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.<sup>FN4</sup>

FN4. RCW 36.70C.010.

“[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.’ ”<sup>FN5</sup>

FN5. Habitat Watch v. Skagit County, 155 Wash.2d 397, 407, 120 P.3d 56 (2005) (quoting RCW 36.70C.030(1)).

¶ 12 Under RCW 36.70C.020(2),<sup>FN6</sup> LUPA defines “land use decision” as

FN6. 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).

\*399 a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with au-

thority 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.<sup>FN7</sup>

FN7. RCW 36.70C.020(2).

[2][3] ¶ 13 A land use decision becomes unreviewable by the courts if not appealed to the superior court within LUPA's specified 21-day timeline.<sup>FN8</sup> Once the 21-day period passes, a land use decision becomes final and binding and is deemed valid and lawful.<sup>FN9</sup> Thus, "even illegal decisions must be challenged in a timely, appropriate manner."<sup>FN10</sup>

FN8. *Habitat Watch*, 155 Wash.2d at 406-07, 120 P.3d 56; RCW 36.70C.040(3).

FN9. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 182, 4 P.3d 123 (2000).

FN10. *Habitat Watch*, 155 Wash.2d at 407, 120 P.3d 56.

¶ 14 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 \*400 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.

¶ 15 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 \*\*1167 homeless encampments.<sup>FN11</sup> 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:

FN11. 166 Wash.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).

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.

¶ 16 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\*401 that the TUA does not fall within the other two categories defined by subsections (2)(b) and (c).

¶ 17 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.

¶ 18 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.

¶ 19 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.

\*402 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 U.S.C. Section 1983.

¶ 20 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

\*\*1168 (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.

¶ 21 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 \*403 and therefore subject to LUPA.<sup>FN12</sup> As the court recognized, "LUPA applies even when the litigant complains of lack of notice under the procedural due process clause."<sup>FN13</sup> 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."<sup>FN14</sup> The court further held that LUPA precluded a nuisance claim because it depended entirely upon a finding that the challenged permit was invalid.<sup>FN15</sup> 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.<sup>FN16</sup>

FN12. 132 Wash.App. 784, 133 P.3d 475 (2006).

FN13. Asche, 132 Wash.App. at 798, 133 P.3d 475.

FN14. Asche, 132 Wash.App. at 799, 133 P.3d 475.

FN15. Asche, 132 Wash.App. at 801, 133 P.3d 475.

FN16. See Robinson v. City of Seattle, 119 Wash.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").

¶ 22 The case cited by the group, *Berst v. Snohomish County*,<sup>FN17</sup> 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.<sup>FN18</sup> 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.<sup>FN19</sup> The Bersts decided not to apply for the short plat but instead applied for a permit for a larger \*404 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.<sup>FN20</sup> Rather, the Bersts sought a declaratory judgment that the FPA did not support the moratorium, challenging its imposition without prior notice or a hearing.<sup>FN21</sup>

FN17. 114 Wash.App. 245, 57 P.3d 273 (2002).

FN18. 114 Wash.App. at 253-54, 57 P.3d 273.

FN19. Berst, 114 Wash.App. at 248-49, 57 P.3d 273.

FN20. Berst, 114 Wash.App. at 249-50, 57 P.3d 273.

FN21. Berst, 114 Wash.App. at 249-50, 57 P.3d 273.

¶ 23 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.<sup>FN22</sup> \*\*1169 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).

FN22. Berst, 114 Wash.App. at 254, 57 P.3d

273. The court further noted that the county did not argue that its decision fit within any of the categories defined in the statute.

¶ 24 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.<sup>[FN23]</sup>

FN23. RCW 36.70C.030(1)(c).

[4] \*405 ¶ 25 But as the case law recognizes, claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails.<sup>FN24</sup> 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.

FN24. See *Shaw v. City of Des Moines*, 109 Wash.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 Wash.App. at 800, 133 P.3d 475 (LUPA precluded nuisance claim for damages because it depended entirely upon a finding that the challenged permit was invalid).

¶ 26 We affirm.

WE CONCUR: DWYER, C.J., and ELLINGTON, J.  
Wash.App. Div. 1,2010.

Mercer Island Citizens for Fair Process v. Tent City 4  
156 Wash.App. 393, 232 P.3d 1163

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# **APPENDIX B**

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

MERCER ISLAND CITIZENS FOR FAIR PROCESS, )

Appellant, )

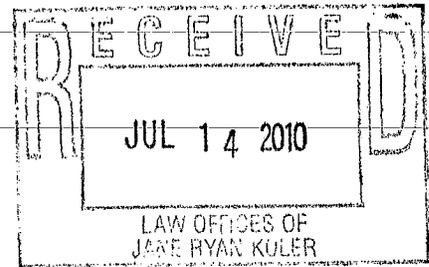
v. )

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. 63504-2-1

ORDER DENYING MOTION FOR RECONSIDERATION



The appellant, Mercer Island Citizens for Fair Process, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 13<sup>th</sup> day of July, 2010.

FOR THE COURT:

Grosse, J

Judge

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STATE OF WASHINGTON  
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**APPENDIX C**

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 21--CIVIL RIGHTS

SUBCHAPTER I--GENERALLY

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. Sec. 1979; Pub. L. 96-170, Sec. 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, Sec. 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Codification

R.S. Sec. 1979 derived from act Apr. 20, 1871, ch. 22, Sec. 1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

Amendments

1996--Pub. L. 104-317 inserted before period at end of first sentence `` , except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable".

1979--Pub. L. 96-170 inserted ``or the District of Columbia" after ``Territory", and provisions relating to Acts of Congress applicable solely to the District of Columbia.

Effective Date of 1979 Amendment

Amendment by Pub. L. 96-170 applicable with respect to any deprivation of rights, privileges, or immunities

[[Page 3695]]

secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub. L. 96-170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure

**APPENDIX D**

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KING COUNTY  
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ORIGINAL

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

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

NO. 08-2-23083-0-SEA

FIRST AMENDED COMPLAINT

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. )

I. PARTIES

1.1 Mercer Island Citizens for Fair Process is a Washington State non-profit corporation.

1.2. Defendant Tent City 4 is an unincorporated association.

1 1.3. SHARE/WHEEL is an advocacy organization comprised of two  
2 Washington non-profit corporations: Seattle Housing and Resource Effort ("SHARE")  
3 and the Women's Housing Equality and Enhancement League ("Wheel").  
4 SHARE/WHEEL operates tent cities in various Washington localities, which temporary  
5 encampments are intended to provide shelter for homeless individuals.

6 1.4 Defendant Mercer Island United Methodist Church (the Church) is a non-  
7 profit religious organization, located at 7070 SE 24<sup>th</sup> Street, Mercer Island, WA.  
8

9 1.5 Defendant City of Mercer Island is a Washington municipal corporation.

10 II. JURISDICTION

11 Paragraphs 1.1 through 1.5 are incorporated herein.

12 2.1 This Court has jurisdiction over this matter because the Defendant  
13 Share/Wheel is a Washington non-profit corporation located in Seattle, Washington.

14 2.2. This Court has jurisdiction over this matter because Defendant Mercer  
15 Island United Methodist Church ("the Church") is located in Mercer Island,  
16 Washington, which is in King County, and because the proposed location of Tent City  
17 4 is on the Church's Mercer Island property.

18 2.3. This Court has jurisdiction over this matter because the City of Mercer  
19 Island is a Washington municipal corporation located in King County.  
20

21 III. STANDING

22 Paragraphs 1.1 through 2.3 are incorporated by reference herein.

23 3.1 Plaintiff has standing to bring this cause of action. Its members are  
24 citizens of Mercer Island who will be affected by the proposed Tent City 4  
25 encampment on the Church's Mercer Island property.



1           4.4. During the past two years, the City of Mercer Island (hereinafter "City")  
2 staff and members of the Mercer Island Clergy Association, of which the Church is a  
3 member, have discussed the possibility of having the Tent City 4 homeless  
4 encampment locate on Mercer Island. In mid-May 2008, the City had a meeting with  
5 the Church which culminated in a written Temporary Use Agreement for the  
6 establishment of Tent City 4. These discussions and subsequent meeting were not  
7 open to the other residents of Mercer Island.

8  
9           4.5 The City code does not have an ordinance authorizing a temporary use  
10 for a housing camp. Despite this fact, the City sought, and received, approval of the  
11 Temporary Use Agreement from the Mercer Island City Council on June 16, 2008 at  
12 the first, and only, public hearing held on the subject. As a result, Tent City 4 is  
13 scheduled to begin encampment on August 5, 2008.

14           4.6 According to the terms of the Temporary Use Agreement, the  
15 encampment is scheduled to last for three months at the Church, but can be repeated  
16 again at the Church within the next 12 months. Because Tent City 4 is an  
17 encampment of homeless people that moves to a new location in eastern King  
18 County every 90 days, it is probable that Tent City 4 will be repeatedly housed on  
19 Church property.

20           4.7. Tent City 4 has previously established camps in several nearby Eastside  
21 cities, including Bellevue, Bothell, Issaquah, Woodinville, Bellevue, Kirkland,  
22 Redmond, Finn Hill and Cottage Lake. Unlike Mercer Island, these host cities allow  
23 temporary use permits for these homeless camps or have allowances for these  
24 camps.  
25

1 4.8 No emergency exists requiring Tent City 4 to be established on the  
2 Church property. Other alternative sites for the encampment exist.

3 V. FIRST CAUSE OF ACTION – DUE PROCESS CLAIM

4 5.1 This claim incorporates paragraphs 1.1 to 4.7 above.

5 5.2 Defendant City of Mercer Island has acted in an illegal fashion by  
6 ntering into a Temporary Use Agreement regarding the Tent City 4 encampment.

7 5.3. No provision in the Mercer Island municipal code authorizes such an  
8 agreement, because the Mercer Island municipal code does not provide for Temporary  
9 Use Agreements.  
10

11 5.4. By acting in an *ad hoc*, arbitrary manner, in violation of the City Code,  
12 the City of Mercer Island has harmed the legitimate property interests of Plaintiff's  
13 members.

14 5.5. While conducting the negotiations regarding the Tent City  
15 encampment, the City of Mercer Island violated the Open Meeting laws.

16 5.6. Because the City of Mercer Island violated its own municipal code in  
17 enacting the Temporary Use Agreement, the agreement should be declared void.

18 5.7 Principles of Due Process require a government agency to follow its own  
19 laws.

20 5.8 It violates plaintiff's right to due process for the City to fail to comply with  
21 its municipal code.  
22

23 VI SECOND CLAIM – NUISANCE

24 6.1 This claim incorporates paragraphs 1.1 to 5.6 above.  
25

1           6.2    The proposed Tent City 4 encampment is being established in violation  
2 of the Mercer Island Municipal Code

3           6.3.   The proposed Tent City 4 encampment unlawfully annoys, injures and  
4 endangers the comfort, repose, health and safety of Plaintiff's members.

5           6.4.   The proposed Tent City 4 encampment unlawfully renders Plaintiff's  
6 members insecure in life and in the use of property.

7           6.3    This camp is a nuisance in fact, because it will unreasonably interfere  
8 with nearby property owners ability to use and enjoy their land.  
9

10          6.4    This nuisance needs to be abated. It is unfair to require families in  
11 nearby single-family residences to have to view the Tent City4 encampment; the sight  
12 of that is a visual blight. There is no visual barrier between the Church property and  
13 the Tent City4 camp.

14          6.5    The encampment is a safety hazard. Smoking within the encampment  
15 could cause fires. The accumulation of mattresses, bedding and other materials also  
16 poses a fire hazard and is a nuisance *per se* under Mercer Island Municipal Code  
17 section 8.24.020 I.7.

18          6.6.   As they will be residing in tents, encampment residents could create  
19 noise which disturbs nearby residents, creating a nuisance *per se* in violation of  
20 Mercer Island Municipal Code section 8.24.020Q and R.

21          6.7    The camp will impair property conditions in the vicinity of the camp,  
22 because Tent City 4 will occupy the Church parking lot.

23          6.8.   Because the encampment is a nuisance, it should be abated and  
24 damages awarded to Plaintiff.  
25







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MIN. CLERK  
SUPERIOR COURT CLERK  
SEATTLE, WA

Honorable Michael J. Fox  
Hearing: September 26, 2008  
9:30 a.m.

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IN THE 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; and Mercer Island United  
Methodist Church (MUIMC), a Washington  
non-profit corporation, and the CITY OF  
MERCER ISLAND, a Washington Municipal  
Corporation.

Defendants.

No. 08-2-23083-0 SEA

RESPONSE TO CITY OF MERCER  
ISLAND'S MOTION FOR SUMMARY  
JUDGMENT

NOTE

The plaintiff is going to take a voluntary nonsuit on its nuisance and ultra vires claim. The only claims which it is now pursuing are its Due Process Claim and its § 1983 claim. In those two claims, plaintiff does not attack the temporary use contract or ask for its invalidation – it is simply seeking a declaratory judgment that the City violated its constitutional right to due process and nominal damages for that violation under 42 USC § 1983.

RESPONSE TO CITY OF MERCER ISLAND MOTION – Page 1  
315:/Tent City/Pleadings/response to city of mercer island mtn

LAW OFFICE OF  
JANE RYAN KOLER, PLLC  
5801 Soundview Drive, Suite 258  
P.O. Box 2509 - Gig Harbor 98335  
TEL: 253 853-1806 FAX 253 851-6225

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I. RELIEF REQUESTED

Mercer Island Citizens for Fair Process ("Association") asks the Court to deny the City of Mercer Island's Motion for Summary Judgment in its entirety.

II. STATEMENT OF FACTS

The City is attempting to "have its cake and eat it, too." On the one hand, it relies on the fiction that the Temporary Use Agreement, which it entered with the Mercer Island United Methodist Church ("Church") and SHARE/WHEEL, is a "land use decision" within the meaning of the Land Use Petition Act ("LUPA"), arguing that the Citizens had to appeal the Temporary Use Agreement in accord with LUPA. On the other hand, although the City is claiming that the Temporary Use Agreement is a land use decision, the City failed to follow any procedures for land use decisions mandated by the Mercer Island City Code ("MICC") and the Local Project Review Statute. That failure forms the very heart of the present lawsuit. It prevented citizens from understanding that the City was making an alleged land use decision.

Although the City claims it made a land use decision, it does not identify where in the City code that decision is described nor what code standards governed. The City code describes land use decisions, the tribunal which addresses such decisions and the code standards which govern such decisions. MICC 19.15.010 (E) does not describe a temporary use contract.

Although the City belatedly claims that the Temporary Use Agreement is a land use decision, it failed to notify members of the public of the proposed action and their ability to comment on it as is required by the Mercer Island City Code. See MICC 19.15.010. Although the City held a "public hearing" on the SHARE/WHEEL contract, it

1  
2 did not conduct this hearing in accordance with procedures mandated by the City Code  
3 for land use hearings. See *id.* Further, the City failed to give notice of the land use  
4 decision and appropriate appeal procedures in accordance with procedures also  
5 mandated by the MICC at 19.15.010. See *Declaration of Tara Johnson dated*  
6 *September 15, 2008.*

7 The City has numerous mandatory requirements governing notice of application,  
8 of decision, and of comment periods. These notice requirements were promulgated in  
9 response to the Local Project Review Statute, codified at Chapter 36.70B RCW.

10 The Growth Management Act, the Local Project Review Statute and the Land  
11 Use Petition Act were a package of so called regulatory reforms applicable to land use  
12 decision making. Such regulations were promulgated to make the land use decision  
13 making process, and any ensuing appeal processes, uniform and predictable. Here,  
14 the City failed totally to comply with such notification procedures. Because the City  
15 utterly failed to comply with the mandatory land use notification procedures and  
16 because the SHARE/WHEEL contract was based on no land use regulation and had  
17 not one of the hallmarks of a typical land use decision, no Association member could  
18 have guessed that the City was making a land use decision.

19 In compliance with the regulatory reform statutes, Mercer Island enacted very  
20 detailed procedures and notice requirements for land use decisions. Section  
21 19.15.010(E) contains a detailed, two-page table describing "actions that the City may  
22 take under the development code, the criteria upon which those decisions are to be  
23 based, and which boards, commissions, elected officials, or city staff have the authority  
24 to make the decisions and to hear appeals of those decisions." MICC 19.15.020. The

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2 Mercer Island Code imposes specific requirements on land use "Applications" including  
3 that they be submitted on City forms and that filing fees paid. When a party applies for  
4 a land use decision, MICC mandates that the City issue a Notice of Application.

5 MICC 19.15.020(E)(3) requires "Public Notice" for all administrative, discretionary  
6 and legislative land use actions. MICC 19.15.020(E). The public notice must include  
7 specific information including the deadline for submission of written public comments:

8 MICC 19.15.020(E)(4), of the Code governs administrative and discretionary  
9 actions, and mandates that "[n]otice shall be mailed to all property owners within 300  
10 feet of the property and posted on the site in a location that is visible to the public right-  
11 of-way." *Id.*

12 The Code further addresses "Decision Criteria," MICC 19.15.020(G), noting that  
13 "decisions shall be based on the criteria specified in the Mercer Island City Code for  
14 the specific action." The code provides criteria and standards for various types of  
15 decision and specifies that those criteria and standards must be followed. Section  
16 19.15.020(G) provides additional criteria for comprehensive plan amendments,  
17 reclassifications of property (rezones), conditional use permits, variances, and  
18 deviations. 19.15.020(G). The Temporary Use Agreement neither has specific criteria  
19 and standards governing it, nor does it fit into any of these five categories. There is no  
20 description of such a temporary use decision anywhere in the City's land use  
21 regulations. In fact, the City code governing residential zones prohibits such a property  
22 use. See 19.01.040 (H) (1-3)

1  
2 The Code also mandates that written notice of the decision be provided to the  
3 applicant and to all parties of record. MICC 19.15.020(H). MICC 19.15.020 (D) (g)  
4 requires that citizens be given notice of relevant appeal periods.

5 The City cannot treat the Temporary Use Agreement as a land use decision now,  
6 because it failed to comply with its own code regarding such decisions. It did not treat  
7 the Temporary Use Agreement as an application, because it did not require the  
8 agreement to be submitted on city forms, and it did not require MIUMC and/or  
9 SHARE/WHEEL to pay an application fee. The City did not provide either the  
10 mandated Notice of Application or the mandated Public Notice of decision. It did not  
11 notify adjacent property owners of its pending action. It certainly did not notify people  
12 that, if they failed to become parties of record, that they would lose their appellate  
13 rights. At no time did the City inform anyone that approval of the contract was a land  
14 use decision. No section of the municipal code gave notice that the SHARE/WHEEL  
15 contract was a land use decision. The City failed to post property and to give nearby  
16 neighbors notice of the alleged application. It did not notify citizens of the date the  
17 appeal period was to expire as is required by MICC 19.15.020 (D)(g).

18 In entering into the Agreement, the City never considered whether the proposed  
19 encampment complied with applicable City codes. In fact, the City concedes, in the  
20 Temporary Use Agreement, that there are no regulations governing this encampment.  
21 The SHARE/WHEEL Contract states "the Mercer Island City Code does not anticipate  
22 a temporary homeless encampment such as that operated by SHARE/WHEEL, and  
23 **none of the City's regulations or administrative procedures address this special**  
24

1  
2 use.” (Emphasis added). See *Contract, paragraph H, Declaration of Jane Koler at*  
3 *Exhibit 1.*

4 The Local Project Review Statute does not contemplate a land use decision-  
5 making process in which City officials do not consider existing comprehensive plans  
6 and adopted regulations, and, instead, simply develops discretionary ad hoc standards.  
7 It would be impossible to consider the Temporary Use Agreement a land use decision  
8 within the meaning of the regulatory reform regulations. The City did not consider  
9 whether the proposed encampment complied with the comprehensive plan or any other  
10 City regulations. Both the Local Project Review Statute and the City Code contemplate  
11 that in making land use decisions, the government will determine compliance of a  
12 proposed development with adopted codes and the Comprehensive Plan. See RCW  
13 36.70 B.030 (intent) and MIMC 19.15.020 (G). See Appendix A.

14 The City erroneously claims that the Mercer Island United Methodist Church  
15 submitted an “application” for a Tent City. See *Declaration of Rev. Knight*. If the  
16 Church had submitted an “application,” surely, the City would have followed the  
17 governing procedures set forth in MIMC 19.15. The Church’s and City’s belated claim  
18 that the Church “applied” to the City to establish Tent City on its property is erroneous.  
19 By its own language, the Temporary Use Agreement demonstrates that no such  
20 application was made to the City. It states that “the Mercer Island United Methodist  
21 Church has extended a specific invitation for Tent City 4 to operate a temporary  
22 homeless encampment on its property for a period not to exceed 93 days beginning  
23 not later than August 5, 2008.” See *Koler Declaration Exhibit 1.*

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2 Neither the Local Project Review Statute nor the Mercer Island City Code allow  
3 assertion of an after-the-fact claim that a particular action is a land use decision. If this  
4 were a land use decision, it would have been necessary that the City to make it in  
5 accord with the decision making process specified in the Local Project Review Statute  
6 and in the MIMC.

7 Moreover, notes from the June 16, 2008 City Council meeting confirm that the  
8 Church invited SHARE/WHEEL to its property. There is no indication in the City  
9 Clerk's summary of the Temporary Use Agreement which the City Council considered  
10 on June 16, 2008, that the Church had made an application to the City to establish the  
11 encampment on its property. The summary states in relevant part:

12 "The Mercer Island United Methodist Church has invited the  
13 non profit organization SHARE/WHEEL (organizer and  
14 manager of Tent City 4) to establish a Tent City encampment  
on the Church's property for 3 months, beginning August 5,  
2008.....

15 *See Koler Declaration Exhibit 2.*

16 For decisions that it characterizes as "land use decisions," Mercer Island  
17 Development Services Group publishes a "Weekly Permit Information Bulletin." This  
18 bulletin contains, *inter alia*, Notices of Application, Notices of Decision, Notices of  
19 Informational Meetings, and Notices of Continuation of Public Hearing. At no time did  
20 the Temporary Use Agreement appear in this publication. *See Declaration of Tara*  
21 *Johnson.*

22 The March 17, 2008 edition of the Weekly Permit Information Bulletin is a typical  
23 example of this publication. In it, the City published the following Notice of Application:

24 **NOTICE OF APPLICATION**

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Project #: SEP08-005

Description: Project (A): the work consists of installing a storm drain system within the public right-of-way of SE 53<sup>rd</sup> Place between Island Crest Way and East Mercer Way. The project includes intercepting three existing cross culverts that currently direct surface water drainage and groundwater seepage into a watercourse on the south side of SE 53<sup>rd</sup> Place for the purpose of reducing the volume and velocity of winter high flows in the stream channel to prevent further erosion, down cutting and reduce sediment deposits splitters while high storm flows will be directed to the proposed drainage system, then discharge into the existing watercourse system just above East Mercer Way. Project (B): the work consists of installing a catch basin at the existing open pipe inlet within the city's own open space. From the catch basin, a underground drain pipe will connect to an existing catch basin to the north. In the public right-of-way on SE 27<sup>th</sup> Street. The protect will also abandon a failing and angled drainage pipe going thru adjacent commercial property known as Thomas Center.

Location: Project (A) is located within the public right-of-way of Drainage Basin 46 located at SE 53<sup>rd</sup> Place, between Island Crest Way and East Mercer Way. Project (B) is located within the open space known as North Mercerdale Hillside immediately west of Thomas Center at 7433 SE 27<sup>th</sup> Street, NW1/4.

Applicant: Fred Gu, CIP Capital Projects Coordinator, for the City of Mercer Island

Date of Application: February 22, 2008

Date Determined To be Complete: March 17, 2008

Approvals Required: SEPA Threshold Determination and stormwater permit #0802-192

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2 SEPA Review: This project is being reviewed in compliance with  
3 the Washington State Environmental Policy Act  
4 (SEPA), pursuant to MICC 19.07.120. An initial  
5 evaluation of the proposed project for probable  
6 significant adverse environmental impacts has  
7 been conducted. It is anticipated that a SEPA  
8 Determination of Non-Significance (DNS) will be  
9 issued for this project. The optional DNS  
10 process, as specified in WAC 197-11-355, is  
11 being used. This may be your only opportunity to  
12 comment on this proposal.

13 Comment Period Ends: March 31, 2008 at 5:00 p.m.  
14 Staff Contact: Sung Lee, Planner

15 It is significant that the City indicated that there was a public comment period,  
16 and noted when the period ends.

17 Also in the March 17 edition, the City published the following Notice of

18 Decision:

19 **NOTICE OF DECISION**

20 Project#: DSR07-023  
21 Description: Final Design Review for the construction of a  
22 13,886 square foot second story addition to an  
23 existing school facility (French American School),  
24 located at 3795 East Mercer Way.

25 SEPA REVIEW: A State Environmental Policy ACT (SEPA)  
26 Threshold of Mitigated Determination of Non-  
27 Significance was issued by the City of Mercer  
28 Island on October 15, 2007, file SEP07-024.

29 Location: 3795 East Mercer Way  
30 Applicant: Kirsten Wild of Weinstein A/U Architects for the  
31 French American School of Puget Sound, tenant  
32 of the Stroum Jewish Community Center.

33 Decision: Approved, subject to three (3) conditions

34 Appeal Period ends: **March 31, 2008 at 5:00 p.m.**

35 Staff Contact: Travis Saunders, Planner

36 The City specifically noted when the appeal period ended in the notice as the

37 Code requires it to do.

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2 In every edition of this publication, the City states that:

3 In order to appeal a project decision, you must have filed a  
4 written comment or testified at the public hearing before the  
5 decision was made. Please contact the City Clerk's office at  
6 206-275-7793 for information on how to file an appeal.  
7 Correspondence should be directed to the contact person at  
8 the following address:

9 Development Services Group City of Mercer Island  
10 9611 SE 36<sup>th</sup> Street  
11 Mercer Island, WA 98040  
12 206-275-7605

13 This puts parties on notice of what they must do to preserve their rights.

14 The City did not notify anyone that they were treating the Temporary Use  
15 Agreement as a land use decision. They did not follow the normal process, nor did they  
16 notify people that they needed to submit a written comment to preserve their appeal  
17 rights. Therefore, the City cannot now rely on LUPA to prevent the Association from  
18 seeking vindication of its constitutional rights.

19 III. STATEMENT OF ISSUES

- 20 A. Whether the Temporary Use Agreement is a land use decision  
21 within the meaning of LUPA when the Agreement does not come  
22 within purview of the definition of Land Use Decision Under the  
23 Act, and because the City did not follow requirements governing  
24 land use decisions specified in the City Code  
25 B. Whether the Association's federal constitutional claims remain,  
26 regardless of whether LUPA applies to the temporary use  
27 agreement when the Plaintiff is not attacking the validity of the  
28 Agreement.

29 IV. EVIDENCE RELIED UPON

30 The Citizens rely on the pleadings and affidavits already contained in  
31 the record as well as the Third Declaration of Tara Johnson and the Second  
32 Declaration of Jane Koler.

33 V. AUTHORITY

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3 In addition to Washington statutes and cases, the Citizens rely on the  
4 Mercer Island City Code (MICC), and Weekly Permit Information Bulletins  
5 published by the City of Mercer Island Development Services Group.

6 VI. ARGUMENT

7 **THE TEMPORARY USE AGREEMENT IS NOT A LAND USE DECISION**  
8 **WITHIN THE MEANING OF LUPA**

9 The Temporary Use Agreement is not a land use decision within the meaning of  
10 the Land Use Petition Act (LUPA). This agreement simply does not fall within the types  
11 of decisions governed by LUPA. Until this litigation, the City never treated the  
12 agreement as a land use decision. It failed to follow all of the procedures mandated  
13 both by Washington statutes and its own code for making land use decisions. Because  
14 the Temporary Use Agreement is not governed by LUPA, the 21 day appeal period  
15 does not apply.

16 **THE CITY'S ENTRY INTO THE TEMPORARY USE AGREEMENT WAS**  
17 **NOT A LAND USE DECISION.**

18 "Challenges to land use decisions are generally governed by the Land Use  
19 Petition Act (LUPA)," . . . [b]ut LUPA does not apply to decisions that are not land use  
20 decisions." *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (Div. 1 2003),  
21 *review denied*, 150 Wn.2d 1015 (2003) (county's imposition of a Forest Practices Act  
22 building moratorium was not a land use decision under the plain language of LUPA).  
23 Here, the City Council's decision to adopt a Temporary Use Agreement governing its  
24 relationship with SHARE/WHEEL is not a land use decision subject to LUPA.

RCW 36.70C.020 carefully defines a land use decision as:

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

4 (a) An application for a project permit or other governmental  
5 approval **required by law** before real property may be  
6 improved, developed, modified, sold, transferred, or used,  
7 but excluding applications for permits or approvals to use,  
8 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;

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

12 (c) The enforcement by a local jurisdiction of ordinances  
13 regulating the improvement, development, modification,  
14 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.

15 The Temporary Use Agreement is not any of these. It is not an application for a  
16 project permit or government approval required by law as defined by 36.70C.20 (a).

17 The Local Project Review Statute defines a project permit application as follows:

18 "Project permit or project permit application means any land  
19 use or environmental permit or license required from a local  
20 government for a project action, including but not limited to  
21 building permits, subdivisions, binding site plans, planned unit  
22 developments, conditional uses, shoreline substantial  
development permits, site plan review, permits or approvals  
23 required by critical area ordinances, site specific rezones  
authorized by a comprehensive plan or sub area plan but  
excluding the adoption or amendment of a comprehensive plan,  
sub-area plan or development regulations, except as otherwise  
specifically included in this subsection.

24 See RCW 36.70B.020 (4).

1  
2 The Mercer Island City Code at 19.15.010 (E) provides a list of all administrative,  
3 discretionary and legislative land use actions. The code also contains a list of the  
4 actions that "the City may take under the development code, the criteria upon which  
5 those decisions are to be based and which boards, commissions, elected officials or city  
6 staff have authority to make the decisions to hear appeals of those decisions". MIMC  
7 19.15.010 (E). Because the Temporary Use Agreement did not involve any land use  
8 approval process required by law and described in the City Code, it cannot be  
9 considered an application for "a project permit or other governmental approval **required**  
10 **by law**" which is contemplated by RCW 36.70C.020 (1)(a). Because, the City  
11 concedes in its Temporary Use Agreement that "none of the City's regulations or  
12 administrative procedures address this special use", approval of the Temporary Use  
13 Agreement is not an approval "required by law" as described in RCW 36.70B.020 (a).  
14 See 19.01.040 H (1-3) In fact, the City Code prohibits such a temporary use. See  
15 19.01.040 (H) (1-3).

16 MIMC 19.15.010 (E) discloses that initial decisions on land use permits/approvals  
17 are made by Code officials, the planning commission or the City Hearing Examiner. It is  
18 hard to claim that a temporary use contract is a "land use permit or approval required by  
19 law" when the City Council has been delegated no authority to make initial decisions on  
20 permits or land use approvals. Further, it does not meet LUPA definition of a "project  
21 permit or other approval required by law" because no city law authorized or described  
22 the temporary property use. The approval of the temporary agreement was not  
23 "required by law"; the temporary contract specified that "none of the City's regulations  
24

1  
2 or administrative procedures address this special use." See *Temporary Agreement at*  
3 *paragraph H. Koler Declaration at Exhibit 1.*

4 Nor is the Temporary Use Agreement "an interpretive or declaratory decision"  
5 within meaning of RCW 36.70C.020.1(b). This section concerns the application to a  
6 specific property of zoning or other ordinances or rules regulating the improvement,  
7 development, modification or maintenance of property. Such decisions are specific  
8 statutory remedies mandated by the Local Project Review Statute. They are not a  
9 "catch-all" provisions allowing what otherwise would not be land use decisions to  
10 become so.

11 Indeed, the City has identified no applicable development regulations which apply  
12 to this temporary encampment or temporary use. Nor has it identified any general city  
13 code requirements which apply. It is nonsensical for the City now to claim that the  
14 Temporary Use Agreement was a code interpretation as contemplated by RCW  
15 36.70C.020 (1)(b); it concedes that "none of the City's regulations or administrative  
16 procedures address this special use". See *Temporary Contract Paragraph H*. Because  
17 no City code provisions apply, it would be impossible to claim that the Temporary  
18 Agreement is a Code interpretation.

19 RCW 36.70C.020.1(b) does not apply here, because the Temporary Use  
20 Agreement did not involve asking the City to interpret its development regulations.  
21 Further, MICC 19.15.010 E specifies that the Code Official rather than the City Council  
22 renders Code enforcement decisions.

23 Finally, the Temporary Use Agreement cannot be considered an enforcement  
24 action by the local jurisdiction within the meaning of RCW 36.70C.020 (1)(c). The City

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2 has not identified any land use regulations which it is enforcing in this case. As  
3 previously discussed, it has conceded that none apply to this temporary encampment.  
4 Therefore, it is impossible to claim that this is a code enforcement action. See  
5 *Temporary Contract, Paragraph H. Koler Declaration*. MICC 19.15.030 (B) specifies  
6 that code enforcement decisions are made by the director of development services.  
7 The City Council has been delegated no authority to make such decisions.

8 ~~The Mercer Island City Code specifies code enforcement procedures. Chapter~~  
9 ~~19.15.030 identifies code enforcement procedures and orders which can be issued by~~  
10 ~~the Director of Development Services in the context of a code enforcement action. It~~  
11 ~~describes the ability of the director or its authorized representative to search properties.~~  
12 ~~It describes emergency orders and triple penalties which can be imposed in the context~~  
13 ~~of such code enforcement proceeding. Not by any stretch of the imagination can the~~  
14 ~~Temporary Use Agreement be considered a code enforcement action as described in~~  
15 ~~RCW 36.70C.020 (1)(c). Because the Temporary Use Agreement does not come within~~  
16 ~~the ambit of the LUPA definition of a land use decision, it cannot be classified as a land~~  
17 ~~use decision subject to LUPA.~~

18 **THE COUNCIL'S APPROVAL OF THE TEMPORARY USE AGREEMENT DOES**  
19 **NOT HAVE THE CHARACTERISTICS OF A LAND USE DECISION MAKING**  
20 **PROCESS**

21 The City Council's consideration of the temporary use contract was never a land  
22 use decision-making process within the meaning of the Local Project Review Statute or  
23 the Code. The approval of the temporary use permit had none of the hallmarks of a  
24 land use decision. Further, the Local Project Review Statute specifies the manner in

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2 which land use applications or proposed land use actions shall be reviewed. It states  
3 that:

4 "fundamental land use planning choices made in adopted  
5 comprehensive plans and development regulations shall serve  
as the foundation for project review."

6 RCW 36.70B.030(1). It emphasizes that the review of a proposed project shall be  
7 based on adopted land use regulations and the adopted comprehensive plan. See  
8 RCW 36.70B.030 (2). MICP 19.15.020 (G) reiterates that land use review will be based  
9 on adopted City regulations.

10 The Local Project Review Statute also contemplates an application evaluation  
11 process which guarantees "public review of the proposed project as required by the  
12 chapter".

13 In this case, the City failed to consider compliance with the comprehensive plan or  
14 development regulations when entering into the Temporary Use Agreement. According  
15 to the Local Project Review Statute and the City Code, such review is the essence of a  
16 land use decision making process.

17 The City Council's consideration of the temporary use contract was neither a land  
18 use decision making process within the meaning of the Local Project Review statute nor  
19 the City Code. It did not involve consideration of adopted regulations and the  
20 comprehensive plan. In fact, adopted regulations prohibited such a property use and  
21 would have prevented approval of the Temporary Use Agreement. MICC 19.01.040  
22 H(1-3) states:

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- 2 1. No land, building, structure or premises shall be used for any purpose or in
- 3 any manner other than a use listed in this code, or amendments thereto,
- 4 for the zone in which such land, building, structure or premises is located.
- 5
- 6 2. No building or structure shall be erected nor shall any building or structure
- 7 be moved, altered, enlarged or rebuilt, nor shall any open spaces
- 8 surrounding any building or structure be encroached upon or reduced in
- 9 any manner, except in conformity with the requirements of this
- 10 development code or amendments thereto.
- 11
- 12 3. No yard or other open spaces provided about any building or structure, for
- 13 the purpose of complying with the regulations of this code or amendments
- 14 thereto shall be considered as providing a yard or open space for any
- 15 other building or structure. (Ord.99C-13 sec.1). Emphasis added.

16 See MIMC 19.01.040(H)(1-3). See Appendix A.

17 **THE CASES CITED BY THE CITY UNDERSCORE THAT THE TEMPORARY**

18 **USE AGREEMENT WAS NOT A LAND USE DECISION**

19 The cases cited by the City demonstrate the Temporary Use Agreement is not a

20 land use decision within the meaning of LUPA. For example, *Chelan County v.*

21 *Nykreim*, 146 Wn. 2d 904 52 P3d 1 (2002) involved a boundary line agreement. Unlike

22 Temporary Use Agreements, boundary line agreements clearly are land use decisions

23 which were governed by the Chelan County code and subject to County code

24 requirements. Indeed, the Mercer Island City Code expressly indicates that a lot line

revision is a land use decision. See *MIMC 19.15.020(D)(7)(b)*; see also *MIMC*

*19.15.010(E)* (specifying procedure for "Lot Line Adjustment Permit.).

Similarly, in *Wenatchee Sportsmen v. Chelan County*, 141 Wn. 2d 169 14 P.3d

123 (2000), the court addressed a subdivision and a rezone, which are characterized

as land use decision by the Local Project Review Statute (as well as the Mercer Island

City Code). Unlike Temporary Use Agreements, subdivisions and rezones are land

use decisions. They follow a land use decision-making process, because the

1  
2 governmental body must consider applicable regulations and the comprehensive plan,  
3 and then must apply such regulations to the rezone application and the subdivision  
4 application. Thus, rezone applications and subdivision applications are clearly project  
5 permits within the meaning of the Local Project Review Statutes. See RCW  
6 36.70B.020 (4); MIMC 19.15.010(E).

7 *Twin Bridges Marine Park v. Department of Ecology*, 162 Wn.2d 825 175 P.3d  
8 1050 (2008) also is distinguishable from the present case. It, too, addressed  
9 recognized land use decisions. It simply held that two building permits issued to a  
10 developer were land use decisions within the meaning of LUPA. Unlike a Temporary  
11 Use Agreement, a building permit is clearly a project permit within the meaning of the  
12 Local Project Review Statute and the Mercer Island City Code. See RCW 36.70B.020  
13 and MIMC 19.15.020(D)(7)(a).

14 Similarly, *James v. Kitsap County*, 154 Wn. 2d 574, 115 P.3d 286 (2005)  
15 addressed conditions of a building permit requiring payment of impact fees; building  
16 permits and impact fees are land use decisions within the meaning of LUPA. The  
17 Local Project Review Statute at RCW 36.70B.060 (5) and 36.70 B.170 (3) (b) make it  
18 clear that conditions pertaining to impact fees are subject to LUPA as well as building  
19 permit decisions. See RCW 36.70B.020 (4).

20 The unpublished Division 3 decision *Neighbors for Responsible Development v.*  
21 *City of Yakima* No. 24857-7 also does not support the City claim that the Temporary  
22 Use Agreement is a land use decision subject to LUPA review. That decision  
23 addressed a development agreement. The Local Project Review Statute codified at  
24 Chapter 36.70B RCW gives clear notice that development agreements are subject to

1  
2 LUPA "if the development agreement relates to a project permit application." See  
3 RCW 36.70B.200. The development agreement at issue in the unpublished case  
4 related to a project permit application. Thus, unlike the Temporary Use Agreement at  
5 bar, the development agreement in that case was specifically made subject to LUPA by  
6 RCW 36.70B.200.

7 Contrary to the claim of the City, *Tapps Brewing, Inc. v. City of Sumner*, 482 F.  
8 Supp. 1218 (W.D. Wa. 2007) did not hold that City contracts pertaining to development  
9 were subject to LUPA. In that case, the Court addressed a constitutional taking claim  
10 which arose in context of contract with the City and fell outside of the scope of LUPA.  
11 This Court should reject the City's erroneous claim contracts pertaining to property  
12 must be addressed through LUPA.

13 In direct contrast to the case at bar, all of the cases cited by the City gave  
14 members of the public clear notice that the actions at issue were land use decisions  
15 specifically subject to LUPA. There is no indication in the Local Project Review Statute  
16 or in LUPA that an agreement which pertains to land, by that fact alone, renders the  
17 agreement subject to LUPA. None of the cases cited by the City provide support for  
18 the proposition that a City agreement entered into outside of any authorized land use  
19 process is a land use decision within the meaning of LUPA.

20 This case resembles the situation in *Berst v. Snohomish County*. In that case,  
21 the Washington Court of Appeals held that the Berst's constitutional claims pertaining  
22 to the imposition of a building moratorium under the Forest Practices Act was not a  
23 "land use decision," and, thus, the 21-day time limit for LUPA claims did not apply. In  
24 that case, as here, Bersts did not seek invalidation of moratorium or building permit

1  
2 denial. They simply sought a declaratory judgment that their constitutional rights had  
3 been impaired. Similarly, here, the Association does not seek invalidation of the  
4 Temporary Use Contract, it simply asks the Court to declare that its constitutional rights  
5 have been violated.

6 **THE TEMPORARY USE CONTRACT IS NOT LIKE A CONDITIONAL USE**  
7 **PERMIT OR REZONE**

8 This Court should reject the City's flawed claim that the Temporary Use Contract  
9 is akin to zoning actions such as a site specific rezone, a contract rezone, a conditional  
10 use permit or a special use permit. All of those zoning actions are described in the City  
11 Code and the Code articulates specific standards with which such actions must  
12 comply. See *Rezone, MICC 19.15.020 (G) Conditional Use Permit MICC 19.11.130*  
13 *(2); MICC 19.15.020 (G)*. None of these applications are exclusively considered by the  
14 City Council. A rezone involves a hearing before the Planning Commission before it is  
15 heard by the City Council. The Planning Commission rules on conditional use permit  
16 applications, followed by an appeal to the City Hearing Examiner. MICC 19.11.130 (2);  
17 19.15.020 (G). All of those applications, in distinction to the Temporary Use contract,  
18 are based on adopted City Codes and recognized as being land use decisions in such  
19 codes.

20 **EVEN IF THE TEMPORARY USE AGREEMENT WERE SUBJECT TO LUPA,**  
21 **THE ASSOCIATION'S CONSTITUTIONAL CLAIMS REMAIN**

22 The state LUPA statute does not, and cannot, deprive the plaintiffs of their right  
23 to seek the federal statutory remedy provided by 42 U.S.C. § 1983, nor can LUPA  
24 impose a time limit to file § 1983 claims. In *Felder v. Casey*, 487 U.S. 131, 108 S.Ct.  
2302, 101 L.Ed.2d 123 (1988), the United States Supreme Court held that a Wisconsin

1  
2 statute requiring notice of claim to be filed within 120 days of alleged injury was  
3 preempted by § 1983. The Court determined that the notice policy "necessarily  
4 clashed with the remedial purposes of the federal civil rights statute," § 1983. Id. at  
5 132. Similarly, the LUPA 21-day time does not apply to the Citizens' § 1983 claims.

6 Accordingly, this Court should reject the City's unsupported claim that LUPA  
7 deprives the plaintiff Association of the remedy provided by 42 U.S.C. § 1983. The  
8 Washington legislature cannot deprive people of their federal rights. ~~Section 1983~~  
9 provides nominal damages or monetary damages when citizens' constitutional rights  
10 are violated. It is a federal remedial statute, which was promulgated long before LUPA.  
11 There is not a single mention of 42 U.S.C § 1983 in LUPA, and even if there were,  
12 LUPA could not trump the federal statute.

13 The essence of the plaintiffs' 1983 action is that the City violated the Citizens'  
14 right to due process of law by failing to follow the City Code. The purpose of due  
15 process is to protect citizens from arbitrary government action. The Citizens have a  
16 complete entitlement to seek nominal damages for the City's violation of their  
17 constitutional rights. The Citizens are not collaterally attacking the Temporary Use  
18 Agreement through their 1983 action. Rather, they are seeking nominal compensation  
19 for the City's violation of their constitutional rights.

20 It also is worthy to note that, should the City be allowed to apply LUPA to the  
21 Temporary Use Agreement, this belated claim is a further due process violation. The  
22 City's complete failure to follow its own land use procedures, including the notice of  
23 application, the notice of hearing, the notice of decision and the right to appeal,  
24 constitutes an actionable deprivation of the Association's due process rights.

1  
2 A LUPA ACTION IS NOT A NECESSARY PREREQUISITE TO ASSERTION  
3 OF PLAINTIFF'S CONSTITUTIONAL CLAIMS

4 The City erroneously contends that parties cannot pursue damages actions  
5 independent from LUPA, and that LUPA is dispositive of the Citizens' 42 U.S.C. § 1983  
6 claims. These arguments are severely flawed, as is the City's reliance on the cases it  
7 cites.

8 The City inaccurately argues that LUPA bars damage claims. It relies on several  
9 cases, none of which support its argument. For example, the City indicated that  
10 Gontmakher v. City of Bellevue, 120 Wn. App. 365, 374, 85 P.3d 926 (2004) stands for  
11 the proposition that, "because their LUPA petition was denied, Gontmakhers could not  
12 pursue his damages action." This is not accurate. In Gontmakher, the court analyzed  
13 whether the Gontmakhers were entitled to damages pursuant to RCW 64.40.010, and  
14 determined that they were not. In reaching this conclusion, the court did not rely in any  
15 way on LUPA. In Mower v. King County, 130 Wn. Appl 707, 125 P.3d 148 (Div. 1,  
16 2005), the plaintiff himself indicated that his particular damages, which he alleged were  
17 pursuant to RCW 64.40.020, were tied either to the success of his LUPA petition or to  
18 his application for a writ of mandamus. If either failed, the plaintiff conceded he was not  
19 entitled to pursue his damage claim. Without analyzing this proposition, the court relied  
20 on the plaintiff's admission. Shaw v. City of Des Moines, 109 Wn. App. 896, 37 P.3d  
21 1255 (Div. 1, 2002), concerned a clerical error by the King County Superior Court  
22 Clerk's office. After the court issued an oral ruling granting relief on a LUPA petition, the  
23 clerk's office dismissed the action for failure to enter a written order. In reversing this  
24 dismissal, the Court of Appeals stated, "The case schedule for land use petitions makes

1  
2 no provision for trial of accompanying damages claims. If the petitioner loses the LUPA  
3 appeal, the damages case is moot and the matter is over.” *Id.* at 901. In addition to  
4 being merely dictum, the statement is too generic to have any precedential value. It  
5 appears to apply only to damages arising from LUPA itself. It certainly does not apply  
6 to independent damage claims.

7       Regarding the City's flawed argument that LUPA disposes of the Citizens' § 1983  
8 claims, it is important for the Court to note that, through their section 1983 claim, the  
9 Citizens are not seeking to challenge the validity of the Temporary Use Agreement  
10 itself. Rather, they are seeking nominal damages for the City's due process violations  
11 concerning the enactment of this agreement. This fact alone distinguishes the case at  
12 bar from many of the cases cited by the City. *Asche v. Bloomquist*, 132 Wn. App. 784,  
13 133 P.3d 475 (Div. 2, 2006) (seeking invalidation of building permit); *Grundy v. Brack*  
14 *Family Trust*, 116 Wn. App. 625; 67 P.3d 500 (Div. 2, 2003) (seeking invalidation of a  
15 building permit); *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005)  
16 (seeking invalidation of impact fees that were a condition of a building permit). Nor is  
17 this case like *Harrington v. Spokane County*, 128 Wn. App. 202, 114 P.3d 1233 (Div. 3,  
18 2005), in which the court held that Mr. Harrington lacked standing to assert his  
19 constitutional claims because he failed to exhaust his administrative remedies. The  
20 City's reliance on *Shaw v. City of Des Moines*, 109 Wn. App. 896, 37 P.3d 1255 (Div. 1,  
21 2002) is entirely misplaced; the case did not even involve claims arising under 42  
22 U.S.C. § 1983.

23       Contrary to the City's briefing, *Peste v. Mason County*, 133 Wn. App. 456, 474,  
24 136 P.3d 140, 149 (Div. 2, 2006) does not stand for the proposition that federal

1  
2 substantive due process claims are barred for failure to seek LUPA review. Rather, in  
3 that case, the court performed a traditional Fourteenth Amendment due process  
4 analysis, and simply held that no Fourteenth Amendment violation had occurred.

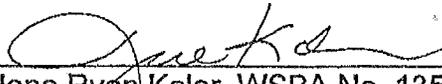
5 The City's analysis of Judge Settle's holding in the unreported *Project Patch*  
6 *Family Therapy Center v. Klickitat County Board of Adjustment*, 2008 WL 9060708  
7 (W.D. Wa. 2008) also is flawed. In that case, Judge Settle remanded the case,  
8 containing both a LUPA challenge and claims under 42 U.S.C. § 1983, to state court,  
9 because "If Plaintiff's LUPA claims are decided, determination of the issues raised by  
10 the 42-U.S.C. §1983 claim for damages could be rendered unnecessary." Judge Settle  
11 was not holding that LUPA claims can in any way dispose of federal constitutional  
12 claims. Rather, he was following well-established doctrine that the "courts will not reach  
13 constitutional issues when a case can be decided on other grounds." See e.g., *State v.*  
14 *Labor Ready, Inc*, 103 Wn. App. 775, 782, 14. P.3d 828, 832 (Div. 3, 2000). Holding  
15 that if the plaintiff in *Project Patch* had prevailed on its LUPA claim, it would not have  
16 been necessary to reach the constitutional issues in no way implies that LUPA disposes  
17 of constitutional claims.

#### 18 VII. CONCLUSION

19 For the reasons stated above, the Courts should deny the City's motion for  
20 summary judgment.

21 DATED this 15 day of September, 2008.

22 LAW OFFICES OF  
23 JANE RYAN KOLER, PLLC

24   
Jane Ryan Koler, WSBA No. 13541  
Laura K. Crowley, WSBA No. 22835

SENT ON 4-20-09 VIA FAX FOR  
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09 APR 20 PM 4:54

Honorable Judge Fox

April 24, 2009

9:00 a.m.

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

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

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MERCER ISLAND CITIZENS FOR FAIR )  
PROCESS, )

NO. 08-2-23083-0 SEA

Plaintiff, )

REPLY TO CITY RESPONSE TO  
CROSS MOTION FOR SUMMARY  
JUDGMENT

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; and Mercer Island United )  
Methodist Church (MUIMC), a Washington )  
non-profit corporation, )

Defendants. )

22  
23  
24  
25

INTRODUCTION

The City asserts that this suit is barred on several grounds. All are incorrect. The contention that Mercer Island Citizens were required to bring this action under LUPA is patently incorrect, because that statute excludes claims for damages. See, RCW 36.70C.030.

REPLY TO CITY RESPONSE TO CROSS MOTION  
FOR SUMMARY JUDGMENT - 1

LAW OFFICE OF JANE RYAN KOLER, PLLC  
5801 Soundview Drive, Suite 288  
P.O. Box 2509 - Glg Harbor 98335  
TEL 253-853-1816 • FAX 253-851-6225

ORIGINAL

1 Further, the assertion that the Mercer Island Citizens have no cognizable property interest  
 2 which the City adversely affected when it deliberately refused to follow its own zoning code is  
 3 contrary to case authority holding that nondiscretionary codes create protectable property  
 4 rights. *See Asche v. Blomquist*, 132 Wn. App. 784, 797-98, 35 P.3d 475 (2006). The City's  
 5 claim that the Church enjoyed some right under the RLUIPA to conduct activities in violation  
 6 of the zoning code flies in the face of well-reasoned United States Supreme Court, Ninth  
 7 Circuit and Washington cases. The Citizen Association requests this Court grant its Motion for  
 8 Summary Judgment and deny the City's Cross-Motion in all respects.

9  
10 **I. ARGUMENT**

11 **A. LUPA Statute Expressly Excludes Damage Claims**

12 The City is in error when it claims repeatedly that the Plaintiffs § 1983 damage claim is  
 13 barred because it was not asserted within the context of a LUPA petition. The express terms of  
 14 LUPA do not support this proposition. LUPA explicitly excludes damage claims:

15 This Chapter shall be the exclusive means of judicial review  
 16 of land use decisions except that this Chapter **does not apply**  
 17 **to (c)...(c) claims provided by law for monetary damages**  
 18 **and compensation.** If one or more claims for damages and  
 19 compensation are set forth in a complaint with a land use  
 20 decision brought under this chapter, **those claims are not**  
 21 **subject to the procedures and standards including**  
 22 **deadlines, provided in this chapter for the review of the**  
 23 **petition.**

24 RCW 36.70C.030.

25 A §1983 claim is clearly a damage claim and not subject to LUPA. The contention of  
 the Church, the City and Share/Wheel that this lawsuit is barred by the LUPA statute of  
 limitations must be disregarded. Damage claims are exclusively excluded from LUPA.

1 **B. The City's Zoning Code Creates a Property Interest**

2 The City contends that there is no possibility that the members of the Citizens  
3 Association had a property interest afforded constitutional protections. The law is that property  
4 rights protected by the United States Constitution are created when a person has a reasonable  
5 expectation of entitlement deriving from existing rules that stem from an existing source such  
6 as state law. Washington recognizes that a non-discretionary, mandatory, zoning ordinance can  
7 create a property right. *Asche v. Blomquist*, 132 Wn. App. 784, 797-98, 33 P.3d 475 (2006)

8  
9 (zoning code created property right entitled to due process protections); *see also Mission*  
10 *Springs v. Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) (Property owner had a property  
11 interest in receiving grading permit because no discretionary standards governed issuance of a  
12 permit); *Bateson v. Guise*, 857 F.2d 1300, 1304-5 (9<sup>th</sup> Cir. 1988) (property owner had a  
13 property right to receive building permit when no discretionary requirements governed issuance  
14 of building permit).

15 *Asche v. Blomquist*, held that because the Kitsap County Code limited the height of  
16 buildings to protect surrounding view, "Asches have a property right created by the zoning  
17 ordinance in preventing the Blomquist from building a structure over 20 feet in height and,  
18 therefore, procedural due process applies." *Asche*, 132 Wn. App. at 797-98.

19 As established by the decision of *Asche v. Blomquist*, the Mercer Island City Code  
20 created a property interest in members of the public. The Mercer Island Municipal code  
21 ("MIMC") § 19.01.040(h)(1), like the code provision at issue in *Asche*, states unequivocally  
22 that:  
23

24 No land, building, structure or premises shall be used for any  
25 purpose or in any manner other than a use listed in this code,  
or amendments thereto, for the zone in which such land,  
building, structure or premises is located.

1  
 2 This *mandatory, nondiscretionary* code provision created a property right in the  
 3 members of the Citizen Association living in the vicinity of the United Methodist Church, a  
 4 constitutionally protected expectation that only those property uses specified in the Code would  
 5 be allowed. The violation of that strict mandatory standard triggered federal due process  
 6 protections. *See Asche*, 132 Wn. App. at 797-98.

7 The fundamental property rights of the Association members, such as Christine and  
 8 Steve Oaks and other members living in the immediate vicinity of the Church were clearly

9 impaired just as the property rights of Mr. and Mrs. Asche were impaired in *Asche v.*  
 10 *Blomquist*. Because their property rights were impaired, federal due process protections were  
 11 triggered. *Asche*, 132 Wn. App. at 482.

12 **C. *Shanks v. Dressel Holding is Inapplicable.***

13 The City erroneously contends that *Shanks v. Dressel*, 540 F.3d 1082 (9<sup>th</sup> Cir. 2008)  
 14 dictates the result in this case. *Shanks* has no bearing on this case. The *Shanks* court found that  
 15 no property interest had been created because the regulations at issue did not create a property  
 16 interest because their application was *discretionary*. As the *Shanks* court explained, "a statute  
 17 that grants the reviewing body unfettered discretion to approve or deny an application does not  
 18 create a property right." *Shanks*, 540 F.3d at 1091. The court further observed that Spokane's  
 19 historic preservation provisions do not create a protected property interest because they "do not  
 20 contain mandatory language that specifically constrains the decision makers' discretion."  
 21 *Shanks*, 340 F.3d at 1090.

22 That is not the case here, and the holding has no instructive value. The Mercer Island  
 23 Zoning Code *prohibits* the City from allowing any use not specified in the Zoning Code. There  
 24 is no discretion allowed in the enforcement of the regulation. The City has never argued that  
 25

1 the zoning code provision prohibiting non-specified uses allows discretion. In contrast to  
 2 *Shanks*, the non discretionary code section at issue here, prohibiting Tent City absolutely,  
 3 creates a protected property right enjoyed by the members of the Citizen Association. *See*  
 4 *Asche v. Blomquist*, 132 Wn. App. 784, 977-98, 33 P.3d 475 (2006).

5 ~~Unlike *Shanks*, the Citizen Association does not allege that the City negligently or~~  
 6 ~~mistakenly issued a permit in violation of the Zoning Code or failed to enforce its Zoning Code~~  
 7 ~~against a third party such as the developer in *Shanks*. Rather, the Citizen Association contends,~~  
 8 ~~and it is not disputed, that the City Council made a clear, deliberate decision to violate the~~  
 9 ~~nondiscretionary Zoning Code provision mandating that *no uses would be allowed* in the City~~  
 10 ~~which *were not specified in the Code*. *See* March 31, 2009 Koler Declaration.~~

11 ~~**THE PLAINTIFF NEITHER STIPULATED NOR ADMITTED THAT THERE IS NO**~~  
 12 ~~**PROCEDURAL DUE PROCESS VIOLATION**~~

13 The City makes the unsupported, incorrect claim in its brief that the Plaintiffs  
 14 "stipulated that there is no procedural due process problem." (*See* City brief, footnote 2, p.4)  
 15 and that Plaintiff has "admitted" that it had "full notice and an opportunity to comment." (City  
 16 brief, p.23) In fact, the Plaintiffs opening memorandum claims that citizens were not accorded  
 17 minimal due process protections. (*See* p. 10-11 of Plaintiffs' memorandum in support of cross-  
 18 motion for summary judgment.) Here, the City failed to provide minimum due process  
 19 protections.  
 20

21 ~~**THE CITY DID NOT GIVE CITIZENS NOTICE THAT ALLOWED THEM TO**~~  
 22 ~~**UNDERSTAND THE PROPOSAL WHICH WAS BEFORE THE CITY AND TO**~~  
 23 ~~**PREPARE INTELLIGENTLY COMMENT ON IT**~~

24 It is a well established proposition that due process requires that notice of a proposed  
 25 government action must be adequate to allow citizens to prepare to address the issue at a public  
 hearing and to prepare to intelligently comment on it. *Glapsey v. Conrad*, 83 Wn.2d 707, 712-

REPLY TO CITY RESPONSE TO CROSS MOTION  
 FOR SUMMARY JUDGMENT - 5

LAW OFFICE OF JANE RYAN KOLBR, PLLC  
 5801 Soundview Drive, Suite 258  
 P.O. Box 2509 - Gig Harbor 98335  
 TEL 253-853-1806 - FAX 253-851-6225

1 13, 521 P.2d 1173 (1974). *Glapsey* held that notice does not pass due process muster if it  
 2 simply summons citizens to a hearing but fails to explain the location of a proposal and the  
 3 basic proposal parameters and leaves citizens to address an action "in a information vacuum."  
 4 *Id.* It held that "if one...is forced to attend a zoning hearing both unprepared for and  
 5 uninformed about the purpose, the hearing will be a farce despite the safeguards thrown around  
 6 it." In fact, in this case, the notice in the *Mercer Island Reporter* was deficient. It simply  
 7 printed the City Council agenda which stated in part:  
 8

9 Regular Business

10 \*\*\*  
 11 Temporary Use Agreement for Tent City visit...

12 See Fourth Declaration of Tara Johnson, Exhibit 1.

13 The notice did not provide any information describing the temporary use agreement  
 14 such as the fact that it (1) authorized a homeless encampment in the parking lot of the Mercer  
 15 Island United Methodist Church,(2) violated the zoning code, and that (3) the City had decided  
 16 not to amend the zoning code to allow the temporary use. The notice also failed to provide the  
 17 location of the camp, the date when the camp would be established and the number of camp  
 18 occupants. <sup>1</sup>

19 The City's notice did not provide citizens with constitutionally adequate notice  
 20 that allowed them to address the temporary use agreement in an intelligent manner. They were  
 21 forced to go to the City Council meeting with no information whatsoever about the illegal  
 22  
 23

24 <sup>1</sup> The information provided in the City's weekly permit bulletin, which gives detailed descriptions of land use  
 25 proposals including their addresses underscores the flawed character of the City's "notice" that the City Council  
 would address a temporary use agreement as part of its regular business.

1 character of the temporary use agreement or any concrete details about the proposed  
2 encampment.

3 They were never given notice of the City decision declining to amend the City code and  
4 simply to allow a prohibited property use without amendment of the code, nor were they given  
5 the opportunity to comment on that decision. It was made behind closed doors. This Court  
6 should reject the City claim that the notice is constitutionally adequate. It did not comply with  
7 the most elementary notice requirements imposed by due process.  
8

9 **THE CITY'S FAILURE TO FOLLOW ITS LAWS WAS A DUE PROCESS**  
10 **VIOLATION BECAUSE THE CITY FAILED TO PROVIDE EVEN MINIMAL DUE**  
11 **PROCESS PROTECTIONS**

12 *Danielson v. City of Seattle*, 45 Wn. App. 235, 724 P.2d 1115 (1986), held that a  
13 government agency's failure to follow mandatory code provisions violates due process "when  
14 the agency violates even minimal due process requirements." *Danielson*, 45 Wn. App. at 244-  
15 245; *Layton v. Swapp*, 484 F.Supp. 958 (U.S.D. Ct. Utah 1979). *Layton* held that the failure to  
16 follow the County's regulations, which accorded a discharged librarian a full evidentiary  
17 hearing, violated her due process rights because even though she was accorded some due  
18 process in a step one hearing, she did not have a full and fair opportunity to confront the  
19 County's allegations against her and to refute such allegations. Thus, the failure to follow  
20 County's rules implicated basic due process rights she possessed. That is the case here. When  
21 the City decided to enter into an agreement which violated the code and not to amend the Code  
22 by adopting an ordinance allowing an outdoor encampment in a residential zone, it did so  
23 without giving its citizens even minimal due process protections.

24 **CITIZENS WERE DENIED A MEANINGFUL HEARING AT A MEANINGFUL TIME**

25  
REPLY TO CITY RESPONSE TO CROSS MOTION  
FOR SUMMARY JUDGMENT - 7

LAW OFFICE OF JANE RYAN KOLER, PLLC  
5601 Soundview Drive, Suite 258  
P.O. Box 2509 - Gig Harbor 98335  
TEL 253-853-1806 - FAX 253-851-6225

1 Mathews v. Eldridge, 24 US 319, 96 S.Ct. 893 (1976) explains that due process  
2 demands a hearing at a meaningful time in a meaningful manner and that a court must  
3 determine what process is due by balancing the competing interests. The competing  
4 considerations in this case were those of the City, which wanted to accommodate the Church's  
5 wish to shelter the homeless and the interest of the citizens in having zoning regulations  
6 followed – i.e. their interest in having no prohibited property uses allowed near their  
7 residences, as well as their interest in having the City amend the zoning code in a public  
8 process rather than adopting a temporary use agreement which violates it.

9  
10 The City had been meeting with the Church and Share Wheel since April, 2008 about  
11 the Church's desire to host a homeless encampment in the Church parking lot. See Fourth  
12 Declaration of Tara Johnson. There was no public emergency – City officials had sufficient  
13 time to at least accord citizens minimal due process protections. There was sufficient time to  
14 give citizens notice about crucial characteristics of the Temporary Use Agreement as well as  
15 the City decision not to amend the Zoning Code. No such notice was provided and no  
16 opportunity given to citizens to comment on such City decisions. The City's interest in  
17 accommodating the Church mission did not trump the interest of its citizens in being accorded  
18 a minimal opportunity to address their government about such decisions. Here, as in Layton v.  
19 Swapp, 484 F. Supp. 958, 961 (D.C. Utah 1979), the City's failure to follow its own Code  
20 resulted in depriving citizens of due process protections.

21  
22 Here, the City officials were fully aware that citizens would be concerned that the  
23 Temporary Use Agreement authorized a property use prohibited by the city code. An e-mail  
24 from Mercer Island City Manager Herzog to Reverend Knight dated May 22, 2008 recognizes  
25

1 that Mercer Island citizens will have concerns about the city "disregarding its own laws." See  
2 March 3, 2009 Koler Declaration, Exhibit 2.

3  
4 The City Attorney also admitted in a June 18, 2008 e-mail to a citizen who had attended  
5 the June 16, 2008 City Council meeting, who was confused about whether the City Code  
6 authorized the temporary use permit that "the City does not have an ordinance authorizing  
7 temporary use for a tent city." See Second Declaration of Tara Johnson, ex. 1. City officials  
8 deliberately concealed that fact from citizens who attended the city council meeting, violating  
9 the citizens' rights to a full and meaningful hearing on the issue.

10 Early versions of the City Attorney's Temporary Use Agreement show that city officials  
11 were fully aware that the contract violated the city zoning code. A draft of the Temporary Use  
12 Agreement stated:

13  
14 The Mercer Island City Code prohibited the use of tents as part of  
15 homeless shelters for the reasons set forth in this paragraph. For  
16 example, MICC 19.06.080(3)(c) requires that a social services  
17 transitional housing facility be located at least 600 feet from the  
18 property line of educational or recreational facilities where  
19 children are known to congregate, including, but not limited to  
20 any churches, or synagogues or schools or licensed daycares.  
21 MICC 19.06.080(B)(3)(e) requires social services transitional  
22 housing facility to comply with all applicable construction codes  
23 set forth in MICC Title 17 and these codes do not permit the use  
24 of tents for human occupancy except under limited circumstances  
25 not applicable to a social service transitional facility. Finally,  
MICC 19.06.010(A) specifically prohibits use of portable toilets  
except for emergency or construction use."

See March 31, 2009 Koler declaration, ex. 1.

23 Although City officials gave citizens no notice that the outdoor encampment violated  
24 the Mercer Island City Code, they expected citizens to raise that issue at the public hearing and  
25 prepared to address that question. A role play script, prepared by Deputy City Manager Herzog,  
instructed Council members about how to address citizen questions about the illegal camp:

REPLY TO CITY RESPONSE TO CROSS MOTION  
FOR SUMMARY JUDGMENT - 9

LAW OFFICE OF JANE RYAN KOLER, PLLC  
5801 Soundview Drive, Suite 258  
P.O. Box 2509 - City Harbor 98035  
TEL 253-853-1806 • FAX 253-851-6225

1 Concerned Citizen (CC) Q:

2 Why has the City substituted a Temporary Use Agreement for the regular temporary or  
3 conditional use permits other cities have used?

4 City Official (CO) Response:

5 There is no reference in the Mercer Island City Code to a temporary encampment or the  
6 type of shelter that tent city operates or that the Methodist Church will host.

6 CC Q:

7 What about MICC 19.06.080 Section B Social Service Transitional Housing which is  
8 permitted in all zones when authorized by the issuance of a conditional use permit  
(CUP)?

9 CO Response:

10 The definition of Social Service Transitional Housing (at MICC 19.16) is key. It says  
11 "Social Service Transitional Housing excludes institutional facilities that typically  
12 cannot be accommodated in a single family residential structure.

12 CC Q:

13 This seems like splitting hairs

14 See March 31, 2009 Koler Declaration for entire role play script.

15 Certainly, as was tacitly recognized by the City in preparing itself for the public  
16 comment period, a crucial component of that discussion was that the Temporary Use  
17 Agreement violated the City code. Before the public comment period opened, Deputy City  
18 Manager Herzog gave a two minute presentation in which she assured citizens that the camp  
19 would comply with all City land use ordinances, a statement which was false. She stated that it  
20 is "the responsibility of municipal government to assure compliance with the ordinances and  
21 regulations that protect the health, safety and well-being of its citizens." She also stated that  
22 "the City had secured the "commitment of the host Church and Tent City managers that they  
23 will comply with the land use and life-safety regulations that are on our books, never once  
24 mentioning that the outdoor camp and the temporary use agreement violated the City's land use  
25

REPLY TO CITY RESPONSE TO CROSS MOTION  
FOR SUMMARY JUDGMENT - 10

LAW OFFICE OF JANE RYAN KOLER, PLLC  
5801 Soundview Drive, Suite 258  
P.O. Box 2509 - Gig Harbor 98335  
TEL. 253-853-1806 • FAX 253-891-6225

1 code. See Fourth Declaration of Tara Johnson. Significantly, *after* public comments closed,  
2 City Attorney Katie Knight in an enigmatic manner, and for the first time indicated that "our  
3 Code does not encompass a homeless camp". See Fourth Declaration of Tara Johnson. What  
4 she did not state is that the Code prohibits a homeless camp. These statements,  
5 misstatements, and failures to disclose prevented the City Council meeting from providing  
6 citizens a meaningful opportunity to intelligently address their elected officials about the City  
7 decision to adopt an illegal contract and to forego amending the zoning code.  
8

9 Similarly, City officials were fully aware that the application of neutral zoning laws  
10 prohibiting a homeless encampment *do not* burden the exercise of religion. An earlier version  
11 of the City Attorney's Temporary Use Agreement recognized that fact:

12 While acknowledging the published decisions of Washington  
13 appellate courts and the requirements that such decisions impose  
14 on a City's exercise of its police powers, the City maintains that  
15 its land use, building and other codes do not substantially burden  
16 the exercise of religion – even if applied to prohibit or limit  
17 temporary tent encampments for homeless or other persons on  
18 Church property.

19 March 31, 2009 Koler declaration, ex. 1.

20 Despite this legal conclusions of the Mercer Island City Attorney, before the public  
21 comment period opened, Deputy City Manager Herzog explained that the United States  
22 Constitution permitted the Church to establish a facility to feed the homeless on church  
23 property. This can only be described as a misleading statement. The result was that citizens  
24 were forced to comment about the temporary use agreement without knowing salient facts  
25 about it – that it, in fact, violated the City code, and that the United States Constitution did not,  
in fact compel establishment of the camp on church property.

At the City Council meeting City officials mislead citizens and refused to provide them  
with accurate information about the camp. Because citizens were forced to attend the public

REPLY TO CITY RESPONSE TO CROSS MOTION  
FOR SUMMARY JUDGMENT - 11

LAW OFFICE OF JANE RYAN KOLBR, PLLC  
5801 Soundview Drive, Suite 258  
P.O. Box 2509 – Gig Harbor 98339  
TEL 253-833-1806 • FAX 253-851-6225

1 hearing without notice of crucial information about the Temporary Use Agreement, the City  
 2 cannot claim that is accorded citizens a meaningful, constitutionally adequate opportunity to  
 3 make informed comments about the temporary use agreement and the City decision not to  
 4 amend the land use code to authorize the encampment. The Plaintiff is entitled to summary  
 5 judgment on its damage claim. The City violated the right of plaintiff to procedural due  
 6 process.

7  
 8 **1. First Assembly of God is Distinguishable**

9 The City erroneously claims that *First Assembly of God of Naples, Florida, Inc. v.*  
 10 *Collier County, Fla.*, 20 F.3d 419 (11<sup>th</sup> Cir. 1994), supports its contention that the the City's  
 11 failure to follow its laws did not violate Plaintiff's right to due process. This case actually  
 12 illustrates that procedural due process was not afforded to the Plaintiff.

13 In *First Assembly of God*, the Church did not argue that it did not have an opportunity to  
 14 be heard regarding the proposed decisions nor did the Church argue it had no notice of the  
 15 actual issue to be decided. The Church only complained that the notice was only 1/4 page long,  
 16 did not include a map, and was not in 18 point type and that the failure to follow such code  
 17 procedures violated the Church's constitutional right to notice. The notice issue in that case did  
 18 not implicate basic due process protections. There was no allegation that the notice failed to  
 19 explain basic facts about the zoning issue before the County. *First Assembly of God*, 20 F.3d at  
 20 422. Unlike this case, the Church in *First Assembly of God* was allowed a full and meaningful  
 21 hearing and were given adequate notice about the zoning issues to be addressed.

22 **THE CITY CONDUCT VIOLATED THE RIGHT OF CITIZENS TO SUBSTANTIVE**  
 23 **DUE PROCESS**

24 The Ninth Circuit has held that arbitrary, irrational conduct that is not motivated by  
 25 legitimate regulatory concerns serves as the basis of a substantive due process violation. See  
*Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (9<sup>th</sup> Cir. 1990), *Dodd v. Hood River*

REPLY TO CITY RESPONSE TO CROSS MOTION  
 FOR SUMMARY JUDGMENT - 12

LAW OFFICE OF JANE RYAN KOLBR, PLLC  
 5801 Soundview Drive, Suite 258  
 P.O. Box 2509 - Gig Harbor 98335  
 TEL 253-853-1806 - FAX 253-851-6225

1 County, 59 F.3d 852 (1995). Here, the City conduct was arbitrary and irrational. The City  
 2 Council made a deliberate decision to allow a prohibited property use and to avoid amending  
 3 the City code even though the City had an absolute obligation to do so. Although the City  
 4 might claim that supporting the Methodist Church plan to host Tent City was a legitimate  
 5 government objective, there is no justification for the City Council to decline to amend the code  
 6 to allow the property use. There was sufficient time to do so. The apparent reason the City  
 7 Council did not elect to amend the code, was to avoid the intense public scrutiny and  
 8 controversy that would have attended such an action.

9 City officials made a big effort to avoid such scrutiny and controversy in this case.  
 10 They gave citizens scant notice of the temporary use agreement. City officials at the City  
 11 Council meeting on June 16, 2008 misled citizens about the temporary use agreement; they told  
 12 them that the Church would comply with all land use codes. They gave citizens no  
 13 opportunity, whatsoever, to address the City decision to avoid amending the land use code even  
 14 though the terms of the land use code demanded amendment. Taking illegal actions and  
 15 misleading citizens to avoid political controversy is not government conduct with a legitimate  
 16 objective.

17  
 18 In fact, some City Council members have conceded that the actions of the City Council  
 19 short-changed citizens and deprived them of a mandated public process. Mayor Ernest "El"  
 20 Jabocke conceded to plaintiff members that "in hindsight where we the Council failed is in not  
 21 having public hearings on a temporary use ordinance". See Third Declaration of Tara Johnson.  
 22

23 Councilman Dan Grausz in an e-mail to Tara Johnson on April 2, 2009 stated:

24 What we have realized, however, is that the contract route did  
 25 not afford the public the same opportunity for input that would  
 have been available through a permitting process.  
 Consequently, we have already initiated staff review to

1 determine whether an ordinance would better serve Islanders  
 2 going forward. ~~Even if we choose not to have an ordinance,~~  
 3 ~~we need to insure an opportunity for sufficient public input~~  
 4 ~~into any future tent city contract. As our failure to do so this~~  
 5 ~~time created frustration and anger that might otherwise have~~  
 6 ~~been avoided. I am the first to acknowledge that the City and~~  
 7 ~~the United Methodist Church could and should have done a~~  
 8 ~~much better job in fostering a constructive dialogue with the~~  
 9 ~~neighborhood before the contract was voted on by the City~~  
 10 ~~Council.~~

11 See Fourth Declaration of Tara Johnson, Exhibit 2.

12 Here, the City violated the plaintiff's right to substantive due process.

13 **IMPOSING CONTENT NEUTRAL ZONING REGULATIONS ON THE CHURCH**  
 14 **WOULD NOT VIOLATE THE RLUIPA**

15 The City, relying on an obscure law review article, legislative history of the RLUIPA  
 16 and cases from the Sixth and Seventh Circuits argues that the City had no authority to enforce  
 17 content neutral zoning laws against the Church and had it done so, it would have imposed a  
 18 substantial burden on the religious exercises of the Methodist Church. The City neglects to  
 19 mention that the United States Supreme Court, in striking down the Religious Freedom  
 20 Restoration Act, rejected that exact argument. It held:

21 It is a reality of the modern regulatory state that numerous  
 22 state laws, such as zoning regulations at issue here, impose a  
 23 substantial burden on a large class of individuals. **When the**  
 24 **exercise of religious has been burdened in an incidental**  
 25 **way by a law of general application,** it does not follow that  
 persons affect it had burdened any more and other citizens let  
 alone burdened because of their religious beliefs.

*City of Bourne v. Flores*, 521 US 507, 535, 117 S Ct 2157, 138 LED 2d 624 (1997)

The City analysis also totally ignores that there is a 2004 Ninth Circuit case exactly on  
 point -- *Morgan Hill v. San Jose Christian College*, 360 F.3d 1024, 1034 (9<sup>th</sup> Cir, 2004). In  
 that case, the Ninth Circuit Court of Appeals found that a land use regulation substantially

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IN THE 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 (MUIMC), a Washington non-profit  
corporation, and the City of Mercer Island, a  
Washington Municipal Corporation.

Defendants.

No. 08-2-23083-0 SEA

FOURTH DECLARATION OF TARA  
JOHNSON

I am over eighteen years of age and have personal knowledge of the following  
facts:

I have reviewed many, many public records obtained by the Plaintiff's  
Association through a public disclosure request to the City of Mercer Island. Through  
reviewing such public records and attending the City Council meeting on June 16,

DECLARATION OF TARA JOHNSON- 1  
Mercer Island Citizens for Fair Process

1  
 2 2008, I have learned the following facts about the City's decision to adopt a temporary  
 3 use agreement. I am over eighteen years of age and competent to provide testimony  
 4 about this matter as a witness.

5 I am a member of the Plaintiff's association and a citizen of Mercer Island. I live  
 6 in the vicinity of the United Methodist Church.

7 The City gave citizens scant notice of the meeting about its temporary use  
 8 agreement with tent city. The sole notice that we got of the City Council's  
 9 consideration of the temporary use agreement was a printed City Council agenda in  
 10 the Mercer Island Reporter on June 11, 2008 which stated that the City Council would  
 11 consider as part of its regular business "temporary use agreement for a tent city visit."  
 12 See true copy of notice in Mercer Island Reporter at Exhibit 1. We got no notice about  
 13 when the tent city visit would occur, the location of the tent city encampment, the  
 14 number of campers and the fact that the outdoor encampment was prohibited by the  
 15 zoning code. Nor did we get any notice that the City had made a decision not to  
 16 amend the zoning code even though the terms of the code demanded an amendment  
 17 and explicitly prohibited the tent city camp. The decision not to amend the zoning code  
 18 and to allow a prohibited property use were made entirely behind closed doors. At no  
 19 time did citizens receive notice of those decisions of the City or any opportunity to  
 20 comment on such decisions.

21 I almost did not attend the City Council meeting on June 16, 2008. I learned  
 22 from a member of the United Methodist Church that the tent city encampment was  
 23 going to be on Church property near my home. I certainly did not learn that fact from  
 24 the notice published in the Mercer Island Reporter.

DECLARATION OF TARA JOHNSON- 2  
 Mercer Island Citizens for Fair Process

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Most members of the Association did not attend the City Council meeting on June 16, 2008. The published agenda did not give notice that the tent city encampment was going to be on the Methodist Church property in its parking lot. Had such notice been provided, many, many more citizens would have attended the meeting.

Had this City notice imparted the type of detail given in the Weekly Permit Bulletin, which the code requires for land use actions, many Mercer Island citizens would have attended the meeting as well as members of the Plaintiff association. The Weekly Permit Bulletin publishes information about the location of the project, the approvals required for the project and review under the State Environmental Policy Act. Here, the notice did not even begin to disclose such information.

At the June 16, 2008 City Council meeting, the City provided very few details about the temporary use agreement. That circumstance caused citizens such as myself who are members of the Plaintiff association to address the temporary use agreement in a vacuum. We had no idea about crucial characteristics of the agreement.

Deputy City Manager, Herzog, gave an approximately two minute presentation about it. I listened to a tape recording of the City Council meeting which member, Ira Appelman made. He is a member of the Plaintiff association. I then transcribed accurately all portions of the June 16, 2008 City Council meeting which pertained to tent city. The recorded transcript exactly corresponded with my memory of that City Council meeting.

DECLARATION OF TARA JOHNSON- 3  
Mercer Island Citizens for Fair Process

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The following is an exact transcription of the portion of the June 16, 2008 City Council meeting which addressed Tent City.

Linda Herzog:

"Thank you Mayor Pearman and thank you for letting me introduce this issue to the Council and the assembled audience. Last Spring the Mercer Island Clergy Association announced that the Faith Community intended to invite Tent City 4 to Mercer Island. In April of this year the Mercer Island United Methodist Church made the invitation and it was accepted. Tent City 4 will be establishing an encampment at the United Methodist church the first week in August and will stay for a 3 month period. As you know, the 1<sup>st</sup> Amendment to the US Constitution and Article 1 of the Washington State Constitution protect the rights of religious freedom. With those rights a religious congregation may offer assistance and shelter to the homeless on Church property. The responsibility of municipal government is to assure compliance with the ordinances and regulations that protect the health, safety and well being of its visitors and its citizens of the jurisdiction.

The Staff, representing the City manager's office, our legal department, the developmental services, police and fire departments, have worked together over the past month to provide you with 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 to all citizens on Mercer Island, and secures the commitment of the host church and Tent City managers that they will comply with the land use and life safety regulations that are on our books. As you see in the agreement before you we are recommending for your adoption the following terms of the agreement. The Church and Tent City folks have already signed the agreement so it is available for your consideration and adoption. The terms are: a verifiable identification of Tent City residents and assurance that no sex offenders or individuals with an outstanding warrant may stay at the camp, and appropriate set back and site obscuring

DECLARATION OF TARA JOHNSON-4  
Mercer Island Citizens for Fair Process

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fencing that will protect the privacy of Tent City residents 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 which is 100, prohibition against children staying overnight at the camp, application of Tent City's own code of conduct that prohibits alcohol and drug use, weapons, violence, intimidation, open flames, trespassing and loitering and requires regular attendance at camp governance meetings, application of municipal codes related to sanitation and life safety, assurance of sufficient vehicle parking at the church for the congregation's weekly services, and permission for health and safety and code compliance officials to inspect the camp throughout their 3 month stay. The agreement also indemnifies the City of Mercer Island against actions, inactions or omissions by the host Church, the residents of the encampment and the SHAREAWHEEL organization that operated the encampment.

I appreciate the opportunity to briefly summarize the agreement and present it for your discussion and deliberation. We also have people in the audience who can serve as your resources. It is a multifaceted issue and there are a lot of people that have expertise in various areas so I would like to introduce those folks that have joined us tonight. First is Rob Odle, he is the Planning Director of the City of Redmond who has hosted a Tent City encampment. Nick Sebrick, who is right here, Kirkland police Lieutenant who has experience with Kirkland's Tent City encampments. And Reverend Leslie Ann Knight, she is the pastor of the Mercer Island United Methodist Church. And unfortunately Greg Assomakopolis, he is not able to be here tonight; he had a family emergency his father is quite ill and he had to be out of town tonight so he will not be with us. And Bruce Thomas from the Tent City 4, a resident and spokesman for the encampment. And then from our own staff and our own departments, Ed Holmes who is our Police Chief, Pete Erickson who is a Police Detective and will be the liaison to the camp, Chris Tubbs, our Fire Chief, Rod Mandery who is our Fire Marshal, Katie Knight who is our Interim City Attorney, Steve Landcaster who is our Development Services Director, and Joy Johnston who is our Communications Manger. All of these people who

DECLARATION OF TARA JOHNSON-5  
Mercer Island Citizens for Fair Process

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have had a part in the assembly of these agreement terms and the negotiations with Tent City and the Church and they will be available to answer any questions that are in their specific areas."

Mayor Pearman then thanks Linda Herzog and opens the meeting up to public comments. After all public comments are heard, the Mayor closes the microphone for future public comment and introduces Katie Knight, the Interim City Attorney, as the person who made the decisions.

Katie Knight:

"The Tent City has been around for several years and one of the things that staff took into consideration is the several lawsuits that have come about because of Tent Cities and the Cities, the various Eastside Cities efforts to regulate Tent City, and what we have come down to after all these years is that the Courts have said Churches are entitled to host Tent City as an exercise of religion and the Cities are entitled to reasonably regulate that process. That being said in looking further into it, our Code doesn't encompass a homeless encampment like Tent City, we have to put an ordinance in place. The alternative that Mercer Island has done which is different than many Cities is to look at the different consent decrees and orders from the other courts and permits that the other Cities in the Eastside had worked out. From that we determined that if we get a temporary use agreement um the churches would invite, since this is an invitation for the Church, the Church's effort to exercise religion and the Cities portion of it was to put into place and agreement that would encompass basically the vast of what we could find from those consent decrees and various issues so that is what we have done. We have drawn from the Seattle consent decree, we have looked at what has happened in Woodinville, in Bellevue, in Bothell, and at the end of the day the agreement between SHARE/WHEEL and the City and the Methodist Church is what is before us through a lot of hard work and a lot of effort to avoid litigation and to allow the Methodist Church to truly exercise its religion."

DECLARATION OF TARA JOHNSON- 6  
Mercer Island Citizens for Fair Process

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Mayor Pearman:

"Ok and I am going to boil it down because I am not an attorney and I know some people in the room don't like law uh so I will make it understandable. The discussion tonight, correct me if I am wrong, is not a discussion of whether or not Tent City happens, it is basically a discussion on how it happens and we are not in a position to deny them to come to the island, is this correct?"

Katie Knight:

"That is correct."

Mayor Pearman:

"Ok so that is what we are discussing and with that as we go now we are going to bring it back to the Council and we have people to help us answer some questions, I think that there were some excellent questions that were asked by the Citizens and we have our Police Chief here, we have uh some people that have handled Tent Cities professionally in their communities, uh we Captain isn't it? Detective, sorry. Did I get you a raise? I know your boss. And the, also we have Rob from the City of Redmond, the planning department who also can. These people were professionals who were on the firing line with their Citizens dealing as our staff will with our community an uh we want to thank you for coming tonight it has been quite useful tonight. Also, Chief Holmes has done some research because there are some questions about real numbers and statistics. And can I put you on the spot Chief before we start?"

Before the comment period began, Deputy Manager, Linda Herzog made an approximately two minute presentation about tent city. She did not disclose that the temporary use agreement authorized a land use prohibited by the code nor did she disclose that the City Council had decided not to amend the City code to adopt an ordinance authorizing a temporary encampment. We were not told that the City code

DECLARATION OF TARA JOHNSON-7  
Mercer Island Citizens for Fair Process

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demands such an amendment if the land use which is prohibited by the zoning code. Instead, we learned from Deputy Manager, Herzog that the host Church and tent city management had agreed to comply with Mercer Island's land use and safety regulations.

If City officials had disclosed that City land use regulations prohibited a tent city and that the City Council had decided not to amend the code to authorize the use, I could have more intelligently commented on this proposal. We were totally deprived an opportunity to comment on those City decisions.

The misleading comments of Ms. Herzog, caused me and my other members of the Plaintiff association to believe that the tent city encampment was a legal property use.

We had difficulty obtaining information about tent city from the City. It did not give us records which we requested pursuant to a public disclosure request until September 2008, even though we had requested such documents many weeks before.

The scant notice we got about the proposed agreement in the newspaper prevented us from intelligently addressing the City Council about our concerns. Because we did not learn about crucial City decisions about tent city until after the public comment period, we never were given the opportunity to address City officials about these matters.

It was not until after the public comment period closed that City attorney, Katie Knight, suggested that the code did not encompass an outdoor encampment like tent city. What Ms. Knight failed to tell us is that the City code, in fact, prohibited an

DECLARATION OF TARA JOHNSON- 8  
Mercer Island Citizens for Fair Process

1  
2 encampment such as tent city. It was not clear from Ms. Knight's comment that that  
3 was the case.

4 Oddly, even though the City gave citizens woefully inaccurate notice about the  
5 temporary use agreement, it invited representatives from other cities and tent city to  
6 the meeting. It did not bother to post the Methodist Church property or to send  
7 personal notice of the property owners including Association members living in the  
8 immediate vicinity of the Church yet the City apparently gave Rob Odle, Redmond  
9 Planning Director and Nick Seabrick, a Kirkland police officer and tent city residents  
10 personal notice of the meeting since they attended it. I doubt that they read City  
11 Council agendas in the Mercer Island Reporter. Although the City apparently  
12 personally invited such individuals to the meeting, it made no significant efforts to  
13 publicize the meeting to its citizens.

14 In retrospect, City officials, apparently wanting to avoid controversy, gave  
15 citizens scant notice of the meeting. I, like many Mercer Island citizens, am very  
16 engaged with City government. I suspect other citizens, would have had very strong  
17 feelings which we would have expressed to the City Council about their decision to  
18 avoid the public process associated with amending the city code. It appears that the  
19 City Council simply wanted to avoid the public uproar that would have ensued had the  
20 City publicly disclosed that it was authorizing an illegal property use and that it had  
21 decided to do so without amending the code.

22 I have attached a true copy of an e-mail which was received from Councilman  
23 Gauszcz on April 2, 2009 as Exhibit 2.

24

DECLARATION OF TARA JOHNSON- 9  
Mercer Island Citizens for Fair Process

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I declare under penalty of perjury that the foregoing is true and correct.

DATED this 20<sup>th</sup> day of April, 2009 at Bellevue, Washington.

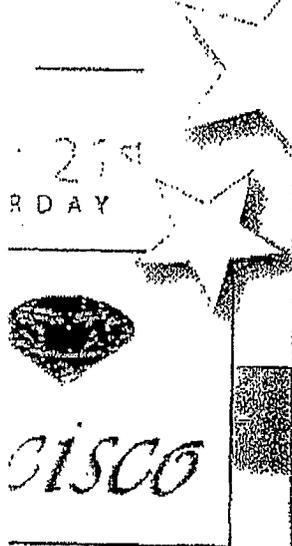
Tara Johnson  
 Tara Johnson

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DECLARATION OF TARA JOHNSON- 10  
 Mercer Island Citizens for Fair Process



DISE



# CITY OF MERCER ISLAND COUNCIL MEETING

**UNLESS OTHERWISE NOTED:**  
Council Meetings are held in the Council Chambers at City Hall the first and third Monday of every month;  
Special Meetings and Study Sessions begin at 6:00 pm;  
Regular Meetings begin at 7:00 pm.

## CITY COUNCIL REGULAR MEETING Monday, June 16, 2008, 7:00 pm

### Consent Calendar

- 2007 Year-End Transfer (Final)
- 40<sup>th</sup> Street Improvements Project Bid Award
- Basin Drainage Improvements Project Bid Award
- Summer Celebration Fireworks Display Permit
- Kiwanis Fireworks Sales Permit
- Fire Apparatus Refurbishment

### Regular Business

- 2007 "Leading Indicators" Report
- Temporary Use Agreement for Tent City Visit
- Funding for Tasefs
- First Hill Property Surplus

Agenda items are subject to change. Verify schedule by going to: [www.mercergov.org/agendas.asp](http://www.mercergov.org/agendas.asp)

**MERCER ISLAND CITY COUNCIL**  
Mayor Jim Pearman, Deputy Mayor El Jahncke,  
Councilmembers Bruce Bassett, Mike Cero,  
Mike Grady, Dan Grausz and Steve Litzow

[www.mercergov.org/council](http://www.mercergov.org/council)

04804

EXHIBIT 1

**Jane Ryan Koler**

---

**From:** "Tara Johnson, CFP" <taraj@emailswa.com>  
**To:** "Jane Ryan Koler" <jane@jkolerlaw.com>  
**Sent:** Wednesday, April 08, 2009 9:27 AM  
**Subject:** FW: City Council Report

**Tara Johnson, CFP**  
Consultant



777 108th Avenue NE, Suite 1880  
Bellevue WA 98004  
425.289.4222 tel  
425.289.1896 fax

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**From:** Tara Johnson, CFP  
**Sent:** Thursday, April 02, 2009 5:25 PM  
**To:** 'Jane Ryan Koler'  
**Subject:** FW: City Council Report  
**Importance:** High

I think this is the last of it but please see Councilmen Grausz's comments in red:

**From:** "Dan Grausz" <dangrausz@comcast.net>  
**Date:** August 2, 2008 11:27:55 PM PDT  
**To:** "Dan Grausz" <dgrausz@hollandamerica.com>  
**Subject:** City Council Report (C)

Fellow Islanders: below is my periodic update of the current happenings with City government. While I would like to report that political life has slowed down for the summer, that has not been the case in 2008:

1. Tent City: while the upcoming arrival of Tent City to the United Methodist Church on First Hill has demonstrated the compassion and goodness of Islanders, it has also raised legitimate concerns on the part of many Islanders who are no less compassionate or good but worry for the safety of their families. Many cities have ordinances that regulate these activities much like other land use requests. It must be understood that these ordinances are not designed to prevent tent cities on church or synagogue property but instead to place appropriate restrictions on the activity that are necessary to protect other public interests such as security and health. The City sought to address the issues normally covered by an ordinance through a contract with the Church and Tent City organizers. The City believes that the contract includes every safeguard that would have been required through an ordinance's permitting process and possibly

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some that we could not have obtained other than through a contract. What we have realized, however, is that the contract route did not afford the public the same opportunity for input that would have been available through a permitting process. Consequently, we have already initiated a staff review to determine whether an ordinance would better serve Islanders going forward. Even if we choose not to have an ordinance, we need to ensure an opportunity for sufficient public input into any future Tent City contract as our failure to do so this time has created frustration and anger that might have otherwise been avoided. I am the first to acknowledge that the City and United Methodist Church could and should have done a much better job in fostering a constructive dialogue with the neighborhood before the contract was voted on by the City Council.

With respect to the Tent City at the United Methodist Church, our Police Chief, Ed Holmes, laid out the City's plan for providing security in the area during the July 9th community meeting which I attended together with fellow Councilmember Mike Cero. I do not blame or criticize anyone for expressing concern as we have never had a Tent City previously on Mercer Island. Everything we have read and heard from other communities suggests that we will not have a resulting crime problem. While there have been some incidents requiring police involvement in those other communities, there is not a record of increased violent crime or risk of theft. While I believe the Chief's plan is well thought out and will protect our citizens, you can be assured that it will be monitored and, if necessary, adjusted. Public safety has always been and will continue to be a top priority on Mercer Island.

While a post-contract dialogue will not satisfy the concerns of many in the First Hill neighborhood (a neighborhood that I am proud to be part of), the Council and staff are taking steps to ensure that any issues with Tent City that may arise are both transparent to the community and addressed by the Council. Towards that end, the Council's August 18th meeting will be for the sole purpose of addressing Tent City issues. Traditionally, the second meeting in August is cancelled as we have found that many members of the public are out of town on vacation. This year, we will hold the meeting so that we are able to quickly address any initial Tent City issues that arise. Second, Council has directed staff to include any new Tent City information on the City's website, including public safety incidents. Third, Council has directed staff to include an update on every City Council agenda while Tent City is on the Island.

Our intention is to welcome the residents of Tent City to Mercer Island and do our utmost to help them get back on their feet so they are no longer homeless. At the same time, we fully acknowledge that there can be persons in any community who pose a safety issue. Since the residents of Tent City do not have roots in our community, the concerns are heightened. The City, both the City Council and staff, will monitor the situation and take whatever public safety measures are required to protect the neighborhood.

2. Island Crest Way and Merrimount: we continue to wrestle with the problem of addressing traffic safety concerns at the corner of Island Crest Way and Merrimount. Last year, we changed the traffic flow at the intersection to facilitate turns from and on to Merrimount. Many citizens have been critical of the new arrangement. Earlier this year, we were considering another option that would have prohibited left hand turns from Merrimount onto Island Crest Way. This was abandoned after it engendered significant negative public comments from people who were particularly concerned by the additional traffic this would have produced near West Mercer Elementary.

We then looked at another option commonly referred to as the "road diet" that would have reduced Island Crest Way to 3 lanes from Merrimount to SE 53rd: one lane in each direction and a center turn lane. This option would also have enabled us to eventually add a bike lane on Island Crest Way. This option, which we approved in May, has now resulted in public criticism as intense as the no left turn at Merrimount alternative from people who believe this will significantly increase travel times.

The other option that remains a possibility is putting a traffic light at the intersection. That option will cost in excess of \$1,000,000 and will likely slow traffic down even more than the "road diet."

At its last meeting, Council directed staff to initiate a public outreach process on this issue so that everyone has all available information on the options. There are many who have complained that the "road diet" decision was made without sufficient notice and public input. Clearly, the level of opposition since the "road diet" was approved had not been visible at the time we made our decision in May. Consequently, we will go back to the public and ask for input. What I ask is that people listen to the specifics on each option and then tell us not only what they oppose but also what they support as doing nothing at that intersection is not an option from a public safety standpoint.

3. PEAK Settlement: In June, the City Council and School Board approved a settlement between the Boys and Girls Club and the neighborhood group that had opposed the project, Islanders for Common Sense, that will enable the PEAK project to be built at the site near the high school. As the mediator of this settlement, I was very glad to see that the two groups could put aside their differences and find common

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# **APPENDIX E**

## **19.02.010 Single-family.**

A use not permitted by this section is prohibited. Please refer to MICC 19.06.010 for other prohibited uses.

A. Uses Permitted in Zones R-8.4, R-9.6, R-12, and R-15.

1. Single-family dwelling.

2. Accessory buildings incidental to the main building.

3. Private recreational areas.

4. ~~Public schools accredited or approved by the state for compulsory school attendance, subject to design commission review and all of the following conditions:~~

a. All structures shall be located at least 35 feet from any abutting property and at least 45 feet from any public right-of-way.

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space per classroom with high schools providing an additional one parking space per 10 students.

c. A one-fourth acre or larger playfield shall be provided in one usable unit abutting or adjacent to the site.

5. Home business as an accessory use to the residential use, subject to all of the following conditions:

a. The home business may make those improvements to the home business normally allowed for single-family residences. For a day care, play equipment and play areas are not allowed in front yards.

b. Only those persons who reside on the premises and one other person shall be permitted to engage in the business on the premises at any one time; provided, that a day care or preschool may have up to three nonresident employees on the premises at any one time. This limitation applies to all owners, managers, staff or volunteers who operate the business.

c. There shall be no exterior storage or display of materials except as otherwise allowed for single-family residences, and no sign advertising the home business located on the premises except as specifically allowed by MICC 19.12.080(B).

d. No offensive noise, vibration, smoke, dust, odor, heat or glare or excessive traffic to and from the premises shall be produced or generated by the home business.

e. The home business shall not involve the use of more than 30 percent of the gross floor area of the residence, not including the allowed basement exclusion area consistent with subsection E of

this section and MICC 19.16.010(G). However, a day care or preschool may use up to 75 percent of said gross floor area.

f. No home business shall be permitted that generates parking demand that cannot be accommodated on the lots consistent with the applicable maximum impervious surface coverage limits of MICC 19.02.020(D). Parking shall be provided to handle the expected parking demand. In the case of a day care or preschool, parking for residents and employees shall occur on site; resident and employee parking shall not occur on an adjacent street.

g. The business shall not provide healthcare services, personal services, automobile repairs; serve as a restaurant, commercial stable, kennel, or place of instruction licensed as a school under state law and which will operate with more than three students at a time; or serve as a bed and breakfast without a conditional use permit as set out in subsection (C)(7) of this section. Nothing contained in this subsection (A)(5)(g) shall be interpreted to prohibit a day care.

h. A day care shall be limited to 18 children maximum (not including dependents) at a time.

6. Public park subject to the following conditions:

a. Access to local and/or arterial thoroughfares shall be reasonably provided.

b. Outdoor lighting shall be located to minimize glare upon abutting property and streets.

c. Major structures, ballfields and sport courts shall be located at least 20 feet from any abutting property.

d. If a permit is required for a proposed improvement, a plot, landscape and building plan showing compliance with these conditions shall be filed with the city development services group (DSG) for its approval.

7. Semi-private waterfront recreation areas for use by 10 or fewer families, subject to the conditions set out in MICC 19.07.080.

8. One accessory dwelling unit (ADU) per single-family dwelling subject to conditions set out in MICC 19.02.030.

9. Special needs group housing as provided in MICC 19.06.080.

10. Social service transitional housing, as provided in MICC 19.06.080.

11. A state-licensed day care or preschool as an accessory use, when situated at and subordinate to a legally established place of worship, public school, private school, or public facility, meeting the following requirements:

a. The number of children in attendance at any given time shall be no more than 20 percent of the legal occupancy capacity of the buildings on the site, in the aggregate.

b. Signage shall be consistent with the provisions of MICC 19.12.080(B)(3).

c. Off-street parking provided by the primary use shall be deemed sufficient for the accessory day care or preschool if at least one space per employee is provided, and either:

i. One additional parking space is provided for every five children in attendance, or

ii. Adequate pick-up and drop-off space is provided as determined by the code official.

B. Additional Use Permitted in Zones R-9.6, R-12, and R-15. One accessory building for the housing of domestic animals and fowl, having a floor area not to exceed 36 square feet for each lot and located not less than 65 feet from any place of habitation other than the owners'; provided, the roaming area shall be fenced and located not less than 35 feet from any adjacent place of human habitation.

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C. Conditional Uses. The following uses are permitted when authorized by the issuance of a conditional use permit when the applicable conditions set forth in this section and in MICC 19.15.020(G)(3) have been met:

1. Government services, public facilities, utilities, and museums and art exhibitions, subject to the following conditions:

a. All structures shall be located at least 20 feet from any abutting property;

b. Off-street parking shall be established and maintained at a minimum ratio of one parking space for each 200 square feet of gross floor area; and

c. Utilities shall be shielded from abutting properties and streets by a sight obscuring protective strip of trees or shrubs.

2. Private schools accredited or approved by the state for compulsory school attendance, subject to conditions set out in subsection (A)(4) of this section.

3. Places of worship subject to the following conditions:

a. All structures shall be located at least 35 feet from any abutting property.

b. Off-street parking shall be established and maintained at a ratio of one parking space for each five seats in the chapel, nave, sanctuary, or similar worship area.

4. Noncommercial recreational areas, subject to the conditions contained in subsection (A)(6) of this section.

5. Semi-private waterfront recreation areas for use by more than 10 families, subject to conditions set out in MICC 19.07.080.

6. Retirement homes located on property used primarily for a place of worship subject to the following conditions:

a. Retirement home structures shall not occupy more than 20 percent of the lot; provided, the total lot coverage for the retirement home, the place of worship, and all other structures shall not exceed the lot coverage specified in MICC 19.02.020(D).

b. A plot, landscape and building plan shall be filed with the design commission for its approval, and the construction and maintenance of buildings and structures and the establishment and continuation of uses shall comply with the approved plot, landscape and building plan. Alterations to the project are permitted only upon approval by the design commission of a new or amended plan.

c. The number of dwelling units shall be determined by the planning commission upon examination of the following factors:

i. Demonstrated need;

ii. Location, size, shape and extent of existing development on the subject property;

iii. Nature of the surrounding neighborhood; and

iv. Legal assurances that the entire property remains contiguous, and that the retirement home is owned and controlled by the applicant religious organization.

d. The retirement home shall be located at least 35 feet from all abutting property.

e. Off-street parking shall be established and maintained at a ratio of one-half parking space for each dwelling unit.

7. The use of a single-family dwelling as a bed and breakfast subject to the following conditions:

a. The bed and breakfast facility shall meet all applicable health, fire, and building codes.

b. Not more than four rooms shall be offered to the public for lodging.

c. There shall be no external modification of any structure that alters the residential nature of the premises.

d. The bed and breakfast shall be the primary residence of the operator.

e. In addition to the parking required set out in MICC 19.02.020(E), one off-street parking space, not located in the lot setbacks, shall be provided for each rental room.

f. Meals shall be made available only to guests, and not to the general public.

8. Nonschool uses of school buildings, subject to the following conditions:

a. No use or proposed use shall be more intensive than the school activity it replaced. Consideration shall be given to quantifiable data, such as, but not limited to, traffic generation, parking demand, noise, hours of operation;

b. All activities, with the exception of outdoor recreation shall be confined to the interior of the building(s);

c. Exterior modification of the building(s) shall not be permitted if such a modification would result in an increase in the usable area of the building(s);

d. Minor changes in the building exterior, landscaping, signs, and parking may be permitted subject to the review and approval of the design commission; and

e. Off-street parking for all activities at the site shall be provided in existing school parking lots.

f. Termination. Conditional use permits for nonschool uses shall terminate and the use of the site shall conform to the requirements of the zone in which the school building is located on the day of the termination under the following conditions:

i. The school building is demolished or sold by the Mercer Island school district.

ii. The city council revokes the permit on the recommendation of the planning commission. Revocation shall be based on a finding that the authorized use constitutes a nuisance or is harmful to the public welfare, or the applicant has failed to meet the conditions imposed by the city.

g. Revision. Any modification to a nonschool conditional use permit shall be approved by the planning commission; however, the code official may approve minor modifications that are consistent with the above stated conditions.

9. A state-licensed day care or preschool not meeting the requirements of subsection (A)(11) of this section, subject to the following conditions:

a. Off-street parking and passenger loading shall be sufficient to meet the needs of the proposed day care or preschool without causing overflow impacts onto adjacent streets.

b. Signage shall be consistent with the provisions of MICC 19.12.080(B)(3).

D. Building Height Limit. No building shall exceed 30 feet in height above the average building elevation to the top of the structure except that on the downhill side of a sloping lot the building may extend to a height of 35 feet measured from existing grade to the top of the exterior wall facade supporting the roof framing, rafters, trusses, etc.; provided, the roof ridge does not exceed 30 feet in height above the average building elevation. Antennas, lightning rods, plumbing stacks, flagpoles, electrical service leads, chimneys and fireplaces and other similar

appurtenances may extend to a maximum of five feet above the height allowed for the main structure.

The formula for calculating average building elevation is as follows:

Formula:

Average Building Elevation = (Mid-point Elevation of Individual Wall Segment) x (Length of Individual Wall Segment) ÷ (Total Length of Wall Segments)

See Appendix G, Calculating Average Building Elevation.

E. Gross Floor Area.

~~1. The gross floor area of a single-family structure shall not exceed 45 percent of the lot area.~~

2. Lots created in a subdivision through MICC 19.08.030(G), Optional Standards for Development, may apply the square footage from the open space tract to the lot area not to exceed the minimum square footage of the zone in which the lot is located. (Ord. 09C-04 §§ 1, 2; Ord. 08C-01 § 1; Ord. 05C-16 § 1; Ord. 04C-08 § 9; Ord. 03C-08 § 3; Ord. 01C-06 § 1; Ord. 99C-13 § 1).

# **Mercer Island Municipal Code**

- 19.15.010 General procedures.
- 19.15.020 Permit review procedures.
- 19.15.030 Enforcement.
- 19.15.040 Design commission.

## **MIMC 19.15.010 General procedures.**

A. Purpose. Administration of the development code is intended to be expedient and effective. The purpose of this chapter is to identify the processes, authorities and timing for administration of development permits. Public noticing and hearing procedures, decision criteria, appeal procedures, dispute resolution and code interpretation issues are also described.

B. Objectives. Guide customers confidently through the permit process; process permits equitably and expediently; balance the needs of permit applicants with neighbors; allow for an appropriate level of public notice and involvement; make decisions quickly and at the earliest possible time; allow for administrative decision-making, except for those decisions requiring the exercise of discretion which are reserved for appointed decision makers; ensure that decisions are made consistently and predictably; and resolve conflicts at the earliest possible time.

C. Roles and Responsibilities. The roles and responsibilities for carrying out the provisions of the development code are shared by appointed boards and commissions, elected officials and city staff. The authorities of each of these bodies are set forth below.

1. City Council. The city council is responsible for establishing policy and legislation affecting land use within the city. The city council acts on recommendations of the planning commission in legislative and quasi-judicial matters, and serves as the appeal authority on discretionary actions.

2. Planning Commission. The role of the planning commission in administering the development code is governed by Chapter 3.46 MIMC. In general, the planning commission is the designated planning agency for the city (see Chapter 35A.63 RCW). The planning commission is responsible for final action on a variety of discretionary permits and makes recommendations to the city council on land use legislation, comprehensive plan amendments and quasi-judicial matters. The planning commission also serves as the appeal authority for some ministerial and administrative actions.

3. Design Commission. The role of the design commission in administering the development code is governed by Chapter 3.34 MIMC and MIMC 19.15.040. In general, the design commission is responsible for maintaining the city's design standards and action on sign, commercial and multiple-family design applications.

4. Building Board of Appeals. The role of the building board of appeals in administering the construction codes is governed by Chapter 3.28 MIMC. In general, the building board of appeals

is responsible for hearing appeals of interpretations or application of the construction codes set forth in MICC Title 17.

5. Development Services Group. The responsible officials in the development services group act upon ministerial and administrative permits.

a. The code official is responsible for administration, interpretation and enforcement of the development code.

b. The building official is responsible for administration and interpretation of the building code, except for the International Fire Code.

c. The city engineer is responsible for the administration and interpretation of engineering standards.

d. The environmental official is responsible for the administration of the State Environmental Policy Act and shoreline master program.

e. The fire code official is responsible for administration and interpretation of the International Fire Code.

6. Hearing Examiner. The role of the hearing examiner in administering the development code is governed by Chapter 3.40 MICC.

D. Actions. There are four categories of actions or permits that are reviewed under the provisions of the development code.

1. Ministerial Actions. Ministerial actions are based on clear, objective and nondiscretionary standards or standards that require the application of professional expertise on technical issues.

2. Administrative Actions. Administrative actions are based on objective and subjective standards that require the exercise of limited discretion about nontechnical issues.

3. Discretionary Actions. Discretionary actions are based on standards that require substantial discretion and may be actions of broad public interest. Discretionary actions are only taken after an open record hearing.

4. Legislative Actions. Legislative actions involve the creation, amendment or implementation of policy or law by ordinance. In contrast to the other types of actions, legislative actions apply to large geographic areas and are of interest to many property owners and citizens. Legislative actions are only taken after an open record hearing.

E. Summary of Actions and Authorities. The following is a nonexclusive list of the actions that the city may take under the development code, the criteria upon which those decisions are to be based, and which boards, commissions, elected officials, or city staff have authority to make the decisions and to hear appeals of those decisions.

ACTION	DECISION AUTHORITY	CRITERIA	APPEAL AUTHORITY
<b>Ministerial Actions</b>			
Right-of-Way Permit	City engineer	Chapter <u>19.09</u> MICC	Hearing examiner
Home Business Permit	Code official	MICC <u>19.02.010</u>	Hearing examiner
Special Needs Group Housing Safety Determination	Police chief	MICC <u>19.06.080(A)</u>	Hearing examiner
Lot Line Adjustment Permit	Code official	Chapter <u>19.08</u> MICC	Hearing examiner
Design Review – Minor Exterior Modification Outside Town Center	Code official	MICC <u>19.15.040</u> , Chapters <u>19.11</u> and <u>19.12</u> MICC	Design commission
Design Review – Minor Exterior Modification in Town Center	Design commission	MICC <u>19.15.040</u> , Chapters <u>19.11</u> and <u>19.12</u> MICC	Hearing examiner
Final Short Plat Approval	Code official	Chapter <u>19.08</u> MICC	Planning commission
Seasonal Development Limitation Waiver	Building official or city arborist	MICC <u>19.10.030</u> , <u>19.07.060(D)(4)</u>	Building board of appeals
Development Code Interpretations	Code official	MICC <u>19.15.020(L)</u>	Planning commission
Shoreline Exemption	Code official	MICC <u>19.07.010</u>	Hearing examiner*
<b>Administrative Actions</b>			
Accessory Dwelling Unit Permit	Code official	MICC <u>19.02.030</u>	Hearing examiner
Preliminary Short Plat	Code official	Chapter <u>19.08</u> MICC	Planning commission
Deviation (Except Shoreline Deviations)	Code official	MICC <u>19.15.020(G)</u> , <u>19.01.070</u> , <u>19.02.050(F)</u> , <u>19.02.020(C)(4)</u> and <u>(D)(3)</u>	Planning commission
Critical Areas Determination	Code official	Chapter <u>19.07</u> MICC	Planning commission
Shoreline – Substantial Development Permit	Code official	MICC <u>19.07.110</u>	Shoreline hearings board
SEPA Threshold Determination	Code official	MICC <u>19.07.120</u>	Planning commission

Short Plat Alteration and Vacations	Code official	MICC <u>19.08.010(G)</u>	Hearing examiner
Long Plat Alteration and Vacations	City council via planning commission	MICC <u>19.08.010(F)</u>	Superior court
Temporary Encampment	Code official	MICC <u>19.06.090</u>	Superior court
<b>Discretionary Actions</b>			
Conditional Use Permit	Planning commission	MICC <u>19.11.130(B)</u> , <u>19.15.020(G)</u>	Hearing examiner
Reclassification (Rezone)	City council via planning commission*	MICC <u>19.15.020(G)</u>	Superior court
Design Review – Major New Construction	Design commission	MICC <u>19.15.040</u> , Chapters <u>19.11</u> and <u>19.12</u> MICC	Hearing examiner
Preliminary Long Plat Approval	City council via planning commission**	Chapter <u>19.08</u> MICC	Superior court
Final Long Plat Approval	City council via code official	Chapter <u>19.08</u> MICC	Superior court
Variance	Hearing examiner	MICC <u>19.15.020(G)</u> , <u>19.01.070</u>	Planning commission
Variance from Short Plat Acreage Limitation	Planning commission	MICC <u>19.08.020</u>	City council
Critical Areas Reasonable Use Exception	Hearing examiner	MICC <u>19.07.030(B)</u>	Superior court
Street Vacation	City council via planning commission**	MICC <u>19.09.070</u>	Superior court
Shoreline Deviation	Planning commission	MICC <u>19.07.080</u>	City council
Shoreline Variance	Planning commission	MICC <u>19.07.110(C)(2)(d)</u>	State Shorelines Hearings Board
Impervious Surface Variance	Hearing examiner	MICC <u>19.02.020(D)(4)</u>	Superior court
<b>Legislative Actions</b>			
Code Amendment	City council via planning commission**	MICC <u>19.15.020(G)</u>	Growth management hearings board

Comprehensive Plan Amendment	City council via planning commission**	MICC <u>19.15.020(G)</u>	Growth management hearings board
*Final rulings granting or denying an exemption under MICC <u>19.07.110</u> are not appealable to the shoreline hearings board (SHB No. 98-60).			
**The original action is by the planning commission which holds a public hearing and makes recommendations to the city council which holds a public meeting and makes the final decision.			

# **APPENDIX F**

## RCW 36.70C.020

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Energy overlay zone" means a formal plan enacted by the county legislative authority that establishes suitable areas for siting renewable resource projects based on currently available resources and existing infrastructure with sensitivity to adverse environmental impact.

(2) "Land use decision" means 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.

(3) "Local jurisdiction" means a county, city, or incorporated town.

(4) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

(5) "Renewable resources" has the same meaning provided in RCW 19.280.020.

## RCW 36.70C.030

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) 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.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

## RCW 36.70C.040

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the

persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

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# **APPENDIX G**

## **Article 6 - Debts, Supremacy, Oaths**

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

**APPENDIX H**

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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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; and Mercer Island United Methodist Church (MIUMC), a  
Washington non-profit corporation, and the CITY OF MERCER  
ISLAND, a Washington Municipal Corporation

Respondents.

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**MOTION FOR RECONSIDERATION AND MODIFICATION OF  
MERCER ISLAND CITIZENS FOR FAIR PROCESS DECISION**

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JANE RYAN KOLER  
W.S.B.A. No. 13541  
Attorney for Appellant

Law Office of Jane Ryan Koler, PLLC  
5801 Soundview Drive, Suite 258  
P.O. Box 2509  
Gig Harbor, WA 98335

Under RAP 12.4, the Appellant asks this court to reconsider and slightly modify its Published Decision, *Mercer Island Citizens for Fair Process v. Tent City 4, et. al.* by eliminating the following holding:

Thus, the plaintiffs' failure to challenge that decision [the temporary use agreement decision] in a timely LUPA appeal bars its due process claims, including claims for damages under 42 U.S.C. § 1983 because these claims are simply a challenge to the approval of the temporary use permit.

Court of Appeals Decision June 1, 2010, page 2.

That holding conflicts with well established federal law and the supremacy clause by severely and impermissibly curtailing the appellant's rights under 42 U.S.C. § 1983. Further, the decision has the effect of shortening the statute of limitations for asserting a § 1983 claim from three years to 21 days, thus additionally conflicting with RCW 36.70C.030 which specifies that damage claims are not subject to the 21 day LUPA period of limitations.

**I. FEDERAL RIGHTS CANNOT BE DEFEATED BY FORMS OF LOCAL PRACTICE**

The United States Supreme Court in *Felder v. Casey*, 487 U.S. 131, 138 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), held that a state notice of claim requirement interfered impermissibly with an individual's federal right to assert a § 1983 claim and that the state claim statute was pre-empted by § 1983 by virtue of the supremacy clause; Supreme Court law holds that state law procedures cannot interfere with the vindication of federal rights under § 1983. See *Felder*, 487 U.S.

at 138. The City cannot place procedural limitations on the vindication of federal constitutional rights; the proper result is dictated by the United States Supreme Court and the United States Constitution's supremacy clause. Section 1983 pre-empts state procedures that frustrate its purpose "to provide a remedy to be broadly construed against all forms of official violation of federally protected rights." *Monnell v. Dept. of Social Serv's*, 436 U.S. 658, 700-701, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1987); See also *Felder* 487 U.S. at 138. (Finding state notice of claim statute that interfered with § 1983 claim was pre-empted).

In this case, the court held that "as case law recognizes, claims for damages based on a LUPA claim must be dismissed if the LUPA claims fails." Court of Appeals Decision June 1, 2010, page 11. The court also notes that "case law also recognizes that the 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." Court of Appeals Decision June 1, 2010, page 9. The decision turns on the incorrect premise that challenging constitutional violations under LUPA is a necessary prerequisite to asserting a § 1983 claim if a due process claim is at issue. This is akin to requiring persons to pursue administrative remedies for violation of constitutional rights See *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21, 829 P.2d 765 (1992) (Exhaustion of administrative remedies is not required under § 1983 for due process claims). This proposition ignores the supremacy clause and that the right to seek redress for

violations of federal constitutional rights pre-empts and prevents any local statute or state procedures which frustrate the purpose of § 1983.

Here, the court has implicitly and errantly recognized a state procedural requirement - - the filing of a successful LUPA claim - - interferes with and frustrates vindication of plaintiff's rights under § 1983. Because federal case law provides that state law procedures cannot interfere with the vindication of federal rights under § 1983, any state procedures, including those in LUPA, that interfere with vindication of appellant's rights under § 1983 must yield.

## **II. THE COURT DECISION EFFECTIVELY CREATES A 21 DAY PERIOD OF LIMITATIONS FOR § 1983 CLAIMS**

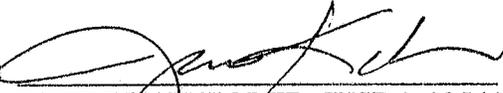
Unlike LUPA, which is subject to a 21 day period of limitations, § 1983 claims are governed by a three year statute of limitations. *Robinson v. City of Seattle*, 119 Wn.2d 34, 86, 830 P.2d 318 (1992). The court's holding in this case effectively deprives the appellant of that three year period of limitation and requires them to assert a federal constitutional § 1983 claim within a 21 day period. It was not the intent of the legislature to impose such a requirement; the LUPA statute clearly specifies that damage actions are not subject to LUPA and its period of limitations. *See RCW 36.70C.030(1)(c)*. The Washington Supreme Court in *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179, 1185 (2009), recently affirmed that damage claims are not subject to LUPA. As a matter of practice, subjecting § 1983 claims to a 21 day period of limitations thwarts the right to assert such claims.

By the expiration of the 21 day LUPA period of limitations, it is doubtful that a litigant would have sufficient time to properly plead a federal § 1983 claim; certainly, in that limited period it is unlikely that there would be enough time to obtain and examine all the public records in a particular case which would disclose the involvement of various public officials in a constitutional violation. Such insufficiency would frustrate the remedial purposes of § 1983 claims. *See Felder*, 487 U.S. at 145-146 (4 month period in which § 1983 claims had to be asserted would not leave victims enough time to comprehend violations of their rights). There is simply no language in LUPA which suggests that the Washington State Legislature was attempting to limit the rights of citizens to seek vindication of their federal constitutional rights.

The court's decision, by making the assertion of a § 1983 claim dependent on the assertion of a valid LUPA claim, ignores that an action for constitutional injury accrues the moment that the injury occurs. Thus, at that moment, a plaintiff is entitled to nominal damages. *See Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252 (1978). Case law does not support this court's conclusion that the right to seek vindication of federal rights and federal constitutional rights only accrues after assertion of a valid LUPA claim. For the above reasons, the appellant urges this court to modify its decision to the extent that it holds that assertion of a valid LUPA claim is a necessary prerequisite to filing a claim under 42 U.S.C. § 1983.

DATED this 16 day of June, 2010.

RESPECTFULLY submitted,

By:   
JANE RYAN KOLER, WSBA 13541  
Attorney for Mercer Island Citizens For Fair Process,  
Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on June 16, 2010 I caused to be served, by the manner indicated below, copies of **Motion for Reconsideration and Modification of Mercer Island Citizens for Fair Process Decision.**

TO:

Mark F. Rising  
HELSELL FETTERMAN LLP  
1001 Fourth Avenue, Suite 4200  
Seattle, WA 98154

By U.S. Mail Postage Pre-Paid

Michael C. Walter  
Keating, Bucklin & McCormack  
800 Fifth Ave., Suite 4141  
Seattle, WA 98104

By U.S. Mail Postage Pre-Paid

Ted Hunter  
SOUND LAW CENTER  
4500 9<sup>th</sup> Ave. NE, Suite 300  
Seattle, WA 98105

By U.S. Mail Postage Pre-Paid

Katie Knight, City Attorney  
City of Mercer Island  
9611 SE 36<sup>th</sup> St.  
Mercer Island, WA 98040

By U.S. Mail Postage Pre-Paid

Dated this 16<sup>th</sup> day of June, 2010

  
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Anita Hope, Legal Assistant  
Law Office Jane Ryan Koler