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No. 63504-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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,
a Washington non-profit corporation, and the CITY OF MERCER
ISLAND, a Washington Municipal Corporation,

Respondents.

**BRIEF OF RESPONDENT
MERCER ISLAND UNITED METHODIST CHURCH**

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I. INTRODUCTION

Respondent Mercer Island Methodist Church (“the Church”) supports the affirmation of the trial court’s dismissal of all of the Appellant’s claims on summary judgment. The trial court’s decision on summary judgment should be affirmed for all of the reasons set forth in the briefs of the City of Mercer Island (“the City”) and Respondent SHARE/WHEEL. The trial court decision should also be affirmed because all of the actions taken by the City in entering into the agreement with the Church and SHARE/WHEEL concerning the Tent City 4 encampment were not only done in full compliance with City ordinances and municipal code, but in fact, the City’s actions were mandated under of the Free Exercise Clause of the First Amendment of the United State Constitution, Article I, Section 11 of the Washington State Constitution, and the provisions of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). In entering into the Temporary Use Agreement (“TUA”) with the Church and SHARE/WHEEL, not only was the City complying with its own municipal code, but more importantly, it was exercising its plenary authority to accommodate the Church’s constitutional and statutory right to the free exercise of its religion. For these reasons, the trial court’s dismissal of the Appellant’s claims should be affirmed.

II. STATEMENT OF THE CASE

A. Facts Regarding the Church and Tent City.

In the fall of 1999 a number of homeless people that had been living on the streets of downtown Seattle sought refuge from the WTO protests. CP 601. They stayed in the parking lot of Crown Hill United Methodist Church for a six week period. *Id.* The group became known as “Tent City.” *Id.* Subsequently, the group divided and stayed in the parking lots of various churches in Seattle, Tukwila, and Renton. CP 334. Since the spring of 2004, "Tent City 4" has stayed on the property of various churches on the east side of Lake Washington. CP 334, 601.

Tent City is a group of self-regulating homeless men and women that need temporary shelter. CP 334-35. They are organized by SHARE/WHEEL, a nonprofit corporation comprised of Seattle Housing and Resource Effort (“SHARE”) and the Women’s Housing Equality and Enhancement League (“WHEEL”). CP 333. They encamp as a group to increase their safety. *Id.* Many are employed full time but cannot earn enough money per hour to pay rent. CP 374.

Tent City is a sanctuary for homeless people who otherwise would have been relegated to the isolated, dangerous activity of trying to find a dry place beneath a bridge or in an alley to lay their heads at night. *Id.* The religious congregations hosting Tent City organize, prepare and serve

meals to the Tent City residents, as well as provide the residents with necessary supplies to help them live with dignity. CP 601. Assistance with transportation and employment are also often offered by the congregations. CP 374. For these congregations, hosting Tent City constitutes a genuine and deep felt practice of their religious faith. CP 605.

The mission of the Mercer Island United Methodist Church focuses on “social holiness.” CP 596-601. This mission drives the Church and its congregation to express its faith through relationships; welcoming the stranger, feeding the hungry, and helping the poor move into better lives. The motto of the Church is “be doers of the word and not merely hearers....” *Id.*

B. Events Leading Up to Approval of the TUA.

The Church first approached the City to explore options to allow it to host a Tent City encampment in spring 2006. CP 720. Thereafter, for about two years, the Church, the City and SHARE/WHEEL discussed options for allowing the Tent City encampment while ensuring that all City land use regulations and codes were complied with and that the public health, safety and welfare of the City was ensured. CP 720-24 *passim*. Because the City’s existing Municipal Code did not expressly contemplate a tent city type encampment or otherwise expressly authorize such uses,

and to comply with federal and state constitutional and statutory requirements for accommodating religious activities, the City, the Church and SHARE/WHEEL, at the request of the Church, determined that a TUA – essentially a land use contract – to address land use regulation, permitting and zoning issues would best serve the Church and Tent City 4, and would ensure that the public health, safety and welfare of Mercer Island citizens was protected. CP 537-40; 714-17; 719-25. This TUA was intended to supplement the City’s land use regulatory authority to allow for the limited-duration Tent City encampment. *Id.*

Prior to approval of the TUA on June 16, 2008, City staff and members of the Mercer Island Clergy Association (“MICA”) discussed the possibility of Tent City coming to Mercer Island. CP 719. In the spring of 2007, MICA announced its intention for one of Mercer Island’s congregations to invite a Tent City encampment. *Id.* MICA agreed that, through a binding land use agreement, the City would be assured that all City codes are respected and regulatory requirements met. CP 539; 719-21, 23-24. In mid-May 2008, MICA leadership invited City staff to meet with a newly-appointed Tent City subcommittee as well as the pastor of the Church, the host congregation, and at that meeting City staff reviewed the history of the previous discussions, and reopened the dialog about specific terms of the TUA. CP 539-40; 721-24. Over the following two

weeks, a written TUA was prepared and discussed with the Church and SHARE/WHEEL, and signed by their representatives. *Id.*

Notice of the Council's deliberation and possible approval of the TUA was published in the Mercer Island Reporter on June 11, 2008. CP 539; 697-98; 724. The notice was proper, timely and in conformance with City of Mercer Island City Council meeting notice requirements. Also, pursuant to the TUA, the Church held a public informational neighborhood meeting approximately one month prior to establishment of the encampment, with notice of the meeting published in the Mercer Island Reporter and delivered to nearby residents/owners two weeks prior to the meeting. *Id. passim.*

During the appearances section of the June 16, 2008 Council meeting, approximately 26 persons spoke to the Council about the TUA and Tent City. CP 539. Ms. Tara Johnson, a representative of appellant Citizens for Fair Process ("CFP"), testified at the public meeting, as did Christine Oaks, wife of Steve Oaks. *Id.* Several residents who were consistently outspoken in their opposition to Tent City 4 expressed themselves to the Council at this meeting. CP 224-25. After hearing citizen comments and lengthy discussion, the Council unanimously approved the TUA, with one amendment. *Id.*

C. The TUA.

The TUA was intended to act as a binding land use agreement among the City of Mercer Island on behalf of its citizens, the Church and SHARE/WHEEL. CP 538-40; 714-17; 719-26. It was negotiated and entered into by the parties to regulate and control the use of the Church property by SHARE/WHEEL and Tent City 4, and was approved by the Mercer Island City Council to protect the health, safety and well-being of Mercer Island citizens. CP 544-45; 719-26. The TUA contained numerous conditions and requirements typically found in City zoning, land use and land regulation codes, and was intended to supplement, or act as a gap-filling provision for, the City's existing land use regulations. *Id. passim*. In every way, the TUA was the City's land use decision, and both permitted the use of the Church's property for the encampment and imposed specific land use regulations and conditions for the use of the property. *Id. passim*.

D. Procedural Background.

On July 10, 2008, counsel for CFP faxed to the Church documents which did not include a cause number. CP 568-69. The same documents, this time with attachments, were received by FedEx package at the Church the following day. CP 569. The first document received by the Church or the Church's attorneys that included a cause number was the Order Setting Case Schedule which was first mailed from counsel for CFP's office in

Gig Harbor on July 11, 2008. CP 569, 579-81. On July 14, 2008, counsel for the Church received a call from the presiding judge's bailiff requesting that he set up a conference call with the other attorneys involved in the case and the judge. CP 569-70. During the conference call, the judge stated that because Tent City 4 was not scheduled to arrive at the Church until August 5, 2008, he wanted to establish a briefing schedule that would give the defendants an opportunity to respond to CFP's papers. *Id.* A hearing date of July 25, 2008 was then scheduled but was then canceled because counsel for CFP could not attend. *Id.*

On July 16, 2008, counsel for the Church was informed that another judge had been assigned to hear CFP's motion for injunctive relief. CP 570. After a conference call with the attorneys in the case, the new judge scheduled the hearing on CFP's motion for July 28, 2008, not August 4, 2008, as CFP implies in its brief. *Id.*

On July 28, the trial court heard oral argument by counsel for the parties regarding CFP's request for a TRO and a preliminary injunction.

CP 79-86. At oral argument, counsel for CFP stated unequivocally:

No, Judge Fox, we're not claiming there was not an opportunity to be heard, we're claiming that a fundamental component of due process is that government must follow its own laws.

CP 840.

At the July 28, 2008 hearing, the Court denied CFP's request for a TRO and preliminary injunction, finding and concluding in part that CFP had not shown a likelihood of prevailing on the merits on its claim; that it failed to show a well grounded fear of immediate invasion of its members' legal rights or that they would suffer irreparable injury as a result of an encampment pursuant to the June 16, 2008 TUA between Defendants; and that it failed to show that it would suffer substantial harm or irreparable injury from the encampment established pursuant to the June 16, 2008 TUA between Defendants. CP 79-86.

After CFP's request for a TRO and preliminary injunction were denied, the City moved for summary judgment on all of CFP's remaining claims. CP 624. CFP then filed a motion and memorandum in support of a cross motion for summary judgment, arguing that the City violated CFP's constitutional right to due process and the City was liable for nominal damages for that alleged violation under 42 U.S.C. § 1983. CP 206. By order entered on April 24, 2009, the trial court granted summary judgment to the City and denied CFP's motion for summary judgment, dismissing the lawsuit with prejudice. Specifically, the trial court found that CFP could not establish liability against the City for a due process violation or for damages or attorney's fees under 42 U.S.C. § 1983 and § 1988 or for any other relief. CP 315-24.

III. SUMMARY OF ARGUMENT

Courts across the nation have recognized that church activities of feeding the hungry and providing a place for the homeless to sleep are protected activities under the Free Exercise clauses of United States and state constitutions. Because these are constitutionally protected activities, municipalities can intervene or limit these activities only to protect “compelling government interests” such as health and safety in the “least restrictive means” available. The City’s entering into the TUA with the Church and SHARE/WHEEL was a valid land use decision made in compliance with the Church’s free exercise of religion under the Free Exercise Clause of the First Amendment of the U.S. Constitution, as well as under Article I, Section 11 of the Washington State Constitution, and the RLUIPA, all of which supersede any alleged requirements under Mercer Island Municipal Code that the Appellant now claims were not followed.

IV. ARGUMENT

- A. The Church’s Free Exercise Of Religion Could Not Have Been Restricted Absent A Showing Of A Compelling Governmental Interest.
1. *Ministering To The Homeless Constitutes A Permitted And Constitutionally Protected “Accessory Use” Of Church Property.*

At the time of the trial court's decision, the Church had already obtained a building permit that entitles it to use its property as a "church." Although different jurisdictions may have slightly different descriptions of the "uses" permitted on church property, applicable land use codes always allow uses "accessory" to worship, missionary and prayer services.

The Supreme Court of Ohio has held that, for a church, a homeless shelter is accessory use. In *Henley v. City of Youngstown Board of Zoning Appeals*, 90 Ohio St.3d 142, 735 N.E.2d 433 (2000), the Ohio Supreme Court held:

The court of appeals concluded, and we agree, that "social programs of a church, such as the ones in this case, *are accessory uses in that they are customarily incidental to the principal use.*" (Emphasis added.) The character of uses and structures that courts have deemed accessory to religious uses has varied widely. See, generally, Annotation, What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance (1982), 11 A.L.R. 4th 1084, 1086, citing 2 Anderson, American Law of Zoning 2d, Section 12.26. Several courts have specifically permitted residential accommodations in church buildings as accessory uses. See, e.g., *St. John's Evangelical Lutheran Church v. Hoboken* (1983), 195 N.J. Super. 414, 479 A.2d 935 (shelter for homeless); *Beit Havurah v. Norfolk Zoning Bd. Of Appeals* (1979), 177 Conn. 440, 418 A.2d 82 (unrestricted overnight accommodations in synagogue). Most recently, the Twelfth District Court of Appeals determined that a home for unwed pregnant teenage girls, which included prenatal care, life skills training, and a spiritual education, was an integral part of a church's missionary purposes. *Solid Rock Ministries Internatl. v. Monroe Bd. of Zoning Appeals* (June 5, 2000), Butler App.

No. CA99-10-170, unreported, 2000 WL 744584. Based on the foregoing, we agree with the court of appeals that Beatitude House would be "customarily incidental" to the principal use of the diocesan property as a Catholic church and would satisfy Article I's definition of "Accessory Use or Building."

90 Ohio St.3d at 149.

Regardless of whether a particular use of church property is deemed "accessory" to a use "permitted" under a land use classifications, courts across the nation have recognized the activities of feeding the hungry and providing a place for the homeless to sleep are protected activities under the Free Exercise clauses of state constitutions and the U.S. Constitution. Because they are constitutionally protected activities, municipalities can intervene or limit these activities only to protect "compelling governmental interests" such as health and safety in the "least restrictive means" available.

2. *The Church's Free Exercise of Religion Is Guaranteed and Protected by the Washington State Constitution.*

Article 1, Section 11 of the Washington State Constitution ensures "[a]bsolute freedom of conscience in all matters of religious sentiment, belief, and worship" to "every individual" and guarantees that "no one shall be molested or disturbed in person or property on account of religion." This guarantee of free exercise – significantly stronger than the corresponding provision in the federal Constitution – "is 'of vital

importance.”” *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 226, 840 P.2d 174 (1992).

If the “coercive effect of [an] enactment” operates against a party “in the practice of his religion”, it unduly burdens the free exercise of religion. A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate Article 1, section 11, if it indirectly burdens the exercise of religion.

State action is constitutional under the free exercise clause of article 1 if the action results in no infringement of a citizen’s right or if a compelling state interest justifies any burden on the free exercise of religion.

First Covenant, 120 Wn.2d at 226 (citations omitted; alterations and omissions in the original); *see also Munns v. Martin*, 130 Wn.2d 192, 200, 930 P.2d 318 (1997); *City of Sumner v. First Baptist Church*, 97 Wn.2d 1, 5, 639 P.2d 1358 (1982).

“A ‘compelling interest’ is one that has a ‘clear justification . . . in the necessities of national or community life,’ that prevents a ‘clear and present, grave and immediate’ danger to public health, peace and welfare.” *First Covenant*, 120 Wn.2d at 226-27 (citations omitted; emphasis added). The interest must be “paramount.” *Sherber v. Verner*, 374 U.S. 398, 406 (1963). The test also focuses on the means used to accomplish the asserted interest: “The State also must demonstrate that the means chosen to achieve its compelling interest are necessary and the least restrictive available.” *First Covenant*, 120 Wn.2d at 227. The least restrictive means

element is virtually impossible to satisfy when reasonable alternatives exist that would advance the government's interests without sacrificing the religious exercise at issue.

In the recently decided *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 211 P.3d 406 (2009), the Washington Supreme Court affirmed the vital importance of the free exercise of religion under Article I, section 11 of the Washington constitution, finding that a church seeking to host the same Tent City encampment at issue here had more protection under the Washington constitution than under the federal constitution and that any burden placed on a church by the State may only arise to the level of being a "slight inconvenience" and "cannot impose substantial burden on exercise of religion." *Id.* at 643-44. Furthermore, if it imposes any burden on the exercise of religion, the government must "show it has a narrow means for achieving a compelling goal." *Id.* at 642 (citing *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 152, 995 P.2d 33 (2000)). Because the City of Woodinville had chosen to enforce a moratorium it had place on issuing temporary use permits and outright denied any consideration of the church's application for a permit, the Supreme Court found that the city had placed a substantial burden on the church. *Id.* at 644. Being unable to show that its decision to stand behind the moratorium was a narrow means for

achieving a compelling goal, the Supreme Court held that the city violated Article I, Section 11 of our the Washington constitution. *Id.* at 644-45.

Woodinville v. Northshore UCC underscores the importance of a church's constitutional right to the free exercise of its religion when compared to a city's interest in complying with or enforcing a procedural land use ordinance. In the present case the City was obligated to accommodate the Church in the exercise of its religion in hosting the Tent City 4 encampment, which could only have been restricted with a showing of a compelling government interest. Arguments by the Appellant that the City improperly entered the TUA are both unsupported by any authority and contrary to the case law discussed above.

3. *The Church's Free Exercise Of Religion Was Also Protected Under The Free Exercise Clause Of The First Amendment Of The United State Constitution.*

Like the Washington Constitution, the United States Constitution proscribes governmental action that infringes on the ability of churches to exercise the mandates of their faith. The same compelling governmental interest test applied by the Washington courts also applies under the First Amendment where, as in most land use matters, individualized exemptions to otherwise generally applicable rules are allowed in the discretion of government officials. In the case of *Church of the Lukumi Babalu Aye*,

Inc. v. City of Hialeah, 508 U.S. 520, 114 S.Ct. 2217, 124 L.Ed.2d 472

(1993), the United States Supreme Court held:

As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”

Id. at 537. Thus, the Free Exercise Clause of the First Amendment prohibits enforcement of zoning regulations that place a substantial burden on the exercise of religion unless the land use authority demonstrates that the regulations are necessary to further a compelling governmental interest (*i.e.*, prevention of a clear, present, grave and immediate danger to public health, peace and welfare) and that the least restrictive means necessary to further that governmental interest are employed.

Numerous other courts have held that the free exercise clause of the First Amendment supports entry of an injunction barring zoning code enforcement actions against churches for providing food or sanctuary to the homeless. *See, e.g., Fifth Ave. Presbyterian Church v. City Of New York*, 293 F.3d 570 (2d Cir. 2002), *Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia*, 946 F. Supp. 1225 (E.D. Va. 1996) (Paine, J.); *Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia*, 862 F. Supp. 538 (D.D.C. 1994) (Sporkin, J.); *The Jesus Center v. Farmington Hills Zoning Board of*

Appeals, 215 Mich.App. 54, 544 N.W.2d 698 (1996); and *St. John's Evangelical Lutheran Church v. City of Hoboken*, 195 N.J.Super. 414, 479 A.2d 935 (1983). These cases all show that a land use authority cannot prevent a church or synagogue from providing sanctuary to homeless people in the exercise of its religious mandates unless the authority demonstrates that its enforcement action furthers a compelling governmental interest and that it has accommodated the church's religious exercise by using the least restrictive means of furthering that compelling governmental interest.

In the case *Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia*, 946 F.Supp. 1225 (E.D. Va. 1996), the Court noted that a meal ministry was motivated by the churches' religious beliefs and went on to hold that the City of Richmond failed to meet its burden under the compelling governmental interest test. The Court found that the City's conclusory assertions regarding governmental interests were insufficient:

Defendants failed to show that there was a compelling state interest in restricting the conduct of the Meal Ministry in its present format and to its present extent. Indeed, they showed only that several complaints had been made over a period of a few days about noise, unruly behavior and urination on private property. No showing was made that the behavior complained of was by the Meal Ministry participants, nor could such a showing be made, according

to the testimony of one witness. Defendants also failed to show that such unruly and disturbing behavior occurred on a regular basis or even on more than one occasion. Preventing a singular occurrence of noise, unruly behavior and unsightly conduct simply would not constitute a compelling state interest where, as here, a substantial burden on the free exercise of religion has been shown. There has been no allegation in this case that the Meal Ministry jeopardizes the public safety, nor that the program has caused acts or threats of violence against neighbors. There has not even been a showing that the program causes traffic jams.

* * *

Absent as showing of compelling state interest, it is not possible to accurately assess whether the Code sections constitute the least restrictive means of achieving that compelling state interest. For example, nothing explains why seasonal limitations are relevant to the achievement of the public safety, health and welfare concerns or the compatibility of land use which the City asserts as justification for the zoning Code. Nor has the numerical limitation been related to those concerns.

Thus, the Court finds that plaintiffs have raised serious, substantial questions respecting whether the Code is the least restrictive means of burdening the free exercise of religion.

Id. at 1229-30. The Court found that a city zoning enforcement action threatened infringement of the churches' constitutional right to free exercise of religion and ordered immediate entry of an injunction against the City of Richmond. *Id.* at 1229-33, 1240 n. 4. *See, also Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia*, 862 F. Supp. 538 (D.D.C. 1994) (Judge Stanley Sporkin

permanently enjoined the District of Columbia from using zoning regulations or ordinances to prevent the church from administering its program to feed the homeless on the church's premises).

In *The Jesus Center v. Farmington Hills Zoning Board of Appeals*, 215 Mich.App. 54, 544 N.W.2d 698 (1996), a zoning board refused to allow a church to run a homeless shelter on its property. The trial court reversed the zoning board, finding that the municipality could not prevent the church from "its religious activity of housing the homeless." *Id.* at 60. On appeal, the Court accepted the zoning board's factual findings that shelter recipients were trespassing on neighbors' property, urinating in public and creating a nuisance to residents of the surrounding area. *Id.* at 61. Nevertheless, the Court upheld the trial court's decision, holding that a summary closure of the shelter violated the church's free exercise rights and that the "least restrictive means" test under the First Amendment and the Religious Freedom Restoration Act ("RFRA")¹ required that the government work with the church to address compelling governmental interests:

Beginning with its application to the Zoning Board, at the Board hearing, and throughout the court proceedings that followed, The Jesus Center has contended that its provision

¹ Although RFRA was held unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the "least restrictive means" requirement is an element of settled interpretation of the Free Exercise Clause of the First Amendment. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993).

of shelter services flows from its religious beliefs and is an exercise of those beliefs. We are not at liberty to question this position. “Determining that certain activities are in furtherance of an organization’s religious mission ... is ... a means by which a religious community defines itself.” *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342; 107 S. Ct. 2862; 97 L.Ed.2d 273 (1987) (Brennan, J., concurring). It is not the job of the courts to second guess “what activities are sufficiently ‘religious’” to qualify for “free exercise” protection. *Coehn v. City of Des Plains*, 8 F.3d 484, 490 (7th Cir. 1993).

However, we note that The Jesus Center’s argument that its shelter program is an expression of its faith is certainly not unique or otherwise difficult to believe. The Bible, which The Jesus Center professes to follow, is replete with passages teaching that the God of the Bible is especially concerned about the poor, that believers must also love the poor, and that this love should result in concrete actions to deal with the needs of the poor. Many of these biblical provisions, found in the Old Testament, are adhered to by Jews and Christians alike. In fact, “the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions.” *Western Presbyterian Church v. Bd of Zoning Adjustment of the Dist of Columbia*, 862 F.Supp. 538, 554 (D.D.C, 1994). The specific act of charity at issue here, providing shelter of sanctuary to the needy, has been part of the Christian religious tradition since the days of the Roman Empire. See *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 146 Misc. 2d 500, 504-505; 550 N.Y.S.2d 981 (1989). The Zoning Board does not argue that the Jesus Center is providing shelter services for anything but a religious purpose.

* * *

The relocation of the shelter program would certainly create an economic burden for The Jesus Center, requiring the lease or purchase of another facility. Further, in contrast to secular organizations providing shelter services,

The Jesus Center's program flows out of and is a witness to the love of God for the poor. By serving the homeless at the same location where The Jesus Center adherents worship their God, this witness is greatly facilitated.

* * *

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

* * *

We assume for purposes of our analysis that the Zoning Board's action was in furtherance of a "compelling governmental interest" under the RFRA.

Nonetheless, we conclude that the Zoning Board did not protect this interest using "the least restrictive means" available. On this issue, we again find guidance in *Western Presbyterian Church*, where the Court noted that "the Church recognizes its responsibility to the community and had represented that it will take all reasonable steps to assure the program will not result in harm to its congregation and neighbors." 862 F. Supp. 546. Similarly, The Jesus Center has exhibited a willingness and an ability to work with city officials as evidenced by the settlement of a related case involving fire and building code violations. With respect to the neighborhood concerns addressed in this case, The Jesus Center has throughout the proceedings been willing to work with city officials to develop guidelines for its operations of the shelter to mitigate community concerns. Under the "least restrictive means" requirement of the RFRA, the City must at least initially attempt to address community concerns in this fashion. *Id.*

The Zoning Board's decision to apply the Ordinance to completely prohibit the shelter service program went too

far under RFRA analysis. The circuit court properly reversed that decision and remanded the case to the City so that, working with The Jesus Center, guidelines might be developed to regulate the shelter program.

Id. at 63-68 (footnotes omitted; underlining added).

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

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

* * *

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

The use of religious places as sanctuaries predates even the Christian Church. ... It is probable that the church sanctuary came into existence from the time of Constantine, A.D. 303. The code of Theodosius, A.D. 392, enacted a law concerning the asylum and church. A later law, about 450, extended the limits to the precincts including the houses of the bishops and clergy, the cloisters, courts and cemeteries. About 680 the King of Wessex in his code of laws provided for sanctuary. Many

subsequent acts were passed in England regulating the subject.

* * *

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

* * *

The harm here is obvious, imminent and severe. If the shelter is closed its occupants will be left without food or shelter. Government alone is not presently able to cope with this grave social problem. *See* Statement of Governor Thomas H. Kean, Task Force On the Homeless delivered Oct. 24, 1983. St. John's represents the only bulwark these homeless people have. To tear that bulwark away would be a travesty of justice and compassion. Any inconvenience to the City of Hoboken and its other residents pales into insignificance when contrasted with what the occupants of the shelter would have to face if turned out into the city streets in winter weather.

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

Id. at 417-18, 420-21 (underlining added). The Court then addressed the constitutional requirement that compelling government interests in health and safety be addressed in a manner that does not force the church to turn away the homeless:

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

Id. at 421 (underlining added).

In *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir.2002), the Second Circuit upheld a preliminary injunction preventing the City of New York from dispersing homeless individuals sleeping by invitation on the Church's landings and steps. Persons taking advantage of the Church's invitation to sleep on its outdoor property were given a list of rules, which included instructions to clean up after themselves and a prohibition on begging, loud music, disruptive behavior, and foul language. *Id.* at 572. The Court held that “absent a demonstration that a neutral law of general applicability justifies the City's actions, the City must assert a compelling interest in preventing the homeless from sleeping on Church property that would suffice to overcome the Church's free exercise rights, and that the means it has adopted to fulfill that interest are narrowly tailored.” *Id.* at 575, relying upon *Church of Lukumi Babalu*

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) and *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972). The Court held that New York had failed to meet the constitutional test.

The relevance of all of these cases to the present is that the Church's free exercise of religion in hosting Tent City 4 was protected under the Free Exercise Clause under the First Amendment which prohibits enforcement of zoning regulations that place a substantial burden on the exercise of religion unless the land use authority demonstrates that the regulations are necessary to further a compelling governmental interest and that the least restrictive means necessary to further that governmental interest are employed. Therefore, in entering into the TUA with the Church and SHARE/WHEEL, not only was the City properly exercising its discretion in compliance with all Mercer Island municipal codes, but even more it was acting in full regard for the Church's right to the free exercise of religion under the United States Constitution.

4. *The City Was Required by RLUIPA To Accommodate the Church's Free Exercise of Religion.*

In entering into the TUA, the City was not only acting within its general authority under state law, but it was required by RLUIPA to adopt the TUA. Congress unanimously passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") to "remedy the well

documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context. 146 Cong Rec. E 1234, 1235 (daily ed. July 13, 2000) (statement of Rep. Charles T. Canady). RLUIPA bars enforcement of any local land use law or regulation that fails the “compelling state interest” test:

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

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

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

42 U.S.C. § 2000cc (a)(1).

The Act broadly defines the term “land use regulation” to mean any “zoning . . . law, or the application of such a law, that limits or restricts a claimant’s use . . . of land.” *Id.*, § 2000cc-5(5). This broad definition of “land use regulation” also encompasses procedures required by municipalities for obtaining use permits. *Grace Church of North County v. City of San Diego*, 555 F.Supp.2d 1126, 1135 (S.D.Cal.2008) (concluding that the city of San Diego’s application of its condition use permit procedures to a church constituted an implementation of a land use

regulation under RLUIPA). RLUIPA goes on to define "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Furthermore, "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the ... entity that uses or intends to use the property for that purpose." *Id.* § 2000cc-5(7)(B). In present case, it is clear that the Church intended to use its real property for the purpose of a legitimate religious exercise, which is protected by the provisions of RLUIPA.

While the Act does not define "substantial burden," courts have repeatedly interpreted the term in similar contexts. Among other things, "a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct . . .". *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996), *certiorari granted, judgment vacated on other grounds*, 522 U.S. 301 (1997); *see also Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994) (government action that forces religious adherents "to refrain from religiously motivated conduct" substantially burdens religious exercise); *Werner v. McCotter*, 49 F.2d 1476, 1480 (10th Cir. 1995) (action that "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs" substantially burdens religious exercise).

RLUIPA specifically permits aggrieved churches to challenge enforcement actions that burden the free exercise of religion. *See id.*, § 2000cc-2(a). Under the constitutional standard, once a church produces evidence demonstrating a burden on the exercise of religion, it is the government's burden to justify its actions under the compelling governmental interest test. *See id.*, § 2000cc (a)(1)(A)-(B); § 2000cc-2(b); § 2000cc-5(2). RLUIPA is to “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.” *Id.*, § 2000cc-3(g) (emphasis added).

RLUIPA also makes it clear that Congress intended land use authorities to be flexible in accommodating churches' free exercise of religion. That section states:

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

Id. § 2000cc-3(e); *see also Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003). Thus, the Act specifically provides that a land use regulator, such as the City, may comply with

RLUIPA and accommodate a church's exercising the mandates of its religion by exempting regulation in connection with homeless ministries.

Under RLUIPA, when a religious organization shows that a certain activity is a protected "religious exercise" under the Act, then government is prohibited from placing any substantial burden on that activity. Given that the Church's ministry to the homeless on Church property here was a protected activity, the City's failure to adopt the TUA, or something akin to it, would have been a clear violation of RLUIPA on the part of the City.

Given the broad protection of religious exercise of RLUIPA, and the equally-broad construction and application of those and similar provisions by courts across the country, it is clear that the Church's ministry to the homeless is a protected activity. The United State Supreme Court has remarked that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *Fowler v. State of Rhode Island*, 345 U.S. 67, 70, 73 S.Ct. 526, 97 L. Ed. 828 (1953). As a rule, courts will accept claims of religious belief unless they are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Scott v. Rosenberg*, 702 F.2d 1263, 1273 (9th Cir. 1983) (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)). After all,

religion “is what the individual human being perceives to be the requirement of the transhuman [sic] Spirit to whom he or she gives allegiance.” *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351, 1357 (9th Cir. 1997). It is “not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of those creeds.”² *Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989).

Commentators have observed that providing housing for the homeless, as a religious exercise, fits squarely within RLUIPA’s protections:

Land use regulations that would otherwise prevent religious organizations from providing housing facilities and services to the homeless should be subjected to the substantial burden test because such regulations cripple the free exercise of religion. After all, when providing housing for the homeless, there are few ideal places to house such persons, in a location that is reasonably safe, well-maintained, affordable, and close to those educational, governmental and private resources that such persons need to live and improve their existence.

David L. Abney, *St. Mary's St. Mary's Law Review on Minority Issues*, Fall 2005. This interpretation is consistent with RLUIPA’s clear mandate

² Even the legislative history of RLUIPA itself shows an intention to include a wide array of religiously-motivated activities that involve the use of land. In fact, the drafters explicitly noted their intention to ensure that religious entities could operate “homeless shelters in suburbs” and similar facilities providing food, housing and other services for the poor. *See* 146 Cong. Rec. E 1564, 1564 (daily ed. Sept. 21, 2000) (statement of Rep. Henry J. Hyde).

that the Act “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”³ 42 U.S.C. § 2000cc-3(g).

In *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186 (D. Wyo. 2002), the court held that a church may bring a claim under RLUIPA to require a city to permit operation of a religious day care facility in a low-density residential neighborhood where such a facility would otherwise have been banned. And in *Dilaura v. Ann Arbor Charter Township*, 30 Fed. Appx. 501, 507-510 (6th Cir. 2002), the Sixth Circuit held that a religious organization was entitled to allege that RLUIPA permitted it to use its property as a religious retreat, despite a contrary zoning ordinance.

³ Since its enactment, the courts addressing RLUIPA have repeatedly upheld the rights of churches and other religious organizations to adopt uses of their property – including temporary and other forms of housing for the homeless – even when there are clear prohibitions on such uses in local ordinances. For instance, in 2002, the Second Circuit upheld an injunction prohibiting the City of New York from dispersing homeless persons that a church had allowed to sleep on the church's outdoor property, in part based on RLUIPA. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 572 (2d Cir. 2002). The Second Circuit accepted the church's position that this assistance for the homeless was “an integral part of its religious mission” and that the church was “commanded by scripture to care for the least, the lost, and the lonely of this world, and, in ministering to the homeless, the Church [was] giving the love of God. There is perhaps no higher act of worship for a Christian.” *Id.* at 574-575. See also, *Family Life Church v. City of Elgin*, 561 F.Supp.2d 978 (N.D. Ill. 2008) (assuming without discussion that providing shelter to the homeless was a protected religious exercise under RLUIPA).

In the present case, the City did what it was both authorized and in fact required to do under RLUIPA—exercise its broad constitutional and statutory authority to regulate land use and make land use approvals for the purpose of eliminating a substantial burden on the Church’s protected religious exercise. In fact, the face of the TUA itself expressly states one of its primary purposes was to eliminate the burden on the Church’s religious exercise under RLUIPA.⁴ CP 542.

5. *The City Fully Acted Properly And Within Its Authority In Entering Into the TUA.*

Appellant argues that even if the City was required to allow the homeless encampment on Church property, it should have been accomplished after a change in the City Code rather than immediately through entering into the TUA here. Appellant’s argument is contrary to case law interpreting the Washington constitution and RLUIPA, and is not supported by *any* authority. Indeed, in the *Northshore UCC* case, the Washington Supreme Court rejected a similar argument of the City of Woodinville that issuance of temporary use permit could be delayed pending completion of a sustainability study. In fact, the Supreme Court held that such a delay violated the Washington constitution. Likewise,

⁴ Paragraph C under the Recitals of the TUA provides: “[T]he Religious Land Use and Institutionalized Persons Act of 2000 prohibits governments from imposing a land use regulation that unreasonably limits religious assemblies, institutions or structures. Court decision hold that a church sponsoring a Temporary Homeless Encampment constitutes protected religious expression.” CP 542.

the Seventh Circuit recently held that the delay a church would face in either filing various land use applications, or simply searching for another parcel on which their desired use was not prohibited, would not alleviate the substantial burden placed on their religious exercise sufficiently to overcome the City's violation of RLUIPA. *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). In light of these holdings, there is no merit to the argument that the Church's burden could have been alleviated by simply waiting for the City Council to go through the lengthy process of amending its City Code.

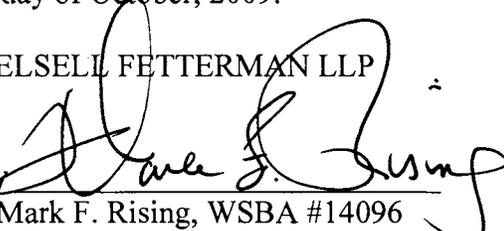
V. CONCLUSION

The decision of the trial court should be affirmed for all of the reasons set forth in the City's and SHARE/WHEEL's response briefs and for all of the reasons set forth above. Not only did the City properly enter into the TUA with the Church and SHARE/WHEEL in accord with its municipal code, but the City's actions were required by Article I, Section 11 of the Washington State Constitution, the Free Exercise Clause of the First Amendment of the United States Constitution, and the provisions of RLUIPA. The Church's right to host Tent City 4 according to its religious beliefs was protected by these laws which superseded any requirements based on the Mercer Island Municipal Code. These additional reasons further support the affirmation of the trial court's dismissal of the

Appellant's claims on summary judgment.

Respectfully submitted this 9th day of October, 2009.

HELSELL FETTERMAN LLP

By 

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MERCER ISLAND CITIZENS FOR FAIR
PROCESS,

Plaintiff,

v.

TENT CITY 4, an unincorporated
Washington association; SHAREWHEEL,
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, ("MIUMC"), a
Washington non-profit corporation; and
the CITY OF MERCER ISLAND, a
Washington municipal corporation,

Defendants.

NO. 08-2-23083-0 SEA

CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT -9 PM 4:19

The undersigned hereby certifies that on October 9, 2009, the undersigned
delivered a true and exact copy of BRIEF OF RESPONDENT MERCER ISLAND UNITED
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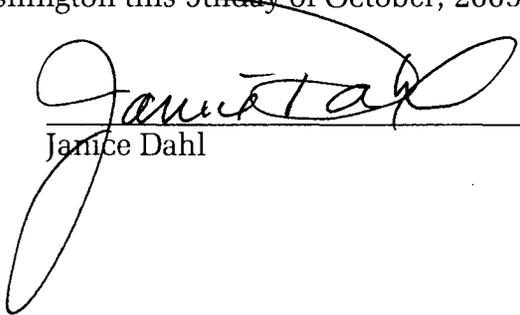
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19 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
20 STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

21 Executed at Seattle, Washington this ~~9th~~ day of October, 2009

22 
23 _____
24 Janice Dahl
25