

Honorable Steven Scott
Noted for: Wednesday, June 9, 2004
9:00 A.M.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF BOTHELL, a municipal
corporation,

Plaintiff,

NO. 04-2-11578-7 SEA

MOTION FOR PRELIMINARY
INJUNCTION

v.

CORPORATION OF THE CATHOLIC
ARCHBISHOP OF SEATTLE, a
Corporation Sole, acting through St.
Brendan Parish; SEATTLE HOUSING
AND RESOURCE EFFORT AND THE
WOMEN’S HOUSING, EQUALITY AND
ENHANCEMENT LEAGUE, a Washington
nonprofit corporation,

Defendants.

I. RELIEF REQUESTED

1.1 Plaintiff, City of Bothell (“City”), by and through its attorneys, Michael Weight, Bothell City Attorney, and Stephen R. King and Kenyon Disend, PLLC, requests that a Preliminary Injunction be issued against Defendant Corporation of the Catholic Archbishop of Seattle, acting through St. Brendan Parish (“St. Brendan Parish”), and Defendant Seattle Housing and Resource Effort and the Women’s Housing, Equality and Enhancement League (“SHARE/WHEEL”) as follows:

a. Declaring St. Brendan Parish to be in violation of the City of Bothell

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1 Municipal Code (“BMC”) by failing to obtain a Conditional Use Permit (“CUP”) for
2 operation of a campground;

3 b. Ordering Defendants to cease and desist from using or allowing the use of
4 the undeveloped property in the 10100 block of NE 195th Street, Bothell, Washington
5 98011 (King County Assessor’s Parcel Number 0526059228) (“Subject Property”) as a
6 campground until such time as Defendants have in their possession a valid CUP issued by
7 the City of Bothell for operation of a campground on the Subject Property;

8 c. Ordering SHARE/WHEEL to cease and desist from occupying the Subject
9 Property until such time as Defendants have in their possession a valid CUP issued by the
10 City of Bothell for operation of a campground on the Subject Property;

11 d. As an alternative to 1.1(b) and 1.1(c) noted above, ordering Defendants to
12 adhere to the following conditions unless and until a valid and current CUP is obtained
13 from the City of Bothell for operation of a campground on the Subject Property: 1)
14 Compliance with the applicable terms of section III(J) of the Consent Decree entered into
15 on March 13, 2002 by SHARE/WHEEL, El Centro De La Raza, and the City of Seattle in
16 the Washington Court of Appeals Case No. 49428-7-I, a copy of which is attached to this
17 Motion for Preliminary Injunction; 2) Within two (2) business days, a clear methodology
18 will be established to provide positive legal identification for all residents of Tent City –
19 the Bothell Police Department will be allowed to utilize this identification to conduct a
20 warrant and sex offender check of the residents only; 3) St. Brendan Parish will, within
21 five (5) business days, post a one million dollar bond or, in the alternative, provide proof
22 of one million dollar liability insurance coverage, with the City of Bothell named as
23 additionally insured, the bond or insurance to protect and personal and property damage
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1 associated with any actions of residents of Tent City 4 and/or any actions of members of
2 SHARE/WHEEL or St. Brendan's Parish in conjunction with Tent City 4; 4) Provide
3 paid, professional site security, both on the Tent City 4 site, as well as in the surrounding
4 neighborhood. This security will be approved by the City of Bothell Chief of Police, in
5 terms of number and type of security personnel required; 5) In the event Bothell Police
6 Department overtime is required to address problems and concerns associated with this
7 use, St. Brendan Parish agrees to reimburse the City of Bothell for these overtime costs;
8 6) SHARE/WHEEL and St. Brendan Parish agree to allow Bothell Police officers to enter
9 Tent City 4 property, if the Police Department deems it necessary to protect the health,
10 safety, and welfare of Bothell and/or Tent City residents; 7) SHARE/WHEEL and/or St.
11 Brendan Parish personnel agree to phone the City's Police Department if someone is
12 rejected or ejected from the site.

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14 e. Granting a judgment for the City's costs incurred during any abatement
15 actions pursuant to RCW 7.48;

16 f. Granting a judgment in favor of the City for its costs, disbursements, and
17 reasonable attorneys' fees incurred herein; and

18 g. Granting such further relief as the Court deems just and proper.

19 II. STATEMENT OF FACTS

20 2.1 On May 14, 2004, the City of Bothell was informed that SHARE/WHEEL
21 would be locating Tent City 4, a temporary tent encampment for up to one hundred (100)
22 homeless persons, on the Subject Property. Declaration of William Wiselogle in Support
23 of Declaratory and Injunctive Relief ("Wiselogle Declaration"), at 1-2.

24 2.2 Defendants have entered into an agreement under which SHARE/WHEEL
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1 may occupy the Subject Property and locate Tent City 4 there. Declaration of Michael
2 Weight in Support of Motion for Preliminary Injunction, Attachment 1.

3 2.3 On May 17, 2004, SHARE/WHEEL began erecting Tent City 4 on the
4 Subject Property. Wiselogle Declaration, at 2.

5 2.4 As of May 26, 2004, SHARE/WHEEL continues to occupy the Subject
6 Property and operate Tent City 4 at that location, with approximately sixty (60) residents.
7 Declaration of Forrest Conover in Support of Motion for Preliminary Injunction
8 (“Conover Declaration”), at 2, filed herewith.

9 2.5 Tent City 4 constitutes a campground under BMC 11.02.004. A CUP is
10 required for property to be used as a campground. BMC 12.06.110. Wiselogle
11 Declaration, at 2.

12 2.6 As of May 26, 2004, Defendants have not obtained a CUP for operation of
13 a campground on the Subject Property. Declaration of Michael DeLack in Support of
14 Motion for Preliminary Injunction (“DeLack Declaration”), at 2-3.

15 2.7 The review of an application for a CUP includes consideration of activities
16 that may be detrimental to the public health, safety and general welfare. BMC
17 12.28.040(A)(2). Without a CUP, there currently exists no mechanism for the City of
18 Bothell to assure the protection of the public health, safety, and welfare.

19 2.8 The Subject Property is located in a single-family residential area, directly
20 adjacent to the grade school playground of Heritage Christian School. Three elementary
21 schools are located within two blocks of the Tent City 4 campsite. Conover Declaration, at 2.

22 2.9 Since Tent City 4 opened at the Subject Property on Monday, May 17, 2004,
23 Bothell police officers have investigated a number of incidents and circumstances in and
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1 around Tent City 4 and involving Tent City 4 residents. Conover Declaration, at 2.

2 2.10 At the time of their contact with Bothell police officers, a number of Tent
3 City 4 residents had current warrants for their arrest. Conover Declaration, at 2.

4 **III. STATEMENT OF ISSUES**

5 3.1 Whether Plaintiff is entitled to a preliminary injunction enjoining Defendants
6 from continuing to operate a campground without a CUP?

7 **IV. EVIDENCE RELIED UPON**

8 4.1 Declaration of William Wiselogle in Support of Declaratory and Injunctive
9 Relief; previously filed in this matter.

10 4.2 Declaration of Forrest Conover in Support of Declaratory and Injunctive
11 Relief; previously filed in this matter.

12 4.3 Declaration of Forrest Conover in Support of Motion for Preliminary
13 Injunction;

14 4.4 Declaration of Michael DeLack in Support of Motion for Preliminary
15 Injunction; and

16 4.5 Declaration of Michael Weight in Support of Motion for Preliminary
17 Injunction.

18 **V. LEGAL AUTHORITY**

19 5.1 BMC Chapter 12.06, "Permitted Uses."

20 5.2 BMC Chapter 12.28, "Conditional Use Permits."

21 5.3 BMC Chapter 11.20, "Enforcement."

22 5.4 Revised Code of Washington, Title 7, Chapter 40, "Injunctions."

23 5.4 Revised Code of Washington, Title 7, Chapter 48, "Nuisance."

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VI. LEGAL ARGUMENT

Under Washington law, this Court has the legal authority to issue a preliminary injunction to enjoin municipal code violations. Defendants’ operation of a campground on the Subject property without proper permits and SHARE/WHEEL’s occupancy of the Subject Property for that purpose, are violations of the Bothell Municipal Code, and the Defendants’ actions satisfy the criteria under Washington caselaw for granting a preliminary injunction.

Additionally, the City’s code requirement do not place a “substantial burden” on the Parish’s religious exercise under the federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”) and the associated caselaw. St. Brendan Parish must comply with the law, and the City is simply seeking to have the Parish do so.

A. This Court Has Authority to Issue an Injunction in This Matter.

RCW 7.40.020 provides:

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff’s rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion....

Emphasis added.

A court may grant such an injunction “at the time of commencing the action, or at any time afterwards, before judgment in that proceeding.” RCW 7.40.040.

The court also has authority under RCW Chapter 7.48 to enjoin public nuisances

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1 and to order abatement of such nuisances. RCW 7.48.020, .200. A public nuisance is a
2 nuisance that “affects equally the rights of an entire community or neighborhood,
3 although the extent of the damage may be unequal.” RCW 7.48.130. RCW 7.48.120
4 defines a nuisance as:

5 unlawfully doing an act, or omitting to perform a duty, which act or
6 omission either annoys, injures, or endangers the comfort, repose, health or
7 safety of others, ... or in any way renders other persons insecure in life, or in
8 the use of property.

9 Emphasis added.

10 Defendants’ “unlawful” act is their operation of a campground without the necessary
11 permit. As detailed in the Conover Declaration, this illegal campground does annoy,
12 injure, and endanger the residents of the neighborhood surrounding Tent City 4 and
13 renders those residents insecure in their safety in and about their homes.

14 Washington case law further makes it clear that this Court is authorized to enjoin
15 violations of City codes. *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 485, 513
16 P.2d 80 (1973). In *City of Mercer Island v. Steinmann*, the Court of Appeals stated that
17 “[e]nforcement of a zoning ordinance by injunction is essential if the amenities of the
18 area sought to be protected are to be preserved.” *Id.* at 486 (emphasis added).

19 B. Defendants’ Conduct Satisfies the Requirements for Issuance of a
20 Preliminary Injunction.

21 A party seeking a preliminary injunction must show: “(1) that he has a clear legal or
22 equitable right; (2) that he has a well-grounded fear of immediate invasion of that right; and
23 (3) that the acts complained of are either resulting in or will result in actual or substantial
24 injury to him.” *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638
25 P.2d 1213 (1982).

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1. Clear Legal or Equitable Right.

Article XI, Section 11 of the Washington State Constitution authorizes municipalities to make and enforce ordinances. The City of Bothell has a clear legal right to enact ordinances and to expect compliance.

Tent City 4 constitutes a campground under BMC 11.02.004. A CUP is required before property may be used as a campground. BMC 12.06.110.

An applicant for a CUP must demonstrate that the proposal is not “detrimental to the public health, safety and general welfare....” BMC 12.28.040(A)(2). The City may grant the permit only if the proposed use “will not introduce hazardous conditions at the site that cannot be mitigated so as to protect adjacent properties, the vicinity, and the public health, safety and welfare of the community from such hazards.” BMC 12.28.040(F) (emphasis added).

In determining if a party has a clear legal or equitable right, the court examines the likelihood that the moving party will prevail on the merits. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621, 623 (1998). In determining that likelihood, “the trial court must reach the merits of purely legal issues[;] ... [h]owever, in accord with well-settled principles, a court is not to adjudicate the ultimate merits of the case.” *Id.*, at 286.

In this case, the City has a clear legal right to enforce its code under Washington law, and as is detailed in Section VI(C) *infra*, RLUPA does not provide a legal basis for preventing the City’s action in requiring a permit for the campground.

2. Bothell has Well-founded Fear of Immediate Invasion of Its Rights

The City of Bothell has a well-founded fear of immediate invasion of its right to enforce its ordinances. As detailed in the Conover Declaration, Defendants have been

1 operating the campground in violation of the City's municipal code since May 17, 2004,
2 and continue to do so.

3 The City of Bothell has exercised its clear legal right to enact ordinances, and has
4 found the Defendants to be in violation of those ordinances. The Defendants have been
5 informed of those violations, yet continue to violate the City code. Under these
6 circumstances, injunctive relief is the appropriate remedy to ensure compliance.

7 3. There Has Been an Injury to the City.

8 The continuing injury suffered by the City of Bothell due to the Defendants'
9 ongoing violations of the City's municipal code is sufficient to justify the issuance of a
10 preliminary injunction. The Defendants' conduct has placed, and continues to place, the
11 public at considerable risk.

12 There are two types of harm the City is suffering due to the Defendants' actions.
13 First, the City is unable to require mitigation of the impacts of Tent City 4 on the
14 surrounding neighborhood, the environment, and the public health, safety, and welfare.
15 Until St. Brendan Parish obtains a CUP for the use of the Subject Property as a
16 campground, the City will not have full information on the scope of activities on the site,
17 and cannot place conditions on those activities.

18 Second, the City has been able to determine certain harms are occurring to the
19 public health, safety, and welfare due to the Defendants' operation of the campground.
20 The Subject Property is located in a single-family residential area, and three elementary
21 schools are located within two blocks of Tent City 4. Since Tent City 4 opened, Bothell
22 police officers have investigated a number of incidents involving Tent City 4 and its
23 residents. At the time of their contact with Bothell police officers, a number of Tent City
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1 4 residents had current warrants for their arrest.

2 One individual was arrested on a warrant for failure to appear on an Assault case,
3 and for Violation of a No Contact Order arising out of the aforementioned Assault, the
4 Violation of a No Contact Order occurring at Tent City 4. This individual pleaded guilty
5 on May 24, 2004 to this Violation of a No Contact Order. Conover Declaration, at 2.

6 Bothell police officers arrested a resident of Tent City 4 on a felony Escape From
7 Community Custody warrant. This individual is classified as a Violent Offender, and has
8 been convicted of Robbery, Burglary, Violation of the Uniform Controlled Substances
9 Act with Intent to Sell, and Assault 4. Conover Declaration, at 2.

10 On Thursday, May 20, 2004, a resident of Tent City 4 was evicted from the
11 encampment due to his status as a Registered Level II Sex Offender. He had been in
12 residence at Tent City 4 since Monday, May 17, 2004. Conover Declaration, at 2.

13 While the harms to the City and its citizens have occurred, and continue to occur,
14 the court is not limited to addressing past or currently occurring harms. *County of*
15 *Spokane v. Local No. 1553, American Federation of State, County and Mun. Employees,*
16 *AFL-CIO*, 76 Wn. App. 765, 771, 888 P.2d 735 (1995) (“[t]he harm need not be
17 irreparable, nor must the injury already have occurred to get an injunction.”).

18
19 4. The Balance of Interests Between Defendants and the City of
20 Bothell Supports Granting of a Preliminary Injunction.

21 In granting an injunction, a court must examine the above-stated criteria
22 “balanc[e] the relative interests of the parties and, if appropriate, the interests of the
23 public.” *Tyler Pipe Indus., Inc.*, 96 Wn.2d, 792. However, this balancing of the relative
24 hardships “is reserved for the innocent defendant who proceeds without knowledge or
25 warning that his activity encroaches upon another’s property rights.” *Hollis v. Garwall*,

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1 *Inc.*, 137 Wn.2d 683, 699-700, 974 P.2d 836 (1999). The Defendants have been
2 informed that their actions were illegal, but they continued to operate Tent City 4. Under
3 *Hollis v. Garwall*, their hardship cannot be considered in issuance of the injunction.

4 C. The City of Bothell's Actions are in Keeping With RLUIPA.

5 The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42
6 U.S.C. §§ 2000cc-2000cc-5, regulates the government's ability to apply land use
7 regulations to religious activities. RLUIPA provides generally that:

8 No government shall impose or implement a land use regulation in a
9 manner that imposes a substantial burden on the religious exercise of a
10 person, including a religious assembly or institution, unless the
11 government demonstrates that imposition of the burden on that person,
12 assembly, or institution (A) is in furtherance of a compelling
13 governmental interest; and (B) is the least restrictive means of furthering
14 that compelling governmental interest.

15 42 U.S.C. § 2000cc(a)(1)(A)-(B) (emphasis added).

16 While St. Brendan Parish is undoubtedly a religious institution, the City of
17 Bothell's requirement that the church follow the City's land use code does not impose a
18 substantial burden on the church's exercise of religion. The Ninth Circuit Court of
19 Appeals found that a land use regulation substantially burdens the exercise of religion
20 only if it imposes "a significantly great restriction or onus upon such exercise." *San Jose*
21 *Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (2004).

22 The federal courts have found that providing services to the homeless is a part of
23 the exercise of the Christian faith. *Fifth Avenue Presbyterian Church v. the City of New*
24 *York*, 293 F.3d 570 (2002). RLUIPA does not give St. Brendan the right to simply ignore
25 the City of Bothell's regulations.

In *San Jose Christian College*, the College applied for a zoning change to allow

1 the College to construct an educational and worship facility on its property. Morgan Hill
2 denied the rezone due to the College's failure to comply with the City's application
3 requirements. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d at 1029.

4 San Jose Christian College brought suit under RLUIPA challenging the City's
5 decision. In upholding the denial of the rezone, the Ninth Circuit found that "[t]he City's
6 ordinance imposes no restriction whatsoever on College's religious exercise; it merely
7 requires College to submit a complete application, as is required of all applicants." *Id.*, at
8 1035 (emphasis added). The City of Bothell's requirement for a CUP is essentially the
9 same as the City of Morgan Hill's requirement for a complete application: "...the City's
10 regulations in this case do not render religious exercise effectively impracticable." *Id.*
11 They require only St. Brendan Parish to follow Bothell's neutral land use laws by
12 obtaining a permit prior to allowing a campground on their property, rather than
13 unilaterally deciding that RLUIPA allows them to ignore local land use regulations.
14

15 VII. CONCLUSION

16 7.1 For the above set forth reasons, the City of Bothell respectfully requests that
17 the Court issue an Order for Preliminary Injunction.

18 RESPECTFULLY SUBMITTED this _____ day of May, 2004.

19 CITY OF BOTHELL

20 By _____
21 Michael Weight, WSBA #11643

22 **KENYON DISEND, PLLC**

23 By _____
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25 WSBA No. 29790
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