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No. 58296-8-1

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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

Appellants,

v.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondent / Cross-Appellant.

**APPELLANT NORTHSHORE UNITED CHURCH OF CHRIST'S
REPLY IN SUPPORT OF APPEAL AND
RESPONSE TO CITY OF WOODINVILLE'S CROSS-APPEAL**

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I. INTRODUCTION

A. Overview

Providing shelter and support for the poor and homeless is a fundamental tenet of Christianity, and is central to the mission of the Northshore United Church of Christ. (CP 222-23; CP 229-31.) Caring for the homeless is an expression of the commandment to “love your neighbor as yourself.” (Id.) Numerous passages from Christian scripture direct Christians to harbor and feed the homeless and dispossessed. The Gospel of St. Matthew, Chapter 25, for example, quotes Jesus himself on the subject:

Then the King will say to those on his right, ‘Come, you who are blessed by my Father; take your inheritance, the kingdom prepared for you since the creation of the world. For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.’

(Emphasis added.)

It was thus unsurprising that when an emergency arose and Tent City 4 could not find a location to host it during a rapidly-approaching 90-day period, the Church volunteered to assist. What has been surprising and disheartening, however, has been the City of Woodinville’s callous and dogged effort to deny shelter to Tent City 4’s residents and to punish the Church for daring to help this peaceful group of homeless men and women.

From the beginning of this case through its most recent briefing, the City has belittled and disparaged Tent City 4’s residents; maligned the

Church, its members and their motives; and trivialized both the challenges that homeless people face and the consequences of summarily tossing dozens of men and women out on the street.¹ This is not a case about a landowner's desire to build a barn or a music venue's efforts to comply with a local noise ordinance. It is about the very survival of the homeless men and women who inhabit Tent City 4, and the hope that stems from being able to hold a job and have companionship in one's time of need. When Tent City 4 found itself in dire need, the Church did what its religious teachings mandate it do, and stepped forward to help, while the City slammed its door on the Church and Tent City 4. The City continues to add insult to injury by seeking money damages and tens of thousands of dollars in attorney fees from Appellants.

The City's actions have been improper and unconstitutional, and their damaging effect was compounded by the trial court's June 12, 2006

¹ For example, the City would have the Court believe that homelessness is a personal choice, and that Tent City 4's residents would have faced no immanent danger if Tent City 4 had been forced to disband. See Respondent's Motion to Modify Commissioner's Ruling at 6-7 ("If the street is where certain residents of the encampment prefer to go if Tent City 4 is not available, then that outcome reflects a choice or preference, not a mandate of the court or an emergency."). The City's deplorable position ignores multiple declarations that are part of the record on appeal, the dramatic disparity between the number of shelter beds in King County (2,500) and the number of homeless individuals in King County (8,300), and the fact that King County's shelters are unable to house Tent City 4's numerous married residents. (CP 221; VRP June 7, 2006 at 27:6-12.)

The City spends a mere \$2 per resident per year on the homeless. (VRP June 2, 2006 at 48:1-13.) Its characterization of the Church's position as a "tired argument" designed to avert an "alleged inconvenience" (City's Response Brief at 42, 44) reflects the City's ongoing arrogance and hostility toward the Church and the poorest and most vulnerable members of our community.

Final Order. As discussed in the Church's opening brief and herein, the trial court erred in entering that order, which this Court should vacate.

B. Standard of Review for Issues Raised in Cross-Appeal

The City's unsupported assertion that "all of the errors claimed by the City concern decisions based on issues of law and should be reviewed de novo" (City's Response Brief at 2) is simply incorrect. The City's cross-appeal puts three issues before the Court. (City's Response Brief at 1.) Only one – whether strict scrutiny is the correct standard to apply to the Church's constitutional claims – is subject to de novo review. The other two issues raised by the City – whether the trial court erred in granting and extending the temporary restraining order ("TRO"), and whether the trial court erred in denying the City's request for attorney fees – are subject to discretionary review.

Washington courts have consistently found that a trial court's decision to grant or deny a temporary restraining order is reviewed for abuse of discretion. See, e.g., Emmerson v. Weilep, 126 Wn. App. 930, 110 P.3d 214 (2005) ("[T]he temporary order of protection was not 'wrongfully issued.' Although the court declined to issue a permanent order of protection, it acted well within its fact finding discretion in granting a temporary protection order."); Swiss Baco Skyline Logging Co. v. Haliewicz, 14 Wn. App. 343, 541 P.2d 1014 (1975) (restraining order is extraordinary remedy, issuance of which is largely within discretion of trial court).

Similarly, a trial court's determination regarding attorney fees in connection with a request for injunctive relief is reviewed for abuse of discretion. As this Court has held:

“The applicable equitable rule is that attorney fees *may* be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. The award is discretionary[.]” Therefore, we review for an abuse of discretion. A trial court abuses its discretion if it bases its decision on untenable grounds.

Cornell Pump Co. v. City of Bellingham, 123 Wn. App. 226, 231-32, 98 P.3d 84 (2004) (internal citations omitted, italics in original, underline added). Accord Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993) (“[g]enerally, in order to reverse a fee award, it must be shown that the trial court manifestly abused its discretion”); Spokoiny v. Washington State Youth Soccer Ass’n, 128 Wn. App. 794, 117 P.3d 1141 (2005) (“[w]e review an award of attorney fees for abuse of discretion”); Emmerson v. Weilep, 126 Wn. App. 930, 110 P.3d 214 (2005) (in connection with dissolving TRO, “[w]e review a trial court's denial of attorney fees for an abuse of discretion”). Abuse of discretion is shown only when the trial court's decision is manifestly unreasonable or is based on untenable grounds. See Eugster v. City of Spokane, 121 Wn. App. 799, 814, 91 P.3d 117 (2004).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH REGARD TO THE TRO

A. The Trial Court Did Not Abuse Its Discretion Entering and Extending the TRO Through the Preliminary Injunction Hearing

This case and accompanying TRO were both initiated by the City. (CP 3-19.) At the time the City filed suit and sought the TRO, the Church had not yet decided whether to invite tent city onto Church property. Neither the Church nor SHARE/WHEEL requested a TRO. (City's Response Brief at 48.)

The trial court declined to enter the City's requested form of TRO and instead *sua sponte* entered a TRO consistent with three prior decisions of the King County Superior Court. (CP 72-76.) Although the City argues that the trial court abused its discretion by issuing the TRO (City's Response Brief at 48), at the time the TRO was entered, the City expressly "agreed to" its entry. (CP 76.) The City should not have signed an agreed to order if it believed the trial court was exceeding its authority and abusing its discretion when entering the order. At most, the City should have approved the order only as to form.

Nor did the trial court abuse its discretion by continuing the TRO until the end of the preliminary injunction hearing. See, e.g., Emmerson, supra, 126 Wn. App. at 941. Instead of simply moving for a preliminary injunction, as contemplated by the plain language of the TRO, the City instead sought an expedited trial on its request for a permanent injunction and an expedited trial for breach of contract. (CP 77-148.) When the judge entered the preliminary injunction, the TRO expired. This is

consistent with the initial TRO, which allowed Tent City 4 to move onto Church property by providing that the “encampment is allowed pending full hearing on plaintiff’s motion for a preliminary injunction.” (CP 72.)

A TRO that expires or differs from the final decision in a case is not always wrongfully entered. See Bowcutt v. Delta North Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999) (Standard of review for preliminary injunctions is abuse of discretion; the court acted within its inherent equitable power to grant a TRO under terms it deemed just in light of the circumstances. Despite a subsequent order that there was no lawful basis for the TRO, the order awarding \$427 in fees for overturning the TRO was erroneous). The TRO was granted pursuant to CR 65(b), which provides the trial court with broad discretion in deciding whether to grant a TRO. The Final Order entered by the trial court does not contain a finding that the court abused its discretion in either entering or continuing the TRO, or that the TRO was wrongfully issued or extended. (CP 477-83.) There is insufficient evidence that the TRO was wrongful to find an abuse of discretion on the part of the trial court.

B. The Trial Court Did Not Abuse Its Discretion Denying the City’s Request for Attorney Fees

It is well established in Washington that attorney fees are discretionary and not available as a matter of right. “The applicable equitable rule is that attorney fees *may* be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order.” Confederated Tribes of Chehalis Reservation v.

Johnson, 135 Wn.2d 734, 758, 958 P.2d 260 (1998) (emphasis in original) (denying request for fees).

1. Fees were inappropriate because the City filed suit, sought a TRO and agreed to the TRO that was entered.

The City seeks fees expended “quashing” a TRO, yet the TRO was requested by the City, entered by the trial court of its own volition, and agreed to by counsel for the City. To support its request, the City argues that the TRO was “wrongfully” issued and extended. (City’s Response Brief at 48-50.) There are several problems with the City’s argument.

First, attorney’s fees are equitable relief, but awarding the City its fees in this matter would fly in the face of Washington public policy:

The purpose of the equitable rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits.

Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 114, 937 P.2d 154 (1997) (citations omitted) (emphasis added), cert. denied, 522 U.S. 1077, 118 S.Ct. 856 (1998). See also Bellevue John Does 1-11 v. Bellevue School Dist. #405, 129 Wn. App. 832, 120 P.3d 616 (2005) (finding that equitable rule did not compel an award of fees when injunctive relief was necessary to preserve rights pending resolution of the action); Cornell Pump Company, supra, 123 Wn. App. at 233 (“[t]he purpose of this equitable rule is to discourage parties from seeking unnecessary injunctive relief prior to a trial on the merits”).

Here, the City sought injunctive relief, not Appellants. The City filed suit before the Church even invited SHARE/WHEEL to host Tent

City 4 on Church property. The same day it filed suit, the City moved the trial court for a TRO preventing tent city from coming to Woodinville. (City's Response Brief at 48; CP1-71.) SHARE/WHEEL and the Church did not cross-move for a TRO allowing the encampment to move to Church property. (Id.) Rather, the Court entered a TRO upon the City's request, and the Defendants followed its provisions. Whether or not the Church arguably benefited from the TRO has no impact as to whether the Church was the party seeking entry of the TRO. The City is responsible for the existence of the TRO, and neither case law nor equitable considerations support the City's request for fees.

Second, as discussed above, there has been no finding in the case at bar that the TRO was "wrongful." The trial court entered the Final Order sought by the City; that order does not contain a finding that the TRO was wrongfully issued and extended. (CP 477-83.) Moreover, even if the TRO was "wrongfully" entered, which it was not, the City's concerns cannot shift the cost of such a TRO onto Appellants, when Appellants never sought such an order.

Awarding the City attorney fees incurred while attempting to "quash" a TRO it initiated flies in the face of the equitable rule permitting fees in hopes of deterring plaintiffs from seeking relief prior to a trial on the merits articulated by the Ino Ino court. The City made the decision to seek temporary relief prior to a trial on the merits. The trial court acted within its discretion when it denied the City an award of legal fees it was responsible for generating.

2. The City's actions lengthened the duration of the TRO.

The TRO was limited in duration until the City could bring the matter on the motion calendar for a “full hearing on plaintiff’s motion for a preliminary injunction.” (CP 72.) The City declined to simply bring a motion for a preliminary injunction and instead moved for an expedited trial on the merits of all of its underlying claims. The legal standard has been articulated as follows:

... [T]he mere fact that appellants served and filed motions to dissolve does not prevent the application of the rule laid down in the Kastner Case. They did not effectively move against the restraining order, to quote the language of the Kastner Case, “until the time when it must expire without any action on their part.” **Its life was not shortened one moment by anything they did, and . . . “appellants cannot be said to have expended anything in securing the dissolution of the restraining order.”**

Chin On v. Culinary Workers and Soft Drink Dispensers Union, 195 Wn. 530, 535-36, 81 P.2d 803 (1938) (emphasis added) (party moving to quash TRO was not entitled to attorney’s fees where TRO expired at injunction hearing, and moving party’s efforts did not shorten the life of the TRO). See also Kastner v. Algase, 130 Wn. 362, 227 P. 504 (1924) (plaintiffs were not entitled to attorney fees incurred while dissolving TRO when the TRO expired automatically when order on temporary injunction was entered).

The TRO expired when the Court entered its ruling on the preliminary injunction. This is precisely when the plain language of the TRO said it would expire. The City’s actions did nothing to speed the

termination of the agreed TRO, but instead lengthened it. As a result, the City is precluded from recovering fees.

3. The City's fee request was unreasonable and insufficiently documented.

The burden of proving the reasonableness of the fees requested was on the City. See Blum v. Stenson, 465 U.S. 886, 898-900, 104 S.Ct. 1541 (1984) (finding respondents failed to carry their burden of justifying an upward adjustment in fees). The trial court properly exercised its discretion when it found the City had not met this burden.

The Washington Supreme Court has noted that attorney fees associated with quashing a TRO are only recoverable in specific, limited, circumstances:

[I]n an action where a trial on the merits has for its sole purpose the determination of whether an injunction should be dissolved, the injunction is dissolved, and a trial was the sole procedure available to the party attempting to dissolve the temporary injunction. **If dissolving the injunction is not the sole purpose of the trial, then attorney fees are available only for services performed in dissolving the temporary injunction.**

Seattle v. McCready, 131 Wn.2d 266, 277, 931 P.2d 156 (1997) (emphasis added). Here, the sole purpose of the expedited trial was not to quash the TRO. In fact, whether the TRO should be quashed was not discussed during the trial. Rather, the expedited trial was on all of the allegations in the City's Amended Complaint, including whether a permanent injunction should be entered and claims for breach of contract granted. Attorney fees are thus not available, because quashing the TRO was merely an adjunct of the injunctive relief sought at trial. See, e.g., Gray v. McDonald, 46

Wn.2d 574, 283 P.2d 135 (1955) (trial upon the merits to establish an easement by prescription; court denied attorney fees incurred quashing injunctive relief); Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.), 119 Wn. App. 665, 691, 82 P.3d 1199 (2004) (remanded for a segregation of fees in order to ensure that fees would be awarded for only some of the claims at issue). Nor are fees recoverable on appeal. See, e.g., Ino Ino, supra, 132 Wn.2d at 114.

The records submitted by the City failed to clarify whether the time purportedly spent on this matter was directly related to quashing the TRO or was related to other work, such as the expedited trial on other claims. Instead, the records were filled with references to conferences with unknown people about unknown subjects. Nor did the City identify what time was associated with seeking the preliminary injunction and what time related to the prosecution of its claims for breach of contract and permanent injunctive relief.² Because the City failed to meet its burden of providing the trial court with sufficient information to determine what fees were incurred while quashing the TRO, the City was not entitled to any fees, and the trial court acted within its discretion when denying the same.

² See Defendant Northshore United Church of Christ's Response in Opposition to City of Woodinville's Motion for Attorney Fees and Costs, (Sub. No. 73, Filed July 14, 2006) and Defendant Northshore United Church of Christ's Sur-Reply in Opposition to City of Woodinville's Motion for Attorney Fees and Costs (Sub. No. 78, Filed July 17, 2006). These two documents are part of Appellant Northshore United Church of Christ's Supplemental Designation of Clerk's Papers, filed October 30, 2006. A citation to sequential pagination is not yet available.

III. THE COURT ERRED IN CONCLUDING THERE WAS A BREACH OF CONTRACT

The City's arguments regarding breach of contract only serve to underscore the problems with the trial court's Final Order. (City's Response Brief at 15-21.)

The City mysteriously argues that "neither SHARE/WHEEL nor Northshore United Church of Christ (NUCC) assign error to any factual finding made by the trial court in the superior court's June 12, 2006 Final Order." (City's Response Brief at 2.) The City then uses that flawed premise to argue that breach of contract has been established. (*Id.* at 15-21.) However, it does not appear that the City has actually taken the time to read the Church's briefing on this matter. Indeed, the Church's fourth assignment of error is addressed to the trial court's errors regarding breach of contract, and the Church's opening brief spends six pages discussing the errors in the trial court's ruling on breach of contract issue. (Church's Opening Brief at 2, 39-44.) For the City to play the role of the ostrich on this issue is petty and disingenuous.

Moreover, even assuming that Appellants failed to assign error to the trial court's findings regarding breach of contract, findings of fact are only viewed as verities if there is substantial evidence to support the findings. See *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). As discussed in Appellants' opening briefing, and herein, no such substantial evidence exists, and the trial court erred.

The City next argues that Appellants "attempt to add a term to the 2004 agreement that would contradict the [agreement's] unambiguous

language....” (City’s Response Brief at 16-17). To the contrary, the plain language of the 2004 Temporary Use Agreement was intended to govern only the 2004 stay. (Church’s Opening Brief at 40-42.) The City Manager testified at trial that the City’s interpretation of the document included the modification to Section 1 to “extend the agreement through November 22, 2004.” (VRP May 31, 2006, 7:14-8:5.) That the agreement expired in 2004 is further reflected in the City’s notes that “no application or request was received by S/W to establish a homeless encampment within Woodinville City limits during its contractual or permitted duration.” (CP 294; emphasis added.) This testimony is both relevant and admissible under the context rule.

Perhaps more importantly, though, the City’s notes on this matter raise questions of fact about the proper interpretation of the contract, breach and the materiality of any alleged breach. These questions of fact should have been left for the jury to resolve. See, e.g., Bailie Communications, Ltd. v. Trend Bus. Sys., 53 Wn. App. 77, 82, 765 P.2d 339 (1988) (whether a party has materially breached a contract is generally a question of fact).

The City next boldly states that the Church fails to cite “any authority” for its argument that the City’s failure to accept the application excused the Church’s performance. (City’s Response Brief at 18.) However, pages 43-44 of the Church’s opening brief, and the authorities cited therein, discuss this point in detail. Yet instead of addressing any of the authorities cited by the Church, or offering any contrary authority, the

City has chosen to simply ignore the governing law.

As detailed in the Church's opening brief, the City's failure to even accept and consider the application excused any performance obligations by Appellants. (Church's Opening Brief at 43-44.) This is not "SHARE/WHEEL's novel theory," as the City arrogantly suggests. (City's Response Brief at 19.) Instead, it is the law of Washington supported by numerous cases, none of which the City addresses.

The City next argues that the 2004 Agreement is unambiguous, thus extrinsic evidence regarding its interpretation is not needed. (City's Response Brief at 20-21.) The City cannot have it both ways on this issue. The City claims that the Agreement is unambiguous, but it was the City who sought to introduce extrinsic evidence regarding the drafting, namely the Declaration of Michael Huddleston. (CP 460, 466-67.) Indeed, the City's witness declared under oath that he was the drafter of the disputed provision, and discussed his intent in the disputed provisions. The City cannot credibly claim at this stage that the integration clause in Section 24 of the 2004 Agreement is meaningful in the least, when the City sought to undermine that very section before the trial court.

Washington law provides that ambiguities in contracts should be interpreted against the drafter. See, e.g., Jacobs v. Greys Harbor Chair and Mfg. Co., 77 Wn.2d 911, 918, 468 P.2d 666 (1970) (if a contract is equally susceptible to two or more interpretations, it should be construed against the drafter); State v. Lathrop, 125 Wn. App. 353, 104 P.3d 737 (2005) (ambiguities in contracts are resolved against the drafter); State v.

Skiggn, 58 Wn. App. 831, 838, 795 P.2d 169 (1990) (same). Any ambiguities in the Agreement must be construed against the City.

Sufficient factual disputes and ambiguities regarding the contract exist to entitle Appellants to discovery on these issues. The trial court erred when finding the contract governed the 2006 stay and determining that the Appellants violated the contract.

IV. THE TRIAL COURT ERRED WHEN IT CONSOLIDATED THE TRIAL WITH THE HEARING ON PRELIMINARY INJUNCTIVE RELIEF

As detailed in the Church's opening brief, the trial court erred in three separate ways by ordering consolidation of the trial on the merits with the City's request for preliminary injunctive relief. (Church's Opening Brief at 16-21.) First, consolidation denied the Church its right to a trial by jury. Second, consolidation improperly allowed the City to obtain all of its requested relief without giving the Church a full opportunity to mount its defense. Third, consolidation deprived the Church of its ability to fully prepare its case.³

Crucially, in its response brief, the City cites no contrary authority and does not attempt to distinguish the Church's authority for the latter two arguments on this issue. That unchallenged authority establishes that

³ The City cites only one case to support its contention that the standard of review on this issue is abuse of discretion, State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). (City's Response Brief at 8.) The City's reliance on Junker is mystifying, though, as that case never once mentions CR 65 or consolidation. Nevertheless, even assuming the standard of review is abuse of discretion on this matter, the trial court clearly abused its discretion for the reasons discussed in the Church's opening brief and herein.

the trial court erred by ordering consolidation. (Church's Opening Brief at 19-21, and the authorities cited therein.) The City's arguments regarding the remaining issue, denial of the Church's right to a trial by jury, lack merit.

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

CR 65(a)(2) warns that "[t]his subsection shall be so construed and applied as to save to the parties any rights they may have to trial by jury." (Emphasis added.) The trial court failed to heed this mandatory language, and deprived the Church of its right to have a jury determine the merits of the action.

In its response brief, the City first argues that consolidation was appropriate because the trial court reserved the determination of damages for a jury trial. (City's Response Brief at 11.) Simply put, this argument misses the point. Without the benefit of even the barest discovery to contest liability, and the inability to contest such liability before a jury, a trial by jury on the measure of damages alone is hollow indeed. This is especially true when the trial court incorrectly entered several important findings of fact on disputed issues, thereby usurping the role of fact-finder reserved for the jury. See, e.g., Bailie Communications, Ltd., supra, 53 Wn. App at 82 (whether a party has materially breached a contract is generally a question of fact).

For example, although the allegation was not pleaded in the Amended Complaint, the Final Order ruled that part of the harm caused by Tent City 4 was "damage to the environment with respect to, *inter alia*,

the identified wetland on the church property.” (CP 481.) As demonstrated in Trial Exhibit 10, there is no visible wetland near the camp, Tent City 4 was not located inside the area of alleged concern, and the City presented no testimony on whether the tents actually damaged or harmed the alleged wetland. The trial court also found that “there was not sufficient time for the City to process an application for a temporary use permit that would allow Tent City 4 to locate on NUCC property.” (CP 479.) However, there was disputed testimony on this subject, since the City processed a temporary use permit application in 2004 in less time than was available in 2006. (VRP June 5, 2006 at 10:11-18.)

The City next argues that consolidation was proper because “the overwhelming thrust of the City’s requested relief” was equitable in nature. (City’s Response Brief at 11.) This argument lacks merit.

First, while the “overwhelming thrust” of the City’s initial complaint may have been equitable in nature, the thrust of its amended complaint certainly was not. The City’s amended complaint seeks money damages for breach of contract. (CP at 363-67.). To claim that Appellants, two nonprofit organizations represented by pro bono counsel, were simply supposed to overlook a claim for money damages – and that the trial court was authorized to deny a trial by jury on this claim – simply because the City also sought to remove Tent City from the Church’s property is dubious, to say the least. Importantly, the City has not pointed to even one factually analogous case in which the trial court denied a trial by jury and entered final judgment on a breach of contract claim on such a

shortened timeframe. This failure is reason enough for the Court to reject the City's argument.

Second, the City's case law does not support its arguments, and the City selectively presents even its own cited authority. For example, the City quotes from the decision in Story v. Shelter Bay Co., 52 Wn. App. 334, 348, 760 P.2d 368 (1988), to support its contention that the trial court had discretion to deny Appellants' jury demand. (City's Response Brief at 11.) Yet the matter before the trial court in Story progressed through the usual course of discovery, did not involve consolidation, and did not include a claim for breach of contract. 52 Wn. App. at 338, 348. The same is true of Kim v. Dean, 133 Wn. App. 338, 135 P.3d 978 (2006), the City's other pertinent authority.

More importantly, however, the City selectively failed to present to this Court the key portion of the decision in Story, which is found in the very next sentence. Put into context, the decision in Story reads:

When a matter contains both legal and equitable issues, a trial court has broad discretion as to whether it will allow a jury on none, some or all of the issues. E.g., Brown v. Safeway Stores, Inc., 94 Wash.2d 359, 617 P.2d 704 (1980). Factors to be considered by a court include: (1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) **in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed**; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or

part of such issues.

Story, 52 Wn. App. at 348 (quoting Brown, 94 Wn.2d at 368) (emphasis added). Neither the City nor the trial court even mention these factors, let alone satisfy them.

Here, even if the right to a trial by jury was doubtful, which the Church obviously disputes, the trial court should have deferred to a trial by jury. Id.; Auburn Mechanical, Inc. v. Lydig Const., Inc., 89 Wn. App. 893, 898, 951 P.2d 311 (1998) (“Any doubt should be resolved in favor of a jury trial, in deference to the constitutional nature of the right.”). It did not.

The trial court’s consolidation deprived the Church of its constitutionally protected right to a trial by jury.

B. Consolidation Improperly Allowed the City to Obtain all the Relief It Sought in a Summary Proceeding

It is well-established in Washington that a “preliminary injunction should not give the parties the full relief sought on the merits of the action.” McLean v. Smith, 4 Wn. App. 394, 399, 482 P.2d 798 (1971) (emphasis added) (citing Dorfmann v. Boozer, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969)). See also the Church’s additional authorities cited at 19-20 of its opening brief.

As noted above, the City failed to offer any contrary authority and did not even attempt to distinguish the Church’s authority on this issue. The trial court erred by allowing the City to obtain the ultimate relief it sought in this action through a summary hearing.

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

It is well-established that courts may order consolidation only after “clear and unambiguous notice ... either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.” University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830 (1981) (citations omitted, internal quotation marks omitted). Neither happened here, as the trial court ordered consolidation only at the conclusion of the hearing, and Appellants were denied a full opportunity to present their respective cases.

Here, the City asserted a claim for breach of contract after all briefing on the request for preliminary injunctive relief had been submitted, yet the Church was never afforded the benefit of even the barest discovery. For the first time during the evidentiary hearing, the City argued that the application was not timely filed and did not satisfy SEPA concerns. These are factual assertions that the Church should have been allowed to investigate. Without such discovery and factual investigation, the trial court improperly entered permanent relief without full consideration of the case. Shishko v. Whitley, 64 N.C.App. 668, 671, 308 S.E.2d 448 (1983) (“A permanent injunction is an extraordinary equitable remedy and may only properly issue after a full consideration of the merits of a case.”); New Orleans Federal Sav. and Loan Ass’n v. Lee, 425 So.2d 947, 948 (La.App. 1983) (“The issuance of a permanent injunction, however, takes place only after trial on the merits, in which the burden of proof must be founded on a preponderance of the evidence,

rather a prima facie showing.”).

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

In its response brief, the City contends that it is “disingenuous” for Appellants to contend that they were “surprised” that the City’s amended complaint would contain a claim for breach of contract. (Response Brief at 8-10.) The City also contends that Appellants should have sought to undertake depositions or other written discovery before or during the evidentiary hearing. (*Id.* at 14.) The City has done nothing more than create straw men.

The point is not that the City’s cause of action came as a surprise to Appellants; it is that Appellants were denied a full opportunity to present their respective cases on that claim. The distinction is important.

The City’s initial complaint raised no cause of action for breach of contract. (CP 3-6.) After all of the briefing was closed, and only one business hour before the hearing on the City’s request for a preliminary injunction, the City filed an amended complaint adding a cause of action for breach of contract and a claim for money damages. (CP 363-67.) The amended complaint was not served upon the Church until May 31, 2006,

the second day of the expedited hearing.⁴ Yet the City unabashedly claims that “both Appellants clearly could have prepared witnesses and/or declarations to address the breach of contract issue.” (Response Brief at 13.)

The Church entered the hearing on Tuesday May 30, 2006 prepared to address the City’s motion for a preliminary injunction. Instead of hearing oral argument, the trial court decided to hold an evidentiary hearing and instructed the City to call its first witness. (VRP, May 30, 2006 at 9:6-10:7.) The trial court also ordered the parties to mediate during those hours of the day that counsel was not present in the hearing. (VRP, May 30, 2006 at 51:21-52:7; May 31, 2005 at 1:10-24.) In addition, as this was an unplanned hearing and mediation, counsel for the Church had other cases pending and other matters to address during the same time period.

Importantly, the time span between the City’s initial complaint and entry of final judgment only covered one month (May 12, 2006 – June 12, 2006). The time span between service upon the Church of the amended complaint and final judgment on that complaint spanned only 13 days

⁴ The City claims that its amended complaint was “filed and served on . . . the attorneys for NUCC the afternoon of May 26, 2006. . . .” (City’s Response Brief at 9.) As the City well knows, counsel for the Church never agreed to accept service for its client. Service of the amended complaint upon counsel for the Church was wholly ineffectual. CR 4(d).

Moreover, it is undisputed that the Church disputed jurisdiction based on the failure of service, and moved to dismiss on those grounds. The trial court denied the Church’s motion. (VRP May 30, 2006, 15:15-16:22.) The Church also has raised the issue as an affirmative defense in its Answer. (CP at 529-30.)

(May 31, 2006 – June 12, 2006). Given this history, for the City to now contend that Appellants should have sought to undertake depositions or other written discovery rings hollow in the extreme.

V. TENT CITY 4 IS NOT A NUISANCE PER SE UNDER WOODINVILLE LAW

The City is incorrect when it asserts that every violation of law is a nuisance *per se*. (City’s Response Brief at 23.) Not every violation of the Woodinville Municipal Code constitutes a nuisance. Rather, the code has a clear definition of what constitutes a “nuisance” in the City of Woodinville:

1.07.040 Nuisance Section.

The following activities and conditions are unlawful:

(1) Owning, leasing, renting, occupying or having charge or possession of any property in the city, including vacant lots, except as may be allowed by any other city ordinance upon which exists any of the following:

(a) Junk, trash, garbage, litter, discarded lumber and/or salvage materials in front yard, side yard, rear yard or vacant lot, which is visible from the public right-of-way or other private property;

(b) Attractive nuisances dangerous to children including but not limited to the following items when located in any front yard, side yard, rear yard or vacant lot:

(i) Abandoned, broken or neglected equipment;

(ii) Potentially dangerous machinery;

(iii) Refrigerators and freezers and other appliances;

(iv) Excavations, wells or shafts that are not properly fenced or covered;

(c) Broken or discarded furniture or household equipment, in any front yard, side yard or vacant lot, which is visible from the public right-of-way or other private property;

(d) Graffiti on the exterior of any building, fence or other structure in any front yard, side yard, rear yard or on any object in a vacant lot, which is visible from the public right-of-way or other private property;

(e) Vehicle parts or other articles of personal property which are discarded or left in a state of disrepair in any front yard, side yard, rear yard or vacant lot, which is visible from the public right-of-way or other private property;

(f) Distribute or possess for the purpose of sale, exhibition or display, in any place of business from which minors are not excluded, any devices, contrivances, instruments, or paraphernalia which are primarily designed for or intended to be used for smoking, ingestion, or consumption of marijuana, hashish, PCP, or any controlled substance other than prescription drugs and devices.

WMC 1.07.040 (attached to City's Response Brief). Tent City 4 does not fit into any of the above definitions of "nuisance."⁵ The City nonetheless continues to argue that Tent City 4 was a nuisance *per se* under the Woodinville Municipal Code, although it is unable to cite to any language in the code expressly decreeing that any violation of law is a nuisance *per se*.⁶ (City's Response Brief at 22.) This is because the Woodinville

⁵ The only other "nuisance" Woodinville Municipal Code section that Tent City 4 would theoretically fall under is Title 15, the Building and Construction Code which is intended to "regulate buildings and construction within the City," (WMC15.06.020) which provides that it shall be a nuisance to "erect [or] construct, . . . any building [or] structure . . . in conflict with or in violation of any of the provisions of this code." (WMC 113.1-113.4.) However, the City does not argue that tent city falls within this title, and, in fact expressly argues that the tents of tent city are not "buildings" or "structures." (City's Response Brief at 24-25.)

⁶ The City may mean to argue that tent city is a nuisance under RCW 7.48.120, but this argument has not been made, and no such finding
(continued . . .)

Municipal Code merely states that in addition to the remedies laid out by the Woodinville Municipal Code, all remedies given by law for the prevention and abatement of nuisances shall also apply. WMC 1.03.030 (attached to City's Response Brief).

The City misquotes the holding of Kitsap County v. Kev, Inc., 106 Wn.2d 135, 720 P.2d 818 (1986), for the proposition that engaging in any otherwise lawful activity in defiance of a law is a nuisance *per se*. (City Response Brief at 23.) Rather, the Kev Court wrote, "Engaging in any business or profession in defiance of a law regulating or prohibiting the same, however, is a nuisance *per se*." Kev, 106 Wn.2d at 138 (emphasis added). The City "cannot make a square peg fit into a round hole by misquoting a case and by failing to explain its holding" Larson v. Seattle Popular Monorail Auth., 156 Wn.2d 752, 760, 131 P.3d 892 (2006). Tent City 4 is neither a business nor a profession, it is a group of homeless individuals that have banded together to provide additional safety and security. (CP 221.) Moreover, the Kev court relied on a local zoning ordinance declaring that an "activity, act, or conduct contrary to the provisions of this ordinance is hereby declared to be unlawful and a public nuisance." Kev, 106 Wn.2d at 138. A similar provision was relied

(. . . continued)

was entered by the trial court. Nor would the argument suffice if the City had made the argument, since there were no findings that tent city "annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property." RCW 7.48.120.

upon by the Court in City of Mercer Island v. Steinmann, 9 Wn. App. 479, 513 P.2d 80 (1973) (“The Mercer Island code states that any use of property contrary to the ordinance is a public nuisance which the city may abate by an action in the superior court.”) There is no similar provision in the Woodinville Municipal Code declaring that a violation of the code is a nuisance *per se*.

The City also cites to Shields v. Spokane School District No. 81, 31 Wn.2d 247, 196 P.2d 352 (1948). The Shields court found that if the legislative branch of the government has declared what a nuisance is, the court should not second-guess such a determination. But, again, Shields is factually distinguishable, as there was a clear statute defining nuisance as “unlawfully doing an act or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others.” Id., at 254. The Woodinville Municipal Code contains no such similar language. Moreover, the Shields court found that the temporary buildings at issue did not, in fact, constitute a nuisance. Id., at 260.

There was no evidence introduced in the expedited trial supporting the City’s argument that Tent City 4 was a nuisance. Since the Woodinville Municipal code does not contain a provision stating that certain violations of the code constitute a nuisance *per se*, the trial court erred when making such a finding.

VI. THE CITY’S POSITION LEAVES THE CHURCH WITH NO ACCESSORY USES OF ITS PROPERTY

The City argues that the Woodinville Municipal Code regulations

allowing for accessory units of residential properties are not applicable to the Church, because the church is not a residence. (City's Response Brief at 25.) However, in the very same breath, the City argues that the Church is sited in R-1 residentially-zoned land, and thus must comply with residential laws and zoning requirements. (*Id.* at 27.) Under the City's interpretation of the Woodinville Municipal Code, there are no allowed accessory uses of the Church that extend more than the two day exemption allowed under the temporary use permit statute,⁷ since the Church is not a residence.

Under the City's interpretation, if the Church wanted to host a visiting pastor for a month, and the pastor wished to stay in a tent on Church property instead of a hotel, the Woodinville Municipal Code would prevent him from doing so. This is an absurd interpretation, as repeatedly upheld by courts around the country, which have found that serving the needs of the homeless are legitimate accessory uses of church property. (Church's Opening Brief at 44-47.)

VII. THE CHURCH WAS DENIED ITS CONSTITUTIONAL RIGHTS AND STRICT SCRUTINY APPLIES

Review of the trial court's rulings on constitutional law and RLUIPA is de novo. See A.C.L.U. of Nevada v. City of Las Vegas, --- F.3d ----, 2006 WL 2988192 (9th Cir. October 20, 2006) (reviewing "de novo the district court's ruling because First Amendment questions are mixed questions of law and fact, and because we review de novo the

⁷ Woodinville Municipal Code 21.32.110.

constitutionality of local ordinances;” finding an impermissible restriction on First Amendment activity); Rickert v. State, Public Disclosure Com'n, 129 Wn. App. 450, 119 P.3d 379 (2005) (noting that “[t]he facial constitutionality of a statute is a question of law requiring de novo review” and finding the statute violated the First Amendment, in that it was not narrowly tailored to advance a compelling state interest, and that the statute was unconstitutionally overbroad). The Court should find that the trial court erred when determining that the Moratorium did not infringe on the Church’s constitutional right to religious expression.

The City’s opposition to all of the Church’s religious expression claims is centered on the premise that the City’s actions did not burden the Church’s religious practice. This argument is unpersuasive. The Church put forth extensive evidence demonstrating that the Moratorium substantially burdened the Church’s religious exercise. Religious teachings mandate that the Church shelter the homeless and needy, (CP 222-23; 229-31) there was an emergency situation where Tent City 4 had no place to go and begged the Church for help. (CP 179-80; 249.) The Church then went to the City to ask what it needed to do to host Tent City 4, (CP 249-50; VRP June 5, 2006 at 4:24-10:7) and took every step requested by the City, (Id.) only to have the rug pulled out from under it when the City ultimately determined that the Church could not host Tent City 4 on the vacant city park land. (CP 250.) There was testimony regarding the Church’s frantic and fruitless efforts to secure an alternate site upon which to host Tent City 4 after the first two options were turned

down by the City. (CP 179-181; 251.) While the City repeatedly implies that a wide variety of additional sites were available to host Tent City 4,⁸ this unsupported implication is at odds with the record, which reflects that the Appellants were unable to find any location other than Church property upon which the Church could carry out its religious mission. (CP at 251; VRP June 9, 2006 at 28:24-31:7, 37:9-38:6; VRP June 2, 2006 at 11:25-12:13.)

This was an emergency situation: without the help of the Church, the residents of Tent City 4 would have been on the streets, at great risk to their health. (VRP June 9, 2006 at 31:20-31:5.) For such a catastrophic result to emerge from a situation where vacant church and city land is ready to host a temporary encampment is a severe miscarriage of justice. While such an event would be offensive to most people, to the members of the Church it holds the additional burden of being a violation of their faith. (VRP June 2, 2006 at 12:3-13; CP 253-54.)

The City's actions would have precluded the Church from hosting the homeless on its private property under exigent circumstances. This is a significant burden. For a City that spends \$2 per resident per year on the homeless⁹ to describe the Church's anguish at being unable to keep the Tent City 4 residents from being forced onto the streets as a "tired argument" or "alleged inconvenience" is reflective of the City's ongoing

⁸ City's Response Brief at 27, 35, 39, 40, 41, 44, 45.

⁹ VRP June 2, 2006 at 48:1-13.

arrogance and hostility towards the Church. (City's Response Brief at 42, 44.)

Since the Church has demonstrated that the City's actions burdened its religious expression, the burden then shifts to the City. The City has utterly failed to argue, let alone demonstrate, that the imposition of the burden imposed by the Moratorium on the Church was in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.

While the Court may find that the City's ongoing efforts to formulate a development plan for residential property is a compelling governmental interest, refusing to accept or consider an application for a Temporary Use Permit that has no long-term impact on the property does not support the City's goal and unduly singles out the Church. The City admits as much in its Response Brief, where it describes what activities constitute legitimate exceptions to the Moratorium:

The issuance of building permits for the repairing, remodeling, etc. of extant structures obviously creates little or no additional impact on the surrounding environment, as the underlying land uses in question already exist. And the exception for public work simply clarifies that the moratorium does not prevent governmental entities from repairing or constructing roads, utilities and other necessary public facilities. Both exemptions reflect commonsensical policy determinations by the Woodinville City Council, and, as the Council specifically found, create a *de minimus* impact with respect to the moratorium's purpose.

(City's Response Brief at 29-30) (internal citations and emphasis omitted.)

For the City to argue that enlarging an apartment building or constructing a road has a "de minimus" impact on property, then turn

around and argue that a group of tents temporarily camping on vacant land in the middle of summer violates the intent of the Moratorium is ludicrous. Surely the creation of a new road has a greater impact on the development of the R-1 zone than temporary tents do; yet under the Moratorium in the residential zone, a new road is allowed, and the encampment is not.

The Moratorium is thus overly broad and insufficiently tailored to protect the Church's religious freedom. At a minimum, the Church put forward sufficient evidence of injury to entitle it to conduct additional discovery on the constitutional issues before a permanent injunction was entered.

The burden of satisfying the governmental interest standard is on the City. The City has failed to meet this burden, as the Moratorium is not narrowly-tailored or the least restrictive means of accomplishing its goal of sustainable development in the R-1 zone.

A. The City's Actions Violate the First Amendment, and Strict Scrutiny Applies

The City argues that under the First Amendment the Moratorium is subject to the "rational basis" standard of constitutional review, and that the Court should limit its review accordingly. (City's Response Brief at 34-38.) However, there are multiple problems with this argument.

The City mistakenly relies on San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004).¹⁰ (City's Response Brief

¹⁰ The Ninth Circuit does not control the Court's decision in this (continued . . .)

at 35.) First, in San Jose Christian College, the college was seeking a *permanent* rezoning of its property so that it could construct numerous new *permanent* buildings on the property. Here, the Church sought to allow a temporary encampment onto its property or the vacant city park property for 90 days. (CP 249-251.) Second, the college declined to fill out the rezoning paperwork repeatedly requested by the city. Here, the Church performed all steps requested by the City and repeatedly attempted to file applications for permits, but was prevented from doing so by the City. (CP 249-251.) Third, in San Jose Christian College, alternative sites were available to the college to construct its buildings. In the case at bar, the City rejected the Church's request to host Tent City 4 at the only known alternative site (originally suggested by the City) and was unable to find any other site for the camp. (CP at 251; VRP June 9, 2006 at 28:24-31:7, 37:9-38:6; VRP June 2, 2006 at 11:25-12:13.) Fourth, there was no element of exigency in the college's attempt to rezone the property. In sharp contrast here, there was a very real risk of the residents of Tent City 4 being forced onto the streets. (CP 251.) The San Jose Christian College Court found that:

(. . . continued)

case. The Ninth Circuit is at odds with many of the other Circuit Courts on this issue, and while its decisions are of assistance to this Court they are not binding upon it. See, e.g., In re Meyer, 142 Wn.2d 608, 16 P.3d 563 (2001) (after examining Ninth Circuit decision with deference, the Washington Supreme Court found it was wrongly decided). The Ninth Circuit's decision in San Jose Christian College differs from decisions of other circuits, including the Second Circuit in Fifth Avenue Presbyterian Church v. City of New York, 293 F.3d 570 (2nd Cir. 2002), and this Court may give the other Circuit Courts equal weight.

[T]he government is prohibited from imposing a land use regulation in a manner that imposes a “significantly great” restriction or onus on “any exercise of religion, whether or not compelled by, or central to, a system of religious belief” of a person, including a religious assembly or institution, unless the government can demonstrate that imposition of the burden on that person, assembly, or institution is: (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering that compelling governmental interest.

360 F.3d at 1034-35.

The next problem with the City’s argument is that despite the City’s claims that the Moratorium is of general application, the Moratorium is not neutral. As the Supreme Court noted:

Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause “forbids subtle departures from neutrality,” and “covert suppression of particular religious beliefs.” Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534, 113 S.Ct. 2217 (1993) (internal citations omitted) (finding governmental interest assertedly advanced by the ordinances were not narrowly tailored and did not justify the targeting of religious activity). The Moratorium impacts only residential zoned property. Yet it exempts all applications for remodeling and expanding all single and multi-family residential structures and all publicly-owned structures and facilities. (CP 116.) If the purpose of the Moratorium is to prevent development in the residential zone while the sustainable development program is completed, (CP 113-14) but allows for the expansion of single family and multi-

family structures as well as all applications relating to publicly owned land, it leaves room for an enormous amount of development in the residential zone. Appellants must be allowed to conduct discovery on whether the Moratorium has a disproportionate impact on the Church in the residential neighborhood.

The third problem with the City's argument is that the Moratorium is not the only action by the City that is being challenged. If the City accepted the application and declined it because of the Moratorium, the Church would only challenge that action. However, the City declined to accept an application for a temporary use permit. It declined to accept the application without weighing whether the Church may have a right to religious expression, even though the impact of Tent City would be *de minimus*, and thus not in violation of the intent of the Moratorium. (City's Response Brief at 29-30.) The City declined to accept it despite the possibility that the Church's application was not governed by the Moratorium since the term "land use permit" is not defined in the Woodinville Municipal Code and a temporary use permit does not meet the intent of the Moratorium. This refusal to accept the application for a permit was a state action governed by the First Amendment that is subject to strict scrutiny since it singled out the Church.

Thus, it is appropriate for this Court to apply strict scrutiny when examining the City's actions under the First Amendment. Under such an analysis, the City's Moratorium was not sufficiently narrowly tailored to protect the Church's religious expression, and thus violates the

Constitution. See Fifth Ave. Presbyterian Church, *supra*, 293 F.3d at 574 (To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests”).

Assuming, *arguendo*, that the Court finds the Church does not meet the standards of San Jose Christian College, and that the City is entitled to rational basis review under the First Amendment, which it should not, the Church still is entitled to strict scrutiny under both the Washington State Constitution and RLUIPA.

B. The City’s Actions Violate RLUIPA and Strict Scrutiny Applies

The City argues that strict scrutiny does not apply to RLUIPA claims. (City’s Response Brief at 39.) However, the City does not cite to any case law to support this proposition, which flies in the face of the plain language of the statute. RLUIPA provides that once a church has produced 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. 42 U.S.C. § 2000cc 2(B); *id.*, at 1(a). See also Cutter v. Wilkinson, 544 U.S. 709, 125 S.Ct. 2113 (2005) (generally upholding the constitutionality of RLUIPA). Moreover, 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.” 42 U.S.C. § 2000cc 3(G).

Though it devotes substantial time to San Jose Christian College, the City entirely avoids discussion of a more recent Ninth Circuit case,

Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006). In Guru Nanak, the Ninth Circuit found that RLUIPA applied to a county's decision to deny a conditional use permit to build a Sikh temple with an assembly area and related activities in a low density, residential R-1 zone. Applying the San Jose Christian College case, the Guru Nanak court concluded that the county's actions were a "substantial burden" on Guru Nanak because the broad reasons for the denials could easily apply to future applications, and that Guru Nanak agreed to every measure suggested by the planning division, but the county found such cooperation insufficient. Guru Nanak, 456 F.3d at 989. In so doing, the Court expressly distinguished San Jose Christian College by noting there was not a substantial burden in that case because the government's actions had not lessened the possibility that the college could find a suitable property, and that the re-zoning application might well be accepted if the application was filled out in full. Id. at 992.¹¹

¹¹ The Guru Nanak Court looked to the Supreme Court's free exercise jurisprudence in defining "substantial burden" under RLUIPA. The Supreme Court has held that various unemployment compensation regulations imposed a substantial burden on adherents' religious exercise, and thereby were subject to strict scrutiny, because the regulations withheld benefits based on adherents' following their religious tenets. See Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790 (1963). This choice between unemployment benefits or religious duties imposed a burden because it exerted "substantial pressure on an adherent to modify his behavior and to violate his beliefs." Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18, 101 S.Ct. 1425 (1981); see also Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51, 108 S.Ct. 1319 (1988) (explaining that to trigger strict scrutiny under the First Amendment a governmental burden must have a "tendency to coerce individuals into acting contrary to their religious beliefs").

Similarly, in the case at bar, the City's refusal to consider a temporary use permit application was an implementation sufficient to satisfy RLUIPA. See 42 U.S. C. §2000cc(2)(C). The Church applied to host Tent City 4 on two separate sites and was turned down for both. There were no other known places upon which to site the encampment. The City's actions would have left the Church with no choice but to violate its religious teachings and watch the residents of Tent City 4 disburse onto the streets instead of coming onto its vacant land. The trial court erred when it found that the City's actions did not violate RLUIPA.

C. The City's Actions Violate the Washington State Constitution, and Strict Scrutiny Applies

The City claims that the Church believes that the Washington State Constitution is a "mandate ... effectively exempting religiously owned property from local land use restrictions." (City's Response Brief at 42.) This statement is perplexing indeed.

The Church has never claimed to be wholly exempt from the law, and does not dispute that the government has the ability to set reasonable zoning requirements. Indeed, from the moment Tent City 4 asked for the Church's aid, the Church did its best to work with the City and comply with all of the City's requests. (VRP June 5, 2006 at 4:24-10:7; 12:11-15:7.) The Church did not extend an offer for Tent City 4 to come onto its property until after a court order expressly decreed that it could. (CP 246; VRP June 5, 2006 at 17:8-18:3.) But when the City arbitrarily determined there was no way the Church could host Tent City 4 on its property for the

foreseeable future,¹² the City placed an unconstitutional substantial burden on the Church's worship.

The City relies on North Pacific Union Conference Ass'n. of Seventh Day Adventists v. Clark Cty., 118 Wn. App. 22, 74 P.3d 140 (2003) for the proposition that religious claimants may not disregard local land use regulations. However, in that case, the church proposed to build a 40,000 square foot five-state regional headquarters in agriculturally zoned land. The county found the building did not meet the county definition of a "church" because the vast majority of the building was administrative offices, which exceed the "accessory use" standard of related church activities which must be subordinate to the principal use of a building.

North Pacific Union Conference is distinguishable from the case at bar because the primary burden claimed by the church in North Pacific Union Conference was the loss of a highly visible and convenient location for the church. Here, the primary burden on the Church is the inability to temporarily shelter the homeless on private property already occupied by the Church. The situations are not comparable.

The City also relies on Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 99 P.2d 33 (2000). That case was decided under Washington law, and the court followed the traditional standard, *i.e.*, the

¹² The City incorrectly refers to the Moratorium as a "six month" burden on the Church. (City's Response Brief at 39.) It is unknown how long the Moratorium will be in effect, but the Court should take judicial notice that Woodinville Ordinance No. 427, attached hereto and passed September 11, 2006, extended the duration to at least one year.

complaining party must first establish that a governmental action has a coercive effect upon the practice of religion. Here, the City's actions clearly rose to the level of having a coercive effect on the Church's activities. Thus, under Open Door, the City must identify whether the means chosen to enforce the governmental interest were 1) necessary and 2) the least restrictive available to achieve the ends sought.

The Open Door Court hinged its decision on the fact that the church in question refused to apply for a conditional use permit in order to build a church on its property. Despite being given every opportunity to apply for a permit, the church declined to do so. But, Open Door is facially distinguishable from the case at bar, since the Church here did everything possible to apply for a Temporary Use Permit and was denied the opportunity to do so by the City.

There is no real dispute that Washington courts have consistently recognized that Article 1, Section 11, provides even greater protections than the First Amendment. (Church's Opening Brief at 31-33.) The City's actions would have forced the Church to turn a blind eye to the homeless people literally on its doorstep asking for shelter. Such action violates the Washington State Constitution. The trial court erred when it found that the City did not violate Article 1, Section 11.

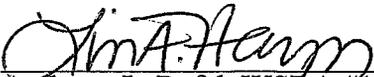
VIII. CONCLUSION

For the foregoing reasons, Appellant Northshore United Church of Christ respectfully requests that the June 12, 2006 Final Order of the King

County Superior Court be vacated, and that this action be remanded to the trial court.

DATED this 30th day of October, 2006.

RAFEL MANVILLE PLLC

By: 
Anthony L. Rafel, WSBA #13194
Lisa A. Hayes, WSBA #29232
Robert Hyde, WSBA#33593
Attorneys for Northshore United Church of Christ

ORDINANCE NO. 427

AN ORDINANCE OF THE CITY OF WOODINVILLE, WASHINGTON, AMENDING ORDINANCE NO. 419; RENEWING FOR AN ADDITIONAL SIX MONTH PERIOD THE TEMPORARY R-1 ZONING DISTRICT LAND USE PERMITTING MORATORIUM CURRENTLY SCHEDULED TO EXPIRE ON SEPTEMBER 20, 2006; ADOPTING FINDINGS IN SUPPORT OF SAID RENEWAL; PROVIDING FOR SEVERABILITY; DECLARING AN EMERGENCY; AND ESTABLISHING AN IMMEDIATE EFFECTIVE DATE.

WHEREAS, through the adoption of Ordinance No. 419 on March 20, 2006, the Woodinville City Council imposed a six-month moratorium upon the receipt and processing of new land use permit applications within the City's R-1 Zoning District; and

WHEREAS, Ordinance No. 419 was amended by Ordinance No. 424 on July 10, 2006, which adopted additional supportive findings and clarified the scope of specified exemptions to the moratorium; and

WHEREAS, the chief purpose of the moratorium is to preserve the *status quo* while the City's Sustainable Development study is completed and new development standards are considered and duly enacted; and

WHEREAS, the Sustainable Development study is proceeding steadily, but will not be fully completed prior to the September 20, 2006 expiration date of the moratorium; and

WHEREAS, it is necessary to renew the moratorium imposed under Ordinance No. 419 in order to prevent land use permit applicants from obtaining vested development rights inconsistent with the anticipated code amendments that will likely result from the Sustainable Development study;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF WOODINVILLE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Findings. The recitals above are hereby adopted as findings in support of the moratorium renewal effected by this ordinance. Pursuant to RCW 36.70A.390 and RCW 35A.63.220, the City Council further makes and enters the additional findings contained in Exhibit A, attached hereto and incorporated herein by this reference as if set forth in full.

Section 2. Renewal of Moratorium. The moratorium imposed under Ordinance No. 419, as amended by Ordinance No. 424, is hereby renewed for an

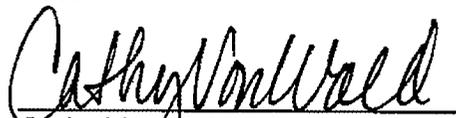
additional six month period commencing upon September 20, 2006. Section 8 of Ordinance No. 419 is accordingly amended to provide in its entirety as follows:

Based upon the findings enumerated in Section 1 of this ordinance and any subsequent enactment relevant hereto, the City Council declares a public emergency necessitating an immediate effective date of the moratorium imposed hereunder. Said moratorium shall take effect immediately, and shall remain effective for one year unless terminated earlier by the City Council. PROVIDED, that the City Council may, in its sole discretion, renew said moratorium for one or more six month periods in accordance with state law. This ordinance or a summary thereof consisting of the title shall be published in the official newspaper of the City.

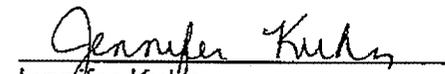
Section 3. Declaration of Emergency; Statement of Urgency; Effective Date. Based upon the findings set forth in Section 1 hereof and Exhibit A hereto, the City Council declares a public emergency necessitating an immediate effective date in order to protect public health, safety, property, peace, welfare and the local environment. This ordinance shall accordingly take effect immediately upon adoption.

Section 4. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

ADOPTED BY THE CITY COUNCIL AND SIGNED IN AUTHENTICATION OF ITS PASSAGE THIS 11TH DAY OF SEPTEMBER 2006.

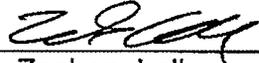

Cathy VonWald, Mayor

ATTEST/AUTHENTICATED:


Jennifer Kuhn
City Clerk

APPROVED AS TO FORM:

OFFICE OF THE CITY ATTORNEY



J. Zachary Lell
City Attorney

PASSED BY THE CITY COUNCIL: 9-11-2006

PUBLISHED: 9-18-2006

EFFECTIVE DATE: 9-20-2006

ORDINANCE NO. 427

EXHIBIT A

FINDINGS IN SUPPORT OF MORATORIUM RENEWAL

The Woodinville City Council hereby reaffirms and incorporates by reference the findings contained in Ordinance Nos. 419 and 424. Pursuant to RCW 35A.63.220 and RCW 36.70A.390, the City Council additionally enters the findings below in support of the moratorium renewal effected by this ordinance. Specifically, the City Council has considered the planning goals set forth at Chapter 36.70A RCW, and acknowledges the following circumstances concerning the Sustainable Development study currently underway to resolve outstanding planning and development issues within the R-1 Zoning District:

1. RCW 36.70A.390 and RCW 35A.63.220 expressly authorize renewal of moratoria for one or more six month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

2. The current moratorium was imposed on March 20, 2006. The City subsequently approved a contract with Steward & Associates to perform a comprehensive Sustainable Development study during the moratorium period. The study's purpose is to assist the City in determining the appropriate levels of urban density and development within the City's R-1 Zoning District, protecting the local environment, and ensuring compliance with applicable GMA planning goals. It is anticipated that the City's Comprehensive Plan, Critical Areas Ordinance and development regulations may be amended at the conclusion of the Sustainable Development study process, which is currently expected to be completed in late September or early October, 2006.

3. In July 2006, the City approved a contract with EKW Law to provide legal counsel regarding issues associated with GMA compliance and other legal matters relevant to the Sustainable Development program.

4. On June 7, 2006 the City Planning Commission appointed an 11 member Citizen Advisory Panel (CAP) to provide public input to and oversee study activities associated with the Sustainable Development program and make appropriate recommendations to the Planning Commission and City Council. The CAP has had three meetings to date with the City consultants and staff involved in the Sustainable Development program.

5. Various factors, including but not limited to the unforeseen complexity of necessary environmental studies and delays in compiling relevant data, have postponed the originally anticipated completion date for the Sustainable Development study.

6. Additional time is necessary in order to complete the Sustainable Development study, appropriately process and respond to any recommendations arising out of the study, and enact necessary amendments to the City's Comprehensive Plan and development regulations.

7. The City Council received a status report from its Sustainable Development consultants at the August 7, 2006 Council meeting indicating that the study would not be completed until after the current expiration date of the moratorium.

8. The earliest available City Council meeting for which to publicly notice, schedule and conduct the public hearing necessary to renew the current moratorium is September 11, 2006.

9. Pursuant to RCW 35A.13.190, an ordinance generally does not take effect until five days after the date of its publication. The earliest available publication date following the September 11, 2006 City Council meeting is September 18, 2006.

10. Delaying the effective date of the moratorium renewal until five days after the anticipated September 18, 2006 publication date would allow the current moratorium to expire for a period of at least three days, which in turn could allow land use permit applicants to obtain vested development rights inconsistent with the Comprehensive Plan and development code amendments that will result from the Sustainable Development program.

11. Allowing land use development within the City's R-1 Zoning District inconsistent with the above-referenced amendments would jeopardize and pose an imminent threat to public health, peace, welfare, property and the local environment.

12. In order to prevent the accrual of vested development rights prior to the completion of the Sustainable Development study and adoption of appropriate Comprehensive Plan and development code amendments, it is necessary and urgent for the moratorium renewal enacted by this ordinance to take effect immediately upon the expiration of the current moratorium, and for this ordinance to take effect immediately upon adoption. The immediate necessity of this action prevents the City's compliance with otherwise-applicable adoption procedures and processes.

13. Pursuant to RCW 36.70A.390 and RCW 35A.63.220, the City Council held a public hearing on September 11, 2006 regarding the moratorium renewal effected by this ordinance.

14. The City is working diligently and in good faith to complete the Sustainable Development study and will take appropriate action, pursuant to applicable procedures and standards, to expeditiously process the Comprehensive Plan and development regulation amendments recommended by the study.