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No. 80588-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioner,

vs.

CITY OF WOODINVILLE, a Municipal Corporation,

Respondents.

AMICUS CURIAE MEMORANDUM OF CHURCH COUNCIL OF
GREATER SEATTLE, TEMPLE BETH AM, EVERGREEN
ASSOCIATION OF AMERICAN BAPTIST CHURCHES,
WASHINGTON ASSOCIATION OF CHURCHES AND THE PACIFIC
NORTHWEST CONFERENCE OF THE UNITED METHODIST
CHURCH IN SUPPORT OF PETITION FOR REVIEW

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

Attorney for Amici Curiae

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A. Identity And Interest Of Amici Curiae.

1. **The Church Council of Greater Seattle** represents more than 400 churches in 15 denominations in King County.

2. **Evergreen Association of American Baptist Churches** has 36 churches in its membership, 27 of which are in Washington state.

3. **Temple Beth Am**, located in Seattle, is a Reformed Jewish Congregation of 870 families. In 2003, and again in 2005, the Temple invited Tent City to share its land.

4. **Washington Association of Churches (WAC)** is an association of ten Christian denominations and eleven ecumenical organizations in Washington State.

5. **The Pacific Northwest Conference of the United Methodist Church** represents 252 congregations in the State of Washington, several of which have hosted Tent City.

The particular interest of each amicus is reflected in the Appendix.

B. Issues Presented For Review.

1. Did the Court of Appeals misapply the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in holding that a City's refusal to grant a temporary use permit to allow a church to establish a 90 day "tent city" on its property did not impose a substantial burden on a church's free religious exercise of ministering to the homeless?

2. Did petitioner's failure to undertake a *Gunwall* analysis preclude consideration of its state constitutional claim where this Court has previously held that Wash. Const., Art. 1, § 11 provides greater protection to the free exercise of religion than does the First Amendment?

C. Statement of the Case.

Amici adopt the statement of the case in the Petition for Review of Northshore United Church of Christ ("the Church").

D. Argument Why Review Should Be Granted.

1. The Court Of Appeals Misapplied The "Substantial Burden" Element Under RLUIPA.

"To protect religious liberty," Congress has prohibited local government from enforcing "a land use regulation in a manner that imposes a substantial burden on the religious exercise of . . . a religious assembly or institution" unless the government establishes that the burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a)(1). By its terms, RLUIPA must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the statute] and the Constitution." 42 U.S.C. § 2000cc-3(g). The Court of Appeals turned this statutory purpose on its head by *narrowly* construing the statute.

a. The Court's Reliance On Hypothetical Alternatives Negates The Church's Right To Exercise Its Faith In The Manner It Chooses.

The Court of Appeals properly recognized that the Church's effort to provide temporary shelter to the homeless was a legitimate exercise of religion¹ (Opinion at 14) and that the "City's actions effectively prevented the Church from hosting Tent City on either the Church property or the alternative Lumpkin property, the 2004 site for Tent City," (Opinion at 16), but incongruously concluded that the City's action did not impose a "substantial burden" on the Church's exercise of religion. The Court of Appeals based its conclusion on speculation that the Church could "minister[] to the homeless on its property in other ways²," or that the Church could "obtain permission to use private land outside of the R-1 zone, such as a local business' property." (Opinion at 17, 18)

A court may not second-guess the manner in which a church chooses to engage in specific religious exercises. Congress intended that the term "substantial burden" in RLUIPA be given the same meaning that it has been given in the Supreme Court's Free Exercise cases. *See Joint*

¹ The City has conceded that "the legitimacy of NUCC's desire to assist the homeless is undisputed." (Answer to Petition at 13)

² The Court of Appeals' holding that a 90-day homeless encampment is not an accessory use of church property under the Woodinville Municipal Code, (Opinion at 20), undermines the Court of Appeals' speculation that the Church could temporarily house homeless residents inside church buildings as an alternative to Tent City 4.

statement of Senator Hatch and Senator Kennedy (co-sponsors), 146 Cong. Rec. S7774, 7776 (July 27, 2000) (“That term [substantial burden] should be interpreted by reference to Supreme Court jurisprudence.”). See *Sherbert v. Verner*, 374 U.S. 398, 404 & n.6 (1983) (government action creates a substantial burden if it has a “tendency to inhibit constitutionally protected activity.”) Although recognizing that the Church must prove a “substantial burden,” the federal courts have uniformly rejected the Court of Appeals reasoning here – that the Church must also prove a negative, e.g., that no other possible alternatives exist.

Thus, the Seventh Circuit has held that the burdens need not be “insuperable” in order to be substantial under RLUIPA. As here, “the Church could have searched around for other parcels of land,” but such hypothetical alternatives did not diminish the substantial burden of being prohibited from using its property in furtherance of its religious principles. *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 at 901 (7th Cir. 2005).³ Similarly, the Second Circuit recently held that “where the alternatives require substantial ‘delay, uncertainty, and expense,’ a complete denial of the [religious] school’s application might be indicative of a substantial burden.” *Westchester Day*

³ Here, the City denied the Church’s request to use an alternative site outside the R-1 zone even though the Church had successfully hosted Tent City on that site only two years before.

School v. Village of Mamaroneck, 2007 WL 3011061, *7 (2nd Cir. 2007).
See *DiLaura v. Township of Ann Arbor*, 112 Fed Appx. 445 (6th Cir. 2004) (zoning permit approval that nonetheless prohibited some of center's religious exercise on property imposed substantial burden where conditions of permit required charging guests a fee and prohibited the serving of meals, including communion wine).⁴

The Michigan Court of Appeals held that a zoning board's refusal to allow a church to operate a homeless shelter as an accessory use to church property imposed a substantial burden on the church's free exercise of religion in *Jesus Center v. Farmington Hills Zoning Bd. Of Appeals*, 544 N.W.2d 698 (Mich. App. 1996). The court rejected the argument that the church could minister to the homeless in other ways, or relocate its homeless program elsewhere:

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.

544 N.W.2d at 704-05.

Deciding that the Church may fulfill its religious obligation to minister to the homeless by other means is itself impermissible religious

⁴ This case would be considered authority under 6th Cir. R. 28(g) because the Sixth Circuit has not addressed the "substantial burden" aspect of RLUIPA in any published opinion. See RAP 10.4(h).

interpretation. See *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (“[i]t 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.”); *Thomas v. Review Board*, 450 U.S. 707, 716 (1981) (“Courts are not arbiters of scriptural interpretation.”). The Court of Appeals’ speculation that hypothetical alternatives of ministering to the homeless were acceptable equivalents to a church is antithetical to the free exercise of religion that is at the heart of RLUIPA. This Court should accept review. RAP 13.4(b)(3).

b. The Court Of Appeals’ Analysis Evades The Application Of Strict Scrutiny To Land Use Restrictions That Inhibit The Free Exercise Of Religion.

The Court of Appeals’ failure to properly apply the “substantial burden” test allowed the City’s land use decisions to evade the strict scrutiny required by RLUIPA. Under RLUIPA, where government action poses a substantial burden on the Church’s religious exercise, it is subjected to “the most rigorous of scrutiny,” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and can be upheld only if narrowly tailored to meet a compelling governmental interest. “Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Navajo*

Nation v. U.S. Forest Service, 9th Cir. No. 06-15371, slip op. at 2863-66 (March 12, 2007), *pet for rehearing en banc granted* Oct. 17, 2007 (citation omitted).

This Court has described compelling interests as those preventing “a clear and present, grave and immediate danger to public health, peace and welfare.” *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 840 P.2d 174 (1992). The City must establish not that the application of the law in general advances a compelling interest but rather that “there is a compelling government reason, advanced in the last restrictive means, to apply the [policy] to the individual claimant.” *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001).

Here, the City’s permit moratorium was neither necessary to protect a compelling governmental interest, nor narrowly tailored. The City’s rolling moratorium⁵ on development in the residential zone applies to permit applications for “the development, rezoning or improvement of real property.” (CP 116) Its purpose was to freeze applications for commercial development that “will irreversibly alter the character and

⁵ The City’s moratorium, first enacted in March 2006, was extended for an additional six-month period. (Opinion at 3) Even in the absence of RLUIPA’s requirement of strict scrutiny, “a reasonable moratorium must be in place no longer than necessary to accomplish the necessary planning by a body exercising diligence to accomplish that planning.” *Biggers v. City of Bainbridge Island*, ___ Wn.2d ___, 169 P.3d 14, 26, ¶ 51 (2007) (Chambers, J., concurring in result).

physical environment” in the R-1 zone, as the moratorium allowed an exception for the expansions of single and multi-family structures and the construction of public owned structures within the zone. A temporary use of the Church’s property to house homeless persons in no way affects the City’s goal of prohibiting the *permanent* alteration of the residential charter of the R-1 zone.

This Court should accept review because the Court of Appeals’ analysis will encourage the lower courts applying RLUIPA to evade the statute’s heightened level of scrutiny by testing the effect of a governmental land use restriction under an erroneous “substantial burden” standard.

c. The Court Should Accept Review To Conform Decisionmaking By Local Government To Uniform Standards Under RLUIPA.

This Court should accept review because the Court of Appeals decision fails to provide proper guidance for local governments, religious institutions and the lower courts, all of which must make important decisions affecting the public interest under the standards established by Congress in RLUIPA. RAP 13.4(b)(4).

The Court of Appeals’ decision immediately and necessarily prejudices the ability of amici to aid the homeless in the manner that their religious principles dictate. But the Court of Appeals decision does not

harm just religious institutions. The standard announced by the Court of Appeals will ultimately put cities and other local governments in the untenable position of yielding to local political pressures to reject land use applications by religious institutions only to have their decisions challenged in federal court under more rigorous standards than those imposed by the Court of Appeals here. This Court should provide needed guidance to governmental decision makers and the lower courts regarding the proper application of RLUIPA's substantial burden test.

2. The Court Of Appeals' Insistence That The Church Provide A *Gunwall* Analysis Diminishes The Protections Under The Washington Constitution.

This Court concluded in *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 152, 995 P.2d 33, 38 (2000), that Washington's Free Religion clause, Art. I, § 11, "absolutely protects the free exercise of religion [and] extends *broader* protection than the first amendment to the federal constitution." Though acknowledging that *Open Door* was "a case similar to this one," (Opinion at 12 n. 27), the Court of Appeals nonetheless concluded it need not consider the Church's claims under Art I, § 11 because the Church did not provide a *Gunwall* analysis. See *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

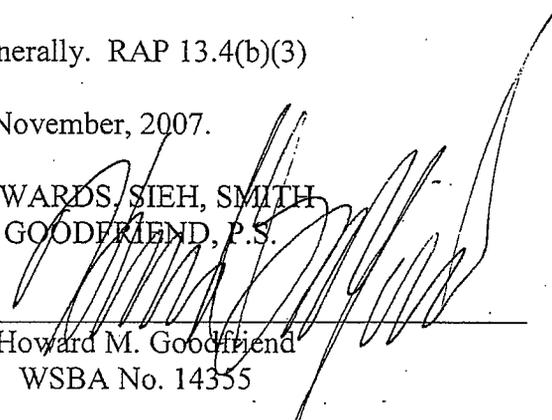
The purpose of a *Gunwall* analysis is to determine whether the Washington Constitution provides broader protections of rights than the

federal Constitution. Once this Court has made that determination – as it clearly has here – a *Gunwall* analysis is no longer necessary. *Voters Educ. Comm. v. Wash. St. Public Disclosure Comm.*, __ Wn.2d __, 166 P.3d 1174, 1187 n.16.(2007). The Court of Appeals’ reasoning threatens to turn *Gunwall* from a tool for the rational development of state constitutional jurisprudence to a formalistic pleading requirement that defeats just application of the Washington constitution.

This Court should grant review to correct this serious threat to both the Washington Free Religion clause and to robust application of the Washington constitution more generally. RAP 13.4(b)(3)

DATED this 13th day of November, 2007.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

Attorney for Amici Curiae

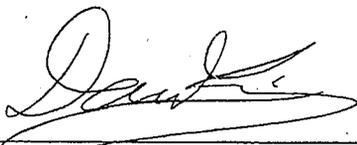
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 13, 2007, I arranged for service of the foregoing Motion to File Amicus Memorandum, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-mail
Anthony L. Rafel, Lisa Hayes, and Robert A. Hyde Rafel Law Group PLLC 999 Third Avenue, Suite 1600 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Greg A. Rubstello & J. Zachary Lell Ogden Murphy Wallace, P.L.L.C. 1601 Fifth Avenue, Suite 2100 Seattle, WA 98101-1686	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Sean Russel Ahlers & Cressman PLLC 999 3rd Ave Ste 3100 Seattle WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail

DATED at Seattle, Washington this 13th day of November, 2007.



Daniel F. King

APPENDIX

Church Council of Greater Seattle.

Established in 1919, the Church Council of Greater Seattle represents more than 400 churches in 15 denominations, as well as thousands of individuals, united by the belief that faith communities can work together to promote justice and increase compassion in our community. Over 130 of its member congregations provide some level of ministry to the homeless in King County.

For the past 25 years, the Church Council has been on the forefront of faith-based efforts to end homelessness. It led the effort to establish the Displacement Coalition and Downtown Emergency Services Center in the 1980's, was a founding member of the Committee to End Homelessness in King County in 2002, and created three human service programs that provide direct service to homeless families and individuals. In 2005, its advocacy and negotiations with the King County Council resulted in the passage of the County's homeless encampment ordinance.

The Church Council believes that religious congregations using their land and facilities to aid the homeless in furtherance of their religious principles are entitled to the full protection of the First Amendment from undue interference by local government.

Evergreen Council of American Baptist Churches.

Evergreen Association of American Baptist Churches has 36 churches in its membership, 27 of which are in the State of Washington. Its mission is to build bridges between communities; provide resources to equip member churches to share Christ and teach God's word; and translate its unity to the world.

One of Evergreen Association's member congregations hosted Tent City IV from August 10 to November 10, 2007, acting in furtherance of the principle that God calls our churches to minister to the poor and homeless and that we cannot live out our ministry and mission unless we do what we can to alleviate pain and suffering in this world.

Temple Beth Am.

Temple Beth Am, located in Seattle, is a Reformed Jewish Congregation of 879 families whose values embrace the concept of *tikkun olam*, to repair the world. Jewish values, based on the Torah - the five books of Moses - recognize *tzedekah*, which is loosely translated both as justice and as charity, as principles for the individual and for the community.

Temple Beth Am has sheltered the homeless as an act of religious faith. For one month during the summer of 2003, and again in 2005, the Temple invited Tent City to share its land, consistent with the Biblical mandate to share "the corners of your field ... [with] the poor and [] the sojourner." VaYikra (Leviticus) 19:9-10. Temple Beth Am considers this effort, as well as its efforts to help homeless individuals and families transition to permanent housing, as both a religious commandment and a blessing for our community - a *mitzvah*.

Other faith groups share a Biblical (or other) command to help the homeless. Temple Beth Am's congregation believes that secular law, as reflected in the First Amendment, safeguards a religious community's decision to shelter the homeless, free from government interference.

The Washington Association of Churches.

Washington Association of Churches (WAC) is an association of ten Christian denominations and eleven ecumenical organizations united in the task of ecumenism in Washington State. Since 1975, WAC has served as a focal point for dialogue, advocacy, action and reflection. WAC's work is rooted in the conviction that our Christian faith calls us to act with compassion for people and respect the sacredness of life. WAC's members feel called to the challenge of unity in our society by addressing the needs of community in our world, including the homeless.

As a constitutional matter, WAC believes religion should be exercised free of governmental interference. Second, our faith tradition and religious calling summons us to defend and support the vulnerable in our midst. Clearly, the homeless are among the most vulnerable and defenseless in our communities. If we failed to act on our convictions, we would betray our religious calling.

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v.

CITY OF WOODINVILLE, a
Municipal Corporation,

Respondent.

MOTION TO FILE AMICUS
MEMORANDUM

A. Identity Of, and Relief Requested By, Applicants.

Applicants for amicus status are, the Church Council of Greater Seattle, Evergreen Association of American Baptist Churches, Temple Beth Am, the Washington Association of Churches and the Pacific

Northwest Conference of the United Methodist Church. Applicants ask this Court to accept their Amicus Memorandum in Support of Petition for Review.

B. Interest of Applicants

1. Church Council of Greater Seattle.

Established in 1919, the Church Council of Greater Seattle represents more than 400 churches in 15 denominations, as well as thousands of individuals, united by the belief that faith communities can work together to promote justice and increase compassion in our community. Over 130 of its member congregations provide some level of ministry to the homeless in King County.

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Evergreen Association of American Baptist Churches has 36 churches in its membership, 27 of which are in the State of Washington. Its mission is to build bridges between communities; provide resources to equip member churches to share Christ and teach God's word; and translate its unity to the world.

One of Evergreen Association's member congregations hosted Tent City IV from August 10 to November 10, 2007, acting in furtherance of the principle that God calls our churches to minister to the poor and homeless and that we cannot live out our ministry and mission unless we do what we can to alleviate pain and suffering in this world.

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4. The Washington Association of Churches

Washington Association of Churches (WAC) is an association of ten Christian denominations and eleven ecumenical organizations united in the task of ecumenism in Washington State. Since 1975, WAC has served as a focal point for dialogue, advocacy, action and reflection. WAC’s work is rooted in the conviction that the Christian faith calls its members to act with compassion for people and respect the sacredness of life. WAC’s members feel called to the challenge of unity in our society

by addressing the needs of community in our world, including the homeless.

As a constitutional matter, WAC believes religion should be exercised free of governmental interference. Second, our faith tradition and religious calling summons us to defend and support the vulnerable in our midst. Clearly, the homeless are among the most vulnerable and defenseless in our communities. If we failed to act on our convictions, we would betray our religious calling.

5. The Pacific Northwest Conference of the United Methodist Church.

During its 223 year history, the United Methodist Church in the United States has stood for justice and tending to the needs of the poorest and weakest among us. The Pacific Northwest Conference of the United Methodist church is one of 63 Conferences across the USA. The conference has 252 congregations in the State of Washington, each with a unique ministry, many of which involve caring for the shelter needs of others: Woodland Park UMC in Seattle, Bellevue First UMC, and Chehalis UMC, to name a few. Several congregations have hosted Tent City: Trinity UMC in Ballard, Riverton Park UMC in Tukwila, and Haller Lake UMC in North Seattle. The Pacific Northwest Conference provided

the legal assistance to Trinity UMC in Ballard to host Tent City over the objections of the City of Seattle.

The Pacific Northwest Conference and its member churches believe in caring for the homeless is an important part of being the Church in the contemporary society. At its 2006 annual meeting, the Pacific Northwest Conferences adopted a resolution supporting homeless encampments at churches regardless of denominational affiliation. The Pacific Northwest Conference stands beside all those who would attempt to provide care and shelter to those without a place to sleep.

D. Issues To Be Addressed By Applicants.

As reflected in their Memorandum, applicants intend to address the following issues presented for review by the petition:

1. Did the Court of Appeals misapply the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.*, in holding that a City’s refusal to grant a temporary use permit to allow a church to establish a 90 day “tent city” on its property did not impose a substantial burden on the congregation’s free exercise of its core religious principle of ministering to the poor and underprivileged?

2. Did petitioner’s failure to undertake a *Gunwall* analysis bar the Court of Appeals from considering petitioner’s state constitutional claim where this Court has unambiguously held that Wash. Const., Art. 1, Sec.

11 provides greater protection to the free exercise of religion than does the First Amendment?

E. Grounds For Granting The Motion.

Applicants' counsel has reviewed the Court of Appeals decision, the appellate briefs, the petition for review and the answer to petition and is familiar with the issues presented by the petition for review. Applicants, through their respective governing bodies, have authorized counsel to file the amicus memorandum in this case, as the Court of Appeals' decision directly and immediately affects applicants and its members in the practice of their respective faiths.

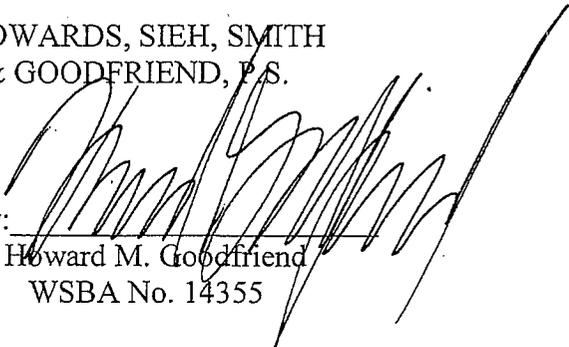
Applicants believe that their experience will assist the Court in addressing the application of heightened scrutiny under federal and state law to a municipality's restrictions on legitimately held faith-based decisions to provide temporary shelter to the homeless.

F. Conclusion.

This Court should grant each of the applicants leave to appear as amicus curiae in this case and accept their amicus curiae memorandum pursuant to RAP 13.4(h).

DATED this 13th day of November, 2007.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

1109 First Avenue, Suite 500
Seattle, WA 98101-2988
(206) 624-0974

Attorneys for Applicants Church
Council of Greater Seattle,
Evergreen Association of American
Baptist Churches, Temple Beth
Am, Washington Association of
Churches and Pacific Northwest
Conference of the United Methodist
Church

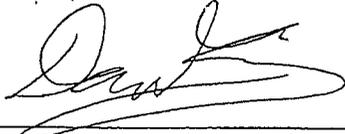
RECEIVED
 SUPREME COURT
 STATE OF WA **DECLARATION OF SERVICE**

2007 NOV 13 10 51 00
 The undersigned declares under penalty of perjury, under
 BY RONALD R. CARPENTER
 the laws of the State of Washington, that the following is true and
 correct: CLERK

That on November 13, 2007, I arranged for service of the
 foregoing Amicus Curiae Memorandum, to the court and to the
 parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-mail
Anthony L. Rafel, Lisa Hayes, and Robert A. Hyde Rafel Law Group PLLC 999 Third Avenue, Suite 1600 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Greg A. Rubstello & J. Zachary Lell Ogden Murphy Wallace, P.L.L.C. 1601 Fifth Avenue, Suite 2100 Seattle, WA 98101-1686	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail
Sean Russel Ahlers & Cressman PLLC 999 3rd Ave Ste 3100 Seattle WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-mail

DATED at Seattle, Washington this 13th day of November,
 2007.


 Daniel F. King

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Subject: RE: Seattle Housing v. City of Woodinville, Cause No. 80588-1

Rec. 11-13-07

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From: Tara Friesen [mailto:taraf@washingtonappeals.com]

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Cc: Howard; Sean Russel; Greg A. Rubstello; Anthony L. Rafel

Subject: Seattle Housing v. City of Woodinville, Cause No. 80588-1

Attached for filing in .pdf format is the Amicus Curiae Memorandum of Church Council Of Greater Seattle, Temple Beth Am, Evergreen Association of American Baptist Churches, Washington Association of Churches and the Pacific Northwest Conference of the United Methodist Church in Support of Petition for Review, and Motion for Amicus Memorandum, in *Seattle Housing and Resource Effort v. City of Woodinville*, Cause No. 80588-1. The person filing these documents is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

Thank you.

Tara Friesen
Legal Assistant to Howard Goodfriend and Catherine Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974