

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

BRIEF OF RESPONDENT CITY OF MERCER ISLAND

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF THE CASE.....1

II. COUNTER-STATEMENT OF THE CASE2

 A. Events Leading up to Approval of the TUA.....2

 B. Substantive Terms of the TUA5

 C. Appellant’s Lawsuit and Claims.....7

 D. No Appeal or Request for Review Under LUPA.....8

 E. Procedural History/Cross-Motions for Summary Judgment.....9

III. ISSUES PRESENTED.....10

IV. LEGAL ARGUMENT.....10

 A. Unchallenged Findings of Fact in the Trial Court’s
TRO Order are Verities on Appeal10

 B. The Trial Court Properly Dismissed the Entirety of
Appellant’s Lawsuit Based on Appellant’s Admitted
Failure to Seek Relief Pursuant to the State Land Use
Petition Act....11

 C. The TUA is a Land Use Decision Subject to LUPA.....13

 D. The TUA is not a “Contract”17

 E. Even if the Court Accepted Appellant’s Contention
that the TUA is a “Contract,” LUPA Still Applies18

 F. Even Illegal, Unlawful or Procedurally Defective Land
Use Decisions are Barred if No Timely LUPA Appeal
is Made.....19

G.	Once the 21-Day Appeal Period Under LUPA Expires, a Land Use Decision or Action Becomes Final, Valid and Binding.....	21
H.	Appellant’s Due Process and 42 U.S.C. § 1983 Claims Constitute an Unauthorized Collateral Attack on an Unchallenged – And now Valid and Time-Barred – Land Use Decision.....	21
	1. Appellant’s <i>Procedural</i> Due Process Claim is Explicitly Barred by the Very Case on Which it Relies	25
	2. Appellant’s <i>Substantive</i> Due Process Claim is Also Barred by <i>Asche</i> and LUPA	27
	3. 42 U.S.C. § 1983 Damage and § 1988 Fee Claims.....	28
I.	Even if the Court Finds that LUPA is not Applicable, Appellant’s Remaining Due Process and 42 U.S.C. § 1983 and § 1988 Claims Fail on their Merits as a Matter of Law	29
	1. 42 U.S.C. § 1983 Claim Creates no Substantive Enforceable Rights, and Is not an Independent Claim.....	30
	2. Introduction to Appellant’s “Due Process” Claim.....	31
	3. Substantive Due Process	32
	4. The City’s Actions Comply With Substantive Due Process Standards	36
	a. The City’s General Power Under State Constitution and Delegated from the Legislature.....	37
	b. The TUA was Required Under the RLUIPA.....	40

c.	The TUA was Required Under State Law and the Recent Decision In <i>City of Woodinville v. Northshore United Church of Christ</i>	40
5.	Procedural Due Process	45
a.	Appellant Misstates the Standard of Review; Lack of Proper Notice is a Question of Law Reviewed <i>de novo</i>	45
b.	No Federal Right has Been Deprived to Support a Procedural Due Process Claim	46
c.	Appellants Have No Property Right at Stake	47
d.	There is no Procedural Due Process Violation	48
IV.	CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases

<i>Asche v. Bloomquist</i> 132 Wn. App. 784, 133 P.3d 475 (2006).....	12, 13, 16, 21, 25, 26, 27, 28
<i>Associated Petroleum Products v. Northwest Cascade, Inc.</i> 149 Wn. App. 429, 203 P.3d 1077 (2009)	45
<i>Bart v. Telford</i> 677 F.2d 622 (7th Cir. 1982)	30
<i>Berst v. Snohomish County</i> 114 Wn. App. 245, 57 P.3d 273 (2003)	18
<i>Blum v. Yaretsky</i> 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).....	35
<i>Branson v. Port of Seattle</i> 152 Wn.2d 862, 101 P.3d 67 (2004)	39
<i>Burns v. City of Seattle</i> 161 Wn.2d 129, 164 P.3d 475 (2007)	38
<i>Chapman v. Houston Welfare Rights Organization</i> 441 U.S. 600 (1979)	31
<i>Chelan County v. Nykreim</i> 146 Wn.2d 904, 52 P.3d 1 92002.....	12, 16, 20, 21, 23
<i>City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.</i> 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003)	37

<i>City of Seattle v. Megrey</i> 93 Wn. App. 391, 968 P.2d 900 (1998).....	11
<i>City of Woodinville v. Northshore United Church Of Christ</i> 166 Wn.2d 633, 211 P.3d 406 (2009).....	30, 41
<i>Clemente v. United States</i> 766 F.2d 1358 (9th Cir. 1985)	46
<i>Collins v. Harker Heights</i> 112 S.Ct. 1061 (1992)	31
<i>County of Sacramento v. Lewis</i> 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043)	37
<i>DeShaney v. Winnebago County Dep’t of Soc. Serv.</i> 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)	35
<i>DeTray v. City of Olympia</i> 121 Wn. App., 90 P.3d 1116 (2004)	16
<i>Dodd v. Hood River County</i> 59 F.3d 852 (9th Cir. 1995)	36
<i>First Assembly of God of Naples, Florida, Inc. v. Collier County, Fla.</i> 20 F.3d 419, (11th Cir. 1994)	46, 47, 48
<i>Furfaro v. Seattle</i> 144 Wn.2d 363, 27 P.2d 1160 (2001)	31

<i>Gagliardi v. Village of Pawling</i> 18 F.3d 188 (2nd Cir. 1994)	35
<i>Gini v. Las Vegas Metro. Police Dep't.</i> 40 F.3d 1041 (9th Cir. 1994)	35
<i>Goad v. Hambridge</i> 85 Wn. App. 98, 931 P.2d 200 (1997).....	30
<i>Gontmakher v. City of Bellevue</i> 120 Wn. App. 365, 85 P.3d 926 (2004)	25
<i>Goss v. Lopez</i> 419 U.S. 565, 95 S.Ct., 42 L.Ed.2d 725 (1975)	48
<i>Greater Harbor 2000 v. City of Seattle</i> 132 Wn.2d 267, 937 P.2d 1082 (1997)	39, 45
<i>Grundy v. Thurston County</i> 155 Wn.2d 1, (2005)	24
<i>Grundy v. Brack Family Trust</i> 116 Wn. App. 625, 67 P.3d 500 (2003).....	27
<i>Habitat Watch v. Skagit County</i> 155 Wn.2d 397, 120 P.3d 56 (2005).....	12, 13, 16, 20, 21, 23, 26, 27, 28
<i>Harris v. Birmingham Board of Education</i> 817 F.2d 1525 (11th Cir. 1987)	47
<i>Herrington v. Spokane County</i> 128 Wn. App. 202, 114 P.3d 1233 (2005)	27, 29

<i>Isla Verde Intl. Holdings, Inc. v. City of Camas</i> 146 Wn.2d 740, 49 P.3d 867 (2002)	16
<i>James v. Kitsap County</i> 154 Wn.2d 574, 115 P.3d 286 (2005)	16, 20, 21, 23, 25
<i>Mower v. King Co.</i> 130 Wn. App. 707, 125 P.3d 148 (2005)	25
<i>North Pacifica LLC</i> 526 F.3d 478 (9th Cir. 2008)	36
<i>NRLB v. Oklahoma Fixture Co.</i> 79 F.3d 1030 (10th Cir. 1996)	45
<i>Peste v. Mason County</i> 133 Wn. App. 456, 136 P.3d 140 (2006).....	28, 29
<i>Post v. City of Tacoma, Dept. of Public Works, Bldg. & Land Use Services Div.</i> 140 Wn. App. 155, 165 P.3d 37 (2007).....	20, 21, 23, 28, 29
<i>Project Patch Family Therapy Center v. Klickitat County Board of Adjustment</i> 2008 WL 906078 (W.D. Wash. 2008)	28
<i>Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus.</i> 159 Wn.2d 555 (2007)	46
<i>Robel v. Roundup Corp.</i> 148 Wn. 2d, 59 P.3d 611 (2002).....	11

<i>Robinson v. City of Seattle</i> 119 Wn.2d 34, 830 P.2d 318 (1992)	31
<i>Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin</i> 396 F.3d 895 (7th Cir. 2005)	44
<i>Samuels Furniture v. Ecology</i> 147 Wn.2d 440, 54 P.3d 1194 (2002)	12, 20, 21, 23
<i>Shanks v. Dressel</i> 540 F.3d 1082 (9th Cir. 2008)	32, 33, 34, 35, 36, 45, 46
<i>Shaw v. City of Des Moines</i> 109 Wn. App. 896, 37 P.3d 1255 (2002)	24, 28
<i>Sintra, Inc. v. Seattle</i> 119 Wn.2d 1, 829 P.2d 765 (1992)	31
<i>Skamania County v. Columbia River Gorge Commission</i> 144 Wn.2d 30, 26 P.3d 241 (2001)	20, 21, 23
<i>Southwick, Inc. v. City of Lacey</i> 58 Wn. App. 886, 795 P.3d 712 (1990)	37
<i>State ex rel. Schillberg v. Everett Dist. Justice Court</i> 92 Wn.2d 106, 594 P.2d 448 (1979)	38
<i>State v. Houvener</i> 145 Wn. App. 408, 186 P.3d 370 (2008)	11
<i>State v. Moore</i> 161 Wn.2d 880, 169 P.3d 469 (2007)	11

<i>Storedahl and Sons v. Clark County</i> 143 Wn. App. 920, 180 P.3d 848 (2008).....	15
<i>Tapps Brewing Company, Inc., et al. v. City of Sumner</i> W.D. Wash. 2007, 482 F.Supp.2d 1218 (2007).....	18, 19
<i>Twin Bridges Marine Park v. Department of Ecology</i> 162 Wn.2d 825, 175 P.3d 1050 (2008)	18, 19, 21
<i>United States v. Edge Broadcasting</i> 519 U.S. 418	39
<i>Weeden v. San Juan County</i> 135 Wn.2d 678, 98 P.2d 273 (1998)	39, 44
<i>Wenatchee Sportsman v. Chelan Co.</i> 141 Wn.2d 169, 4 P.3d 123 (2000)	12, 15, 16, 20, 21, 23
<i>West Farms Assocs. V. State Traffic Comm'n</i> 951 F.2d 469 (2d Cir. 1991)	35
<i>Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima</i> 122 Wn.2d 371, 858 P.2d 245 (1993)	39
<i>Zinerman v. Burch</i> 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).....	48
<u>Statutes</u>	
RCW 35A.11.010.....	38
RCW 35A.01.010.....	38

RCW 36.70C.130(1)20, 24

42 U.S.C. § 1983.....7, 8, 9, 28, 29, 30, 31, 35, 41

42 U.S.C. § 19889

Other

2A Eugene McQuillin, The Law of Municipal Corporations39

Religious Land Use and Institutionalized Persons Act.....40 , 42, 43, 44

Washington State Constitution Article I, § 1141, 42, 43

I. INTRODUCTION AND SUMMARY OF THE CASE

This case involves a challenge by a non-profit organization comprised of a few Mercer Island citizens (“group”) challenging a land use approval between the City of Mercer Island (“City” or “Mercer Island”), the Mercer Island United Methodist Church (“Church”), and a non-profit organization known as SHARE/WHEEL. The Church invited SHARE/WHEEL, organizer and manager of “Tent City 4,” to establish a Tent City encampment for homeless persons on the Church’s property for three months beginning August 5, 2008. The Church’s pastor, congregational leaders, and SHARE/WHEEL signed a Temporary Use Agreement (“TUA”), with the City Council unanimously approving it following a land use process which included an open public meeting, at which members of the group attended and commented. The TUA was the City’s land use decision, and both permitted the use of the Church’s property for the encampment and imposed specific land use regulations and conditions for use of the property. CP 537-538, 719-721, 723-725.

The neighborhood group sued the City, Church, Tent City 4 and SHARE/WHEEL claiming that the TUA was unauthorized and wrongfully issued, and seeking damages and attorneys’ fees against the City for issuance of the approval. The Trial Court denied the group’s request for a temporary restraining order and a preliminary injunction, and then

dismissed the group's lawsuit, finding that its failure to seek review under LUPA barred all of its claims. Additionally, the Court found that notwithstanding the group's failure to seek review under LUPA, its due process and § 1983 damage claims should be dismissed as a matter of law.

The group now appeals, spending less than eight pages of its 50-page Brief addressing the dispositive issue of its failure to seek review pursuant to LUPA. Instead, the group diverts the Court's attention to a discussion of the merits of its due process and § 1983 claims. The group's Brief also ignores a new and relevant decision of the State Supreme Court.

The Trial Court properly found that LUPA applied to the TUA, and that the Appellant's failure to seek review pursuant to LUPA barred its claims. The Trial Court also properly found that notwithstanding failure to seek review under LUPA, the group's remaining claims failed on their merits. This Court should affirm in all respects the Trial Court's summary judgment decision entered on April 24, 2008.

II. COUNTER-STATEMENT OF THE CASE

A. Events Leading up to Approval of the TUA

The Church first approached the City to explore options to allow it to host a Tent City encampment in spring 2006. CP 719. Thereafter, for about two years, the Church, the City and SHARE/WHEEL discussed options for allowing the Tent City encampment while ensuring that all

City land use regulations and codes were complied with and that the public health, safety and welfare of the City was ensured. CP 539-540; 719-726. Because the City's existing Municipal Code did not expressly contemplate a "tent city"-type encampment or otherwise expressly authorize such uses, and to comply with federal and state constitutional and statutory requirements for accommodating religious activities, the City, Church and SHARE/WHEEL -- at the request of the Church -- determined that the most appropriate means of accomplishing the parties' goals was through a "Temporary Use Agreement" -- a form of land use approval. A TUA would address land use regulation, permitting and zoning issues that would best serve the Church and Tent City 4, and would ensure that the public health, safety and welfare of Mercer Island citizens was protected, CP 537-540, 714-717, and was intended to supplement the City's land use authority to allow for the limited-duration Tent City. *Id.*

The Church came to the City applying to use its property for the Tent City encampment; the City did *not* solicit such use by the Church or SHARE/WHEEL. CP 539-540, 714-717, 719-721, 723-724. Prior to approval of the TUA on June 16, City staff and members of the Mercer Island Clergy Association ("MICA") discussed the possibility of Tent City coming to Mercer Island. In the spring of 2007, MICA announced its intention for one of Mercer Island's congregations to invite a Tent City

encampment. MICA agreed that, through a binding land use document, the City would be assured that all City codes are respected and regulatory requirements met. CP 539, 719-721, 723-724. In mid-May 2008, MICA leadership invited City staff to meet with a newly-appointed Tent City subcommittee as well as the pastor of the Church, the host congregation, and at that meeting City staff reviewed the history of the previous discussions, and reopened the dialog about specific terms of the Agreement. CP 539-540. Over the following two weeks, the TUA was drafted, discussed with the Church and SHARE/WHEEL, revised and signed by their representatives. *Id.*

Notice of the Council's forthcoming deliberation and possible approval of the TUA was published in the *Mercer Island Reporter* Newspaper on June 11, 2008. CP 539, 668, 724. The notice was proper, timely and in full conformance with Mercer Island City Council meeting notice requirements.¹ CP 1018-1020. During the appearances section of the June 16 Council Meeting, approximately 26 persons spoke to the Council about the TUA and Tent City. Ms. Tara Johnson, a representative of the Appellant, testified at the public meeting, as did Christine Oaks,

¹ At the trial court level, the Appellant did not challenge this notice, nor did the group claim that its members did not know of the hearing or could not participate in it. Indeed, representatives of the Appellant *did* appear and *did* speak during the City Council meeting at which the TUA was discussed. Counsel for the Appellant confirmed that the group did have notice and an opportunity to be heard. CP 539, 668, 671-672, 674-677, 777-778, 798, 823.

wife of Steve Oaks, also a group member. CP 539, 668, 679-698. Several residents who have continued to be outspoken in their opposition to Tent City 4 also expressed themselves to the Council at this meeting. CP 668, 674-677, 724-725. After citizen comments and discussion, the Council *unanimously* approved the TUA, with one amendment. CP 668. *Id.*

B. Substantive Terms of the TUA

In preparing the TUA and working with City staff as to conditions that the City needed to require to protect its residents from any impacts of the encampment, the City Attorney looked at the various consent decrees, agreements, ordinances and permits from other jurisdictions over the last several years. She also discussed this issue with legal counsel from the various jurisdictions. CP 538-540. Based on the extensive litigation involving Seattle and other Eastside communities in the past, the City determined that it was unlikely to prevail on preventing such an encampment if the Church invited Tent City 4. CP 538-540, 719-721. The City also determined that it could obtain more favorable conditions and protections to the City if it approved a land use permit with SHARE/WHEEL and the Church, including warrant, sex offender checks, and hold harmless/indemnity provisions. CP 537-567.

The TUA was intended to act as a binding land use approval among the City on behalf of its citizens, the Church and SHARE/WHEEL.

CP 714-717, 719-726, 538-539. The form and content of the TUA was similar to contract rezones, development agreements, conditional or special use permits, and other land use approvals which set forth terms, conditions and uses of a specific parcel of property. Among the many land use terms, conditions and limitations in the TUA are the following:

- There will not be more than one encampment on Mercer Island in a calendar year at the Church, and the duration of any stay will not exceed three months.
- The location and visual screening of the camp will afford privacy for Tent City residents and neighbors.
- No more than 100 people will stay at the camp.
- The church will manage parking at weekly services to minimize spillover onto neighborhood streets.
- No children under the age of 18 will reside in the Tent City encampment.
- A stringent code of conduct will be enforced and SHARE/WHEEL and the Church will comply with all lawful City and State codes.
- The identity of all camp residents will be verified, and warrant and sex offender status of prospective residents will be checked. Any positive results will be reported to the MI Police Department.
- No sex offenders will be allowed to stay at the encampment.
- The Church and Tent City managers will allow regular inspections by the City (Fire, Police and DSG) and the King County Health Department.
- The Church and SHARE/WHEEL agreed to a hold harmless and indemnification provision.

CP 543-551, 716.²

The TUA was approved by the City Council to protect the health, safety and well-being of Mercer Island citizens. CP 543-544, 719-726. The TUA contains numerous conditions and requirements typically found

² A copy of the TUA is attached to this brief as *Appendix A*.

in City zoning, land use and land regulation codes. It was intended to supplement existing land use regulations.³ CP 537-541, 714-717.

C. Appellant's Lawsuit and Claims

On July 10, 2008, the group (Appellant) filed its Complaint seeking an injunction and TRO, and asserting damage claims based on nuisance, violation of due process and 42 U.S.C. § 1983.⁴ CP 1-9. The Appellant amended the Complaint on July 18 to add a claim for “*ultra vires* action.”⁵ Additional papers in support of Appellant’s motion for a preliminary injunction were also filed on July 18. As of July 25, 2009, Appellant had failed to personally serve *any* defendant with its pleadings or motion papers. CP 568-71.

On July 28, the Court heard argument on the Appellant’s request for a temporary restraining order (“TRO”) and a preliminary injunction. CP 20-41, 342-364, 372-394, 407-417.⁶ The Court denied Appellant’s TRO and preliminary injunction requests, finding that the Appellant:

- Had not shown a likelihood of prevailing on the merits on its claim;
- Failed to show a well grounded fear of immediate

³ After approval of the TUA, the Church held an informational neighborhood meeting roughly a month prior to establishment of Tent City 4, with notice of the meeting published in the *M.I. Reporter* and delivered to nearby residents two weeks before the meeting. CP 716-717. *Id.*

⁴ The Appellant was not a valid legal entity at the time of filing the Complaint on July 10. CP 530-531. The entity did not come into existence until July 16, 2008. *Id.*

⁵ Hereinafter, all references are to Plaintiff’s First Amended Complaint dated July 18, 2008 (“*Complaint*”).

⁶ A copy of the Court’s August 4, 2008 TRO Order (CP79-86) is attached as *Appendix B*.

invasion of its members' legal rights or that they would suffer irreparable injury as a result of an encampment pursuant to the June 16, 2008 Temporary Use Agreement between Defendants; and

- Failed to show that it would suffer substantial harm or irreparable injury from the encampment established pursuant to the June 16, 2008 Temporary Use Agreement between Defendants. . . .

CP 79-86. The Appellant has never appealed from or sought any kind of review of the Court's TRO/preliminary injunction Order.

Following the Court's dismissal of Appellant's TRO and injunction claims, the only claims remaining were: (1) A due process claim; (2) a nuisance claim; (3) a claim for damages predicated upon 42 U.S.C. § 1983; and (4) a claim of "*ultra vires* action." CP 74-77.⁷

D. No Appeal or Request for Review Under LUPA

As discussed below, LUPA is the exclusive *and mandatory* procedure to challenge land use decisions such as the TUA. Failure to seek review pursuant to LUPA within the 21-day appeal period bars all claims and causes of action related to or arising out of the land use decision at issue. The Appellant has never sought relief under LUPA.⁸

Here, The City Council made its decision on the TUA on June 16,

⁷ Following requests by the City's counsel, the Appellant subsequently dismissed its nuisance and "*ultra vires* claims." CP 182. In its response to the City's motion for summary judgment (discussed below), the Appellant's counsel confirmed that "the only claims which it is now pursuing are its Due Process Claim and its § 1983 claim." *Id.*

⁸ Appellant's counsel has admitted that she knew of the LUPA process (in place since 1995) and considered it here before filing suit, but that she determined that it was not applicable. CP 777-778, 797.

2008. The Complaint in this matter – which did NOT contain a LUPA petition (or even a reference to LUPA) -- was filed on July 10, 2008, three days *after* the 21-day LUPA appeal period had passed.⁹

E. Procedural History/Cross-Motions for Summary Judgment

On August 27, 2008 the City filed its motion for summary judgment, seeking dismissal of Appellant's amended complaint based on its failure to seek review under LUPA. CP 622-666. The City's motion sought dismissal with prejudice of *all* remaining claims and causes of action in the amended complaint. CP 624. The Defendants joined in with the City's motion. CP 727-728, 919-935.

On the due date for Appellant's response to the City's pending summary judgment motion, the group filed its response, CP 182-205, and contemporaneously filed its own cross-motion for summary judgment. CP 206-218. At Appellant's request, and over objection of the Defendants/Respondents, the City's and Appellant's motions for summary judgment were consolidated and continued (on several occasions) to April 24. CP 995-996. The City filed its response to

⁹ While Appellants in their Opening Brief claim that "the City, as a litigation tactic, belatedly characterized the City decision approving the contract as a land use action ..." (Opening Brief at 12), in fact the City raised the issue of Appellant's non-compliance with LUPA and the status of the TUA as a land use decision early on in the case, and continued to raise it throughout the litigation. In its answer filed on August 22, 2008, the City specifically asserted the defense of Appellant's failure to seek review pursuant to LUPA, and that failure to challenge the TUA under LUPA barred its due process and § 1983/§ 1988 claims. CP 618-620.

Appellant's cross-motion for summary judgment on April 13, in which the Church, Tent City IV and SHARE/WHEEL joined. CP 997-1038, 1055-1058, 1051-1054, 838-899.

The trial court Judge, Michael Fox, heard argument on the cross-motions for summary judgment on April 24 and granted, in its entirety, the City's motion for summary judgment predicated on Appellant's failure to seek relief pursuant to LUPA, and on the merits of Appellant's due process/§1983 damage claims. CP 1066, 315-324. The Court also denied Appellant's cross-motion for summary judgment.¹⁰ *Id.*

III. ISSUES PRESENTED

- A. Whether Appellant was required to utilize the procedures under LUPA, Ch. 36.70C RCW as the exclusive method of challenging or seeking review of the June 16, 2008 TUA?
- B. Whether Appellant's failure to seek review pursuant to the Land Use Petition Act, Ch. 36.70C RCW, bars its remaining claims for review and claims for damages or other relief, since the TUA is now final, valid, binding, and cannot be judicially challenged?
- C. Whether, notwithstanding Appellant's failure to seek review of the TUA pursuant to LUPA, the trial court properly dismissed Appellant's remaining due process and §1983 claims on their merits, based on the undisputed evidence before the Court.

IV. LEGAL ARGUMENT AND AUTHORITY

- A. **Unchallenged Findings of Fact in the Trial Court's TRO Order are Verities on Appeal**

¹⁰ A copy of the Court's Order on the cross-motions for summary judgment is attached to this brief as *Appendix C*.

An appellate court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence in the record. *City of Seattle v. Megrey*, 93 Wn.App. 391, 394, 968 P.2d 900 (1998). Unchallenged findings of fact are verities on appeal. *State v. Houvener*, 145 Wn.App. 408, 415, 186 P.3d 370 (2008); *State v. Moore*, 161 Wn.2d 880, 884, 169 P.3d 469 (2007); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

In this case, the Appellant has not challenged *any* of the findings of fact contained in the Court's August 4, 2008 TRO Order. Appellants have not appealed or challenged any part of this Order. Accordingly, all of the findings made by the Court in its TRO Order are verities on appeal.¹¹ Many of these findings support dismissal of Appellant's claims.

B. The Trial Court Properly Dismissed the Entirety of Appellant's Lawsuit Based on Appellant's Admitted Failure to Seek Relief Pursuant to the State Land Use Petition Act

In 1995, the Legislature enacted the Land Use Petition Act ("LUPA") with the intent to:

... reform the process for judicial review of land use decisions made by local jurisdictions, by establishing *uniform, expedited appeal procedures* and *uniform criteria* for reviewing such decisions, in order to provide consistent, predictable, and *timely judicial review*.

RCW 36.70C.010 (emphasis added). With few enumerated exceptions

¹¹ Even if the Appellant had challenged the TRO Order substantial evidence in the record still supports both the findings and the decision on the merits.

(none applicable here), LUPA is the *exclusive* means of judicial review of land use decisions made by local government decision-makers, such as city councils, hearing examiners, administrative personnel, executive officers. RCW 36.70C.020(1) and .030(1). *See also, Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Samuels Furniture v. Ecology*, 147 Wn. 2d 440, 449, 54 P.3d 1194 (2002).

LUPA establishes a mandatory 21-day deadline for appealing land use decisions and actions of local government land use authorities. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005); *Samuel's Furniture v. Ecology*, *supra.*; *Wenatchee Sportsman v. Chelan Co.*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000) (once 21-day appeal period in LUPA expires, the decision became "valid" and the opportunity to challenge it is no longer available). As the Court of Appeals noted in *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006):

To serve the purpose of timely review, LUPA provides ***stringent deadlines***, requiring that a petitioner file a petition for review within 21-days of the date of the Land Use Decision. RCW 36.70C.040(3).

Id., 132 Wn. App. 795 (emphasis added). Even illegal or unauthorized land use decisions codes must be challenged under LUPA within the 21-day time period. *See, e.g., Asche v. Bloomquist, supra*, 132 Wn. App. 795-796; *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005).

C. The TUA is a Land Use Decision Subject to LUPA

The City Council approved the TUA at its open public meeting on June 16, 2008, after giving proper and timely notice of that meeting. CP 537-539, 667-669, 724-725. There can be no doubt that the decision by the City Council to approve the TUA is a land use decision under LUPA.

Under LUPA, a “land use decision” is defined as:

(1) . . . a final determination by a local jurisdiction’s body or office with the highest level of 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 approval 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. . . .

RCW 36.70C.020(1). The TUA was indisputably a “final determination” by the Mercer Island City Council, and the Council is the City’s “body or office with the highest level of authority to make the determination . . .”.

The TUA falls within all three definitions of land use decision under RCW 36.70C.020(1).¹² First, the TUA is clearly the result of an application for “other government approval required by law before real property [i.e., the Church property] may be . . . used . . .”. The TUA itself makes clear that the parties were crafting a City approval for the use of Church property by Tent City 4 and SHARE/WHEEL. Moreover, it is uncontested that the Church came to the City and applied for – or requested – the land use terms and conditions that ultimately resulted in the Agreement. CP 719-721, 723-725. The result of that request was the TUA, which was the City of Mercer Island’s “approval required by law” before the Church property could be “used” for the purpose requested, *i.e.*, to host the Tent City 4 encampment. CP 537-541, 718-726. *Id.*

The TUA also falls within the second definition of land use decision under § (1)(b). It is an interpretative or declaratory “decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development,

¹² This Court can compare the form, content and effect of the TUA, attached as Appendix A hereto, to the three alternative/optional definitions of “land use decision” under LUPA in RCW 36.70C.020(1).

modification, maintenance, or use of real property [*i.e.*, the Church property].” The TUA has all of the hallmarks of a typical local government land use decision. It was made at an open public meeting following notice to the public and comment by the public. It is indisputably a “decision” – the TUA was approved following a vote of the Mercer Island City Council. It applies to a specific piece of property – the property owned by the United Methodist Church. And it applies the “zoning or other ordinances or rules” to regulate the “improvement,” or “modification” or “use” of the Church property.

Finally, the TUA also falls under subsection (1)(c) of RCW 36.70C.020, since it has the effect of an enforcement document or action by the City of Mercer Island to regulate the “improvement,” “development,” “modification,” or “use” of the Church property.

The TUA is readily analogized to a government approval for a site-specific or contract rezone (that is, a rezoning of a specific or single parcel of property with specific conditions attached), which must be challenged under LUPA, and only under LUPA. See, e.g.: *Wenatchee Sportsmen v. Chelan County*, *supra.*; *Storedahl and Sons v. Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008).

In nearly every instance in which a broad range of governmental actions relating to land permitting or conditioning, land development and

land uses and approvals have been challenged, Washington Courts have required compliance with LUPA. For example, in *Chelan County v. Nykreim*, 146 Wn.2d 904, 53 P.3d 1 (2002) the court examined whether County approval of a boundary line adjustment application issued by a county officer was a “land use decision” under LUPA. *Id.*, 146 Wn.2d 904. The court held that it was. *Id.* Courts have also uniformly found that building permits and conditions associated with them are “land use decisions” which are subject to judicial review under LUPA. *See, e.g., Wenatchee Sportsmen Association, supra; Asche v. Bloomquist, supra.*

Washington courts have also reviewed other actions and conditions associated with land use decisions under LUPA. For example, LUPA applies to special use permits; permits/approvals, which are substantially similar to the TUA at issue in this case. *See, e.g., Habitat Watch v. Skagit County, supra.* It also applies to conditional use permits – *De Tray v. City of Olympia*, 121 Wn. App., 777, 90 P.3d 1116 (2004).

The validity of *conditions* imposed on the issuance of permits or land use decisions is also subject to review under LUPA. *Isla Verde Intl. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *James v. Kitsap County*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005).¹³

¹³ In *James*, the Supreme Court rejected a developer’s claim that LUPA did not apply to imposition of impact fees and costs as a condition of development. The Supreme Court

D. The TUA Is Not A “Contract”

Appellant contends that the TUA is a “contract” which falls outside the ambit of LUPA.¹⁴ However, Appellant has failed to provide a single case establishing that 1) a temporary use agreement is *not* a land use decision as defined by LUPA, and 2) even if the TUA could be construed as a contract, such contracts are outside the scope of LUPA. Instead, Appellant relies solely upon baseless assertions about the language of RCW 36.70C and case law which is wholly inapposite to the issue at hand. An analysis of the TUA in conjunction with RCW 36.70C and case law interpreting the statute reveals that it falls squarely within the definition of a land use decision, and thus is subject to LUPA’s 21 day limitation.¹⁵

Appellant is faced with a major procedural barrier (LUPA’s 21 day period of limitations), which precludes it from prevailing on its substantive claims. The Court can consider Appellant’s substantive claims if, and only if, it successfully proves that the TUA at issue is *not* a land use decision. Because Appellant has failed to provide *any* authority supporting that the TUA is not a land use decision, the inquiry ends before

disagreed, finding that LUPA clearly applied and reiterated that LUPA is the “exclusive means of judicial review of land use decisions.”

¹⁴ Appellant relies heavily on the art of repetition, making well over 50 references to the word “contract” in its Opening Brief. However, no matter how many times the TUA is called a “contract,” such references do not make it so. The nature of the document still meets the definition of a “land use decision.” See Appendix A, and *supra*. at §§ IV.A, B.

¹⁵ Even if this Court were to accept Appellant’s erroneous construction of the TUA as a “contract,” it *still* falls within the ambit of LUPA. See *infra*, §IV.E.

reaching the merits of Appellant’s substantive claims. Ironically, Appellant devotes but eight pages of briefing (out of 50) to the dispositive issue in this case: whether the TUA was in fact a land use decision.¹⁶

E. Even If The Court Accepted Appellant’s Contention That The TUA Is A “Contract,” LUPA Still Applies

Assuming *arguendo* this Court accepts Appellant’s unsupported argument that the TUA at issue is a “contract,” the document would *still* fall within the ambit of LUPA, and thus Appellant’s claims fail. First, state and federal courts have interpreted LUPA to apply to contracts and agreements. *See, e.g., Twin Bridges Marine Park v. Department of Ecology*,¹⁷ 162 Wn.2d 825, 175 Pl.3d 1050 (2008), and *Tapps Brewing*

¹⁶ Notably, the only case cited to within those pages is *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (2003), *review denied*, 150 Wn.2d 1015 (2003), which held that the county’s imposition of a Forest Practices Act building moratorium was not a land use decision under the plain language of LUPA. *Opening Brief*, p. 14. Clearly, the TUA at issue here has nothing whatsoever to do with a moratorium. However, Appellant attempts to draw an unsuccessful analog—as no other authority was found to support its position. Appellant also uses *Berst* to establish that LUPA does not apply when an action involves neither a direct nor a collateral attack on a land use decision. This argument is inapplicable here, where the land use decision is clearly being attacked.

¹⁷ In *Twin Bridges Marine Park*, the developer got into a dispute with local authorities and the Department of Ecology, which dispute was resolved by an *agreement* by which the parties abandoned various land use appeals, and the county issued certain permits to the developer pursuant to the agreement. *Id.* at 832-33. Later, Ecology denied the validity of the permits and issued additional penalties to the developer, which the developer appealed. The Supreme Court found that the parties’ actions *were* subject to LUPA, and that it was incumbent upon Ecology to follow LUPA’s mandatory procedures. *Id.* at 843. Ecology, like the Appellant here, failed to follow LUPA’s procedures and, thus, its claims became time-barred. *Id.* at 846-47.

Co., Inc. v. City of Sumner,¹⁸ W.D. Wash. 2007, 482 F.Supp. 2d. 1218 (2007).

Second, the Legislature has determined that contracts, such as development agreements, are in fact governed by LUPA. RCW 36.70B.200 provides:

A county or city shall only approve a development agreement by ordinance or resolution after a public hearing. The county or city legislative body or a planning commission, hearing examiner, or other body designated by the legislative body to conduct the public hearing may conduct the hearing. If the development agreement relates to a project permit application, ***the provisions of chapter 36.70C RCW shall apply to the appeal of the decision on the development agreement.***

(emphasis added). Under RCW 36.70B.170(4), the execution of a development agreement is a proper exercise of county and city police power and ***contract authority***. This explicit language undermines Appellant's attempt to characterize the TUA as a document that cannot possibly fall within the purview of LUPA.

F. Even Illegal, Unlawful or Procedurally Defective Land Use Decisions are Barred if No Timely LUPA Appeal is Made.

¹⁸ In *Tapps Brewing, Co.*, the Court found that an exchange of letters between the Plaintiff (property owner) and City of Sumner staff constituted an offer by the City, ". . . which the Appellants accepted by performance." *Id.* at 482 F. Supp. 2d at 1231 and 1224. The Court found that the pipe upgrade requirement at issue in the case was proposed through letters and agreed to by the property owner, and ". . . was an exchange made for consideration . . .", and essentially a contract or agreement. *Id.*, 482 F. Supp. 2d at 1232. The Court dismissed claims for damages and other remedies because Plaintiffs failed to appeal the letters-agreement under LUPA. *Id.* at 1232-33.

In its Brief, the Appellants repeatedly chastise the City (and the other Respondents) for employing an allegedly unlawful procedure. CP 74. However, LUPA contemplates these exact allegations and challenges. *See*, RCW 36.70C.130(1)(a). LUPA then subsumes *all* of the Appellant’s remaining allegations. Accordingly, if the Appellant had sought review under LUPA and had proven its case under one or more of the standards in RCW 36.70C.130(1), it would have been entitled to relief.

In *Habitat Watch v. Skagit County*, *supra.*, Skagit County *improperly* granted a special use permit renewal. In doing so, the County admittedly failed to provide notice and a public hearing. *Id.* at 155. Because Habitat Watch did not get notice that there was a decision to be challenged, it urged that its non-compliance with LUPA should be excused. The Supreme Court disagreed, holding: “Even illegal decisions must be challenged in a timely, appropriate manner.” *Id.* at 407. LUPA, as well as its strict procedural timeline, were held applicable and barred Habitat Watch’s claims.¹⁹

¹⁹ *See, also: Post v. City of Tacoma*, 140 Wn. App. 155, 165 P.3d 37; *James v. Kitsap County*, *supra*, 154 Wn.2d at 590 (challenge to legality of impact fee subject to LUPA); *Habitat Watch*, *supra*, 155 Wn.2d at 407 (“even illegal decisions must be challenged in a timely, appropriate manner.”); *Chelan County v. Nykriem*, *supra*, 146 Wn.2d at 926 (boundary line adjustment which was granted in violation of the law became valid once opportunity to challenge it under LUPA passed); *Samuel’s Furniture v. State Dept. of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002) (promoting policy of administrative finality to avoid unjust results); *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 48, 26 P.3d 241 (2001) (same); *Wenatchee Sportsmen*, *supra*, 141 Wn.2d at 174 (decision of questionable legality not subject to challenge outside of LUPA).

Since Appellant failed to seek review under LUPA, its challenges to the TUA *and* related damages claims are barred.

G. Once the 21-Day Appeal Period Under LUPA Expires, a Land Use Decision or Action Becomes Final, Valid and Binding

Representatives of Appellant had actual notice of the public meeting at which the TUA was approved, actually attended this meeting, and vigorously participated in it. The 21-day appeal period expired, on July 7, 2008. The Appellant never filed a LUPA petition, nor has Appellant ever attempted to seek relief pursuant to LUPA. CP 1-9, 70-78.

Once the 21-day LUPA appeal period has passed, a land use decision becomes “final” and is binding. More importantly, the law deems the decision to be *valid and lawful*. *Wenatchee Sportsman, supra*, 141 Wn.2d at 182 (if there is no challenge to the land use decision pursuant to LUPA, the decision becomes “valid”); *Asche v. Bloomquist, supra*, 132 Wn. App. at 795-96 (same). It cannot thereafter be attacked either directly *or collaterally*. *Chelan County v. Nykreim, supra*; *Wenatchee Sportsmen v. Chelan County, supra*; *Twin Bridges, supra*.

H. Appellant’s Due Process and 42 U.S.C.§1983 Claims Constitute an Unauthorized Collateral Attack on an Unchallenged -- and now Valid and Time-Barred -- Land Use Decision

Appellants’ Opening Brief criticizes the City for failing to follow the Local Project Review Statute RCW 36.70(B).080 (*Opening Brief*, p. 15), violating the City code (*Opening Brief*, p. 21), and violating

Plaintiff's constitutional rights (*Opening Brief*, pp. 22-47). However, LUPA expressly contemplates every one of these allegations. RCW 36.70C.130(1)(a) provides, in pertinent part, that:

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. ***The court may grant relief*** only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The relevant standards are:

(a) ***The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process***, unless the error was harmless;

(b) ***The land use decision is an erroneous interpretation of the law***, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(e) ***The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or***

(f) ***The land use decision violates the constitutional rights of the party seeking relief.***

(Emphasis added). The fact that Appellant contends that the City acted illegally or violated its constitutional rights does not remove its claims from LUPA's reach. Indeed, LUPA subsumes *all of* Appellant's allegations and claims – including the due process and § 1983 claims.

Even if the City did, *arguendo*, act wrongfully in approving the TUA, Appellant's claims are *still* barred, as land use decisions, *even*

illegal or procedurally defective ones, become valid if not timely challenged under LUPA.²⁰ Appellant's failure to seek review of the TUA pursuant to LUPA thus bars its remaining damages and fee claims. Stated another way, the Appellant cannot collaterally attack the City's approval of the Tent City 4 encampment or the TUA because the group failed to avail itself of the exclusive and mandatory procedures under LUPA. The TUA is now final, valid and binding: it cannot be attacked under other legal theories or causes of action. No other collateral relief is available.

The Appellant seeks to make an end-run around the clear and deliberate statutory process and challenge the City's approval of the by way of various damage claims (due process, §1983, etc.). To be clear, these are damage claims asserted against a now *conclusively valid* and unassailable land use decision. Appellant cannot collaterally attack approval of Tent City 4 or the TUA through due process or §1983 claims.

Appellant argues it neither directly nor collaterally attacked the tent city "contract." *Opening Brief*, p. 22. However, Appellant contradicts its own statement throughout its Brief, referring to the TUA as an "*illegal contract*" (*i.e.* p. 47), and enumerating numerous alleged reasons for its

²⁰ See, e.g., *Post v. City of Tacoma, Dept. of Public Works, Bldg. & Land Use Services Div.*, 140 Wn. App. 155, 165 P.3d 37 (2007); *James v. Kitsap County*, *supra*; *Habitat Watch*, *supra*; *Chelan County v. Nykriem*, *supra*; *Samuel's Furniture v. State Dept. of Ecology*, *supra*; *Skamania County v. Columbia River Gorge Commission*, *supra*; and *Wenatchee Sportsmen*, *supra*.

illegality. Appellant is forced to claim that it is not directly or collaterally attacking the TUA because Washington courts have held that such attacks are improper. For example, in *Grundy v. Thurston County*, 155 Wn.2d 1, 15 (2005) the court stated the following with regard to Plaintiff's nuisance claim and failure to follow LUPA:

Such would simply be a collateral attack on the permit and would allow any party to avoid the procedural requirements of LUPA by claiming development authorized by an unchallenged permit is a "public nuisance" and later suing to abate the alleged public nuisance. By explicitly stating that LUPA is the "exclusive means of judicial review of land use decisions," RCW 36.70C.030(1), the legislature clearly did not intend for public nuisance actions premised on permit invalidity to "end run" around chapter 36.70C RCW.

If a party fails to or cannot successfully challenge a land use decision through LUPA, it *cannot* collaterally challenge that decision through pursuit of claims for damages arising out of that land use decision. "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). Thus, once the LUPA appeal is resolved, or the time limit has expired to challenge the matter under LUPA, any other claims or causes of action are "moot" and "the matter is over." *Id.* No damage claims can be brought. *Id.*; *See, also, Mower v. King Co.*, 130 Wn. App. 707, 720, 125 P.3d 148 (2005) (since underlying decision was upheld on

LUPA petition, plaintiff could not pursue his damages action); *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 374, 85 P.3d 926 (2004) (Because their LUPA petition was denied, the Gontmakhers were not entitled to additional relief in the form of damages).²¹

These cases simply articulate the common-sense proposition that a decision should first be proven “wrong” before it can inure to a damage claim. Stated another way, because the land use decision at issue here – approval of the TUA and the authorization for the Church to allow its property to be used for the Tent City 4 encampment – is now “valid” and final, there can be no basis for damages or for other relief. Appellant’s damages and fee claims fail because none of them can be predicated upon a now valid and lawful decision, which is the status of the TUA.²²

1. **Appellant’s Procedural Due Process Claim Is Explicitly Barred by the Very Case on Which it Relies**

²¹ See, also: *Asche v. Bloomquist*, *supra*, 132 Wn. App. at 799-802 (plaintiff cannot avoid the LUPA statute of limitations by seeking damages; failure to seek relief pursuant to LUPA precludes other claims); *James v. Kitsap County*, *supra*, 154 Wn.2d at 586 (decision requiring payment of impact fees was land use decision required to be challenged within 21 days; plaintiffs’ suit seeking monetary refund dismissed as untimely collateral attack).

²² Ultimately, Appellant cannot pretend that it is not making a direct and/or collateral attack on the TUA, as all of its substantive damages and fee claims flow *directly* from the document’s alleged illegality. As discussed below, Appellant’s procedural due process claim stems from its claim that the City did not provide citizens with constitutionally adequate notice. *Opening Brief*, p. 29. Appellant’s substantive due process claim stems from its claim that the City acted arbitrarily, irrationally, and *illegally*, in approving the temporary use agreement. *Opening Brief*, pp. 36-37.

Appellants rely on *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) to support its claim that the City deprived it of procedural due process in enacting the TUA. Ironically, Appellant fails to acknowledge the crux of the *Asche* court's holding: that Plaintiffs' due process claim ultimately *failed*. In *Asche*, the court evaluated a due process claim like the one raised by the Appellant here. The property owners argued – in addition to claiming a nuisance – that that County's issuance of an invalid building permit deprived them of due process. The court *agreed* that they had a due process right in preventing their view from being blocked, *Id.* at 797-98; nonetheless, it rejected the due process claim based upon “the bright-line rule” established in *Habitat Watch*. *Id.* at 798. The Court rejected the Plaintiff's due process claim because:

Our Supreme Court has established a bright-line rule in *Habitat Watch*; LUPA applies even when the litigant complains of lack of notice under the procedural due process clause. We note that Habitat Watch had been given notice and had participated in proceedings to oppose the special use permit. *Habitat Watch*, 155 Wn.2d at 402 . Then, in two instances, Habitat Watch was not given notice required by the local ordinance and therefore did not have the opportunity to challenge the special use permit's extension. *Habitat Watch*, 155 Wn.2d at 403 . The court held that despite the lack of notice, LUPA barred Habitat Watch's challenges. *Habitat Watch* , 155 Wn.2d at 401 . The court stressed that LUPA's "statute of limitations begins to run on the date a land use decision is issued," *Habitat Watch*, 155 Wn.2d at 408 , and that "even illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch* , 155 Wn.2d at 407. Given that

position, we are constrained to hold that the Asches' due process challenge fails. Having failed to file a land use petition within 21 days of the building permit's issuance, they have lost the right to challenge its validity.

Asche, 132 Wn. App. 798-99. While Appellant relies on *Asche* to persuade the Court it had an established property right, its failure to acknowledge the actual holding serves as yet another example of Appellant's failure to recognize and accept LUPA's procedural barrier.

2. **Appellant's Substantive Due Process Claim Is Also Barred By *Asche* and LUPA**

The holding in *Asche v. Bloomquist*, also bars Appellant's substantive due process claims. *See, id.* 132 Wn. App. at 799 ("... we are constrained to hold that the Asches' due process challenge fails. Having failed to file a land use petition within 21 days of the building permit's issuance, they have lost the right to challenge its validity). *See, also, Grundy v. Brack Family Trust*, 116 Wn. App. 625, 67 P.3d 500 (2003) (due process claims precluded for failure to challenge under LUPA); *Herrington v. Spokane County*, 128 Wn. App. 202, 114 P.3d 1233 (2005) (denial of substantive and procedural due process claims barred for failure to appeal land use decision under LUPA or to seek review under the same 21-day appeal period under the Shoreline Management Act, RCW

90.58.180(1)).²³

3. 42 U.S.C. §1983 Damage and §1988 Fee Claims.

Appellant's civil rights claim under 42 U.S.C. §1983 and fee claim under §1988 are also barred. The position advanced by the group is that they should be awarded money damages because the City allegedly violated their right to due process. CP 7. The analysis under LUPA, *Asche* and *Habitat Watch* is the same; since the City's actions and the TUA are now final, valid, and binding, there can be no due process violation.

Recently, in *Project Patch Family Therapy Center v. Klickitat County Bd. of Adjustment* 2008 WL 906078 (W.D. Wash. 2008), the plaintiff filed a LUPA petition and §1983 damage claims. After the defendant removed the action to federal district court, the plaintiff urged for a remand. Judge Settle agreed, basing his decision, in part, on the fact 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. Put differently, damage claims – even those which are federal in nature – are moot if the underlying land use decision is not properly challenged. This is because "if the petitioner loses the LUPA appeal, the damages case is moot and the matter is over." *Shaw v. City of*

²³ See, also, *Peste v. Mason County*, 133 Wn. App. 456, 474-76, 136 P.3d 140 (2006) (substantive due process claims barred for failure to seek review under LUPA), *Post v. City of Tacoma*, *supra*, (same).

Des Moines, supra, 109 Wn. App. at 901.

Because there is no due process violation, there can be no §1983 claim. *Herrington v. Spokane County, supra*.²⁴ See, also, *Peste v. Mason County*, 133 Wn. App. 456, 474-76, 136 P.3d 140 (2006) (claims of denial of substantive due process under the Constitution are barred for failure to seek review under LUPA); *Post v. City of Tacoma, supra*, (2007) (same).

I. Even if the Court Finds that LUPA is not Applicable, Appellant's Remaining due Process and 42 U.S.C. §1983 and §1988 Claims Fail on their Merits as a Matter of Law²⁵

Notwithstanding Appellant's non-compliance with LUPA, its due process and §1983 damage claims fail on their merits. First, under the undisputed facts before the Court, Appellant simply cannot meet the standards applicable to either a substantive or procedural due process claim. Second, in its Brief, Appellants improperly shift the burden of proof on summary judgment, alleging that the facts and reasonable inferences on *its* motion should be construed in *its* favor. *Opening Brief*

²⁴ In *Herrington*, the court rejected plaintiff's argument that he was not required to exhaust remedies (*i.e.*, file an appeal under LUPA) in order to pursue his various constitutional damage claims. Similar to Appellant here, *Herrington* had asserted damage claims under the Federal Civil Rights Act, 42 U.S.C. § `1983, alleging violations of his right to develop his property in accordance with applicable land use regulations, denial of substantive and procedural due process, in violation of equal protection. *Id.*, 128 Wn. App. at 210-15. The court rejected the claims.

²⁵ Appellant's claim that construing the TUA as a land use decision subject to LUPA "...was devised simply to deprive the Association members of their constitutional claims" (*Opening Brief* at 13) is patently absurd, and borders on a frivolous allegation. It is not supported by any evidence in the record.

at 22, 24-25.²⁶ Third, Appellant’s Opening Brief utterly ignores a key decision by the State Supreme Court (*City of Woodinville v. Northshore United Church of Christ*, discussed *infra*.) that governments must accommodate tent city encampments and cannot delay approval of such encampments.

1. 42 U.S.C. §1983 claim Creates no Substantive or Enforceable Rights, and is not an Independent Claim

The Appellant has asserted a damages claim under 42 U.S.C. §1983, ostensibly as a “stand-alone” cause of action. However, this claim creates no substantive rights and is not an independent claim or cause of action; it is entirely dependent on the success of its due process claim.

Section 1983 creates a remedy for violations of federal constitutional rights or other rights guaranteed by federal statute. In order to prevail on a Section 1983 claim, the plaintiff must prove the violation of an underlying *federal right*. 42 U.S.C. § 1983; *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). A cause of action under § 1983 rights is not established unless a *federal* constitution or statutory right has been

²⁶ “In dismissing [Appellant’s] claims, the trial court abdicated its duty to view all evidence and evidentiary inferences in a light most favorable to the non moving party.” *Opening Brief* at 24. This, of course, is not the standard on summary judgment. *Goad v. Hambridge*, 85 Wn. App. 98, 931 P.2d 200 (1997) (burden is on the moving party to establish its right to judgment as a matter of law, and the facts and reasonable inferences from the facts are considered in favor of the nonmoving party). Here, of course, on the Appellant’s summary judgment motion, Appellant had the burden of proof, and all facts and reasonable inferences from those facts were to be construed in favor of *the City* as the non-moving party. Appellant has the burdens shifted 180-degrees.

violated by a person acting under “color of state law.” *Id.*; *Furfaro v. Seattle*, 144 Wn.2d 363, 27 P.2d 1160 (2001). The violation of a right, privilege or obligation granted by a *state* law or a *state* constitution, or a local ordinance or regulation, is *not* actionable under § 1983. *Id.*

Section 1983 itself does not *create* any substantive rights. 42 U.S.C. § 1983; *Collins v. Harker Heights*, 112 S.Ct. 1061 (1992); *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992). It is merely an enabling measure that creates a private cause of action to enforce certain federal rights. *Id.*; *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992). Thus, “one cannot go into court and claim a violation of §1983 – for §1983 by itself does not protect anyone against anything.” *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

2. Introduction to Appellant’s “Due Process” Claim

Appellant claims that the TUA violated the group’s due process rights under the Fourteenth Amendment of the U.S. Constitution; however, at the trial court, Appellant never specified whether it was alleging deprivation of *substantive* or *procedural* due process, thus forcing the City and the Court to guess at which type of due “process” was allegedly denied.²⁷ Appellant has now clarified that it is making *both* a

²⁷ Given the extensive analysis required under either substantive or procedural due process, Appellant’s failure at the trial court to even *identify* which section its claim fell under again illustrates the weakness of its case. Despite its failure to clarify *substantive*

procedural and *substantive* due process challenge. No matter how they are cast, however, both types of due process challenges fail. CP 1005-1020.

3. **Substantive Due Process**

The first step in making a claim under substantive due process is to identify a specific property right that has allegedly been deprived. The recent case of *Shanks v. Dressel*, 540 F.3d 1082 (9th Cir. 2008), bears remarkable similarities to this case. In *Shanks*, the City of Spokane allowed developers to convert private homes into student housing in the City's historic district. A group of neighboring residents claimed that the City's failure to enforce applicable zoning ordinances against the developers violated their substantive due process. *Id.* The Ninth Circuit first noted that "[t]o state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Id.* at 1087. Eventually, the court affirmed dismissal of the case because plaintiff's substantive due process claim was based solely on the fact that Spokane had not followed its own zoning ordinances, and this failure did not implicate any federally-protected right: "[Plaintiff's] contrary, and erroneous, assumption that every state law violation invariably gives rise to a substantive due process claim is inconsistent with the principle that

versus procedural due process, the City briefed both types of claims, and the trial court concluded that neither had substantive merit. CP 315-324, 1005-1020.

substantive due process is not a font of tort law that superintends all official decision making.” *Id.* at 1089.

The same is true here. As in *Shanks*, the Appellant here is a group of neighboring property owners who claim that the City’s approval of a property use contrary to the City’s zoning ordinances constitutes a deprivation of Appellant’s due process rights. However, as was the case in *Shanks*, even assuming that the City’s approval of the TUA was *actually* in violation of the zoning code, Appellant cannot show that such a violation has any impact on any of Appellant’s *federally*-protected rights. In fact, not only did Appellant fail to show how any federal right was violated, at the trial court level it could not even identify what federally-protected right might be at issue.²⁸

Even if Appellant *had* alleged that some particular federal right had been violated by the City’s land use action here, the case law is clear that such claims have no merit. Courts have held that in cases involving a City’s land use decision and application of its zoning ordinances,

²⁸ Federal courts have made it clear that local governmental actions in violation of zoning ordinances do not amount to violations of substantive due process unless Appellant can point to a specific *federally*-protected right implicated by the local decision. As a result, Appellant’s failure to identify any relevant federal right, let alone explain how such a right was violated here, supports the trial court’s dismissal of Appellant’s substantive due process claim fails as a matter of law.

neighboring landowners and “community groups” that are not parties to that land use decision have *no federally-protected interest* in the outcome.

In this case, Appellant claims that the City’s alleged failure to enforce the prohibition on the temporary use of the Church property by Tent City 4 resulted in various undesirable effects in their neighborhood: excessive noise, light, traffic, crime, etc., or, alternatively, that in allowing the allegedly illegal temporary use, the City failed to protect the neighboring residents from those various deleterious effects. CP 1-9. In *Shanks v. Dressel*, the neighboring landowners made the exact same claims: that the City’s failure to properly enforce zoning laws resulted in the decline of their property values, and other undesirable effects in the area. *Id., passim*. In that case, the Ninth Circuit soundly rejected the idea that such a set of facts constituted a substantive due process violation:

[Plaintiff’s] ‘failure-to-protect’ and ‘failure-to-enforce’ allegations do not suffice. The Constitution generally does not require the state to ‘protect the life, liberty, and property of its citizens against invasion by private actors.’ Consequently, the state’s failure to protect an individual from ‘harms inflicted by persons not acting under color of law’ will not ordinarily give rise to § 1983 liability.

Shanks v. Dressel, supra at 1087 (quoting *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)). The *Shanks* court went on to reiterate that “Spokane had no independent constitutional duty to safeguard the Dressels’ neighbors from

the negative consequences -- economic, aesthetic or otherwise -- of the Dressels' construction project."²⁹ *Id.* at 1088.

Even if the Court assumes, *arguendo*, the City's approval of the TUA constitutes more than mere failure to enforce the applicable zoning ordinances here, the same claim was again rejected in *Shanks*.

Logan Neighborhood urges that Spokane applied the law improperly and therefore took an affirmative step beyond simply not enforcing it at all. It contends that Spokane unlawfully and arbitrarily issued a building permit to the Dressels because it did not first require them to obtain a certificate of appropriateness and administrative special permit. We do not agree that the issuance of a building permit to the Dressels made their conduct fairly attributable to Spokane in the sense required for § 1983 liability. Without more, Spokane's '[m]ere approval of or acquiescence in' the Dressels' construction is 'not sufficient to justify holding [it] responsible for [that construction] under the terms of the Fourteenth Amendment.'

Shanks v. Dressel, *supra* at 1088 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)).³⁰ Here, the alleged negative effects Appellant complains of – excessive light, noise, crime,

²⁹ See also *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2nd Cir. 1994) (explaining that substantive due process does not generally require government to enforce laws against private wrongdoers); *West Farms Assocs. v. State Traffic Comm'n*, 951 F.2d 469, 472 (2d Cir.1991) (generalized benefits conferred by statute are not property interests protected by the Due Process Clause), *cert. den.*, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992), *Gini v. Las Vegas Metro. Police Dep't.*, 40 F.3d 1041, 1045 (9th Cir.1994).

³⁰ Other Circuits have made identical holdings in cases with similar facts. For example, in *Gagliardi, supra*, the plaintiffs made substantive due process claims based on Village's failure to properly apply the zoning laws to a neighboring landowner. The Court affirmed dismissal of those claims, noting that "No due process right is implicated here because the Gagliardis have no right to demand that the Municipal Defendants enforce the zoning laws." 18 F.3d at 192; See also, *DeShaney v. Winnebago County Dep't of Social Servs.*, *supra* at 195 ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.").

undesirable persons in the neighborhood, etc. – are *not* caused by the City. Rather, they are the actions of private individuals that are only secondarily a result of the City’s alleged “failure to enforce” local zoning laws, or “failure to protect” Appellant from such results; they are insufficient to establish a substantive due process claim.

4. **The City’s Actions Comply With Substantive Due Process Standards**

Even if the City’s actions implicated the rights of third-party landowners – an idea repeatedly and soundly rejected by every court addressing the issue – the City’s actions with respect to the TUA at issue here comply with all substantive due process standards.

The Supreme Court has ‘long eschewed . . . heightened [means-ends] scrutiny when addressing substantive due process challenges to government regulation’ that does not impinge on fundamental rights. Accordingly, the ‘irreducible minimum’ of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose.

Shanks v. Dressel, *supra* at 1088 (quoting, *North Pacifica LLC*, 526 F.3d 478, 484 (9th Cir. 2008)). See also, *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995). Specifically, the *Shanks* Court stated the standard: “When executive action like a discrete permitting decision is at issue, only ‘egregious official conduct can be said to be ‘arbitrary in the constitutional sense: it must amount to an ‘abuse of power’ lacking any ‘reasonable justification in the service of a legitimate governmental

objective.” *Id.* at 1088 (9th Cir. 2008) (quoting, *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043). *See also*, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 198, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003).

Based on this very high standard, the City’s action in approving the TUA is well within the bounds of substantive due process protections.³¹ There is simply no merit to any allegation that the TUA was “egregious” official content, or an “abuse of power” “lacking any reasonable justification in the service of legitimate governmental objective.”

a. The City’s General Power Under State Constitution and Delegated from the Legislature.

Under the Washington State Constitution "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." WA. Const. Art. 11, § 11. Washington courts have long held that a “So long as the subject matter is local and the legislation is reasonable, this grant of authority is as broad as the Legislature's authority” and that “The courts will not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is the legislative intent.” *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 891-892, 795 P.2d 712

³¹ Again, it is important to note that this discussion is purely hypothetical; as discussed above, since Appellant is merely neighboring landowners and *not* a party to the TUA here, it has no federally-protected right at stake.

(1990) (citing *State ex rel. Schillberg v. Everett Dist. Justice Court*, 92 Wn.2d 106, 108, 594 P.2d 448 (1979)). A City's authority with respect to land use within its own jurisdiction is certainly one of the most basic examples of that broad authority granted under the state constitution.

Although the State Constitution gives the Legislature the ability to limit a City's regulatory authority, the fact is that the State Legislature has actually expanded and further specified the broad authority of local governments. For example, in addressing the power of local governments, the State Legislature has specifically stated:

“The purpose and policy of this title is to confer...the broadest powers of local self-government consistent with the Constitution of this state. ... *All grants of municipal power to municipalities electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, shall be liberally construed in favor of the municipality.*

RCW 35A.01.010 (emphasis added). And, even if the TUA is construed as a “contract” as Appellant suggests, the grant of authority from the legislature explicitly includes the power to “contract and be contracted with.” RCW 35A.11.010. In addressing that section, the State Supreme Court recently held that “the power to contract, like other specific and general powers conferred upon optional code cities, ‘shall be liberally construed in favor of the municipality.’” *Burns v. City of Seattle*, 161 Wn.2d 129, 154, 164 P.3d 475 (2007) (citing RCW 35 A. 01.010). *See*

also, *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 383, 858 P.2d 245 (1993)). Moreover, the Court has noted that “There is a ‘range of reasonableness within which a municipality’s manner and means of exercising its powers will not be interfered with or upset by the judiciary.’³²” *Branson v. Port of Seattle*, 152 Wn.2d 862, 871, 101 P.3d 67 (2004) (quoting, 2A Eugene McQuillin, *The Law of Municipal Corporations*, § 10.18.10, at 366)).

Throughout Appellant’s Brief, it argues, over and over and over that the City’s actions violate due process because the City did not overtly regulate Tent City encampments, or create a separate code for Tent City encampments. This, however, is *not* the law. An agency does not have to “make progress on every front before it can make progress on any front.” *Weeden v. San Juan County*, 135 Wn.2d 678, 704, 98 P.2d 273 (1998). As the *Weeden* court said:

Agencies often must contend with matters of degree. Regulations, in other words, are not arbitrary just because they fail to regulate everything that could be thought to pose any sort of problem.

Id.; *United States v. Edge Broadcasting*, 519 U.S. 418.

³² The State Supreme Court has held that: “A municipal corporation is permitted to enter into contracts which are proper and reasonably necessary to enable it to perform functions expressly conferred and essential to enable it to perform fully the duties of a local government.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 282, 937 P.2d 1082 (1997).

b. The TUA was Required Under the RLUIPA

Not only was the TUA within the City’s general authority under State law, adoption of the TUA was actually *required* under the federal Religious Land Use and Institutionalized Persons Act (“RLUIPA” or “Act”). In 2000, Congress passed RLUIPA to “remedy the well documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context.” 146 Cong Rec. E 1234, 1235 (daily ed. July 13, 2000) (statement of Rep. Charles T. Canady). The heart of RLUIPA is a specific ban on land use and zoning regulations that place a “substantial burden” on the exercise of religion. 42 USC §2000cc (a)(1). The Act broadly defines “land use regulation” to mean any “zoning...law, or the application of such a law, that limits or restricts a claimant’s use ...of land.” *Id.* at §§ 5(5), and defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”³³ *Id.* at §§ 5(7)(A).

c. The TUA was Required Under State Law, and the Recent Decision in *City of Woodinville v. Northshore United Church of Christ*

³³ The City hereby incorporates by this reference the facts, argument and authorities in the Church’s Response Brief, which addresses in great detail why RLIUPA, First Amendment protections and equal protection law are applicable herein. The Court is encouraged to review the Brief by the Church for more detail on this aspect of the Appellant’s claims. *See, e.g.*, Brief of Church, pp. 9-36.

Ironically, Appellant’s Opening Brief utterly ignores a recent decision by the Washington State Supreme Court, *City of Woodinville v. Northshore United Church of Christ*, 166 Wn. 2d 633, 211 P.3d 406 (2009),³⁴ holding that local governments – such as the City of Mercer Island – must accommodate shelters for the homeless, and that they cannot “freeze” applications for such uses or otherwise deny them.

In the *Woodinville* case, the Supreme Court reviewed a decision by the Court of Appeals which upheld the City’s denial of a temporary use permit³⁵ applied for by the church for the Tent City 4 encampment. That denial was based on a moratorium which was in effect at the time which prohibited submission of all land use permit applications in the residential zone, pending completion of a study on sustainable development. The Supreme Court *reversed* the Court of Appeals’ decision, finding that under Article I, § 11 of the Washington Constitution, the City could not apply a moratorium to preclude a permit request from the church.

The Supreme Court found that the City’s refusal to process the church’s requested permit application based on moratorium was a

³⁴ What is more ironic – but not surprising – is that at the trial court level, on the parties’ cross-motions for summary judgment, the Appellants relied on the Division I decision in *Woodinville v. Northshore United Church of Christ*. *See, i.e.*, CP 258. This case, in fact, has now been reversed by the Supreme Court. Nonetheless, Appellants now ignore both the Div. I decision as well as the new Supreme Court decision in their Opening Brief, despite the fact that they deemed the Div. I case to be significant to adjudication to their due process and § 1983 claims.

³⁵ That permit was similar in form and content to the TUA. *See, id.*, 166 Wn. 2d at 638.

violation of Article I, § 11 of the State Constitution.³⁶ While noting that the church has “more protection under Washington’s Constitution” than it has under the Federal Constitution (First Amendment), the Court held that a party challenging government action with respect to church activities must show two things: (1) that the religious belief is sincere, and (2) that the government action burdens the exercise of religion. *Id.* at p. 10. The government must then show that it has a narrow means for achieving a “compelling [governmental] goal.”

The Court found that there was no issue raised as to whether hosting Tent City is important or central to the church’s exercise of religion, and that the only issue presented was whether the City’s actions – through enactment of the moratorium which prohibited submission of any applications at all – “substantially burdened the free exercise of the church’s religious sentiment, belief or worship.” The Court found that “the total refusal to process a permit application [based on the moratorium] is such a burden.” *Id.* The governmental burden can be a “slight inconvenience” without violating Article I, § 11; however, the government cannot impose a “substantial burden” on the exercise of

³⁶ The Court made clear, however, that its decision was narrowly based on Article I, § 11 of the State Constitution, and was *not* based on the Federal Constitution or the Federal statute, the Religious Land Use and Institutionalized Persons Act, “RLUIPA.”

religion. Any governmental burden must be evaluated “in the context in which it arises.” *Id.* at 644.

In finding that the moratorium was a “substantial” burden on the church’s exercise of religion, the court made clear that cities have authority to address impacts and “externalities” resulting from tent city type encampments, and that they “may mediate these externalities reflecting concerns for safety, noise, and crime but may not outright deny consideration of permitting.” *Id.* at 644. A church must still comply with “reasonable permitting processes;” however, here the City’s moratorium, which precluded the submission of an application, was too substantial of a burden such that it violated Article I, § 11. *Id.*, at 644. This decision fully reinforces the City’s actions here to accommodate the Church, Tent City 4, SHARE/WHEEL, and the general public and citizenry of Mercer Island in authorizing and regulating the three-month Tent City 4 shelter. The decision also confirms that local governments have authority to regulate and mitigate “externalities” reflecting concerns for “safety, noise, and crime,” as Mercer Island did through approval of the TUA.

Appellant argues that even if the City was required to allow the homeless encampment on Church property,³⁷ it should have been

³⁷ Section C of the TUA provides: “[T]he Religious Land Use and Institutionalized Persons Act of 2000 prohibits governments from imposing a land use regulation that unreasonably limits religious assemblies, institutions or structures. Court decisions hold

accomplished by a change in the City Code rather than by entering into the TUA here. However, that argument is contrary to the case law and is not supported by *any* authority. For example, the Seventh Circuit recently held that the delay a church would face in either filing various land use applications, or simply searching for another parcel on which their desired use was not prohibited, would not alleviate the substantial burden placed on their religious exercise sufficiently to overcome the City's violation of RLUIPA. *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). Moreover, local government is not required to legislate on every "front," and regulations are not arbitrary just because they fail to regulate everything that could be thought to pose any sort of problem. *Weeden v. San Juan County*, *supra*.

Appellant's claim that the City was somehow not authorized to enter into the TUA is contrary to every single facet of the law concerning the applicable issues: The Washington State Constitution, the U.S. Constitution, RCW Title 35A, RLUIPA, and nearly every case from every jurisdiction interpreting these provisions. The City is bestowed with broad authority to regulate land use within its borders under the State Constitution, and is more specifically granted broad authority to enter into

that a church sponsoring a Temporary Homeless Encampment constitutes protected religious expression." CP 543; *Appendix A*, generally.

contracts or take any other action “essential to enable it to perform fully the duties of a local government.”³⁸ *Greater Harbor 2000, supra*.

5. Procedural Due Process

While the analysis relevant to a procedural due process claim is more straightforward than the substantive due process issues addressed above, the result here is the same. Appellant cannot establish a violation of procedural due process under the undisputed facts here.

a. Appellant Misstates the Standard of Review; Lack of Proper Notice is a Question of Law, Reviewed *de novo*

Appellant first contends that whether adequate or meaningful notice is given is a question of fact for the trier-of-fact. *Opening Brief*, pp. 35-36. However, the authority upon which it relies is wholly inapposite to that issue. Appellant cites *Associated Petroleum Products v. Northwest Cascade Inc.*, 149 Wn. App. 429, 203 P.3d 1077 (2009), in which court held that before terminating a contract, a party must give reasonable notice to the other party, and that whether such notice is reasonable is usually a fact for the jury. *Id.* Appellant also relies on a 10th Circuit case, *NRLB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1035 (10th Cir. 1996), in which the

³⁸ Given that broad and specific authority, coupled with the federal requirement to remedy any substantial burden on religious exercise under RLUIPA, there is simply no way to conclude that City’s adoption of the TUA amounts to an “abuse of power lacking any reasonable justification in the service of a legitimate governmental objective.” *Shanks v. Dressel, supra*. Consequently, Appellant’s claim that the City violated Appellants substantive due process rights fails.

court held that whether an employer has provided meaningful notice in the context of a bargaining agreement is a question of fact. Relying on contract and employment case law, Appellant fails to acknowledge on-point Washington case law, which has explicitly held that procedural errors, such as lack of proper notice, are *questions of law* reviewed de novo (emphasis added). *See, Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus* 159 Wn.2d 555, 566 (2007).

b. No Federal Right has Been Deprived to Support a Procedural Due Process Claim

In order to establish a violation of procedural due process, Appellant must first identify a specific property right that has been implicated. “Absent a substantive property interest in the outcome of procedure, [a plaintiff] is not constitutionally entitled to insist on compliance with the procedure itself. To hold otherwise would immediately incorporate virtually every regulation into the Constitution.” *Shanks v. Dressel, supra* at 1089 (quoting, *Clemente v. United States*, 766 F.2d 1358, 1364 (9th Cir.1985)). This fact has been stated repeatedly in cases such as this one. *See, generally, First Assembly of God of Naples, Florida, Inc. v. Collier County, Fla.*, 20 F.3d 419, 422 (11th Cir. 1994) (“Plaintiff must show: (1) that it has a liberty or property interest that was

interfered with by the state; and (2) that the state failed to use ‘constitutionally sufficient procedures’ in interfering with that interest.)

c. Appellants have no Property Right at Stake

Appellant has no substantive property right at issue here; and while the group complains that the City Council did not follow the proper procedure for amending its own City Code, the simple fact is that “the violation of a State statute mandating procedure is not the equivalent of a *federal Constitutional* violation.” *First Assembly of God of Naples, Florida, Inc. v. Collier County, Fla.*, 20 F.3d 419, 422 (11th Cir. 1994). The law is clear that a violation of *state* or *local* procedural statutes – such as the procedure for amending a city code or compliance with the State Regulatory Reform Act – does *not* implicate any *federal* rights. Therefore there is no basis for a claim under procedural due process.

[W]e emphasize that the *violation of a state statute outlining procedure does not necessarily equate to a due process violation under the federal Constitution. If otherwise, federal courts would have the task of insuring strict compliance with state procedural regulations and statutes.*

Id. at 422 (emphasis added)(citing, *Harris v. Birmingham Board of Education*, 817 F.2d 1525, 1527-1528 (11th Cir.1987).

In its Opening Brief, Appellant repeatedly points to the fact that the City adopted the TUA without complying with the internal procedure for amending the City Code; however, the group cannot establish how

failure to follow the local procedure amounts to a *federal* constitutional violation. Neither State nor local procedural statutes define the process that is due under the *Federal* Constitution, and Appellant's failure to even identify any procedural deprivation sufficient to implicate the Federal Constitution precludes its procedural due process claim.

d. There is no Procedural Due Process Violation

Even if Appellant *could* identify a substantive right at issue here, and even if it *could* point to a relevant procedural deprivation, the fact is that the City's adoption of the TUA fully complied with the necessary constitutional requirements to satisfy procedural due process. In *First Assembly of God of Naples, Florida, Inc. v. Collier County, Fla.*, *supra*, the county's enforcement of its zoning regulations resulted in the closure of a homeless shelter located on church property. The Church and the residents of the shelter sued under procedural due process and argued that the zoning regulations were improperly adopted and never actually codified into the county ordinances. *Id.* at 421-422. In affirming summary judgment against the Church, the Court pointed out that the procedural due process protections of the Constitution merely require "that persons deprived of a right must be afforded notice and an opportunity to be heard." *Id.* (citing *Zinerman v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990)). *See also*, *Goss v. Lopez*, 419 U.S. 565, 579, 95

S.Ct. 729, 738, 42 L.Ed.2d 725 (1975) (due process only requires *some* kind of notice and ... *some* kind of hearing). The court held that the County's procedural shortcomings in adopting and codifying its zoning ordinances did not rise to the level of a federal claim:

Here, [Appellant] does not dispute that some notice was given, nor does it dispute that a public hearing was held. Rather, [Appellant] argues that the fact that the published notice was less than 1/4 page in size, did not include a geographic location map, and did not have a headline in 18 point type proves that it was denied sufficient notice under the Constitution. ***Given that [Appellant] was provided notice and an opportunity to be heard, we hold that the deficiencies in notice alleged in this case do not rise to the level of a federal constitutional violation. Therefore, because [Appellant] cannot show a violation of procedural due process, the district court was correct in entering summary judgment for the County on this issue.***

Id. (emphasis added). The same is true here. Even assuming, *arguendo*, that the City had no authority whatsoever to enter into the TUA without amending the City Code, the fact is that the resulting procedural deprivation does not rise to the level of a *federal constitutional* violation. As the *First Assembly* court made clear, the constitution merely requires that Appellant be given notice and an opportunity to be heard.

Here, even Appellant itself admits it had full notice of the proposed TUA and the opportunity to publicly comment.³⁹ In fact, at oral argument on the preliminary injunction and TRO, Appellant's counsel explicitly

³⁹ On June 11, 2008, the City Council provided public notice in the Mercer Island Reporter that the proposed TUA would be discussed at the upcoming Council meeting.

stated Appellants were “...*not claiming there not an opportunity to be heard...*” CP 798 (emphasis added). The TUA was raised and discussed in an open public meeting on June 16, 2008. Appellant certainly cannot allege it was unaware of that meeting because members of its group actually attended and made public comments at that meeting.⁴⁰ CP 682-683. Appellant can make no argument that its members were denied notice of the TUA or the opportunity to speak directly to the Council in a public forum regarding the adoption of the document.

VI. CONCLUSION

The City of Mercer Island asks this Court to affirm in all respects the Trial Court’s April 24, 2008 dismissal of Appellant’s lawsuit.

Dated this 8th day of October, 2009.

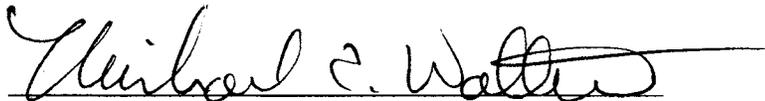
KEATING, BUCKLIN & McCORMACK, INC., P.S.



Michael C. Walter, WSBA #15044

Attorney for Respondent City of Mercer Island

CITY OF MERCER ISLAND



For Katie Knight, WSBA #18058

City Attorney for Respondent City of Mercer Island

⁴⁰ For example, Ms. Johnson and Mrs. Oaks both addressed the Council regarding their opposition to Tent City and their concerns about its effects on the community, and in fact commented specifically on the proposed TUA itself. All in all, more than 25 separate people made comments about the proposed TUA and its potential impact on the City.

*Mercer Island Citizens for Fair Process v. City of Mercer
Island, et. al.*

**CITY OF MERCER ISLAND'S RESPONSE
BRIEF (10-09-09)**

Exh. A

Exh. A

TEMPORARY USE AGREEMENT

THIS AGREEMENT FOR TEMPORARY USE ("Agreement") is dated effective the 16th day of June, 2008 and is entered into between the City of Mercer Island, a Washington municipal corporation ("City") and the Seattle Housing and Resource Effort ("SHARE") a registered 501(c)(3) non-profit alliance and Women's Housing Equality and Enhancement League ("WHEEL"), a non-profit alliance ("SHARE/WHEEL") and Mercer Island United Methodist Church ("Church").

RECITALS

- A. The Seattle Housing and Resource Effort ("SHARE") and the Women's Housing Equality and Enhancement League ("WHEEL"), non-profit organizations experienced in operating and managing temporary encampments for homeless individuals, have collaborated to provide temporary housing on the Eastside of King County, under the designation "Tent City 4."
- B. Tent City 4 encampments operate under a strictly enforced Code of Conduct to protect the health and safety of Tent City 4 residents and to protect the host community from any negative effects of an encampment.
- C. Both the First Amendment to the United States Constitution and Article 1, Section 11 of the Washington State Constitution protect the free exercise of religion; further, the Religious Land Use and Institutionalized Persons Act of 2000 prohibits governments from imposing a land use regulation that unreasonably limits religious assemblies, institutions or structures. Court decisions hold that a church sponsoring a Temporary Homeless Encampment on its own property constitutes protected religious expression.
- D. The faith community of Mercer Island welcomes Tent City 4 to Mercer Island and pledges its support and assistance for a safe and positive experience for residents of both Tent City and the greater Mercer Island community.
- E. The Mercer Island United Methodist Church has extended a specific invitation for Tent City 4 to operate a Temporary Homeless Encampment on its property for a period not to exceed 93 days, beginning not earlier than August 5, 2008.
- F. Beginning in May 2004, Tent City 4 has had successful stays in several Eastside Cities including Bellevue, Bothell, Issaquah, Kirkland, Redmond, as well as in unincorporated communities in east King County including Finn Hill and Cottage Lake. Tent City 4 has accepted invitations to return to some of these jurisdictions after positive Tent City 4 experiences.
- G. The City of Mercer Island, its elected and appointed officials are committed to protect the health, safety and well-being of its citizens, as mandated by the State Constitution.

H. The Mercer Island City Code does not anticipate a Temporary Homeless Encampment such as that operated by SHARE/WHEEL, and none of the City's regulations or administrative procedures address this special use.

I. In keeping with the duties and responsibilities of municipal government, the City of Mercer Island must apply to the Tent City 4 encampment and the hosting Mercer Island United Methodist Church all the public safety, health and welfare protections routinely provided to Mercer Island citizens and visitors.

AGREEMENT

1. **Definitions.** For purposes of this Agreement, the following terms will have the following meanings:

“Temporary Homeless Encampment” shall mean a transient or interim gathering or community comprised of temporary enclosures (tents and other forms of portable shelter that are not permanently attached to the ground), which may include common areas designed to provide food, living and sanitary services to occupants of the encampment.

“Church” shall mean the United Methodist Church that has an agreement with SHARE/WHEEL to provide basic services and support for the residents of a Temporary Homeless Encampment and liaison with the surrounding community.

2. **Length of Stay.** SHARE/WHEEL and the Church will not host, sponsor or manage more than one Temporary Homeless Encampment in Mercer Island in any twelve month period, and the length of stay for such Temporary Homeless Encampment shall not exceed 93 days. No more than one Temporary Homeless Encampment will be maintained at any one time by SHARE/WHEEL within the city limits.
3. **Conditions.** SHARE/WHEEL and the Church will not host, sponsor or manage any Temporary Homeless Encampment on Mercer Island except in accordance with the following conditions and other provisions of this Agreement:
- (i) **20' Setback.** The Temporary Homeless Encampment shall be located a minimum of 20 feet from the property line of abutting residential properties.
 - (ii) **Sight obscuring fence or screen.** A sight obscuring fence, vegetative screen or other visual buffering shall be provided between the Temporary Homeless Encampment and any abutting residential property. The purpose of this fence or screen is to provide a reasonable degree of privacy and visual buffering among neighboring properties. The Code Official shall consider existing vegetation, fencing, topographic variations and other site conditions in determining compliance with this requirement.
 - (iii) **Exterior Lighting.** Exterior lighting must be directed downward, away from adjoining properties, and contained within the Temporary Homeless Encampment.
 - (iv) **Maximum Residents.** The maximum number of residents within the Temporary Homeless Encampment is 100. In exigent circumstances, this number may be exceeded if a person or persons seek shelter overnight.

(v) Parking. A minimum of twenty-six (26) off-street parking spaces shall be maintained on Mercer Island United Methodist Church property on Saturdays, Sundays and after 6:00 PM on weekdays. A minimum of eight (8) off-street parking spaces shall be maintained on Mercer Island United Methodist Church property at all other times. During occasional events or gatherings where this parking capacity will be exceeded, visitors will be directed to available public on-street parking and, if necessary, to the public parking lot at the Park on the Lid.

(vi) Proximity to Transit. The Temporary Homeless Encampment shall be located within reasonable walking distance of transit service. The Parties acknowledge that the nearest transit service is located immediately across the street from the Church.

(vii) Children Prohibited. No children under the age of 18 are allowed to stay overnight in the Temporary Homeless Encampment. In exigent circumstances, if a child under the age of 18 attempts to stay overnight at the Temporary Homeless Encampment, the Encampment managers will immediately contact SHARE/WHEEL, and SHARE/WHEEL will contact Child Protective Services.

(viii) Code of Conduct. SHARE/WHEEL requires its residents to comply with a Code of Conduct, attached hereto as Exhibit A and incorporated into this Agreement as though fully set forth herein.

(ix) Compliance with Codes. SHARE/WHEEL and the Church shall comply with lawful Washington State and City codes concerning but not limited to, drinking water connections, human waste, solid waste disposal, electrical systems, cooking and food handling and fire resistant materials.

(x) Identification. SHARE/WHEEL shall obtain verifiable identification from prospective encampment residents and use the identification to obtain sex offender and warrant checks from the appropriate agency. Warrant checks are done before someone is permitted to become an encampment resident. SHARE/WHEEL shall report any positive results of sex offender or warrant checks to the Mercer Island Police Department, and comply with all requirements of the Mercer Island Police Department related to prospective residents identified as sex offenders or as having outstanding warrants. SHARE/WHEEL shall not allow any person to reside in the Temporary Homeless Encampment who has not completed a warrant check and registered sex offender check from the appropriate agency.

(xi) Inspections. SHARE/WHEEL and the Church shall permit regular inspections by the City and/or King County Health Department to check compliance with the standards for encampments. The Mercer Island Fire Department shall do an initial fire inspection and safety meeting at the inception of the Temporary Homeless Encampment at the Church.

4. Notice and Permit Requirements for Temporary Homeless Encampments.

(i) Public Meeting. A minimum of 20 calendar days prior to opening date of Temporary Homeless Encampment, SHARE/WHEEL and the Church shall conduct a neighborhood public information meeting by providing written notice to owners and residents of property within 600 feet of the proposed site, and residents and tenants adjacent to the proposed site. The notice of the neighborhood public information meeting shall also be published in the Mercer Island Reporter not less than 14 days prior to the scheduled

meeting. The Mercer Island Reporter is published each Wednesday and submissions are due at noon the Thursday prior to publication.

The Church shall also provide a designated spokesperson to answer public inquiries, and will state the name and telephone contact information of the designated spokesperson in all public notices:

The purpose of the neighborhood public information meeting is to provide the surrounding community with information regarding the proposed duration and operation of the Temporary Homeless Encampment, conditions that will likely be placed on the operation of the Temporary Homeless Encampment, requirements of the Code of Conduct, and to answer questions regarding the Temporary Homeless Encampment.

(ii) Schools/Daycares. SHARE/WHEEL and the Church shall meet and confer with the administration of any public or private elementary, middle, junior high or high school within 600 feet of the boundaries of the proposed site, and shall meet and confer with the operators of any known child care service within 600 feet of the boundaries of the proposed site. SHARE/WHEEL and the Church shall make a good faith effort to reach agreement with the school administration and/or child care service operator upon any additional conditions that may be appropriate or necessary to address school and/or child care concerns regarding the location of a Temporary Homeless Encampment within 600 feet of such a facility. The Parties are not aware of any schools or child care services within 600 feet of the Church.

5. **Violation of Agreement.** Upon determination that there has been a violation of any term or condition of this Agreement, the City will give written notice to SHARE/WHEEL and the sponsoring Church describing the alleged violation. Within 14 days of mailing of notice of violation, SHARE/WHEEL and the Church will either cure the violation or the Temporary Homeless Encampment use will be terminated.
6. **Indemnification and Hold Harmless.** SHARE/WHEEL and the Church agree that the City is not responsible for the actions, inactions or omissions of SHARE/WHEEL or of any resident of the Temporary Homeless Encampment. SHARE/WHEEL and the Church agree to indemnify, defend and hold the City, its City Council members, employees, agents and volunteers, past and present, harmless from all losses, actions, liabilities for and against any liability for damages to persons or property as the result of: (a) the actions, inactions or omissions of SHARE/WHEEL or of any Encampment resident or of the Church; (b) the City, the Church and SHARE/WHEEL's entry into this Agreement; and (c) the City's entry into the Temporary Homeless Encampment to enforce this Agreement. Provided, however, that the agreement to indemnify, defend and hold harmless set forth herein shall not apply to damages caused by the negligence of the City.
7. **Notice to Parties.** Any written notices required by this Agreement shall be directed to the Parties as follows:

Pastor Leslie Ann Knight
Mercer Island United Methodist Church
7070 SE 24th Street
Mercer Island, Washington 98040

Scott Morrow, SHARE Managing Organizer
SHARE/WHEEL
P.O. Box 2548
Seattle, Washington 98111

Katie H. Knight, Interim City Attorney
9611 SE 36th Street
Mercer Island, Washington 98040

8. **Authority to Sign.** Each person signing this Agreement represents and warrants that he or she is duly authorized and empowered to execute and deliver this Agreement on behalf of the party for whom he or she signs.
9. **General Provisions.** This Agreement contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Agreement. No provision of the Agreement may be amended or modified except by written agreement signed by the Parties. This Agreement shall be binding upon and inure to the benefit of the Parties' successors in interest, heirs and assigns. Any provision of this Agreement which is declared invalid or illegal shall in no way affect or invalidate any other provision. In the event any of the Parties defaults on the performance of any terms of this Agreement or either Party places the enforcement of this Agreement in the hands of an attorney, or files a lawsuit, each Party shall pay all its own attorney fees, costs and expenses. The venue for any dispute related to this Agreement shall be King County, Washington. Failure of the Parties to declare any breach or default immediately upon the occurrence thereof, or delay in taking any action in connection with, shall not waive such breach or default. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

CITY:

CITY OF MERCER ISLAND

By: 
Richard M. Conrad, City Manager
9611 SE 36th Street
Mercer Island, WA 98040

SHARE/WHEEL:

**SEATTLE HOUSING AND
RESOURCE EFFORT**

By: _____
Name: _____

Pastor Leslie Ann Knight
Mercer Island United Methodist Church
7070 SE 24th Street
Mercer Island, Washington 98040

Scott Morrow, SHARE Managing Organizer
SHARE/WHEEL
P.O. Box 2548
Seattle, Washington 98111

Katie H. Knight, Interim City Attorney
9611 SE 36th Street
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CITY:

CITY OF MERCER ISLAND

SHARE/WHEEL:

**SEATTLE HOUSING AND
RESOURCE EFFORT**

By: _____
Richard M. Conrad, City Manager
9611 SE 36th Street
Mercer Island, WA 98040

By: 
Name: SCOTT MORROW

APPROVED AS TO FORM:

Katie H. Knight
Katie H. Knight, Interim City Attorney

**WOMEN'S HOUSING EQUALITY
AND ENHANCEMENT LEAGUE**

By: _____
Name: _____

CHURCH:

**MERCER ISLAND UNITED
METHODIST CHURCH**

By: *Leslie Ann Knight*
Name: Leslie Ann Knight

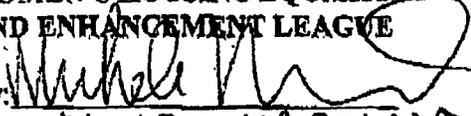
By: *Diana Blakney*
Name: Diana Blakney

By: *LeRoy C. Melberg*
Name: LeRoy C. Melberg

APPROVED AS TO FORM:

Katie H. Knight, Interim City Attorney

WOMEN'S HOUSING EQUALITY
AND ENHANCEMENT LEAGUE

By: 
Name: MICHELE MARCHAND

CHURCH:

MERCER ISLAND UNITED
METHODIST CHURCH

By: _____
Name: _____

By: _____
Name: _____

By: _____
Name: _____

EXHIBIT "A"

TENT CITY 4 CODE OF CONDUCT

WE, THE PEOPLE OF SHARE/WHEEL, IN ORDER TO KEEP A MORE HARMONIOUS COMMUNITY, ASK THAT YOU OBSERVE THE FOLLOWING CODE OF CONDUCT:

- SHARE/WHEEL'S TENT CITY 4 IS A DRUG AND ALCOHOL FREE ZONE. THOSE CAUGHT DRINKING OR USING DRUGS WILL BE ASKED TO LEAVE. SOBRIETY IS REQUIRED.
- NO WEAPONS ARE ALLOWED. KNIVES OVER 3-1/2 INCHES MUST BE CHECKED IN.
- VIOLENCE WILL NOT BE TOLERATED. PLEASE ATTEMPT TO RESOLVE ANY CONFLICT IN A CREATIVE AND NONVIOLENT MANNER.
- DEGRADING ETHNIC, RACIST, SEXIST OR HOMOPHOBIC REMARKS ARE NOT ACCEPTABLE. NO PHYSICAL PUNISHMENT, VERBAL ABUSE OR INTIMIDATION WILL BE TOLERATED.
- WE ARE A COMMUNITY. PLEASE RESPECT THE RIGHTS AND PRIVACY OF YOUR FELLOW CITIZENS.
- NO MEN IN THE WOMEN'S TENTS.
- NO WOMEN IN THE MEN'S TENTS.
- NO OPEN FLAMES.
- NO LOITERING OR DISTURBING NEIGHBORS.
- NO TRESPASSING.
- ATTENDANCE OF AT LEAST ONE OF THE SEVERAL COMMUNITY MEETINGS HELD THROUGH THE WEEK IS REQUIRED.
- DAYS AND TIMES WILL BE POSTED SO THAT YOU MAY WORK IT INTO YOUR SCHEDULE.

IF THESE RULES ARE NOT RESPECTED AND ENFORCED, TENT CITY 4 MAY BE PERMANENTLY CLOSED.

*Mercer Island Citizens for Fair Process v. City of Mercer
Island, et. al.*

**CITY OF MERCER ISLAND'S RESPONSE
BRIEF (10-09-09)**

Exh. B

Exh. B

Counsel Rising
shall promptly mail copies of this
order to all other counsel/parties

HONORABLE MICHAEL J. FOX

RECEIVED
AUG 06 2008

HELSELL FETTERMAN

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MERCER ISLAND CITIZENS FOR FAIR
PROCESS,

Plaintiff,

vs.

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; Mercer Island United
Methodist Church, a Washington non-
profit corporation; and the CITY OF
MERCER ISLAND, a Washington
municipal corporation.

Defendants.

NO. 08-2-23083-0 SEA

ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION

THIS MATTER, having come before the Court on the motion for a
Temporary Restraining Order and/or Preliminary Injunction filed by plaintiff

ORDER DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY
INJUNCTION - 1

HELSELL
FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

1 Mercer Island Citizens for Fair Process, and the Court having reviewed the
2 Complaint, Motion and Memorandum in Support of Injunctive Relief, Declaration
3 of Steve Oakes, Declaration of Tara Johnson, and Declaration of Jane Koler, with
4 attachments, as well as the Certificate Service filed by plaintiff on July 10, 2008,
5 the Notice of Appearance filed by defendant Mercer Island United Methodist
6 Church on July 14, 2008, the Supplemental Memorandum in Support of
7 Injunctive Relief, First Amended Complaint, Second Declaration of Tara Johnson,
8 Additional Authority, Supplemental Memorandum in Support of Injunctive
9 Relief, and Certificate of Service filed by plaintiff on July 17, 2008, the Response
10 in Opposition to Motion for Temporary Restraining Order, Declaration of
11 Reverend Leslie Ann Knight, and the Declaration of Mark F. Rising filed by
12 defendant Mercer Island United Methodist Church on July 25, 2008, and the
13 Response by Defendant City of Mercer Island To Motion for Injunctive Relief, the
14 Declaration of Katie H. Knight in Support of the City of Mercer Island's Response
15 to the Plaintiff's Motion for Injunctive Relief, the Declaration of Eileen Robinson
16 in Support of City's Response to Motion for Injunctive Relief, the Declaration of
17 Joyce Trantina in Support of City's Response to Motion for Injunctive Relief, and
18 Defendant City of Mercer Island's Objections to Evidence filed by the City of
19 Mercer Island on July 25, 2008, Defendant SHARE/WHEEL's Response to Request
20 for Injunction, the Affidavit of Scott Morrow, the Declaration of Deborah L.
21 Colley, the Declaration of Karisa L. Vaughn, the Declaration of Bruce Thomas, the
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1 Declaration of Daryl G. Shoop, the Declaration of David L. Shoop, the Declaration
2 of Ronald L. Foley, the Declaration of Ashton M. Green, the Declaration of Darryl
3 L. Jackson, the Declaration of Reese R. Murphy, the Declaration of Christopher L.
4 Stroud, the Declaration of Alvin W. Day, the Declaration of Michael C. Durr, the
5 Declaration of Kerry J. Husman, the Declaration of Alan H. Borden, the
6 Declaration of Benny Sepulveda, the Declaration of Shawn M. Dewitt, the
7 Declaration of David R. Peloquin, the Declaration of Randall G. Ennes, the
8 Declaration of Ricardo Rush II, the Declaration of Jeffrey S. Towle, the Declaration
9 of Teofanes Gayda, the Declaration of Julie R. Weaver, the Declaration of Ralf H.
10 Gilkyson, the Declaration of Tommie L. Kolacek, the Declaration of Robin L.
11 Karno, the Declaration of Joseph M. Minichini, the Declaration of Vanisha L.
12 Rush, the Declaration of Christina M. Lux, the Declaration of Mardiros M.
13 Hakimian, the Declaration of Mario A. Crane, the Declaration of Tae W. Suh, the
14 Declaration of Dennis P. Long, the Declaration of Stanley R. Thompson, the
15 Declaration Madelynn C. Bush, the Declaration of Christopher J. Cook, the
16 Declaration of Colt Star Jones, the Declaration of Shy Wit, the Declaration of
17 Randy G. Deguise, the Declaration of Leo M. Rhodes, the Declaration of Norman
18 N. Varain, the Declaration of Russell L. Jensen, the Declaration of Terry E.
19 Edwards, the Declaration of Robert M. Meeks, the Declaration of Mike D. Spivey,
20 the Declaration of Pamela S. Roberts, filed on July 25, 2008, and the Court having
21 heard argument of counsel for plaintiff Jane Ryan Koler, argument of counsel City
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1 of Mercer Island Katie H. Knight, argument of counsel for SHARE/WHEEL Sean
2 Russel, and argument of counsel for Mercer Island United Methodist Church Mark
3 f. Rising at a hearing on July 28, 2008; and having considered the foregoing
4 evidence and argument of counsel,

5 NOW THEREFORE, the Court makes the following Findings and
6 Conclusions:

7
8 1. The declarations submitted by plaintiff in support of its motion are
9 conclusory, argumentative, and speculative, and do not establish the kind of facts
10 regarding injury necessary to support a temporary restraining order or preliminary
11 injunction. The declarations submitted by many Tent City 4 residents show,
12 through individualized circumstances, how they would likely be adversely
13 affected if injunctive relief were granted preventing Tent City 4 from moving onto
14 church property pursuant to the June 16, 2008 Temporary Use Agreement.
15

16 2. Plaintiff has not shown a likelihood of prevailing on the merits on its
17 claims.
18

19 3. Plaintiff has not made a sufficient showing regarding the inconvenience
20 or injury its members would suffer compared to the inconvenience or injury that
21 residents of Tent City 4 would likely suffer if they are not allowed to move to the
22 property of Mercer Island United Methodist Church.

23 4. Plaintiff has not shown that the equities weigh in favor of its members
24 compared to the hardship residents of Tent City 4 would suffer if they were not
25

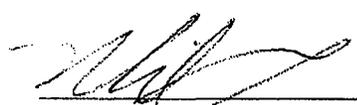
1 allowed to move to the property of Mercer Island United Methodist Church
2 pursuant to the June 16, 2008 Conditional Use Agreement.

3 5. Plaintiff has failed to show a well grounded fear of immediate invasion
4 of its members' legal rights or that they would suffer irreparable injury as a result
5 of an encampment pursuant to the June 16, 2008 Temporary Use Agreement
6 between defendants.
7

8 6. Plaintiff has failed to show that it would suffer substantial harm or
9 irreparable injury from the encampment established pursuant to the June 16, 2008
10 Temporary Use Agreement between defendants. Because Tent City 4 is being
11 placed in a gravel church parking lot, no natural flora or fauna will be disturbed.
12 Plaintiff has not shown that harm suffered would be substantial. Likewise,
13 because the proposed encampment is temporary, plaintiff has not shown that any
14 injury its members will suffer is permanent.
15

16 WHEREFORE, based on the foregoing Findings and Conclusions, the Court
17 DENIES plaintiff's Motion for a Temporary Restraining Order and/or Preliminary
18 Injunction. This order is made without prejudice to any other defenses asserted
19 to plaintiff's claims, and without prejudice to plaintiff's other claims.
20

21 Done in open Court this 4 ^{August} ~~July~~ th day of 2008.

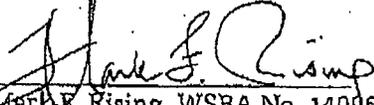
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24 Honorable Michael J. Fox

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Presented by:

HELSELL FETTERMAN LLP

By 
Mark F. Rising, WSBA No. 14096
Attorneys for Mercer Island United
Methodist Church

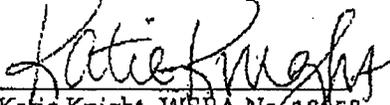
Presented by:

AHLERS & CRESSMAN PLLC

By _____
Sean Russel, WSBA No. 34915
Attorneys for SHARE/WHEEL

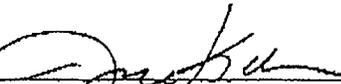
Presented by:

KATIE KNIGHT, INTERIM CITY ATTORNEY

By 
Katie Knight, WSBA No. 18058
Counsel for City of Mercer Island

Approved as to form;
Notice of Presentation Waived;

LAW OFFICE OF JANE RYAN KOLER

By 
Jane Ryan Koler, WSBA No. 18541
Attorneys for plaintiff

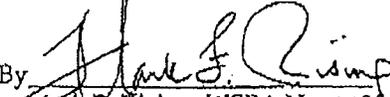
ORDER DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY
INJUNCTION - 6

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1001 Fourth Avenue, Suite 4200
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206.292.1144 WWW.HELSELL.COM

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Presented by:

HELSELL FETTERMAN LLP

By 
Mark P. Rising, WSBA No. 14096
Attorneys for Mercer Island United
Methodist Church

Presented by:

AHLERS & CRESSMAN PLLC

By 
Sean Russel, WSBA No. 34915
Attorneys for SHARE/WHEEL

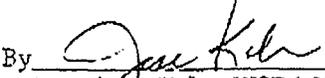
Presented by:

KATIE KNIGHT, INTERIM CITY ATTORNEY

By _____
Katie Knight, WSBA No. 18058
Counsel for City of Mercer Island

Approved as to form;
Notice of Presentation Waived:

LAW OFFICE OF JANE RYAN KOLER

By 
Jane Ryan Koler, WSBA No. 18541
Attorneys for plaintiff

ORDER DENYING MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY
INJUNCTION - 5

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206.292.1144 www.HELSELL.COM

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Presented by:

HELSELL FETTERMAN LLP

By Mark F. Rising

Mark F. Rising, WSBA No. 14096
Attorneys for Mercer Island United
Methodist Church

Presented by:

AHLERS & CRESSMAN PLLC

By Sean Russel
Sean Russel, WSBA No. 34915
Attorneys for SHARE/WHEEL

Presented by:

KATIE KNIGHT, INTERIM CITY ATTORNEY

By Katie Knight
Katie Knight, WSBA No. 18058
Counsel for City of Mercer Island

Approved as to form;
Notice of Presentation Waived:

LAW OFFICE OF JANE RYAN KOLER

By Jane Ryan Koler
Jane Ryan Koler, WSBA No. 18541
Attorneys for plaintiff

*Mercer Island Citizens for Fair Process v. City of Mercer
Island, et. al.*

**CITY OF MERCER ISLAND'S RESPONSE
BRIEF (10-09-09)**

Exh. C

Exh. C

RECEIVED

24 APR 2009 09 30

The Honorable MICHAEL FOX

DEPARTMENT OF
JUDICIAL ADMINISTRATION
KING COUNTY, WASHINGTON

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MERCER ISLAND CITIZENS FOR FAIR
PROCESS, a Washington non-profit
corporation,

Plaintiff,

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; MERCER ISLAND UNITED
METHODIST CHURCH, a Washington non-
profit corporation; and the CITY OF MERCER
ISLAND, a Washington municipal corporation,

Defendants.

NO. 08-2-23083-0 SEA

~~[PROPOSED]~~ ORDER GRANTING
SUMMARY JUDGMENT TO
DEFENDANT CITY OF MERCER
ISLAND, DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, AND DISMISSING
LAWSUIT WITH PREJUDICE

[CLERK'S ACTION REQUIRED]

THIS MATTER CAME ON FOR HEARING pursuant to CR 56 upon Defendant
City of Mercer Island's Motion for Summary Judgment Re: All Remaining Claims dated
August 28, 2008 and the City of Mercer Island's request for Summary Judgment on the
merits as set forth in the City's Response brief in Opposition to Summary Judgment dated

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 1**

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861

1 April 13, 2009, and on Plaintiff Mercer Island Citizens for Fair Process's Cross-Motion for
2 Summary Judgment dated September 15, 2008.

3 THE CITY OF MERCER ISLAND, the moving and responding party, appeared by
4 and through its associated counsel of record, Michael C. Walter of Keating, Bucklin &
5 McCormack, Inc., P.S. and Katie H. Knight, Mercer Island City Attorney. Plaintiff Mercer
6 Island Citizens for Fair Process, the responding and cross-moving party, appeared by and
7 through its attorney of record, Jayne Ryan Koler of the Law Offices of Jayne Ryan Koler,
8 PLLC. Defendant SHARE/WHEEL appeared by and through its attorneys of record,
9 Theodore Paul Hunter of Sound law Center PLLC and Sean Russel of Ahlers & Cressman.
10 Defendant Mercer Island United Methodist Church appeared by and through its attorney of
11 record, Mark Rising of Hessel Fetterman LLP.

12 THE COURT CONSIDERED the following pleadings, memoranda and briefs by
13 the parties:

- 14 1) *Plaintiff's Motion and Memorandum in Support of Injunctive Relief*, dated
15 July 10, 2008;
- 16 2) *Supplemental memorandum in Support of Injunctive Relief*, dated July 18,
17 2008;
- 18 3) *Defendant SHARE/WHEEL's Response to Request for Injunction*, dated July
19 25, 2008
- 20 4) *Defendant City of Mercer Island's Objections to Evidence*, dated July 25,
21 2008;
- 22 5) *Defendant City of Mercer Island's Response to Plaintiff's Motion for
23 Injunctive Relief*, dated July 25, 2008;
- 24 6) *Defendant City of Mercer Island's Motion for Summary Judgment*, dated
25 August 27, 2008;
- 26 7) *Defendant Mercer Island Methodist Church's Joinder in Motion for
27 Summary Judgment*, dated August 29, 2008;

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 2**

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 465-1100

- 1 8) *Plaintiff's Motion to Shorten Time to Consider Cross-Summary Judgment*
2 *Motion, dated September 11, 2008;*
- 3 9) *Plaintiff's Motion and Memorandum in Support of Cross-Motion for*
4 *Summary Judgment, dated September 15, 2008;*
- 5 10) *Plaintiff's Response to Defendant City of Mercer Island's Motion for*
6 *Summary Judgment, dated September 15, 2008;*
- 7 11) *Defendant City of Mercer Island's Response to Plaintiff's Motion to Shorten*
8 *Time, dated September 17, 2008;*
- 9 12) *Defendant Mercer Island United Methodist Church's Opposition to*
10 *Plaintiff's Motion to Shorten Time, dated September 17, 2008;*
- 11 13) *Plaintiff's Reply in Support of Motion to Shorten Time, dated September 17,*
12 *2008;*
- 13 14) *Defendant Mercer Island United Methodist Church's Objection and Motion*
14 *to File Sur-Reply, dated September 18, 2008;*
- 15 15) *Defendant City of Mercer Island's Motion to Shorten Time, dated September*
16 *22, 2008;*
- 17 16) *Defendant City of Mercer Island's Motion for Overlength Brief, dated*
18 *September 22, 2008;*
- 19 17) *Defendant City of Mercer Island's Reply on Summary Judgment, dated*
20 *September 22, 2008;*
- 21 18) *Defendant SHARE/WHEEL's Brief in Support of Summary Judgment*
22 *Motion, dated September 22, 2008;*
- 23 19) *Defendant Mercer Island United Methodist Church's Reply Brief in Support*
24 *of Motion for Summary Judgment Based on LUPA, dated September 22,*
25 *2008;*
- 26 20) *Order Denying Plaintiff's Motion to Shorten Time, dated September 22,*
27 *2008;*
- 21) *Letter from Plaintiff's Counsel to all Defense Counsel Re: New Hearing*
Date, dated December 30, 2008;
- 22) *Plaintiff's Motion to Continue, dated March 4, 2009;*
- 23) *Plaintiff's Amended Motion to Continue, dated March 4, 2009;*

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 3**

- 1 24) *Plaintiff's Reply in Support of Amended Motion to Continue*, dated March
2 12, 2009;
- 3 25) *Order Granting Plaintiff's Motion to Continue Hearing and Setting Hearing*
4 *for April 24, 2009*, dated March 16, 2009.
- 5 26) *Defendant City of Mercer Island's Response in Opposition to Plaintiff's*
6 *Cross-Motion for Summary Judgment*, dated April 13, 2009;
- 7 27) *Declaration of Jane Ryan Koler in Support of Cross Motion for Summary*
8 *Judgment and Response to City Motion for Summary Judgment*, dated March
9 31, 2009 [served on April 3, 2009];
- 10 28) *Response to Mercer Island United Methodist Church Motion for Summary*
11 *Judgment and SHARE/WHEEL's Motion for Summary Judgment*, dated
12 April 13, 2009;
- 13 29) *Defendant City of Mercer Island's objection to Plaintiff's Submission of*
14 *Inadmissible Evidence and Untimely Papers*, dated April 20, 2009;
- 15 30) *Defendant Mercer Island United Methodist Church's Joinder in Defendant*
16 *City of Mercer Island's Objection to Plaintiff's Submission of Inadmissible*
17 *Evidence and Untimely Papers*, dated April 20, 2009;
- 18 31) *Plaintiff's Reply to City of Mercer Island's Response in Opposition to*
19 *Plaintiff's Cross-Motion for Summary Judgment*, dated April 20, 2009;
- 20 32) *Defendant City of Mercer Island's objection to [Plaintiff's] Reply to City*
21 *Response to Cross Motion for Summary Judgment and Fourth Declaration*
22 *of Tara Johnson*, dated April 21, 2009;
- 23 33) *Plaintiff's Motion to Shorten Time to Hearing Motion to Allow Filing of*
24 *Overlength Reply Brief to City's Response to Plaintiff's Cross-Motion for*
25 *Summary Judgment*, dated April 21, 2009.
- 26 34) *Plaintiff's Motion to Allow Filing Overlength Reply Brief to City's Response*
27 *to Plaintiff's Cross-Motion for Summary Judgment*, dated April 21, 2009;
- 35) *Plaintiff's Response to City of Mercer Island's Objection to Evidence*, dated
April 23, 2009;
- 36) *Plaintiff's Additional Authority*, dated April 23, 2009;
- 37) *Plaintiff's Errata Sheet Corrections to March 31, 2009 Declaration of Jane*
Koler, dated April 23, 2009;

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 4**

- 1 38) *Plaintiff's Errata Sheet Corrections to Caption of Response to City of*
2 *Mercer Island's Motion for Summary Judgment*, dated April 23, 2009; and
3 39) *Plaintiff's Response to City of Mercer Island's Objection to Plaintiff's Reply*
4 *to City Response to Cross-Motion for Summary Judgment and Fourth*
5 *Declaration of Tara Johnson*, dated April 23, 2009.

6 THE COURT ALSO CONSIDERED the following affidavits, declarations and
7 evidentiary material, including exhibits appended to each:

- 8 1) *Declaration of Steve Oaks in Support of Plaintiff's Motion and*
9 *Memorandum in Support of Injunctive Relief* (July 10, 2008);
10 2) *Declaration of Tara Johnson in Support of Plaintiff's Motion and*
11 *Memorandum in Support of Injunctive Relief* (July 10, 2008);
12 3) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion and*
13 *Memorandum in Support of Injunctive Relief*, and attachments thereto (July
14 10, 2008);
15 4) *Second Declaration of Tara Johnson in Support of Plaintiff's Supplemental*
16 *Memorandum in Support of Injunctive Relief*, and attachments thereto (July
17 18, 2008);
18 5) *Affidavit of Scott Morrow in Support of Defendant SHARE/WHEEL's*
19 *Response to Plaintiff's Request for Injunction* (July 25, 2008);
20 6) *Declaration of Bruce Thomas in Support of Defendant SHARE/WHEEL's*
21 *Response to Plaintiff's Request for Injunction* (July 25, 2008);
22 7) *Declaration of Karisa Vaughn in Support of Defendant SHARE/WHEEL's*
23 *Response to Plaintiff's Request for Injunction* (July 25, 2008);
24 8) *Declaration of Deborah Colley in Support of Defendant SHARE/WHEEL's*
25 *Response to Plaintiff's Request for Injunction* (July 25, 2008);
26 9) *Declaration of Scott Briggs Morrow in Support of Defendant*
27 *SHARE/WHEEL's Response to Plaintiff's Request for Injunction*, (July 25,
2008);
10) *Declaration of Joyce Trantina in Support of the City of Mercer Island's*
Response to the Plaintiff's Motion for Injunctive Relief, and attachments
thereto (July 25, 2008);

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 5**

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
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SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861

- 1 11) *Declaration of Eileen Robinson in Support of the City of Mercer Island's*
2 *Response to the Plaintiff's Motion for Injunctive Relief* (July 25, 2008);
- 3 12) *Declaration of Katie H. Knight in Support of the City of Mercer Island's*
4 *Response to the Plaintiff's Motion for Injunctive Relief*, and attachments
5 thereto [filed with the Court in conjunction with Plaintiff's TRO and
6 Preliminary Injunction Motion] (July 25, 2008);
- 7 13) *Declaration of Linda Herzog in Support of Defendant City of Mercer*
8 *Island's Motion for Summary Judgment Re: All Remaining Claims*,
9 attachments thereto (August 25, 2008);
- 10 14) *Declaration of Allison Spietz in Support of Defendant City of Mercer*
11 *Island's Motion for Summary Judgment Re: All Remaining Claims*, and
12 exhibits thereto (August 26, 2008);
- 13 15) *Declaration of Reverend Leslie Ann Knight in Support of Defendant City of*
14 *Mercer Island's Motion for Summary Judgment Re: All Remaining Claims*
15 (August 27, 2008);
- 16 16) *Declaration of Laura K. Crowley in Support of Plaintiff's Motion to Shorten*
17 *Time to Consider Plaintiff's Cross-Motion for Summary Judgment, or in*
18 *Alternative, to Change/Extend Mercer Island's Summary Judgment Motion*
19 (September 11, 2008);
- 20 17) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion and*
21 *Memorandum in Support of Cross-Motion for Summary Judgment*, and
22 attachments thereto (September 15, 2008);
- 23 18) *Third Declaration of Tara Johnson in Support of Plaintiff's Motion and*
24 *Memorandum in Support of Cross-Motion for Summary Judgment*, and
25 attachments thereto (September 15, 2008);
- 26 19) *Declaration of Jane Ryan Koler in Support of Plaintiff's Response to*
27 *Defendant City of Mercer Island's Motion for Summary Judgment*, and
attachments thereto (September 15, 2008);
- 20) *Declaration of Joy Johnston in Support of Defendant City of Mercer Island's*
Response to Plaintiff's Motion to Shorten Time (September 17, 2008);
- 21) *Declaration of Michael C. Walter in Support of Defendant City of Mercer*
Island's Reply on Summary Judgment, and attachments thereto (September
22, 2008);
- 22) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion to Continue*,
and attachments thereto (March 4, 2009);

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 6**

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

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- 1 23) *Declaration of Jeremy Culumber Re: Scheduling Summary Judgment Motion*
2 *Hearing* (March 10, 2009);
- 3 24) *Declaration of Jane Ryan Koler in Support of Response to Methodist Church*
4 *and SHARE/WHEEL's Motion for Summary Judgment* (April 12, 2009);
- 5 25) *Fourth Declaration of Tara Johnson* (April 20, 2009);
- 6 26) *Declaration of Jane Ryan Koler in Support of Plaintiff's Motion to Shorten*
7 *Time to Hear Plaintiff's Motion to Allow Filing of Overlength Reply Brief*
8 (iApril 21, 2009);
- 9 27) *Fifth Declaration of Tara Johnson, and attachments thereto* (April 23, 2009);
10 and
- 11 28) The pleadings, papers and other evidence presently on file with the Court
12 Clerk.

13 THE PARTIES' MOTIONS AND CROSS-MOTIONS were consolidated by the
14 Court on September 22, 2008, and were heard together. The Court decided these motions
15 after hearing argument by counsel for the parties on April 24, 2009, and considered that
16 argument in addition to and in conjunction with the foregoing pleadings, memoranda,
17 affidavits and other evidentiary materials.

18 BASED ON THE FOREGOING and pursuant to CR 56(c), the Court finds as
19 follows: (1) There are no disputed material facts with respect to Defendant City of Mercer
20 Island's Motion for Summary Judgment Re: All Remaining Claims dated August 28, 2008,
21 the City of Mercer Island's request for Summary Judgment on the merits as set forth in the
22 City's Response brief in Opposition to Summary Judgment dated April 13, 2009, or Plaintiff
23 Mercer Island Citizens for Fair Process's Cross-Motion for Summary Judgment dated
24 September 15, 2008; (2) that the issues presented the parties' motions are pure questions of
25 law, and that law is clear; (3) as a matter of law and based on the undisputed facts in the
26 record Plaintiff's Cross-Motion for Summary Judgment fails, and Plaintiff cannot establish
27 liability against the City of Mercer Island for a due process violation or for damages or
28 attorney's fees under 42 U.S.C. §1983 and §1988 or for any other relief and, therefore,

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 7**

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

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FAX: (206) 223-9423

1 Plaintiff's Motion for summary judgment must be denied; and (4) that as a matter of law
2 and based on the undisputed facts in the record, Defendant City of Mercer Island is entitled
3 to dismissal of all claims against the City in the Plaintiff's First Amended Complaint and,
4 therefore, the City of Mercer Island is entitled to Summary Judgment pursuant to City's
5 Motion for Summary Judgment Re: All Remaining Claims dated August 28, 2008 and on the
6 merits of Plaintiff's remaining claims as set forth in the City's Response in Opposition to
7 Plaintiff's Cross-Motion for Summary Judgment dated April 13, 2009.

8 NOW, THEREFORE, IT IS HEREBY:

9 ORDERED, ADJUDGED AND DECREED that Defendant City of Mercer Island's
10 Motion for Summary Judgment Re: All Remaining Claims dated August 28, 2008, and the
11 City's request for Summary Judgment on the merits as set forth in its Response in
12 Opposition to Plaintiff's Cross-Motion for Summary Judgment dated April 13, 2009, is
13 hereby **GRANTED**; and, it is hereby further

14 ORDERED, ADJUDGED AND DECREED that the Plaintiff's Cross-Motion for
15 Summary Judgment dated September 15, 2008 is hereby **DENIED**; and, it is hereby further

16 ORDERED, ADJUDGED AND DECREED that all of the remaining claims and
17 causes of action in the Plaintiff's First Amended Complaint are hereby dismissed with
18 prejudice, and Plaintiff's First Amended Complaint is hereby dismissed in its entirety, and
19 without costs to the Plaintiff; and, it is hereby further

20 ~~ORDERED, ADJUDGED AND DECREED that the Defendant City of Mercer~~
21 ~~Island is the prevailing party on these motions and is, therefore, entitled to statutory~~
22 ~~attorneys' fees and costs.~~

23 DATED this 24 day of April, 2009.

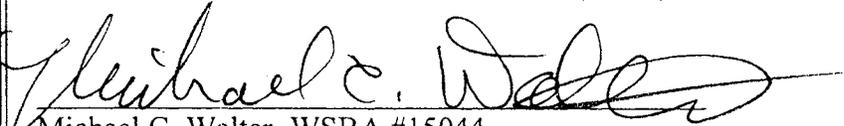
24
25 
26 **HONORABLE MICHAEL FOX, JUDGE**

27 **ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 8**

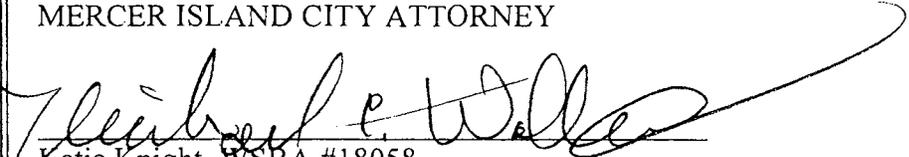
KEATING, BUCKLIN & McCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

1 Presented by:

2 KEATING, BUCKLIN & McCORMACK, INC., P.S.

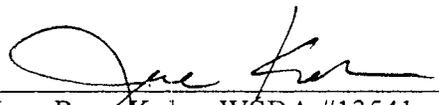
3 
4 Michael C. Walter, WSBA #15044
5 Attorneys for Defendant City of Mercer Island

6 MERCER ISLAND CITY ATTORNEY

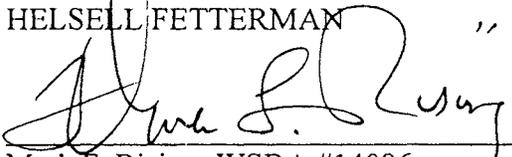
7 
8 Katie Knight, WSBA #18058
9 Mercer Island City Attorney

10 Notice of presentation acknowledged and waived;
11 Approved for entry:

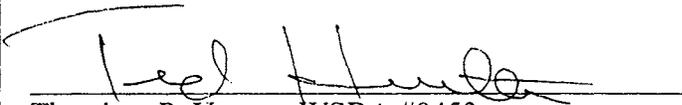
12 LAW OFFICES OF JANE KOLER

13 
14 Jane Ryan Koler, WSBA #13541
15 Attorneys for Plaintiff

16 HELSELL FETTERMAN "

17 
18 Mark F. Rising, WSBA #14096
19 Attorneys for Mercer Island United Methodist Church

20 TED HUNTER, ATTORNEY AT LAW

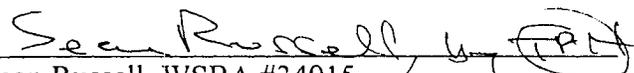
21 
22 Theodore P. Hunter, WSBA #8453
23 Attorneys for SHARE/WHEEL

24
25
26
27 **ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 9**

KEATING, BUCKLIN & McCORMACK, INC., P.S.
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AHLERS & CRESSMAN

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Sean Russell, WSBA #34915 
Attorneys for SHARE/WHEEL

**ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANT CITY, DENYING
PLAINTIFF'S MOTION FOR S.J.,
AND DISMISSING CASE WITH PREJUDICE - 10**

KEATING, BUCKLIN & McCORMACK, INC., P.S.
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I AT SEATTLE

MERCER ISLAND CITIZENS FOR FAIR
PROCESS, a Washington non-profit
corporation,

Plaintiff,

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; MERCER ISLAND UNITED
METHODIST CHURCH, a Washington
non-profit corporation, and the CITY OF
MERCER ISLAND, a Washington
municipal corporation,

Defendants.

No. 08-2-23083-0 SEA

CERTIFICATE OF SERVICE

FILED
APPEALS DIV. #1
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT -8 PM 4:57

The undersigned declares under penalty of perjury that I caused to be served by
ABC Legal Messengers, a copy of the below listed documents no later than October 8,
2009 as follows:

DOCUMENTS: Brief of Respondent City of Mercer Island; COS

TO: Jane Ryan Koler
Law Offices of Jane Ryan Koler
5801 Soundview Drive, Suite 255
Gig Harbor, WA 98335

ORIGINAL

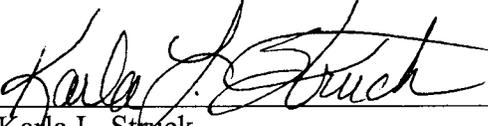
1 Ted Hunter
2 Law Offices of Ted Hunter
3 4500 9th Avenue NE, Suite 23
4 Seattle, WA 98105

5 Sean Russel
6 Ahlers & Cressman
7 999 Third Avenue, Suite 3100
8 Seattle, WA 98104-4088

9 Mark Rising
10 Helsell Fetterman
11 1001 Fourth Avenue, Suite 4200
12 Seattle, WA 98154

13 Katie Knight
14 City Attorney
15 City of Mercer Island
16 9611 SE 36th Street
17 Mercer Island, WA 98040

18 Dated this 8th day of October, 2009.

19 
20 _____
21 Kayla L. Struck