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COURT OF APPEALS DIV. #1
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NO. 63504-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MERCER ISLAND CITIZENS FOR A FAIR PROCESS,

Appellant,

v.

SHARE/WHEEL, a Washington Non-Profit Corporation, CITY OF
MERCER ISLAND & MERCER ISLAND METHODIST CHURCH, a
Washington Non-Profit Corporation

Respondents

RESPONDENT SHARE/WHEEL'S RESPONSIVE BRIEF

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I. STATEMENT OF THE CASE

Defendant SHARE/WHEEL, by and through its attorneys of record, respectfully requests this Court to uphold the decision of the Honorable Michael J. Fox of King County Superior Court, who dismissed the Plaintiff's claims because the exclusive means to seek review of a land use decision is by the Land Use Petition Act ("LUPA"), RCW 36.70C, and Plaintiffs did not seek review under that Act.

SHARE/WHEEL, the City of Mercer Island, and the United Methodist Church of Mercer Island entered into a contractual agreement regarding a temporary stay of Tent City IV on church property. CP 543-544, 719, 726. The agreement specifies the time for the stay (no more than 93 days), the regulations governing the stay (such as fences, sanitation and water), and the code of conduct for those who stay (such as no alcohol or drugs, noise levels, and warrant checks). CP 543-551. Citizens for Fair Process ("CFP") sought injunctive relief that prohibited the contracting parties from performing their respective duties and obligations. CP 1-9. The Court refused to issue the requested injunctive relief, finding that LUPA is the exclusive means of seeking review of a land use action. CP 20-41, 342-364, 407-417.

CFP now asks the Court of Appeals to overturn this decision. The request by CFP is inappropriate because LUPA is the exclusive means of seeking review of a land use decision by the City, and CFP failed to follow the requirements of LUPA.

II. ARGUMENT AND LEGAL AUTHORITY

The Land Use Petition Act is the Exclusive Means to Seek Review of the City's Land Use Action.

1. Standard of Review

Appellate courts review summary judgment orders de novo performing the same inquiry as the trial court. *Waples v. Yi*, 14 Wn. App. 54, 189 P3d 863 (2008). In the present case, the trial court's grant of partial summary judgment is justified based on the strict requirement that all appeals of Land Use Actions be done in accordance with LUPA.

2. All Land Use Decisions Made by Local Government are Final Unless Appealed Pursuant to the Land Use Petition Act, RCW 36.70B.

The City Council approved a contract with SHARE/WHEEL and the United Methodist Church at its Council meeting on June 16, 2008. CP 668. That contract is a land use decision by the City. The Legislature and the Courts direct that LUPA "shall be the exclusive means of judicial review of land use decisions". RCW 36.70C.030. This means the Court must reject the request for a preliminary injunction and direct CFP to

follow the dictates of the Legislature and the Court and file an appropriate action under LUPA if it is timely to do so.

There is no doubt that the decision of the City to authorize Tent City in a Temporary Use Agreement is a land use decision. It is a “final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination” as that term is defined in RCW 36.70C.020. The directive to follow the procedural requirements of LUPA when seeking review of a land use decision is consistent with the purpose of LUPA 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. Failure to follow LUPA when seeking review of a land use decision introduces chaos to local government actions in its regulation of land within its borders. This Court should reject CFP’s effort to create chaos following an orderly decision by the City, as this Court of Appeals and the Washington Supreme Court has done on many occasions.

In *Chelan County v. Nykreim*, the court examined whether approval of a boundary line adjustment (BLA) application issued by a county officer was a "land use decision" under LUPA . *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). In that case, the court held

that LUPA applies to both ministerial and quasi-judicial land use decisions. *Chelan County*, 146 Wn.2d 927. The Court has also found that building permits are “land use decisions” which are subject to judicial review under LUPA. *Id.* at 938; *see also James v. Kitsap County*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005).

The *James* court rejected a claim that a developer appeal should be heard under the Superior Court’s original jurisdiction in Article IV, Section 6 of the Washington State Constitution. In that case, the developer claimed that because the superior court has original jurisdiction, the challenge to the County's imposition of impact fees as a condition on issuance of their building permits is subject to a three-year statute of limitations under *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994). The Court disagreed, finding that the argument “no longer viable in the wake of LUPA, which, establishes uniform procedures and by its own terms is the “exclusive means of judicial review of land use decisions. . .” *James*, 154 Wn.2d at 590. The *James* court further concluded that “applying the procedural requirements of LUPA does not divest the power of the superior court to exercise its original jurisdiction under Article IV, Section 6” and that “while a superior court may be granted power to hear a case under article IV, section 6, that grant does not obviate procedural requirements established by the legislature.”

James, 154 Wn.2d at 586. The *James* Court held that the purpose of following LUPA as the exclusive means of review of a City's land use decision is to establish "definite time limits is to allow property owners to proceed with assurance in developing their property". *James*, 152 Wn.2d at 589. Assurance that a land use decision is final is important to homeless persons seeking a safe place to stay, and to those who would provide it to them.

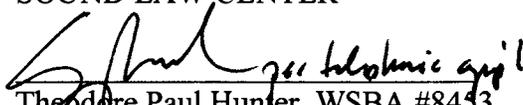
III. CONCLUSION

Based on the foregoing, SHARE/WHEEL asks this Court to uphold the decision of the Superior Court, and give assurance to all that land use decisions made by local government are final unless appealed pursuant to the Land Use Petition Act, RCW 36.70B.

RESPECTFULLY SUBMITTED this 9th day of October, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of October, 2009, I caused a copy of the document to which this certificate is attached to be served on all counsel of record by the following methods:

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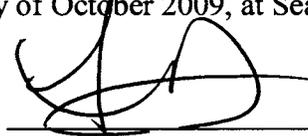
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DATED this 9th day of October 2009, at Seattle, Washington.



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