

**ORIGINAL**

NO. 63504-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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MERCER ISLAND CITIZENS FOR FAIR PROCESS,

Appellant,

v.

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

Respondents.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX

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**BRIEF OF APPELLANT**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erroneously concluded that the City of Mercer Island's contract authorizing an outdoor tent city encampment was a land use decision within the meaning of LUPA when no adopted City ordinance or plan authorized the camp and, in fact, it violated the City Code.
2. The trial court erroneously dismissed the Appellant Association's due process claim based on its apparent conclusion that the claim had to be asserted in a LUPA petition and that Association members were not entitled to due process protection.
3. The trial court erroneously dismissed the Appellant Association's 42 U.S.C. § 1983 claim when the appellant had demonstrated that the city violation of the City Council's policy decision adopting the tent city contract was the moving force behind various constitutional violations including a violation of the Association members' property rights as well as their right to procedural and substantive due process and the Association asserted a valid claim based on 42 U.S.C. § 1983.
4. The trial court erroneously dismissed plaintiffs procedural due process claim on summary judgment because the issue of whether

notice was adequate under the circumstances of the case is a question of fact.

5. The trial court committed error by declining to schedule timely a hearing on the Association's application for a temporary restraining order.

**A. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS**

1. Did the trial court erroneously conclude that the City of Mercer Island's decision approving a contract authorizing an outdoor encampment was a land use decision within the meaning of RCW 36.70C.020?
2. Did the trial court erroneously dismiss the Appellant Association's constitutional claims based on the erroneous premise that such claims had to be asserted in a Land Use Petition Act petition and subject to LUPA's 21 day period of limitations?
3. Did the trial court erroneously dismiss the Appellant Associates due process claims because such claims were not asserted in LUPA petition?
4. Did the trial court erroneously dismiss Appellant Association 42 U.S.C. § 1983 action when the Association had demonstrated the existence of a valid section 1983 claim?

5. Did the trial court commit error by dismissing the Association's procedural due process claim when the issue of whether notice was adequate is a question of fact which should be determined at trial?
6. Whether the trial court effectively deprived the Association of its right to seek a temporary restraining order by refusing to timely schedule a hearing on the restraining order.
7. Whether the city's litigation claim that the contract was a land use decision violated the Association's right to due process by depriving it of the right to seek redress for city's constitutional violations?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL POSTURE OF CASE**

The Mercer Island City Council held an open meeting on June 16, 2008 at which the hearing, the Council approved a contract it authorized the Mercer Island United Methodist Church to host a hundred people who would live in tents in its parking lot, in violation of the Mercer Island City Code ("MICC").

On July 10, 2008, the Plaintiffs filed a complaint seeking an Injunction and Temporary Restraining Order based on the city's violation of the Association's right to Due Process. The Superior Court refused to allow the Court Commissioner to consider the motion for a temporary

restraining order. Although the presiding judge scheduled a hearing on the temporary restraining order on July 14, 2009, he later refused to consider the motion because the other parties had not bothered to submit any response to the Association's motion. Although Civil Rule 65 contemplates that a temporary restraining order is relief which can be obtained promptly, the Superior Court refused to hear the Association's motion until August 4, 2008, a date some 25 days after the Association requested that a hearing on a temporary restraining order be scheduled. Hearing the motion on the eve of the date tent city was scheduled to move to the Church parking lot effectively deprived the Association of the temporary restraining order remedy; the parties all claimed on August 4, 2008 that Tent City would have nowhere to go if the order were entered. The King County Superior Court, Judge Michael Fox, denied the plaintiffs' request for a preliminary injunction on August 4, 2008.

The defendants asked for summary judgment dismissing all of plaintiffs claims based on the theory that such claims should have been asserted in a Land Use Petition Act Petition ("LUPA") and were subject to LUPA's 21 day period of limitations. The plaintiffs filed a cross motion for summary judgment asking trial court to declare that a due process violation had occurred and that there was liability under 42 U.S.C. § 1983 for various constitutional violations. The trial court granted the city's

motion for summary judgment and dismissed all of the Association claims and denied the Appellant's cross motion for summary judgment.

#### **B. STATEMENT OF FACTS**

The City of Mercer Island has a zoning code with rigid procedural requirements for land use. The Mercer Island City Code flatly prohibits all property uses that are not specifically authorized by the zoning ordinances. *MICC 19.01.040.*

There is no zoning authorization which allows establishment of temporary use such as temporary encampments in residential zones, or in any other zone within Mercer Island. Nor does the phrase "temporary use agreement" appear anywhere in the Mercer Island Code.

The Mercer Island Clergy Association ("MICA"), a coalition of Mercer Island churches, approached the Mercer Island City Council in the spring of 2006 with a plan to invite a tent city to come to Mercer Island. *Decl. of K. Knight.* Tent cities are encampments of homeless people living in tents. No provision of the Mercer Island Code allows a property use such as a tent encampment. *Mercer Island City Code ("MICC").* The City acknowledges this fact. *Temporary Use Agreement, Recital Paragraph H. Declaration of Jane Koler, July 10, 2008. CP 172.*

The Mercer Island Clergy Association eventually settled on having the Mercer Island United Methodist Church host the proposed Tent City. The

Mercer Island United Methodist Church is located in the R-9-6 zone, a single-family residential zone. The Mercer Island Municipal Code prohibits establishment of temporary encampment or any other temporary use in a single family residential area. *MICC 19.02.010*.

For two years, the City Council inexplicably put off making any decision about temporary use ordinance even though it was aware that a tent city encampment eventually would be established in Mercer Island. The City Council was aware of the need to enact an ordinance authorizing a tent city encampment because the present code prohibits such a use. *CP 54*. Perhaps to avoid significant public controversy, it elected to adopt a contract which violated the City Code before tent city came to town rather than simply adopting a City Code amendment that would authorize the outdoor encampment. *CP 269*.

The City was aware that it had no right to authorize the Church to allow a tent encampment. Deputy Mayor Ernest L. ("El") Jahncke, who is also a member of the City Council, described in an e-mail dated July 9, 2008 how the City had known from early on that it could only authorize the Tent City camp if it adopted an ordinance which amended the Code. He acknowledges that the City violated the interests of citizens by failing to amend the City Code to authorize the camp: *CP 54*

“The City leadership has been discussing the potential for Tent City to come to [Mercer Island] at the invitation of MI Clergy Ass’n. Initially, about three years ago, it is my recollection that the plan was to do a one year moratorium while former City Attorney Londi [Lindell] drafted, and the council passed a temporary use ordinance, which we do not and still due [sic] not have. *This temporary use ordinance would have reflected and incorporated the results of the litigation undertaken by the various eastside cities. All of this litigation, we were told, failed to prevent Tent City from entering a city at the invitation of a church to do its thing on a church property.* I am not sure why Rich Conrad [City Manager] apparently took it upon himself subsequently to take the approach of negotiation this agreement with Tent City and the Clergy Ass’n or United Methodist Church. ***In hindsight where we the council failed is in not having public hearings on a temporary use ordinance before lifting a moratorium and then allowing Tent City to come to MI at a Church’s invitation.*** Some of us, me included, should have spoken up and insisted on the original approach.”

CP 54.

City officials were clearly aware that the tent city encampment violated many city code provisions, yet the city did not attempt to amend its zoning code to authorize the use. CP 228-229.

The City of Woodinville, under similar circumstances, to avoid the specter of an illegal encampment which violated city codes, passed an ordinance, after public hearings which allowed the temporary camp on city property which was located near no homes. Initially the Woodinville encampment was proposed to be located adjacent to the single family residences. To avoid inappropriately locating tent city abruptly, in close

proximity to single family residences, without sufficient notice and without amending the zoning code, the city invited tent city to set up its encampment on vacant city property. The City of Woodinville placed tent city on public property because of the short time allowed for public hearings about the property use and to avoid impairing the interests of nearby property owners. The city's ordinance No. 369 stated:

The timeline for reviewing the north shore United Church of Christ application for a temporary use permit does not allow for an adequate public process and **does not respect the legitimate concerns and interests of numerous adjacent property owners.** As has been evidenced since the King County executives failed attempt to permit a homeless camp on the brick yard Park n Ride transit line on April 29, 2004 and abrupt notices demeaning that the host community and tent city residence alike. The lack of notification impedes dialogue among all perspectives on an important regional issue prevents adequate planning and proper mitigation and perpetuates the conflict over problem solving.

*CP 64-68.*

Unlike Woodinville, the Mercer Island City Council, in this process, decided to ignore the concerns of nearby property owners and adopted a contract which violated the zoning code and the property rights of such neighbors. A draft version of the contract demonstrates city officials were aware that the tent city encampment violated the code. It stated:

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

*Draft Version of Temporary Use Contract. CP 228-229; CP 225-227.*

In March 2008, the Mercer Island United Methodist Church and the City invited SHARE/WHEEL, organizer and manager of Tent City 4, to come and locate Tent City 4 on the Church's parking lot for three months, beginning on August 5, 2008. *CP 54.* There was no public notice or discussion of the proposed arrival of Tent City nor any public notice that the contract was being prepared. *CP 269.*

Mercer Island citizens received scant notice of the plan to authorize a tent city encampment through a contract with tent city and the Church. The sole notice given to citizens was a printed notice of the agenda of a regularly scheduled City Council meeting. *CP 262-265.* One of the

agenda items stated “temporary use agreement for tent city visit”. That notice was given only six days before the Council made the decision to adopt the tent city agreement. The printed notice failed to disclose the location of the camp, the number of campers or when the camp would be established. It did not disclose that the camp would be authorized by a contract which violated the city zoning code. *CP 271; 268; 262.*

Although the City gave citizens little notice about the public hearing, it carefully crafted a plan about how the Mayor, who is a Council member, would run the meeting and designed the “process the MI [Mercer Island] City Council will follow for considering the Temporary Use Agreement for Tent City 4”. *CP 312.* City officials had numerous preliminary meetings and planning sessions about the June 16, 2008 City Council meeting coordinating with Mercer Island officials, officials from other cities, Church officials and tent city residents about their participation in the City Council hearing, but somehow forgot to contact citizens living in the immediate vicinity of the Church or give them effective notice of the June 16, 2008 meeting. *CP 311-314; CP 303; CP 262-269.*

Although the City failed to give citizens living in the vicinity of the proposed encampment any personal notice that the tent city contract would be considered at the City Council meeting, it specifically invited

individuals to the meeting who supported the contract, including government officials from other municipalities, as well as tent city residents. *CP269; CP 265; CP 311*. At the meeting, the City Council and City staff presented the tent city contract as one which the City was obligated to adopt. *CP 264*.

Citizens attending the meeting were deprived of the opportunity to intelligently comment on the contract; they were given very little accurate information about the tent city encampment before they were allowed to comment on it at the City Council meeting. Prior to the public comment period, City staff did not inform the public that the proposed tent city encampment was prohibited by the City Code. Nor did they inform citizens that that the City Council had declined in a public process to amend the city code to authorize the encampment. *CP 262-265*. In fact, the assistant city manager, Ms. Herzog affirmatively misled members of the public about the tent city agreement. She informed citizens that the contract complied with all laws on city books and that the contract required tent city to comply with all city codes. *CP 264*. The city did not inform citizens before the public comment period that the tent city contract actually violated the city code. *CP 262*. City officials were keenly aware of that fact. In fact, City Council members had been given

“role play” scripts to assist them in fielding awkward citizen inquiries. *CP 303-34; CP 312.*

The trial court dismissed the appellant’s complaint, including its damage claim based on 32 U.S.C. § 1983 based on its conclusion that the citizen association should have asserted its claim in a Land Use Petition Act petition. *CP 321-322.* In its motion for summary judgment, the city had asserted that the Land Use Petition Act’s 21 day appeal period applied to the due process claim and damage claim under 42 U.S.C. § 1983 and required the plaintiffs to assert such claims within the 21 day period. None of the Association’s claims constituted a collateral or direct attack on the city contract; they simply addressed the City’s violation of the constitutional rights of Association members.

The City, as a litigation tactic, belatedly characterized the City decision approving the contract as a land use action even though it had failed to follow code requirements governing such actions and did not characterize the contract as a land use decision until it sought summary judgment. It did not require the Church to submit an application or pay application fees. The City did not provide the code mandated Notice of Application or Notice of Decision. It did not provide for a public comment period on the matter nor did it disclose that members of the public had to submit a public comment on the proposed contract. Nor did

it give code- required public notice of the application, notice of the decision, or notice of the date that the appeal period expired. The City never addressed the contract in the biweekly Development Services Group bulletin which provides notice about land use applications. *See MICC 19.15.020; See CP 90; CP 106-161.* The claim that the contract was a land use decision subject to LUPA was devised simply to deprive the Association members of their constitutional claims.

### **III. SUMMARY OF ARGUMENT**

The City Council's approval of the tent city contract was not a land use decision subject to LUPA. It does not fall within the LUPA definition of a land use decision set forth in RCW 36.70C.020 and the city followed none of the procedures mandated by the City Code in making such a decision. The City's approval of the tent city contact violated the Appellant Association's right to procedural due process, substantive due process and violated the property rights of Association members such as Mr. and Mrs. Oakes living in the immediate vicinity of the encampment to be free from property uses not specifically allowed by the City Code, the Association based on such constitutional violations asserted a valid 42 U.S.C. § 1983 claim which the trial court erroneously dismissed.

#### IV. ARGUMENT

##### A. THE TRIAL COURT ERRONEOUSLY DISMISSED THE APPELLANT'S CLAIMS BASED ON THE CONCLUSION THAT SUCH CLAIMS SHOULD HAVE BEEN ASSERTED IN A LAND USE PETITION

Concluding erroneously that the City's adoption of the tent city contract was a land use decision and subject to the requirements of LUPA, the trial court dismissed the Appellant Association's complaint. The LUPA's definition of a land use decision shows that approval of the Tent City contract was not such a decision.

It is well established that "challenges to land use decisions are generally governed by the Land Use Petition Act (LUPA), ". . . [b]ut LUPA does not apply to decisions that are not land use decisions and does not apply when an action involves neither a direct nor a collateral attack on a land use decision." *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (Div. 1 2003), *review denied*, 150 Wn.2d 1015 (2003) (county's imposition of a Forest Practices Act building moratorium was not a land use decision under the plain language of LUPA). Here, the City Council's decision to adopt a contract with tent city is not a land use decision subject to LUPA. *CP 183-201*.

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

a final determination by a local jurisdiction's body or officer with the highest authority to

make the determination, including those with authority to hear appeals, on:

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

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

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

The Temporary Use Agreement is not any of these. It is not an application for a project permit or government approval required by law as defined by 36.70C.20 (a). The Local Project Review Statute defines a project permit application as follows:

“Project permit or project permit application means any land use or environmental permit or

license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site specific rezones authorized by a comprehensive plan or sub area plan but excluding the adoption or amendment of a comprehensive plan, sub-area plan or development regulations, except as otherwise specifically included in this subsection.

*See* RCW 36.70B.020 (4)

The Mercer Island City Code at 19.15.010 (E) provides a list of all administrative, discretionary and legislative land use actions. The code also contains a list of the actions that “the City may take under the development code, the criteria upon which those decisions are to be based and which boards, commissions, elected officials or city staff have authority to make the decisions to hear appeals of those decisions”. MICC 19.15.010 (E). Because the Temporary Use Agreement did not involve any land use approval process required by law and described in the City Code, it cannot be considered an application for “a project permit or other governmental approval **required by law** ” which is contemplated by RCW 36.70C.020 (1)(a). Because, the City concedes in its Tent City Contract that “none of the City’s regulations or administrative procedures address this special use”, approval of the Temporary Use Agreement is not an

approval “required by law” as described in RCW 36.70B.020 (a). *See* 19.01.040 H (1-3) In fact, the City Code prohibits such a temporary use. *See MICC 19.01.040 (H) (1-3). CP 172.*

MICC 19.15.010 (E) discloses that initial decisions on land use permits/approvals are made by Code officials, the planning commission or the City Hearing Examiner. It is hard to claim that the tent city contract is a “land use permit or approval required by law” when the City Council has been delegated no authority to make initial decisions on permits or land use approvals. Further, it does not meet LUPA definition of a “project permit or other approval required by law” because no city law authorized or described the temporary property use. The approval of the temporary agreement was not “required by law”; the temporary contract specified that “none of the City’s regulations or administrative procedures address this special use.” *See Temporary Agreement at paragraph H. CP172.*

**B. THE TENT CITY CONTRACT IS NOT AN INTERPRETIVE OR DECLARATORY DECISION**

Nor is the Temporary Use Agreement “an interpretive or declaratory decision” within meaning of RCW 36.70C.020.1(b). This section of the LUPA definition concerns the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification or maintenance of property.

Such decisions are specific statutory remedies mandated by the Local Project Review Statute. They are not a “catch-all” provisions allowing what otherwise would not be land use decisions to become so.

Indeed, the City has identified no applicable development regulations which apply to this temporary encampment or temporary use. Nor has it identified any general city code requirements which apply. It made no sense for the City to claim on summary judgment that the Temporary Use Agreement was a code interpretation as contemplated by RCW 36.70C.020 (1) (b); it concedes that “none of the City’s regulations or administrative procedures address this special use”. *See Temporary Contract Paragraph H*. Because no City code provisions apply, it would be impossible to claim that the Temporary Agreement is a Code interpretation. *CP 195-196*.

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

**C. THE TENT CITY CONTRACT IS NOT AN ENFORCEMENT DECISION**

Finally, the Temporary Use Agreement cannot be considered an enforcement action by the local jurisdiction within the meaning of RCW 36.70C.020 (1) (c). The City did not identify any land use regulations which it was enforcing in this case. As previously discussed, it has conceded that none apply to this temporary encampment. Therefore, it is impossible to claim that this is a code enforcement action. *See Contract, Paragraph H. CP172.* MICC 19.15.030 (B) specifies that code enforcement decisions are made by the director of development services. The City Council has been delegated no authority to make such decisions. *CP 196.*

The Mercer Island City Code specifies code enforcement procedures. Chapter 19.15.030 identifies code enforcement procedures and orders which can be issued by the Director of Development Services in the context of a code enforcement action. It describes the ability of the director or its authorized representative to search properties. It describes emergency orders and triple penalties which can be imposed in the context of such code enforcement proceeding. Not by any stretch of the imagination can the Tent City contract be considered a code enforcement action as described in RCW 36.70C.020 (1)(c). *CP 196.* The contract clearly does not come within the ambit of the LUPA definition of a land use decision and cannot be classified as a land use decision subject to

LUPA. Because of that circumstance, the trial court erroneously dismissed Appellant Association's claims because they were not set forth in a LUPA petition.

**D. THE COUNCIL'S APPROVAL OF THE CONTRACT DOES NOT HAVE THE CHARACTERISTICS OF A LAND USE DECISION MAKING PROCESS**

The City Council's consideration of the Tent City contract was never a land use decision-making process within the meaning of the Local Project Review Statute or the Code. The approval of the contract had none of the hallmarks of a land use decision. Further, the Local Project Review Statute specifies the manner in which land use applications or proposed land use actions shall be reviewed. 183-185. It states that:

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

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

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

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

The City Council's consideration of the temporary use contract was neither a land use decision making process within the meaning of the Local Project Review statute nor the City Code. *CP 183-185; 192-197*. It did not involve consideration of adopted regulations and the comprehensive plan. In fact, adopted regulations prohibited such a property use and would have prevented approval of the Tent City contract. MICC 19.01.040 (H) (1-3) states:

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

See MICC 19.01.040 (H) (1-3). See *Appendix A*.

The City's Land Use Code prohibits such a temporary use in a residential zone. *CP 185*. Because approving the Tent City contract is not a land use decision, the trial court erroneously dismissed the Association's complaint based on its conclusion that the appellant needed to comply with LUPA requirements and the LUPA period of limitations.

**E. THE TRIAL COURT ERRONEOUSLY DISMISSED THE CONSTITUTIONAL CLAIMS OF THE CITIZEN ASSOCIATION**

The trial court erroneously adopted the City's argument that the citizen association could not assert constitutional claims or a federal claim based on 42 U.S.C. § 1983 because it had not sought relief under LUPA.

The analysis the trial court adopted is invalid. The Citizen Association neither directly nor collaterally attacked the tent city contract. *Berst v. Snohomish County*, 114 Wn. App. 245 held that when a lawsuit neither involves a direct or collateral attack on a decision, LUPA does not apply. There is neither a LUPA statute nor a Washington case which prohibits the Citizen Association from seeking a declaratory judgment that the city violated its right to due process or a federal remedy under 42 U.S.C. § 1983 for city's violation of its constitutional rights. *Id.* 42 U.S.C.

§ 1983 is a federal remedy for constitutional violations which is unrelated to LUPA.

LUPA did not swallow up or diminish the remedy provided by Section 1983. Further, LUPA states at RCW 36.70C.030 that it excludes damage actions and that the LUPA period of limitations does not apply to such damage actions. *CP 276*. Federal 1983 claims are absolutely unrelated to LUPA. Contrary to the city's trial court argument, there is no threshold requirement that an individual seek a remedy under LUPA before filing a § 1983 claim.

Because the appellant Citizen Association did not seek to attack or invalidate the tent city contract, none of the values protected by LUPA's short 21 day period of limitations were implicated. LUPA protects the finality of land use decisions and shields property owners from uncertainty associated with untimely attacks on land use decisions. *Twin Bridges v. Department of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008) explains that LUPA:

Offers protection to private property owners and finality to the decisions of local government.....LUPA's underlying rationale is that prolonged uncertainty is manifestly unfair to landowners who seek a final determination of their property status.

162 Wn. 2d 843-45.

Because the Appellant Association did not attack or seek to invalidate the tent city contract, its § 1983 action did not implicate the principles of finality protected by LUPA or the city decision approving the tent city contract.

The LUPA statute is accordingly unrelated to the Association's constitutional claims and such claims should not have been dismissed by the trial court. LUPA has absolutely no bearing on such claims.

**F. THE CITIZEN ASSOCIATION ASSERTED VALID CONSTITUTIONAL CLAIMS**

The Appellant Association properly asserted three constitutional claims; that the city had violated its right to procedural due process, substantive due process and violated its property rights. *CP 247*. The trial court improperly and prematurely dismissed such claims. The Appellant Association was entitled to have a trial on such issues. In dismissing such claims, the trial court abdicated its duty to view all evidence and evidentiary inferences in a light most favorable to the non moving party. *Norfolk Southern Corp v. Oberly*, 632 F..Supp 1225, 1231 (D. Del.1986) (citing *Adickes v. Kress and Company*, 398 US 144, 157 90 S.Ct. 1598, 1608, 26 L.Ed. 2d 142 (1970), *aff'd* 882 F.2d 388 (3d Cir. 1987).

If the evidentiary record supports a reasonable inference that the ultimate facts may be drawn in favor of the non moving party, then the

moving party cannot obtain summary judgment. In re *Japanese Electronic Products Antitrust Litigation*, 723, F.2d 238, 258 (3d.Cir. 1983) rev'd on other grounds 475 U.S. 574 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986).

Here, viewing the evidence and evidentiary inferences in favor of the non moving party, should have prevented the trial court from dismissing the Association's constitutional claims.

**G. THE CITY VIOLATED THE RIGHT OF THE ASSOCIATION TO PROCEDURAL DUE PROCESS**

The Appellant Association asserted a valid procedural due process claim. Members of the Appellant Association had property rights at stake which triggered due process protections. Property rights protected by the United States Constitution are created by independent sources such as state law or local ordinances. Washington recognizes that non-discretionary, mandatory zoning ordinances can create a property right. CP 246. *Asche v. Blomquist*, 132 Wn. App. 784, 797-98, 33 P.3d 475 (2006) (zoning code created property right entitled to due process protections); *see also Mission Springs v. Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) (Property owner had a property interest in receiving grading permit because no discretionary standards governed issuance of a permit); *Bateson v. Guise*, 857 F.2d 1300, 1304-5 (9<sup>th</sup> Cir. 1988) (property

owner had a property right to receive building permit when no discretionary requirements governed issuance of building permit).

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

As established by the decision of *Asche v. Blomquist*, the Mercer Island City Code created a property interest in Appellant Association members such as Steve and Christine Oakes who lived in the immediate vicinity of the Church. *Declaration of Steve Oaks. CP16*. The Mercer Island City Code (“MICC”) § 19.01.040(h)(1), like the code provision at issue in *Asche*, states unequivocally that:

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

This *mandatory, nondiscretionary* code provision created a property right in the members of the Citizen Association living in the vicinity of the United Methodist Church, a constitutionally protected expectation that only those property uses specified in the Code would be

allowed. The violation of that property interest, which is protected by the United States Constitution, allowed the Citizen Association to avail itself of the federal remedy provided by 42 U.S.C. § 1983. *See Ashe*, 132 Wn. App. at 797-98.

The fundamental property rights of the Association members, such as Christine and Steve Oaks and other members living in the immediate vicinity of the Church were clearly impaired just as the property rights of Mr. and Mrs. Blomquist were impaired in *Ashe v. Blomquist*. Because their property rights were impaired, federal due process protections were triggered. *Ashe*, 132 Wn. App. at 791; *Wedges/Ledgers of CA v City of Phoenix*, 24 F.3d 56.62 (9<sup>th</sup> Cir. 1944).

**H. THE APPELLANT ASSOCIATION ASSERTED A VALID PROCEDURAL DUE PROCESS CLAIM AND THE TRIAL COURT COMMITTED ERROR BY DISMISSING IT**

It is a well established proposition that due process requires that notice of a proposed government action must be adequate to allow citizens to prepare to address the issue at a public hearing and to prepare to intelligently comment on it. *Glapsey v. Conrad*, 83 Wn.2d 707, 712-13, 521 P.2d 1173 (1974). CP 248-252. *Mephis Light and Water Div. V. Craft*, 436 US 1.14, 98 S.Ct 1554, 56 LEd 2d 30 (1978); *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952). *Glapsey* held that notice does not pass

due process muster if it simply summons citizens to a hearing but fails to explain the location of a proposal and the basic proposal parameters and leaves citizens to address an action “in a information vacuum.” *Id.* It held that “if one...is forced to attend a zoning hearing both unprepared for and uninformed about the purpose, the hearing will be a farce despite the safeguards thrown around it.” In fact, in this case, the notice in the *Mercer Island Reporter* was deficient. It simply printed the City Council agenda which stated in part:

Regular Business  
...  
Temporary Use Agreement for Tent City  
visit...

*CP 271.*

The notice did not provide any information describing the temporary use agreement such as the fact that it (1) authorized a homeless encampment in the parking lot of the Mercer Island United Methodist Church,(2) violated the zoning code, and that (3) the City had decided not to amend the zoning code to allow the temporary use. The notice also failed to provide the location of the camp, the date when the camp would be established and the number of camp occupants. <sup>1</sup> *CP 262-269.*

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<sup>1</sup> The information provided in the City’s weekly Development Services Group permit bulletin about land use proposals, which gives detailed descriptions of land use proposals including their addresses underscores the flawed character of the City’s “notice” that the

The City's notice did not provide citizens with constitutionally adequate notice that allowed them to address the tent city contract in an intelligent manner. They were forced to go to the City Council meeting with no information whatsoever about the illegal character of the Tent City contract or any concrete details about the proposed encampment.

They were never given notice of the City decision declining to amend the City Code and simply to allow a prohibited property use without amendment of the code, nor were they given the opportunity to comment on that decision. That decision was totally insulated from public scrutiny. The City's notice of the Council's consideration of the tent city contract did not comply with the most elementary notice requirements imposed by due process. *CP 267-268*.

**I. CITIZENS WERE DENIED A MEANINGFUL HEARING AT A MEANINGFUL TIME**

*Mathews v. Eldridge*, 24 US 319, 96 S. Ct. 893 (1976) explains that due process demands a hearing at a meaningful time in a meaningful manner and that a court must determine what process is due by balancing the competing interests. The competing considerations in this case were those of the City, which wanted to accommodate the Church's wish to

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City Council would address a temporary use agreement as part of its regular business. *CP 106-168*.

shelter the homeless and the interest of the citizens in having zoning regulations followed – *i.e.* their interest in not having a property use established which violated their property interests as well as their interest in having the City amend the zoning code in a public process rather than adopting a temporary use agreement which violates it.

The City had been meeting with the Church and Share Wheel since March, 2008 about the Church's desire to host a homeless encampment in the Church parking lot. *CP 54*. There was no public emergency – City officials had sufficient time to amend the Zoning Code. *CP 54*. According to City Attorney Katie Knight, City officials had been aware since March, 2006 that a tent city encampment would be established in Mercer Island, yet the City Council failed to amend the City Code to allow an encampment. There was sufficient time to amend the zoning code and at the very least, time to give citizens notice about crucial characteristics of the Temporary Use Agreement as well as the City decision not to amend the Zoning Code. No such notice was provided and no opportunity given to citizens to intelligently comment on such City decisions. The City's interest in accommodating the Church mission did not trump the interest of its citizens in being accorded a minimal opportunity to address their government about such decisions..

The City officials were fully aware that citizens would be concerned that the Tent City contract authorized a property use prohibited by the city code. An e-mail from Mercer Island Assistant City Manager Herzog to Reverend Knight dated May 22, 2008 recognizes that Mercer Island citizens will have concerns about the city “disregarding its own laws.” *CP 302*.

The City Attorney also admitted in a June 18, 2008 e-mail to a citizen who had attended the June 16, 2008 City Council meeting, who was confused about whether the City Code authorized the temporary use permit that “the City does not have an ordinance authorizing temporary use for a tent city.” *CP 52-53*. City officials deliberately concealed that fact from citizens who attended the city council meeting, violating the citizens’ rights to a full and meaningful hearing on the issue.

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

The Mercer Island City Code prohibited the use of tents as part of homeless shelters for the reasons set forth in this paragraph. For example, MICC 19.06.080(3)(c) requires that a social services transitional housing facility be located at least 600 feet from the property line of educational or recreational facilities where children are known to

congregate, including, but not limited to any churches, or synagogues or schools or licensed daycares. MICC 19.06.080(B)(3)(e) requires social services transitional housing facility to comply with all applicable construction codes set forth in MICC Title 17 and these codes do not permit the use of tents for human occupancy except under limited circumstances not applicable to a social service transitional facility. Finally, MICC 19.06.010(A) specifically prohibits use of portable toilets except for emergency or construction use.”

*CP 228-229.*

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

Concerned Citizen (CC) Q:

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

City Official (CO) Response:

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

CC Q:

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

CO Response:

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

CC Q:

This seems like splitting hairs

*CP 303.*

Certainly, as was tacitly recognized by the City in preparing Council members for the public comment period, a crucial component of that discussion was that the Tent City contract violated the City code. Before the public comment period opened, Deputy City Manager Herzog gave a two minute presentation in which she assured citizens that the camp would **comply with all City land use ordinances**, a statement which was false. She stated that it is “**the responsibility of municipal government to assure compliance with the ordinances and regulations that protect the health, safety and well-being of its citizens.**” She also stated that “the City had secured the “commitment of the host Church and Tent City managers that they will comply with the land use and life-safety regulations **that are on our books**, never once mentioning that the outdoor camp and the temporary use agreement violated the City’s land

use code. *See* Fourth Declaration of Tara Johnson. *CP 268*. Significantly, *after* public comments closed, City Attorney Katie Knight in an enigmatic manner, and for the first time indicated that “our Code does not encompass a homeless camp”. *See* Fourth Declaration of Tara Johnson. *CP268-269; 266*. What she did not state is that the Code **prohibits** a homeless camp. *CP 266*. These statements, misstatements, and failures to disclose prevented the City Council meeting from providing citizens a meaningful opportunity to intelligently address their elected officials about the City decision to adopt an illegal contract and to forego amending the zoning code to authorize a property use which violated the property rights of citizens living in the immediate vicinity of the encampment.

Similarly, City officials were fully aware that the application of neutral zoning laws prohibiting a homeless encampment *does not* burden the exercise of religion. An earlier version of the City Attorney's Temporary Use Agreement recognized that fact:<sup>2</sup> *CP 225*.

The result was that citizens were forced to comment about the temporary use agreement without knowing salient facts about it – that it,

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<sup>2</sup> It states: While acknowledging the published decisions of Washington appellate courts and the requirements that such decisions impose on a City's exercise of its police powers, the City maintains that its land use, building and other codes do not substantially burden the exercise of religion – even if applied to prohibit or limit temporary tent encampments for homeless or other persons on Church property. *CP 225*.

in fact, violated the City code, and that the United States Constitution did not, in fact compel approval of establishment of the camp on church property. *CP 267*.

At the City Council meeting City officials mislead citizens and refused to provide them with accurate information about the camp. Because citizens were forced to attend the public hearing without notice of crucial information about the Temporary Use Agreement, the City cannot claim that is accorded citizens a meaningful, constitutionally adequate opportunity to make informed comments about the temporary use agreement and the City decision not to amend the land use code to authorize the encampment. The trial court improperly dismissed plaintiff's due process claim. The City violated the right of plaintiff to procedural due process.

**J. THE TRIAL COURT SHOULD NOT HAVE DISMISSED THE PROCEDURAL DUE PROCESS CLAIM; WHETHER ADEQUATE OR MEANINGFUL NOTICE IS GIVEN IS A QUESTION OF FACT FOR THE TRIER OF FACT CONSEQUENTLY PLAINTIFFS WERE ENTITLED TO A TRIAL ON THE ISSUE**

The trial court committed error by dismissing the Association's procedural due process claim. The Association claimed that it had not been given adequate or meaningful notice about the tent city contract which allowed it to address it in a meaningful fashion at the City Council

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meeting. It is well established that the issue of whether notice is reasonable or adequate depends on the circumstances of each case and is ordinarily a question of fact for the jury or trier of fact. *Associated Petroleum Products v. Northwest Cascade Inc.*, 149 Wn. App. 429, 203 P.3d 1077 (2009); *National Labor Relations Board v. Oklahoma Fixture Co.*, 79 F.3d 1030 (1996) (*whether employer has provided meaningful notice or adequate notice is a question of fact*). Because the question of whether notice is meaningful or adequate is a question of fact for the trier of fact, the plaintiffs are entitled to have a trial on this issue.

**K. THE APPELLANT ASSOCIATION ASSERTED A VALID SUBSTANTIVE DUE PROCESS CLAIM WHICH THE TRIAL COURT ERRONEOUSLY DISMISSED**

The Ninth Circuit has held that arbitrary, irrational conduct that is not motivated by legitimate regulatory concerns serves as the basis of a substantive due process violation. *See Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (9<sup>th</sup> Cir. 1990), *Dodd v. Hood River County*, 59 F.3d 852 (1995). Here, the City conduct was arbitrary and irrational. CP 255-257. The City Council made a deliberate decision to violate the property rights of citizens living in the immediate vicinity of the Church and to permit prohibited property use and to avoid amending the City code even though the City had an absolute obligation to do so. Although the City might claim that supporting the Methodist Church plan to host Tent

City was a legitimate government objective, there is no justification for the City Council to decline to amend the code to allow the property use or to violate the property rights of citizens living by the Church. There was sufficient time to amend the Code or to adopt a solution like that of Woodinville which avoided violating the property rights of homeowners living in the vicinity of the Church parking lot. The apparent reason the City Council did not elect to amend the code, was to avoid the intense public scrutiny and controversy associated with that action.

City officials made a substantial effort to avoid such scrutiny and controversy in this case. They gave citizens scant notice of the temporary use agreement. City officials at the City Council meeting on June 16, 2008 misled citizens about the temporary use agreement; they told them that the Church would comply with all land use codes. They gave citizens no opportunity whatsoever to address the City Council's decision refusing to amend the land use code even though the terms of the land use code demanded amendment. Taking illegal actions, violating their property rights and misleading citizens to avoid political controversy is not government conduct with a legitimate objective.

In fact, some City Council members have conceded that the actions of the City Council short-changed citizens and deprived them of a mandated public process. Mayor Ernest "El" Jahncke conceded to

plaintiff members that “in hindsight where we the Council failed is in not having public hearings on a temporary use ordinance”. CP54.

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

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

*See Fourth Declaration of Tara Johnson, Exhibit 2. CP 54.*

Here, the City violated the plaintiff’s right to substantive due process. The trial court erroneously dismissed the Association’s substantive due process claim; the members of the Association were entitled to have a trial court or jury determine whether the city engaged in

arbitrary, irrational conduct that is not motivated by legitimate regulatory concerns. *CP 255-257*..

**L. BY FAILING TO FOLLOW THE CITY CODE AND ADOPT AN AMENDMENT  
AUTHORIZING THE CAMP, THE CITY VIOLATED THE RIGHT OF THE  
CITIZEN ASSOCIATION TO DUE PROCESS**

A fundamental principle of due process requires government agencies to follow their own laws. *Layton v. Swapp* and *Davis County Library Board*, 484 F.Supp. 958, 961 (U.S.D.C.N.D. Utah, 1979). Here, the City of Mercer Island abdicated its duty to follow the City Code and amend it before adopting a contract which authorized a property use prohibited by the zoning code. After the public hearing, the City Attorney, Katie Knight, disclosed in an e-mail that the City Code has no process permit which authorizes a temporary property use. *CP 266; CP 52-53*.

Councilman Jahncke recognized in an e-mail to Association members that the City Council violated the citizen's right to a fair process when it adopted the Temporary Use Agreement. He stated that "where we the City Council failed is in not having public hearings on a temporary use ordinance before lifting a moratorium and allowing tent city to come to Mercer Island at a Church's invitation." *CP 54*.

Washington courts and federal courts have recognized on many

occasions that the due process rights of citizens require governments to adopt legal standards within an established public process which allows public comment on proposed legislation. Such courts have reiterated on many occasions that governments can only exercise their regulatory authority in accord with adopted published regulations and that citizens should not be subject to ad hoc discretionary standards. *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P. 2d 744 (Div. 1, 1999); (city violated due process rights of developer by relying on unadopted, discretionary standards). Similarly, courts recognize that due process requires that legal standards must be adopted in a proper public process. *Simpson Tacoma Kraft v. Department of Ecology*, 119 Wn. 2d 640, 850 P.2d 1030 (1992) declined to enforce an Ecology penalty for a dioxin discharge based on a standard that was not properly adopted in an established public rule making process that allowed notice and comment on the proposed regulation. The Washington Supreme Court held that the interests of the regulated public demand a fair public process in which citizens can comment on such legislation. *Tabbs Lake Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988) held that before the Corps of Engineers could adopt a standard which had the effect of a substantive rule, it must adopt that rule in accord with public notice and comment provisions “to insure public participation and fairness to affected parties.”

Id. Similarly, *Salt Pond v. United States Army Corps of Engineers*, 815 F. Supp. 766 (D. Del. 1993) held that the Corps needed to adopt a rule or statute in a proper public legislative process before it could exercise jurisdiction over wetland excavation activities. The Court observed that because the ad hoc rule imposed extreme additional obligations on Salt Pond and had significant effects on the private interests of residents, it was necessary to adopt that standard in a public rule making process in order to vindicate the right of the regulated public to intelligently comment on legislative proposals. The concerns articulated by these courts are essentially due process concerns. *CP 211-216*.

In this case, if the City Council were going to authorize a temporary property use on Church property which is prohibited by the city's zoning, members of the public were entitled to public hearings authorized by the City Code. It was necessary for the City Council to follow code provisions governing the amendment of the zoning code. Such code provisions required a hearing before the planning commission followed by a hearing before the City Council. It was necessary for the City to meet the standards governing zoning code amendment. See MICC 19.15.010 (E) (summary of actions and authorities).

Here, the city's failure to follow its Code resulted in depriving plaintiffs of significant notice and opportunity to comment on the

proposed encampment. Had the city followed its Code, there would have been two public hearings, one before the planning commission and one before the City Council. MICC 19.15.010 (E). Members of the Appellant Association would have received sufficient notice of the proposal which would have allowed them to intelligently comment on it. Because the city decided not to follow its Code, members of the Appellant Association were deprived of such notice.

Notice of the decision to amend the Code would have been provided in the bi-weekly DSG Bulletin as well as posted at City Hall. MICC 19.15.020 such notice provides a thorough description of the government proposal, details about review under the State Environmental Policy Act and information about the public comment period. *CP 90.*

Further, the Code required that Citizens be given a chance to comment on the proposed action. MICC 19.15.020 (D)(1)(g). Individuals living within 300 feet of the property subject to the proposed action would have been given personal written notice of the action and “notice must be posted on the site in a location visible to the public from the public right of way. MICC 19.15.020. Further, the Code requires that the City provide actual notice of the proposed action and the City decision. *See MICC 19.15.020 (D)(1).* *CP 90.*

In this case, the City Council's abdication of its obligation to amend the Code resulted in depriving the Appellant Association of even minimal notice of the city proposal. City officials made the decision to forego amending the City Code behind closed doors and neither gave Association members any notice of that decision nor any opportunity to comment on it. *CP 262-269.*

In contrast, when the City of Woodinville when it decided not to dispense with its temporary use permit process, it gave its citizens clear public notice of that decision and the opportunity to comment on it. *CP 62-68.* Unlike Woodinville, Mercer Island simply hoped that it would elude the attention of citizens that Mercer Island did not have an ordinance authorizing temporary uses and simply hoped that that fact would not be noticed by citizens.

The City's failure to follow the Code resulted in nearby property owners (who are Association members) such as Steve and Christine Oakes, receiving no personal notice of the tent city encampment. Further, no adequate notice of the action was published and no notice of the proposed contract was provided in the biweekly Development Services Group Bulletin. They received no notice of a public comment period and no opportunity to comment on environmental review documents associated with environmental review under the State Environmental

Policy Act (“SEPA”). Also, the city failed to publish notice of the decision adopting the contract. *CP 90*.

The City Council decision to forego amending the City Code and to omit SEPA review was totally insulated from public scrutiny and the public had no opportunity whatsoever to comment on that decision. *CP 262-263*. Also, the city’s ad hoc decision-making process resulted in Appellant Association members receiving only slight, inadequate notice of the proposed tent city contract. *Id.* Association failed to receive notice of the most basic facts about the encampment, thereby impairing its due process rights.

**M. THE TRIAL COURT ERRONEOUSLY DISMISSED THE APPELLANT ASSOCIATION’S CLAIM THAT THE CITY COUNCIL DECISION VIOLATED CONSTITUTIONALLY PROTECTED PROPERTY RIGHTS**

The trial court improperly dismissed the Appellant Association’s claim that the City Council decision to adopt a contract which allowed a camp prohibited by zoning violated an unequivocal property right. *Asche v. Blomquist, 132 Wn. App. 797-98* teaches that a mandatory zoning code provision confers a property right. Here, MICC 19.01.040 (h)(1) creates the right of citizens such as Association members to be free of property uses which violate the Zoning Code. Such property rights are protected by the Fifth Amendment of the United States Constitution. *CP 247*. The

violation of that property right forms the predicate constitutional violation for a 42 U.S.C. § 1983 claim. *CP 216-218*.

**N. THE TRIAL COURT IMPROPERLY DISMISSED THE APPELLANT ASSOCIATION CLAIM BASED ON 42 U.S.C. § 1983**

Evidence before the trial court demonstrated that the Appellant Association had asserted a viable claim based on 42 U.S.C. § 1983. If it had followed its duty to view all evidence and evidentiary inferences in a light most favorable to the non-moving party, it should not have dismissed that claim.

**O. THE CITY'S CONDUCT ESTABLISHES LIABILITY UNDER 42 U.S.C. § 1983**

Local governments are liable under § 1983 when the execution of official policy or custom causes an individual's constitutional rights to be violated. *CP 216-218. Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). Government policy may be either a law, regulation statement of policy or decision, that has been officially adopted by the officials of the local government. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1989). Official policies may be created by the local government's legislative body whether the decision is a formal written rule intended to cover all similar situations occurring in the future, or a decision pertinent only to a single incident. *Id.* A decision by the legislative body that is limited to a particular person, or a particular issue

still establishes government policy for purposes of liability under 42 U.S. C. § 1983. *Bateson v. Guise*, 857 F.2d 1300 (9<sup>th</sup> Cir. 1988). Moreover, a single incident of constitutional deprivation arising from the execution of an official policy or custom may impose liability against the government. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). For example, the decision or ratification of the decision to terminate a government employee is an expression of official policy. *Nicks v. Norman*, 879 F.2d 429 (8<sup>th</sup> Cir. 1989). Similarly, decisions made while the legislative body is sitting in an executive capacity, such as making decisions regarding permit applications, establishes government policy. *Bateson v. Geise*, 857 F.2d 1300 (9<sup>th</sup> Cir. 1988).

Evidence before the Court, and its inferences, if viewed in a light most favorable to the appellant, the non moving party, demonstrated that the city violated the Appellant Association's right to procedural due process, by failing to follow mandatory City Code procedures for amending the Zoning Code and failing to give citizens any notice of that decision. *CP 211-214*. Further, the City violated the right of the Appellant Association to procedural due process by giving it inadequate notice of the City Council hearing which resulted in impairing the rights of Association members to intelligently comment on the tent city contract. In addition, the arbitrary conduct of city officials, in affirmatively misleading

citizens members about the tent city contract constituted a substantive due process violation. The city also violated constitutionally protected property rights of Appellant Association members by approving a contract which violated and damaged property rights created by the City Code; the right to have only property uses authorized by the Zoning Code located within the city. *CP 247*.

Here, City Council policy decisions were the moving force behind the constitutional violations which occurred. The City Council adopted a contract which

- (1) violated property rights conferred by the City Code,
- (2) abdicated its duty to amend the Code which would have resulted in due process protections to citizens,
- (3) approved the contract in a context which deprived citizens of the opportunity to intelligently comment on it,
- (4) allowed citizens to be misled about the legality of the contract.

Because the City Council's policy decision to adopt the illegal contract was the moving force behind the constitutional violations, the Appellant Association established a valid claim under 42 U.S.C. § 1983. Further, it established a valid due process claim. The trial court consequently committed error by dismissing such claims.

**P. THE TRIAL COURT'S REFUSAL TO PROMPTLY SCHEDULE A HEARING ON  
THE ASSOCIATION'S TEMPORARY RESTRAINING ORDER EFFECTIVELY  
DEPRIVED APPELLANT OF THAT REMEDY**

The Association sought a temporary restraining order in advance of August 5, 2008 date tent city planned to move to the United Methodist Church parking lot. The trial court scheduled a hearing on July 14, 2008 and directed plaintiff's attorney to provide copies of the motion and memorandum to all parties. *CP 20*. Although the parties had received the motion and memorandum 4 days before the hearing (CR 65 only requires 24 hours notice of the intent to seek a temporary restraining order) the trial court refused to consider the motion for a temporary restraining order because the other parties had not bothered to submit a response. The motion was properly before the Court and should have been considered by the Court. The failure of the other parties to submit a response should not have prevented the Court from considering the motion for a temporary restraining order. The trial court refused to consider the temporary restraining order and assigned the matter to Judge Fox, who scheduled a hearing on the temporary restraining order and preliminary injunction on August 4, 2008, one day before tent city moved to Mercer Island. The trial court's refusal to consider the temporary restraining order in a timely fashion and refusal to consider it until nearly one month after the

Appellant's sought such relief effectively deprived the Association of that provisional remedy provided by the Civil Rules. The Civil Rules contemplate that such motions can be heard on an expedited basis and not 25 days after they are filed. *See* CR 65. The refusal of the Superior Court to allow the motion to be promptly heard was an abuse of discretion and effectively deprived the Association of that remedy. By the time the Court heard the motion, there was no opportunity for tent city to make alternative plans. The Superior Court deprived appellant of a hearing at a meaningful time about its application for a restraining order.

**Q. THE CITY'S BELATED CHARACTERIZATION OF THE ACTION AS A LAND USE DECISION VIOLATED THE ASSOCIATION'S RIGHT TO DUE PROCESS BY DEPRIVING IT OF THE RIGHT TO SEEK REDRESS IN COURT OF THE CITY DECISION**

The City, as a litigation tactic, characterized the city decision as a land use decision and convinced the trial court to dismiss the decision because the Association had not asserted its constitutional claims in a LUPA petition. This tactic resulted in depriving plaintiff of its absolute right to seek redress for the City's violation of its constitutional rights in court. Such conduct, thus, violated the Association's right to due process. *See Truax et al. v. Corrigan et al.*, 257 U.S. 312, 42 S. Ct. 124 (1921).

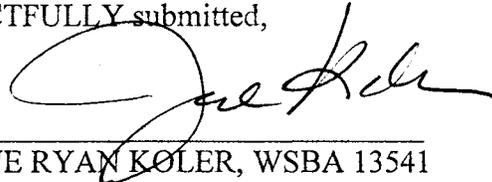
**E. CONCLUSION**

For the reasons stated above, the Association asks this Court to reverse the decision of the trial court and remand this issue for trial and rule that a due process violation occurred.

DATED this 8<sup>th</sup> day of September, 2009.

RESPECTFULLY submitted,

By:



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

## **APPENDIX A: SELECTED TEXT OF MICC TITLE 19**

### **19.01.040 Zone establishment.**

H. Except as hereinafter provided:

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

### **19.15.010 General procedures.**

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

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

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

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

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

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

4. Building Board of Appeals. The role of the building board of appeals in administering the construction codes is governed by Chapter 3.28 MICC. In general, the building board of appeals is responsible for hearing appeals of interpretations or application of the construction codes set forth in MICC Title 17.

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

- a. The code official is responsible for administration, interpretation and enforcement of the development code.
- b. The building official is responsible for administration and interpretation of the building code, except for the International Fire Code.
- c. The city engineer is responsible for the administration and interpretation of engineering standards.
- d. The environmental official is responsible for the administration of the State Environmental Policy Act and shoreline master program.

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

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

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

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

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

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

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

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

ACTION	DECISION AUTHORITY	CRITERIA	APPEAL AUTHORITY
Ministerial Actions			
Right-of-Way Permit	City engineer	Chapter <u>19.09</u> MICC	Hearing examiner
Home Business	Code official	MICC <u>19.02.010</u>	Hearing

Permit			examiner
Special Needs Group Housing Safety Determination	Police chief	MICC <u>19.06.080(A)</u>	Hearing examiner
Lot Line Adjustment Permit	Code official	Chapter <u>19.08</u> MICC	Hearing examiner
Design Review – Minor Exterior Modification Outside Town Center	Code official	MICC <u>19.15.040</u> , Chapters 19.11 and 19.12 MICC	Design commission
Design Review – Minor Exterior Modification in Town Center	Design commission	MICC <u>19.15.040</u> , Chapters 19.11 and 19.12 MICC	Hearing examiner
Final Short Plat Approval	Code official	Chapter <u>19.08</u> MICC	Planning commission
Seasonal Development Limitation Waiver	Building official or city arborist	MICC <u>19.10.030</u> , 19.07.060(D)(4)	Building board of appeals
Development Code Interpretations	Code official	MICC <u>19.15.020(L)</u>	Planning commission
Shoreline Exemption	Code official	MICC <u>19.07.010</u>	Hearing examiner*
Administrative Actions			

Accessory Dwelling Unit Permit	Code official	MICC <u>19.02.030</u>	Hearing examiner
Preliminary Short Plat	Code official	Chapter <u>19.08</u> MICC	Planning commission
Deviation (Except Shoreline Deviations)	Code official	MICC <u>19.15.020(G)</u> , 19.01.070, 19.02.050(F), 19.02.020(C)(2) and (D)(3)	Planning commission
Critical Areas Determination	Code official	Chapter <u>19.07</u> MICC	Planning commission
Shoreline – Substantial Development Permit	Code official	MICC <u>19.07.110</u>	Shoreline hearings board
SEPA Threshold Determination	Code official	MICC <u>19.07.120</u>	Planning commission
Short Plat Alteration and Vacations	Code official	MICC <u>19.08.010(G)</u>	Hearing examiner
Long Plat Alteration and Vacations	City council via planning commission	MICC <u>19.08.010(F)</u>	Superior court
Discretionary Actions			
Conditional Use Permit	Planning commission	MICC <u>19.11.130(2)</u> , 19.15.020(G)	Hearing examiner
Reclassification	City council via planning	MICC <u>19.15.020(G)</u>	Superior court

(Rezone)	commission*		
Design Review – Major New Construction	Design commission	MICC <u>19.15.040</u> , Chapters 19.11 and 19.12 MICC	Hearing examiner
Preliminary Long Plat Approval	City council via planning commission**	Chapter <u>19.08</u> MICC	Superior court
Final Long Plat Approval	City council via code official	Chapter <u>19.08</u> MICC	Superior court
Variance	Hearing examiner	MICC <u>19.15.020(G)</u> , 19.01.070	Planning commission
Variance from Short Plat Acreage Limitation	Planning commission	MICC <u>19.08.020</u>	City council
Critical Areas Reasonable Use Exception	Hearing examiner	MICC <u>19.07.030(B)</u>	Superior court
Street Vacation	City council via planning commission**	MICC <u>19.09.070</u>	Superior court
Shoreline Deviation	Planning commission	MICC <u>19.07.080</u>	City council
Shoreline Variance	Planning commission	MICC 19.07.110(C)(2)(d)	State Shorelines Hearings Board
Impervious	Hearing	MICC	Superior court

Surface Variance	examiner	<u>19.02.020(D)(4)</u>	
Legislative Actions			
Code Amendment	City council via planning commission**	MICC <u>19.15.020(G)</u>	Growth management hearings board
Comprehensive Plan Amendment	City council via planning commission**	MICC <u>19.15.020(G)</u>	Growth management hearings board
*Final rulings granting or denying an exemption under MICC <u>19.07.110</u> are not appealable to the shoreline hearings board (SHB No. 98-60).			
**The original action is by the planning commission which holds a public hearing and makes recommendations to the city council which holds a public meeting and makes the final decision.			

(Ord. 08C-01 § 8; Ord. 06C-06 § 2; Ord. 06C-05 § 2; Ord. 05C-12 § 9; Ord. 04C-12 § 16; Ord. 04C-08 § 3; Ord. 03C-08 §§ 9, 10; Ord. 02C-04 § 5; Ord. 02C-01 § 6; Ord. 99C-13 § 1).

**19.15.020 Permit review procedures.**

The following are general requirements for processing a permit application under the development code. Additional or alternative requirements may exist for actions under specific code sections (see MICC 19.07.080, 19.07.100, and 19.08.020).

A. Preapplication. Applicants for development permits are encouraged to participate in informal meetings with city staff and property owners in the neighborhood of the project site. Meetings with the staff provide an opportunity to discuss the proposal in concept terms, identify the applicable city requirements and the project review process. Meetings or correspondence with the neighborhood serve the purpose of informing the neighborhood of the project proposal prior to the formal notice provided by the city.

B. Application.

1. All applications for permits or actions by the city shall be submitted on forms provided by the development services group. An application shall contain all information deemed necessary by the code official to determine if the proposed permit or action will comply with the requirements of the applicable development regulations.

2. All applications for permits or actions by the city shall be accompanied by a filing fee in an amount established by city ordinance.

#### C. Determination of Completeness.

1. The city will not accept an incomplete application. An application is complete only when all information required on the application form and all submittal items required by code have been provided to the satisfaction of the code official.

2. Within 28 days after receiving a development permit application, the city shall mail or provide in person a written determination to the applicant, stating either that the application is complete or that the application is incomplete and what is necessary to make the application complete. An application shall be deemed complete if the city does not provide a written determination to the applicant stating that the application is incomplete.

3. Within 14 days after an applicant has submitted all additional information identified as being necessary for a complete application, the city shall notify the applicant whether the application is complete or what additional information is necessary.

4. If the applicant fails to provide the required information within 90 days of the determination of incompleteness, the application shall lapse. The applicant may request a refund of the application fee minus the city's cost of determining the completeness of the application.

#### D. Notice of Application.

1. Within 14 days of the determination of completeness, the city shall issue a notice of application for all administrative, discretionary, and legislative actions listed in MICC 19.15.010(E).

2. The notice of application shall include the following information:

a. The dates of the application, the determination of completeness, and the notice of application;

- b. The name of the applicant;
  - c. The location and description of the project;
  - d. The requested actions and/or required studies;
  - e. The date, time, and place of the open record hearing, if one has been scheduled;
  - f. Identification of environmental documents, if any;
  - g. A statement of the public comment period, which shall be not less than 14 days nor more than 30 days following the date of notice of application; and a statement of the rights of individuals to comment on the application, receive notice and participate in any hearings, request a copy of the decision once made and any appeal rights;
  - h. The city staff contact and phone number;
  - i. The identification of other permits not included in the application to the extent known by the city;
  - j. A description of those development regulations used in determining consistency of the project with the city's comprehensive plan; and
  - k. Any other information that the city determines appropriate.
3. Open Record Hearing. If an open record hearing is required on the permit, the city shall:
- a. Provide the notice of application at least 15 days prior to the hearing; and
  - b. Issue any threshold determination required under MICC 19.07.100 at least 15 days prior to the hearing.
4. Notice shall be provided in the bi-weekly DSG bulletin, posted at City Hall and made available to the general public upon request.
5. All comments received on the notice of application must be received by the development services group by 5 pm on the last day of the comment period.
6. Except for a determination of significance, the city shall not issue a threshold determination under MICC 19.07.100 or issue a decision on an

application until the expiration of the public comment period on the notice of application.

7. A notice of application is not required for the following actions; provided, the action is either categorically exempt from SEPA or an environmental review of the action in accordance with SEPA has been completed:

- a. Building permit;
- b. Lot line revision;
- c. Right-of-way permit;
- d. Storm drainage permit;
- e. Home occupation permit;
- f. Design review – minor new construction;
- g. Final plat approval;
- h. Shoreline exemption permit;
- i. Critical lands determination; and
- j. Seasonal development limitation waiver.

**G. Decision Criteria.** Decisions shall be based on the criteria specified in the Mercer Island City Code for the specific action. A reference to the code sections that set out the criteria and standards for decisions appears in MICC 19.15.010(E). For those actions that do not otherwise have criteria specified in other sections of the code, the following are the required criteria for decision.

- 1. Comprehensive Plan Amendment.
  - a. There exists obvious technical error in the information contained in the comprehensive plan;
  - b. The amendment is consistent with the Growth Management Act, the county-wide planning policies, and the other provisions of the comprehensive plan and city policies;
  - c. The amendment addresses changing circumstances of the city as a whole;

d. If the amendment is directed at a specific property, the following additional findings shall be determined:

- i. The amendment is compatible with the adjacent land use and development pattern;
- ii. The property is suitable for development in conformance with the standards under the potential zoning;
- iii. The amendment will benefit the community as a whole and will not adversely affect community facilities or the public health, safety, and general welfare.

2. Reclassification of Property (Rezoning).

- a. The proposed reclassification is consistent with the policies and provisions of the Mercer Island comprehensive plan;
- b. The proposed reclassification is consistent with the purpose of the Mercer Island development code as set forth in MICC 19.01.010;
- c. The proposed reclassification is an extension of an existing zone, or a logical transition between zones;
- d. The proposed reclassification does not constitute a “spot” zone;
- e. The proposed reclassification is compatible with surrounding zones and land uses; and
- f. The proposed reclassification does not adversely affect public health, safety and welfare.

3. Conditional Use Permit.

- a. The permit is consistent with the regulations applicable to the zone in which the lot is located;
- b. The proposed use is determined to be acceptable in terms of size and location of site, nature of the proposed uses, character of surrounding development, traffic capacities of adjacent streets, environmental factors, size of proposed buildings, and density;
- c. The use is consistent with policies and provisions of the comprehensive plan; and

d. Conditions shall be attached to the permit assuring that the use is compatible with other existing and potential uses within the same general area and that the use shall not constitute a nuisance.

4. Variances.

a. No use variance shall be allowed;

b. There are special circumstances applicable to the particular lot such as the size, shape, topography, or location of the lot; the trees, groundcover, or other physical conditions of the lot and its surroundings; or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access;

c. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated;

d. The granting of the variance will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property; and

e. The variance is consistent with the policies and provisions of the comprehensive plan and the development code.

5. Deviation.

a. No use deviation shall be allowed;

b. The granting of the deviation will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated;

c. The granting of the deviation will not alter the character of the neighborhood, nor impair the appropriate use or development of adjacent property; and

d. The deviation is consistent with the policies and provisions of the comprehensive plan and the development code.

**19.15.030 Enforcement.**

B. Duty to Enforce.

1. It shall be the duty of the director of the development services group to enforce the development code. The director may call upon the police, fire, health or other appropriate city departments to assist in enforcement.
2. Upon presentation of proper credentials, the director or duly authorized representative of the director may, with the consent of the owner or occupier of a building or premises, or pursuant to a lawfully issued inspection warrant, enter at reasonable times any building or premises subject to the consent or warrant to perform the duties imposed by the development code.
3. The development code shall be enforced for the benefit of the health, safety and welfare of the general public, and not for the benefit of any particular person or class of persons.
4. It is the intent of the development code to place the obligation of complying with its requirements upon the owner, occupier or other person responsible for the condition of the land and buildings within the scope of this code.
5. No provisions or term used in this code is intended to impose any duty upon the city or any of its officers or employees, which would subject them to damages in a civil action.

ORIGINAL

NO. 63504-2

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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MERCER ISLAND CITIZENS FOR FAIR PROCESS,

Appellant,

v.

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

Respondents

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX

---

**CERTIFICATE OF SERVICE REGARDING  
BRIEF OF APPELLANT**

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JANE RYAN KOLER  
Attorney for Appellant

5801 Soundview Drive  
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PO 2509  
Gig Harbor, WA 98335

2009 SEP -9 AM 9:25

STATE OF WASHINGTON

FILED

I, Anita Hope, legal assistant for Jane Ryan Koler, hereby state as follows:

I am over the age of 18 years, competent to testify, and certify to the following based on my own knowledge and belief.

On the date below stated, I caused the Brief of Appellants and Certificate of Service to be sent in the manner noted to the following parties:

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- Via electronic mail- mrising@helsell.com

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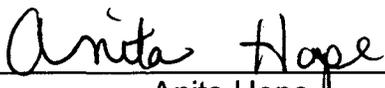
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DATED THIS 8th day of September, 2009

  
\_\_\_\_\_  
Anita Hope