

63504-2

63504-2

NO. 63504-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MERCER ISLAND CITIZENS FOR FAIR PROCESS,

Appellant,

v.

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

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS

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**I. THE CITY IMPROPERLY DISMISSED PLAINTIFFS DUE PROCESS CLAIMS; FACTUAL QUESTIONS WERE IN DISPUTE**

The City erroneously claims that lack of proper notice is a question of law. City Brief at 45. Questions of fact include “whether the Defendant has failed to ensure that Plaintiffs received adequate notice and the opportunity for a fair hearing;” *Hernandez v. Medows*, 209 F.R.D. 665, 669 (S.D. Fla. 2002). “Although, the question of whether the procedural safeguards provided for in the Code are adequate to satisfy due process is a question of law for the court to determine, whether the City indeed provided the [claimants] with such procedure is a question of fact for the jury.” *Stauch v. City of Columbia Heights*, 212 F.3d 425, 431 (8th Cir. 2000). In the present matter, there was a factual dispute whether the City notice was adequate; that factual dispute should have prevented the court from entering summary judgment. The Appellant is entitled to a trial on that issue.

**II. LUPA DOES NOT PRECLUDE THE ASSERTION OF A DUE PROCESS CLAIM AND A CLAIM BASED ON 42 U.S.C. §1983**

The Respondents’ briefs turn on the untenable premise that Appellant was obliged to assert a Land Use Petition Act (“LUPA”) appeal and that its failure to do so precluded it from asserting a due process declaratory judgment claim and a claim based on 42 U.S.C. § 1983. Neither LUPA nor any Washington case support this proposition. The Respondents’ claim that the Appellant was required to bring its claims under LUPA is patently incorrect because the Tent City contract (“The Contract”) is not a land use decision within the meaning of RCW 36.70C.020, and therefore, not subject to LUPA. Additionally, LUPA excludes

claims for damages. *See* RCW 36.70C.030. Further, the Appellant is neither appealing The Contract, nor collaterally attacking it, therefore, all of the claims about LUPA are red herrings which have no bearing on the matter before the Court. The single issue before the Court is whether the trial court impermissibly dismissed the Citizen Association's declaratory judgment due process claim and 42 U.S.C § 1983 claims.

LUPA only applies to those decisions which explicitly fall within the parameters of the definition of a land use decision specified in RCW 36.70C.020. *Post v. Tacoma*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 1179, 1185 (Oct. 15, 2009). Attempting to convince the Court that The Contract is a land use decision within the meaning of RCW 36.70C.020, the Respondents rely on cases which are, in fact, land use decisions within the meaning of LUPA, and are unrelated to The Contract. The Respondents miss a crucial distinction; unlike this case, the land use decisions in the cited cases are authorized by the city and county codes under which the cases arise and were clearly land use decisions within the meaning of RCW 36.70C.020. The Contract, in contrast, would have been a land use decision, and analogous to the cited cases, only if the Mercer Island Municipal Code ("MIMC") had specified that a "temporary use agreement" is the form of approval required for authorization of temporary uses and only if the Code authorized a specific City official or body to enter into such contracts. *See* RCW 36.70C.020(2)(a). Because the Code prohibited such a temporary use and authorized no official or body to enter into an agreement authorizing a property use prohibited by the Code, it was

not a land use decision within the meaning of RCW 36.70C.020. This Court should decline the City's invitation to expand LUPA and apply it to any case pertaining to the use of property, and make new law by holding that a LUPA petition is a necessary prerequisite to asserting a § 1983 claim against a municipal entity. No Washington case supports these propositions.

Respondents' briefs cite to numerous LUPA cases in an attempt to demonstrate that The Contract is a "land use decision." However, the Respondents fail to identify a single case in which a court demands a LUPA appeal when a matter falls outside the parameters of a land use decision as defined in RCW 36.70C.020 or a case which addresses a contract not authorized by the city or county zoning code and permits a property use prohibited by the Code. In the cases on which Respondents rely, the challenged decisions were originally authorized by the local code, unlike The Contract. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002) (boundary line adjustments and related decisions were authorized by county code; authority for decision making was given to the Planning Director); *Wenatchee Sportsmen Association*, 141 Wn.2d 169, 4 P.3d 123 (2000) (site specific rezone application and decision were authorized by code); *Storedahl and Sons v. Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008) (site specific rezone application and decision were authorized by code); *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) (building permit was found to be a "land use decision"); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005) (special use permit and related procedures were authorized by

county code); *De Tray v. City of Olympia*, 121 Wn. App. 777, 90 P.3d 1116 (2004) (conditional use permits were authorized by city zoning ordinance and county Shoreline Master Program); *Isla Verde Intl. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) (preliminary plat application approval was challenged due to conditions contained within plat approval; plat application and procedures were authorized by municipal code); *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005) (impact fees associated with building permits were authorized by county code and were land use decision). All of the cases cited by the City contain the same distinguishing feature: the original decisions were all authorized by local code and defined as a land use decision under the code. Here, the MIMC does not authorize the use of “Temporary Use Agreements” and no body or officer has been given the authority to make such a decision. Without these elements, The Contract is not a land use decision under RCW 36.70C.020(1).

**A. THE TENT CITY CONTRACT IS NOT SUBJECT TO LUPA**

The Respondents cite inapplicable cases and statutory authority to support their argument that any agreement that pertains to land is subject to LUPA. As indicated by their inability to cite applicable legal authority, there is simply no support for this position. The City is incorrect when it states that courts “interpret[] LUPA to apply to contracts and agreements.” Brief of City at 18.

The City relies erroneously on *Twin Bridges Marine Park* to support the assertion that a contractual agreement between parties may be subject to LUPA. In *Twin Bridges*, although there was an agreement between the parties, the agreement

itself was not the subject of the appeal.<sup>1</sup> Rather, the action applied solely to building permits. *Twin Bridges Marine Park v. Dept. of Ecology*, 162 Wn.2d 825, 843–46, 175 P.3d 1050 (2008).<sup>2</sup> This case stands for nothing more than the fact that building permits issued by local authority and authorized by local code are land use decisions subject to LUPA and has no relation to the present case.

The City also extended *Tapps Brewing* beyond the actual holding of the court. The court only discussed LUPA as it pertained to one claim, an assertion that an agreement authorized an invalid impact fee, and thus was an illegal tax under RCW 82.02.020. *See Tapps Brewing Inc. v. City of Sumner*, 482 F.Supp.2d 1218, 1232–33 (W.D. Wash. 2007). However, the court did not rule on whether the agreement was an impact fee or other final land use decision because the issue was dismissed on other grounds. Applying *James v. Kitsap County*, the court simply held that “the imposition of impact fees as a condition on the issuance of a building permit is a ‘land use decision’ under LUPA.” *Id.* at 1233. Therefore, the court ruled that the petitioner’s challenge to the supposed impact fee must have been brought via a LUPA petition, without deciding whether the agreement was, in fact, a land use decision.

The City also mistakenly compares The Contract with “development agreements” authorized by RCW 36.70B.170. However, The Contract in the

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<sup>1</sup> The agreement was simply mentioned within the facts for a complete history of the matter. *See Twin Bridges Marine Park*, 162 Wn.2d at 831–32.

<sup>2</sup> “The requirement that Ecology file a LUPA challenge concerning the disputed building permits is also consistent with prior holdings of this court that favor finality in

present matter is not a “development agreement.” Development agreements “set forth development standards . . . [for] the development of the real property . . . .” RCW 36.70B.170(4). The Contract does not concern the development of real property and is instead an agreement concerning the use of property.

Further, LUPA only applies “if the development agreement relates to a project permit application . . . .” RCW 36.70B.200 (emphasis added). By calling out a specific circumstance in which an agreement would be reviewed under LUPA, the Washington Legislature demonstrates that other agreements would not typically be reviewed under LUPA. Based upon the plain meaning of RCW 36.70B.200, a development agreement that concerns the use and development of land, without relating to a current project permit application, would not be subject to LUPA. Similarly, The Contract may concern the use of land, but that does not make it a “land use decision” subject to LUPA.

**B. DEFECTIVE LAND USE DECISIONS ARE SUBJECT TO LUPA ONLY IF THE UNDERLYING TYPE OF DECISION IS AUTHORIZED BY CODE**

The City is confused regarding the application of LUPA to illegal, unlawful, and procedurally defective land use decisions. Such decisions are not subject to LUPA because they are defective, but rather because the decision is a land use decision within the meaning of RCW 36.70C.020. The Washington Supreme Court, in *Post v. Tacoma*, \_\_ Wn.2d \_\_, 217 P.3d 1179, 1185 (Oct. 15, 2009), recently held that LUPA only applies to land use actions as defined in RCW

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land use decisions. . . . In the current case, LUPA plainly applies because the County was the local permitting authority within the statute.” *Id.* (emphasis added).

36.70C.020 and declined to expand LUPA to actions falling outside of that definition. RCW 36.70C.130(1)(a) must be read in conjunction with the rest of LUPA. While relief may be granted if “the body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process,” the decision must still be a final land use decision under RCW 36.70C.020 for LUPA to apply. *See* Section II and Brief of Appellant at 16. This important distinction is found in every case that the City cites to support its position.<sup>3</sup>

For example, in *Habitat Watch*, 155 Wn.2d 397, 400, 120 P.3d 56 (2005) a special use permit decision which is a land use decision within the meaning of RCW 36.70C.020, was challenged as being defective due to a failure to provide notice and a public hearing. The Washington Supreme Court determined that the decision was subject to LUPA, not because it was defective, but because it was a special use permit decision: “LUPA specifically applies to the particular type of decision at issue here. . . . There should be no question that a challenge to a special use permit decision lies within LUPA-even where the decision is allegedly

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<sup>3</sup> In all cases cited by the City to support its position that illegal, unlawful, or procedurally defective decisions are subject to LUPA, the decisions underlying the challenges were authorized by the local code. *See James v. Kitsap County*, 154 Wn.2d 574, 578, 115 P.3d 286 (2005) (challenged impact fees were authorized by county code); *Chelan County v. Nykreim*, 146 Wn.2d 904, 927, 52 P.3d 1 (2002) (challenged BLA applications and related decisions were authorized by county code; authority for decision making was given to the Planning Director); *Samuel’s Furniture, Inc. v. Dept. of Ecology*, 147 Wn.2d 440, 450–54, 54 P.3d 1194 (2002) (substantial development permit issued pursuant to local code was subject to LUPA); *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 36–37, 26 P.3d 241 (2001) (challenged permits were authorized by county code); *Wenatchee Sportsmen Association*, 141 Wn.2d 169, 174–75, 4 P.3d 123 (2000) (site specific rezone application and decision was authorized by code).

It is worth noting that the City relied upon *Post v. Tacoma*, 140 Wn.App. 155, 165 P.3d 37 (2007). The case has been reversed by the Washington Supreme Court subsequent to the filing of the City’s Brief. *See Post v. Tacoma*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 1179 (Oct. 15, 2009).

void.” *Id.* at 407–08 (emphasis added). In that case, special use permits and related procedures were authorized by the county code. *Id.* at 401.

This distinction is crucial. The Contract is indeed illegal, unlawful, and procedurally defective, but that alone does not make The Contract subject to LUPA. The MIMC does not authorize this type of decision and did not grant authority to the City Council to enter into such a contract. The MIMC contains a list of land use decisions and the official or body that makes the decision, which does not include such contracts. MIMC 19.15.010. Without Code authorization, The Contract is not a final land use decision subject to LUPA. *See* Section II and Brief of Appellant at 16.

**C. THE DUE PROCESS DECLARATORY JUDGMENT ACTION AND §1983 CLAIM ARE NOT COLLATERAL ATTACKS ON TENT CITY CONTRACT**

The City has no authority for its assertion that Appellant’s claims are impermissible attacks on an unchallenged land use decision. The cases it relies upon in no way support its position.

The City selectively quotes from *Shaw v. City of Des Moines* on page 24 of its brief: “If the petitioner loses the LUPA appeal, the damages case is moot and the matter is over.” *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901, 37 P.3d 1255 (2002). The City’s quote, at most, indicates that a claim for damages that relates to an accompanying LUPA appeal **may** be moot if the LUPA appeal fails. *Shaw* has no bearing on the matter before the court.

Finally, the City improperly relies upon unpublished<sup>4</sup> portions of *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 369 n.5, 85 P.3d 926 (2004).<sup>5</sup> Brief of City at 25. The court only made one reference to LUPA in the published portion: “The LUPA petition is not before this court.” In *Gontmakher*, the court analyzed whether they were entitled to damages under RCW 64.40.010 and determined that they were not, not relying in any way on LUPA. The cases cited by the City simply do not support the claim that Appellants have made an impermissible collateral attack upon an unchallenged land use decision. Further, Appellants are not appealing The Contract, but are asserting claims for damages based upon the City’s violation of constitutional rights.

**D. LUPA DOES NOT BAR THE ASSOCIATION FROM ASSERTING INDEPENDENT DAMAGE CLAIMS**

Neither LUPA nor Washington decisional precedents support the City claim that “LUPA subsumes all of the appellant’s allegations and claims including the due process and Section 1983 claims.” City Brief at 22. These are odd claims; the City fails to explain how the Washington State Legislature in promulgating LUPA could add procedural prerequisites to asserting a federal statutory remedy such as § 1983. Further, RCW 36.70C.030 explicitly excludes “claims provided by any law for monetary damage or compensation,” and the Washington Supreme

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<sup>4</sup> Washington courts have been clear that the citation of unpublished opinions in appellate briefs is grounds for sanctions. See *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005) (holding that sanctions are appropriate for citation to unpublished opinions in appellate briefs).

Court recently affirmed that monetary damages are excluded from LUPA. *Post v. Tacoma*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 1179, 1185 (Oct. 15, 2009).

Even if The Contract were a “conclusively valid” land use decision as claimed by the City, *See* City Brief at 23, that does not diminish the right of the Appellant to invoke the federal § 1983 remedy and seek vindication of the constitutional rights of Association members. In this case, the Association has neither appealed nor collaterally attacked The Contract. It simply wants the court to recognize that when the City adopted The Contract, it violated the property rights of some Association members and failed to accord due process; City officials failed to follow City ordinances, misled citizens about The Contract and did not give them proper notice about it. The City’s claim that LUPA abolished the right of citizens to seek redress for such constitutional violations under § 1983 is not supported by any of the cases cited by the City. Because of this circumstance, such arguments should be disregarded.<sup>6</sup>

The City erroneously claims that LUPA cases demonstrate that the Association’s claims are barred. For example, the City improperly asserts that *Asche v. Bloomquist* bars the appellant’s due process claims. *See* City Brief at 26–28. The City makes the baseless assertion that the failure to file a LUPA appeal

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<sup>5</sup> The portion referring to damage claims and the previous LUPA petition were not discussed on page 374 of the opinion as indicated by the City, but rather in the unpublished portion that follows.

<sup>6</sup> It is a well established principle of appellate law that arguments unsupported by any legal authority must be disregarded. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (declining to consider argument where not supported by reference to the record or citation to authority).

barred *Asche* from seeking damages. In fact, the Court of Appeals held that the Asches had the right to assert a private nuisance claim to the extent that they were seeking damages but that they could not seek an abatement remedy which would stop construction authorized by the unchallenged building permit. *Asche* has no bearing on this case; Appellant is seeking damages under § 1983, based on the violation of its property rights, its right to substantive and procedural due process; such damage claims are not subject to LUPA. See RCW 36.70C.030.

The City's brief also incorrectly cites cases to support its argument that substantive due process claims are barred if not filed with a LUPA petition. For example, the City improperly relies on *Grundy v. Brack Family Trust*, 155 Wn.2d 1, 117 P.3d 1089 (2005) to support that proposition. City Brief at 27. *Grundy* solely addressed nuisance claims and held that LUPA claims were not properly before the court. The City's *Grundy* arguments rely on Justice Sander's dissent.

The City also erroneously relies on *Harrington v. Spokane County*, claiming that the court denied due process claims "for failure to appeal land use decision under LUPA or seek review under the same 21-day appeal period under the Shoreline Management Act." City Brief 27; 29. However, the court made no such ruling. In fact, the appellant did file a LUPA petition, but the court ruled that LUPA did not apply. *Harrington v. Spokane County*, 128 Wn. App. 202, 214, 114 P.3d 1233 (2005). Also, the court dismissed his claims for failure to exhaust administrative remedies prior to filing an appeal, not for failure to appeal under LUPA. *Id.* at 216.

Further, *Peste v. Mason County*, 133 Wn. App. 456, 465–67, 136 P.3d 140 (2006) does not support the City’s claim that the Appellant’s substantive due process claims are barred.<sup>7</sup> *Peste* has no application to the present case because it addressed an actual appeal of a land use decision falling within the definition of such a decision in RCW 36.370C.020 and did not involve a substantive due process claim based on § 1983. It simply addressed constitutional damage claims asserted in a LUPA petition.

Finally, the City relies on *Project Patch Family Therapy Center v. Klickitat Cy*, 2008 WL 906078 (W.D. Wash. 2008) which is an unpublished opinion from the U.S. District Court for the Western District of Washington. In *Project Patch*, the court remanded the LUPA claim to state court and retained jurisdiction over the federal claims and stated that “if Plaintiff’s LUPA claims are decided, determination of the issues raised by the 42 U.S.C. § 1983 claim for damages **could** be rendered unnecessary.” *Id.* at 1. The court did not state the damage claims would be moot; simply that they might be.

Looking past the City’s repeated misinterpretation of case law, and use of unpublished and reversed opinions, as well as dissents, reveals that not a single case cited by the City involves a claim for damages based on § 1983 brought without a LUPA petition, as is the case here.

### **III. THE CITY DECISION VIOLATED THE PROPERTY RIGHTS OF ASSOCIATION MEMBERS**

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<sup>7</sup> The City also cited to the Court of Appeals decision in *Post v. Tacoma*. As noted earlier, that case has been reversed by the Washington Supreme Court subsequent to the City’s filing. See *Post v. Tacoma*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 1179 (Oct. 15, 2009).

Contrary to the claims in the City’s brief, case law is clear that the federal constitution protects property rights created by state or local laws. “A property interest in a benefit protected by the due process clause results from a ‘legitimate claim of entitlement’ created and defined by an independent source, such as state or federal law.” *Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983) (finding that state statute providing for particular procedures amounted to entitlements protected by due process).<sup>8</sup> Additionally, local ordinances may also create property interests protected by the federal constitution:

Such an interest arises not from the Due Process Clause of the Constitution itself, but is “created by independent sources such as a state or federal statute, a municipal charter or ordinance, or an implied or express contract. . . .” While the underlying interest is generally created by state law, “federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.”

*Teigen v. Renfrow*, 511 F.3d 1072, 1079 (10th Cir. 2007) (citations omitted).

Courts from nearly every jurisdiction, including the State of Washington, recognize that local ordinances create property rights protected by the federal constitution.<sup>9</sup>

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<sup>8</sup> See also *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (“Property interests, of course, are not created by the Constitution. Rather they are created . . . from an independent source such as state law . . . .”); *Groten v. California*, 251 F.3d 844, 850 (9th Cir. 2001) (“A state statute can give rise to federally protected due process interests.”).

<sup>9</sup> *Bolton v. City of Dallas*, 472 F.3d 261, 263–65 (5th Cir. 2006) (finding that ordinance created a protected property interest in continued employment); *Jenkins v. County of Riverside*, 398 F.3d 1093, 1098 (9th Cir. 2005) (ordinance created a property interest in continued employment); *Hulen v. Yates*, 322 F.3d 1229, 1240 (10th Cir. 2003) (“constitutionally protected property interests are created and defined by statute, ordinance, contract, implied contract and rules and understandings developed by state officials”); *Ulichny v. Merton Community School Dist.*, 249 F.3d 686, 700 (7th Cir. 2001) (“federal property interests under the 14th Amendment usually arise from

The City relies improperly upon *Furfaro v. Seattle* for the proposition that “the violation of a right, privilege or obligation created by a state law or a state constitution, or a local ordinance or regulation, is not actionable under § 1983.” City Brief at 31. In *Furfaro*, the appellants were claiming a violation of the state constitution under § 1983. *Furfaro v. City of Seattle*, 144 Wn.2d 363, 375–76, 27 P.3d 1160 (2001) (warrantless arrests violated greater protections of state constitution). In dismissing the appellants’ claims, the court simply stated that § 1983 only applied to rights protected by the federal constitution, not the state constitution. *Id.* Significantly, the court did not hold that property rights protected by the U.S. Constitution cannot be created by state law or local ordinance.<sup>10</sup> Here, in contrast to *Furfaro*, there is no state constitutional claim at issue.

Appellants have properly claimed that the MIMC has created protected property rights; the right to live in a neighborhood in which only uses authorized by the Code are allowed. The Code clearly protects members of the plaintiff Association from living in the midst of property uses prohibited by the Code. The City Council action violated that property right. That constitutional violation forms the predicate of a viable § 1983 claim. The trial court should not have dismissed Appellant’s § 1983 claim.

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rights created by state statutes, state or municipal regulations or ordinances”); *Stauch v. City of Columbia Heights*, 212 F.3d 425, 429–30 (8th Cir. 2000) (holding that municipal code created property interest protected by the Fourteenth Amendment); *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62–64 (9th Cir. 1994) (finding that city ordinance created a protected property interest in gaming licensee).

<sup>10</sup> The City also cited to *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982) for the same proposition. See City Brief at 30–31. But again, the court said nothing regarding rights granted by

#### A. *SHANKS V. DRESSEL* IS INAPPLICABLE

The City erroneously claims that *Shanks v. Dressel* dictates the result in this case. The *Shanks* court found that the regulations at issue did not create a property interest because **their application was discretionary**. As the *Shanks* court explained “a statute that grants the reviewing body unfettered discretion to approve or deny an application does not create a property right.” *Shanks v. Dressel*, 540 F.3d 1082, 1091 (9<sup>th</sup> Cir. 2008). The court further observed that Spokane’s historic preservation provisions do not create a protected property interest because they “do not contain mandatory language that specifically constrains the decision makers’ discretion.” *Id.* at 1090. That is not the case here, and the holding has no instructive value. The MIMC **prohibits** the City from allowing any use not specified in the Zoning Code. There is no discretion allowed in the enforcement of that regulation. Unlike *Shanks*, the Citizen Association does not allege that the City negligently or mistakenly issued a permit in violation of the Zoning Code or failed to enforce its Zoning Code against a third party such as the developer in *Shanks*. Rather, the Citizen Association contends, and it is not disputed, that the City Council made a clear, deliberate decision to violate the nondiscretionary Zoning Code provision mandating that *no uses would be* allowed in the City which *were not specified in the Code*. See March 31, 2009 Koler Declaration. CP 225.

#### IV. CITY COUNCIL’S ACTIONS VIOLATED SUBSTANTIVE DUE PROCESS

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state statute or municipal code. Instead, the court discussed the merits of a violation of First Amendment rights.

The City erroneously claims that the trial court properly dismissed petitioner's due process Declaratory Judgment action and its 42 U.S.C. § 1983 claim based on a substantive due process violation. Without a doubt, the petitioner was entitled to a trial on this issue. Whether conduct is arbitrary is a question of fact. *Ochsner v. Board of Trustees of Washington Community College Dist. No. 17*, 61 Wn. App. 772, 775–76, 811 P.2d 985 (1991) (whether action was arbitrary and capricious was a question of fact). *See also State ex rel. Pacific Northwest Bell Tel. Co. v. Wash. Utilities and Transp. Comm.*, 66 Wn.2d 411, 437, 403 P.2d 73 (1965) (whether commission acted arbitrarily was a question of fact).<sup>11</sup>

Here, the trial court abdicated its duty to view all evidence and evidentiary inferences in a light most favorable to the nonmoving party. There was evidence before the court that the City Council, to avoid public scrutiny and controversy associated with conducting two public hearings about adopting a text amendment to the Code providing for temporary use permits, decided to enter into a contract which violated the Code. Evidence established that the City Council knew that The Contract violated the Code and gave scant notice about the adoption of The Contract to the public. Evidence showed that City Council members knew that

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<sup>11</sup> There is further support for this position by way of analogy to determining the reasonableness of an action. The reasonableness of an action is a question of fact not suitable for summary judgment as long as differing conclusions regarding the reasonableness are possible. *Evanston Ins., Co., v. OEA, Inc.*, 566 F.3d 915, 920 (9th Cir. 2009) (citing *In re Software Toolworks, Inc.*, 50 F.3d 615, 621–22 (9th Cir. 1994)). *See also Green v. Normandy Park*, 137 Wn. App. 665, 693, 115 P.3d 1038 (2007) (holding that whether a community club's actions were reasonable is a question of fact). Similarly, here, whether the Council's actions were arbitrary and irrational is a disputed fact that should be decided by the trier of fact and not on summary judgment.

City officials affirmatively misled citizens at the public hearing by telling them that The Contract complied with the Code. CP 268-69. Also, evidence before the court demonstrated that City Council members were trained by way of role play scripts to gloss over the fact that the encampment was a prohibited property use. CP 230-31. The trial court improperly adopted the City's view of such conflicting evidence and viewed such evidence in a light most favorable to the City, despite the fact that the City was the moving party. The trial court improperly dismissed the substantive due process claim despite the fact that there was a factual dispute about whether the conduct of the City was arbitrary.<sup>12</sup>

**V. THE CITY'S FAILURE TO FOLLOW REQUIRED PROCEDURES CONSTITUTES A DUE PROCESS VIOLATION**

The City's failure to follow its laws was a due process violation because the City failed to provide even minimal due process protections. Contrary to the claim of the City, *First Assembly of God v. Naples*, 20 F.3d 419, 422 (11th Cir. 1994) did not hold that the City's failure to follow code provisions is not a due process violation. Instead, the court determined that a violation of local procedures is not automatically a constitutional violation, but that it must be analyzed further to determine whether a due process violation occurred. Similarly, *Layton v. Swapp*, 484 F.Supp. 958 (D. Utah 1979) analyzed whether the failure to

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<sup>12</sup> Additionally, the City Council's actions were arbitrary and irrational because it entered into a contract which violated the zoning code. The City of Mercer Island does not have authority to enter into contracts which are in violation of local code. *Mincks v. City of Everett*, 4 Wn. App. 68, 72-73, 480 P.2d 230 (1971). See also *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 292, 937 P.2d 1082 (1997) ("Any contract requiring performance in violation of an applicable ordinance is illegal and void even if made by the city."). The Contract, which is in violation of local code and therefore illegal and void, can only be the result of arbitrary and irrational conduct.

follow county regulations which accorded a discharged librarian a full evidentiary hearing violated her due process rights. The court determined that even though she was accorded some due process in the Step 1 hearing, she did not have a full and fair opportunity to confront the county's allegations against her and refute such allegations. Thus, the failure to follow county rules implicated basic due process rights she possessed. That is the case here.<sup>13</sup>

Had the City amended its code to authorize the camp, citizens would have been given notice that the camp would violate the Code, and thus their property rights, unless the Code were amended. They would have been given such notice through a large sign posted on the church property, notice published in the City's biweekly DSG bulletin as well as in the newspaper, and written personal notice to Association members living within 300 feet of the Church property. MIMC 19.18.020. The Code requires a thorough description of such a proposal and gives citizens the right to present written comments on it. MIMC 19.15.020(1)(g); CP 90.

Had the City followed the Code, citizens also would have been given the opportunity to comment on the proposal after having been thoroughly informed about it at two public hearings. MIMC 19.15.010(E).

## **VI. THE CITY DID NOT GIVE ASSOCIATION MEMBERS MINIMAL DUE PROCESS**

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<sup>13</sup> Whether the Court determines that the failure of the City to follow its own procedures is a due process violation does not have any effect on the Appellant's other constitutional claims; that the City violated the property rights of Association members, gave them defective notice of the hearing and committed a substantive due process violation.

The City's failure to follow the Code resulted in citizens being deprived of minimal due process protections. Association members received no notice whatsoever before the public hearing that The Contract violated the Code and thus their property rights. Thus they were deprived of the opportunity to confront elected city officials and comment on the loss of their property rights and the City decision to ignore the City Code and authorize a camp that violated it. This was a salient characteristic of the camp of which the City Council was aware and citizens were utterly deprived of the opportunity to address their elected officials about that aspect of the camp. CP 268.

This Court should reject the City argument that the City accorded Association members minimal due process. The cases on which the City relies demonstrate that Association members were not accorded minimal due process. In *Harris v. Birmingham Board of Education*, 817 F2d 1525 (11<sup>th</sup> Cir. 1987), the discharged custodian was given notice of the reasons why he had been discharged and an opportunity to address such claims.

The United States Supreme Court in *Goss v. Lopez*, 419 US 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) held that at the very minimum, students facing suspension must be given "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence that authorities have and an opportunity to present his side of the story." *Goss* teaches that "secrecy is not congenial to truth seeking" and "no better instrument has been devised for arriving at truth than giving a person in jeopardy of loss notice ...." *Id.* at 580.

Washington cases clearly hold that defective notices which mislead as to the true nature of a proposal violate due process. *Barrie v. Kitsap County*, 84 Wn.2d 579, 585–86, 527 P.2d 1377 (1975) held that notice was defective and “conceivably deprived the plaintiffs . . . of their opportunity to be heard by misleading them into believing that the proposed PUD and rezone would be treated as one action.”<sup>14</sup>

The City, by publishing notice that the Council would consider “temporary use agreement for tent city visit,” did not begin to give citizens even bare bones notice that the temporary use agreement violated the zoning code, and thus impaired the property rights established by the City Code. Further, it did not summon Association members who lived in close proximity to the camp to the City hearing because it failed to disclose its location.

The City contention that Association members were accorded minimal due process fails to recognize that a hearing must be accorded at a meaningful time in a meaningful manner. *Mathews v. Eldridge*, 24 US 319, 96 S. Ct. 893 (1976). It is impossible to claim that Association members had a meaningful opportunity to address The Contract. They had not the slightest notion that The Contract violated the City Code and thus violated their property rights. Before they addressed the City Council they were assured by the Assistant City Manager that The Contract

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<sup>14</sup> See also *Responsible Urban Growth Group v. Kent*, 123 Wn.2d 376, 389, 868 P.2d 861 (1994) (notice violated due process when it failed to apprise citizens of an amendment, a rezone or either ordinance 2771 or ordinance 2837); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (Notice violates due process when it “is sufficiently misleading that it introduces a high risk of

complied with all land use regulations on the books. CP 268. They had no idea that The Contract violated the Code until the day after the hearing when the City attorney disclosed that fact to an Association member who was confused about whether the City Code authorized the temporary property use. CP 52. Because the City had given Association members no notice whatsoever, that The Contract violated Code and thus impaired their property rights, it cannot be claimed that they had a hearing at a meaningful time and an opportunity to intelligently comment on the proposal. Lacking knowledge about the crucial contract characteristics caused citizens to comment on it “in an information vacuum.” *Glaspey v. Conrad*, 83 Wn. 2d 707, 712-713, 521 P. 2d 1173 (1974). The City did not accord Association members minimal due process. CP 268–69.

The trial court erroneously granted summary judgment when material facts about the notice given were in dispute. It is well established that the question of whether notice is adequate is a factual determination. *US v. Clark*, 84 F. 3d 378, 381 (10<sup>th</sup> Cir. 1996) (whether defendant employed means that were reasonably calculated to provide claimant actual notice is a question of fact). Here, the trial court improperly failed to view all evidence and evidentiary inferences in a light most favorable to the Association, the nonmoving party and dismissed its substantive and procedural due process claims as well as its § 1983 claim.

The City erroneously claims that “at the trial court level Appellant did not challenge this notice.” City Brief at 4. The Appellant’s summary judgment

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error into the disability decision-making process . . . the notice given in this case does not clearly

briefing shows that this was a central summary judgment issue. CP 215; 248–49; 253; 256. Further, the City improperly claims that the Appellant attorney’s statement at the temporary restraining order (“TRO”) hearing at an early moment in this case that there was no issue related to notice and an opportunity to be heard pertained solely to arguments made about issuance of the TRO. At the summary judgment hearing, which is the subject of this appeal, the claim that the City’s notice violated due process was a central issue. Appellant’s analysis of the case before looking at public records and meeting with all members of group is irrelevant to issues raised at summary judgment.

**VII. NEITHER THE RLUIPA OR THE FIRST AMENDMENT REQUIRED THE CITY TO ENTER THE TENT CITY CONTRACT**

The City erroneously argues that the RLUIPA and the First Amendment compelled the City to allow establishment of Tent City and apparently makes the argument that the RLUIPA would have prevented the City from following its Code and amending the Code to adopt a text amendment to authorize the temporary use. The United States Supreme Court in striking down the Religious Freedom Restoration Act rejected exactly the same type of argument and held:

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

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indicate that if no request for reconsideration is made, the determination is final.”).

*City of Bourne v. Flores*, 521 U.S. 507, 535, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).<sup>15</sup>

The City analysis also totally ignores that there is a 2004 Ninth Circuit case exactly on point – *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). In that case, the Ninth Circuit Court of Appeals found that a land use regulation substantially burdens the exercise of religion only if it imposes a “significantly great restriction or onus upon such exercise.” *Id.*<sup>16</sup>

In *San Jose Christian College*, the college applied for a zoning change to allow it to construct an educational worship facility on its property. Morgan Hill denied the rezone due to the college’s failure to comply with City application requirements. *San Jose Christian College* brought suit under RLUIPA challenging the City decision. In upholding the denial of the rezone, the Ninth Circuit found that “the City’s ordinance imposed no restriction whatsoever on the college’s religious exercise; it merely requires the college to submit a complete application as is required for all applicants. *Id.* at 1035. Here, also, requiring the Church to comply with neutral zoning provisions requiring amendment of the Code to

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<sup>15</sup> RLUIPA does not apply to the current matter because it does not fit within the scope of the Act. The supposed burdens of the Code are not imposed by “a program or activity that receives Federal financial assistance,” do not affect “commerce with foreign nations, among the several States, or with Indian Tribes,” and are not imposed by a system “under which a government makes . . . individualized assessments of the proposed uses for the property involved.” 42 U.S.C. § 2000cc(a)(2). Rather, the City had no system with which to authorize temporary uses on an individualized basis.

<sup>16</sup> See *Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990) (upheld the denial of a CUP where an attempt was made to establish a church in a residential neighborhood); *Messiah Baptist Church v. County of Jefferson*, 986 F.2d 820 (10th Cir. 1988) (upheld denial of special use permit which was sought to build a church building on property belonging to the church but zoned for agricultural uses); *Lakewood Ohio Congregation of*

authorize the temporary use would not burden its religious exercise. The City's brief discloses that the City and churches had been discussing a camp locating on a church property for a two year period. That was certainly adequate time in which to seek a rezone of their property or seek a text amendment authorizing such a temporary use. Such neutral requirements are imposed on all citizens and are unrelated to the religious practices of the United Methodist Church. The Respondents also ignored decisions by Washington courts concluding that compliance with content neutral zoning laws do not burden religious exercise.

In *Open Door Baptist Church v. Clark County*, the church argued that constitutional protections exempted it from even applying for a Conditional Use Permit. The Washington State Supreme Court rejected this argument, stating that “[a] church has no constitutional right to be free from reasonable zoning regulations.” *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 168, 995 P.2d 33 (2000).

Contrary to the City claim, the holding in the *City of Woodinville v. Northshore United Church of Christ* is limited and does not affect the outcome of the present matter. Unlike the *Woodinville* case, no moratorium is at issue here; no moratorium prevented the City Council from amending the City Code by adopting a temporary use ordinance. Because the Church had an unfettered right to request that the City Council accommodate the encampment by requesting a rezone or a

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*Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (upheld denial of exception to zoning ordinance where church sought to build on land it had purchased).

text amendment, no actual burden on the Church's exercise of religion existed, and the holding in *City of Woodinville* does not apply.<sup>17</sup>

Additionally, the City claims erroneously that case law supports its position that The Contract was an appropriate method for allowing the encampment rather than abiding by the Code and making a simple amendment or rezone. City Brief at 43–44. The only case law the City cites for this proposition is *Sts. Constatine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). In *Sts. Constantine and Helen*, the church complied with the local code and applied for a rezone to allow its intended use. *Id.* at 898. The application for a rezone is the exact same procedure that would have been appropriate in the current matter. The court did not hold that the rezone application process was a substantial burden. Rather, the court held that a substantial burden occurred when the rezone was denied based solely upon the Council's misunderstanding regarding the application of state property law. *Id.* The filing of new land use applications and searching for different parcels that the City of Mercer Island draws attention to were simply faulty suggestions for alleviating the burden which had already been established. *Id.* at 901. Consistent with *Sts. Constatine*, the City of Mercer Island

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<sup>17</sup> The Washington Supreme Court held that the City of Woodinville “may not outright deny consideration of the temporary use.” *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 644, 211 P.3d 406 (2009) (emphasis). However, the Court did not attempt to determine whether the City was required to actually allow the encampment. This is an important distinction. The Appellants in the present matter do not deny that the City of Mercer Island was required to at least consider the encampment, which it did for two years. The Appellants are only claiming that such a decision should have followed the procedures specified in the Municipal Code, just as Woodinville was required to consider the temporary use application in accord with the procedure required by the local code for considering temporary uses. *Id.* Whether or not such encampments must be allowed despite violating neutral zoning laws is an entirely different matter.

should have required a rezone request or amended the Code, rather than entering into an illegal contract.

The position of the City in this case is disingenuous. The City attorney analyzed RLUIPA issues and First Amendment in an early version of the temporary use agreement and adopted a conclusion which is directly contrary to that which it is advancing to this Court. The draft of that agreement stated that “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 City encampments for homeless or other persons on Church property.” *See* March 31, 2009 Koler Declaration, Ex. 1., CP 229.

Additionally, even if this court believes that RLUIPA required the City to allow the encampment, RLUIPA does not bar the appellants’ § 1983 claims.

#### **VIII. FINDINGS OF FACT IN TRO ORDER HAVE NO BEARING ON THE SUMMARY JUDGMENT**

The City notes that unchallenged findings of fact in the trial court’s TRO Order are verities on appeal. However, the TRO Order is not before the court because the Appellant has not appealed the Order. Summary judgment and a temporary restraining order are decided under different legal standards. Granting a restraining order is a matter within the discretion of the court whereas a summary judgment is determined with reference to the governing law. *See* CR 65. Thus, the findings and conclusions entered by the court in the context of a temporary restraining order would have no bearing on a summary judgment decision which addressed entirely different issues.

## IX. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, the Association asks this Court to reverse the decision of the trial court because it failed to view evidence and evidentiary inferences in a light most favorable to the nonmoving party, committed legal errors discussed above and granted summary judgment when facts were in dispute about adequate notice and arbitrary conduct. This case should be remanded to the trial court for trial on Appellants' due process declaratory judgment and § 1983 claims.

DATED this 7 day of December, 2009.

RESPECTFULLY submitted,

By:

  
\_\_\_\_\_  
JANE RYAN KOLER, WSBA 13541

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Appellant