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313395

COURT OF APPEALS DIV III OF THE STATE OF WASHINGTON

BEDREDDIN IMAN and SAMEER HATEM, Appellants,

and

MUSLIM AMERICA, Appellant,

v.

TOWN OF SPRINGDALE, Respondent

APPELLANTS' OPENING BRIEF

Bedreddin Iman
Sameer Hatem
Appellants, *pro se*

Dawud Ahmad & Associates
P.O. Box 522
Springdale, WA 99173-0522
(509) 258-9031
qalam@muslimamerica.net

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ASSIGNMENTS OF ERROR

Assignments of Error

1. The Superior Court erred in ignoring evidence of deliberated official harassment in a proceeding seeking prohibition of that harassment.

2. The Superior Court erred in refusing to accept Appellants' Writ Applications for "lack of standing."

3. The Superior Court abused its discretion by failing to exercise its equity jurisdiction.

4. The Superior Court erred in determining this action was "frivolous" so as to award the Town "reasonable expenses."

Issues Pertaining to Assignments of Error

1. May a municipality disturb and molest citizens in their persons and properties under color of law on account of religion? (Assignment of Error 1.)

2. Given the Town's disturbance of Plaintiffs under color of law on account of their religious exercise, did the Superior Court fail to properly assume subject matter jurisdiction over the Town's enforcement actions? (Assignment of Error 1.)

3. Did the Superior Court err in ignoring conclusive evidence that the Town's actions to prohibit a religious land use violated explicit federal law? (Assignment of Error 1.)

4. Did the Superior Court err in concluding that the Defendant Town was acting withing its jurisdiction? (Assignments of Error 1 & 2.)

5. Did the Superior Court err in concluding that Plaintiffs have a plain, speedy and adequate remedy at law? (Assignment of Error 2.)

6. May a Writ of Prohibition lie to prohibit a wrongful prosecution certain to be dismissed or overturned? (Assignment of Error 2.)

7. Given the *prima facie* circumstances of Plaintiffs' religious land use, did the Superior Court err in concluding that adoption of an ordinance pursuant to RCW § 19.27.042 is a "discretionary" act? (Assignment of Error 2.)

8. Did the Superior Court err in concluding that the language of RCW § 19.27.042(1), containing the word "may," is "clear language" conferring discretion and option in addition to authorization? (Assignment of Error 2.)

9. Plaintiffs enjoy equitable rights to the use of Muslim America's property which remains uncontested by Muslim America. Their religious land use is also an equitable right. Did the Superior Court err in failing to cognize Plaintiffs' standing in equity? (Assignments of Error 2 & 3.)

10. With respect to the balancing interests of both parties, the Superior Court could have provided a reasonable equitable remedy to Plaintiffs and Defendant Town at the outset of this action, forestalling any need for protracted and expensive litigation. Did the Superior Court abuse its discretion by failing to exercise its equity jurisdiction? (Assignment of Error 3.)

11. May the Superior Court deny a request for a ruling on jurisdiction, or do so off the record and fail to make a record of that denial? (Assignment of Error 3.)

12. May an action invoking the equity jurisdiction of the court for want of an adequate remedy at law – one that advances issues justiciable only in equity – be termed "frivolous" for an alleged lack of issues actionable at law? (Assignments of Error 2, 3 & 4.)

13. Is the underlying action "entirely frivolous" so as to allow the court to award "reasonable expenses" under RCW § 4.84.185? (Assignment of Error 4.)

STATEMENT OF THE CASE

The Town of Springdale ("Town") acted against Appellants Dawud Ahmad ("Ahmad") and Bedreddin Iman ("Iman") (together "Appellants") to prohibit their recognized religious practice of providing housing for indigent persons in a cottage owned by the nonprofit corporation of their religious assembly, Muslim America, by attempting to enforce a proprietary model building code template purchased from a private publisher and, contrary to the Town's delegated legislative authority, adopted as an ordinance inconsistent with State law; (CP 208) by refusing to implement the Town's enforcement jurisdiction under RCW §19.27.050 in adopting an ordinance or resolution pursuant to RCW §19.27.042 given the *prima facie* circumstances of Appellants' religious land use and their civil petition for equitable relief; (CP 28) by directing an extra-judicial summary eviction by the Town Marshal; (CP 12 § 10, 11) by officially threatening to remove or demolish the cottage; (CP 31) by issuing a Notice of Violation clarifying unequivocally the Town's prohibition of petitioners' residency in the cottage; (CP 68) by issuing Notices of Infraction to the corporation (CP 46-48) and to a non-corporate fiduciary office of the religious assembly (CP 49-50) for failure to obtain a non-required Town Business License, later dismissing the Notices from the District Court;

and by otherwise disturbing and molesting the Appellants on account of their religious practice.

Ahmad and Iman, proceeding pro se and *in forma pauperis*, (CP 1-6) sought to invoke the equity jurisdiction of the Superior Court to protect their religious practice. Serving Notice on the Town of Springdale, (CP 7) Appellants applied for a statutory Writ of Prohibition pursuant to Chapter 7.16 of the Revised Code, (CP 8-31) against a specific enforcement action initiated by the Town of Springdale pursuant to the Town's non-law Building Code Ordinance, alleging *inter alia* that the Town did not have enforcement jurisdiction under the Washington State Building Code for that action, and later that the enforcement action violated preemptive federal law, the Religious Land Use and Institutionalized Persons Act of 2000, codified as 42 U.S.C. §2000cc. (CP 164-175)

Subsequently, and prior to entry of the Court's Orders of Indigency, the Town formally refused to adopt an Ordinance implementing its enforcement jurisdiction under the State Building Code. (CP 51-52, 361-362) Appellants presented for filing an Amended Application, contained within a Motion for Leave to Amend Application, (CP 37-39) additionally seeking a statutory Writ of Mandamus directing the Town to adopt such an ordinance.

(CP 33-52, 59-68) This Motion, and all previous and supporting documents, were filed simultaneously with the Orders of Indigency on April 7, 2010.

On April 26, 2010, two days before Judge Maryann C. Moreno's pre-assignment to this case, (CP 69) the Town issued a Notice of Infraction to Muslim America's Secretary General, Sameer Hatem ("Hatem"), for violation of the Town's Building Code Ordinance 343, (CP 150) failing to file it with the Stevens County District Court. Two days following Judge Moreno's pre-assignment, the Town withdrew the Infraction on a technicality, (CP 151) leaving opportunity for its re-issuance pending the outcome of this action.

The Superior Court, during an off-the-record scheduling conference prior to any hearing, denied the Appellants' written (CP 139-141) and oral request for a ruling on jurisdiction without making a record of its denial; (CP 495-500) and without any notice of its action, denied the Appellants' standing to apply for the Writs, failing to assume the initial jurisdiction conferred on the Court by RCW 7.16 or to dismiss the action for lack of jurisdiction. The Court revealed this later during the January 7, 2011 hearing:

> [T]he parties that were listed as plaintiffs really had no standing to bring either of these issues before the court.

Verbatim Report of Proceedings ("VRP"), 1/7/11, p. 19, lines 21-23.

Moving for joinder, the Town contended that as owner of the property

that was the subject of the lawsuit, only Muslim America had standing to apply for a Writ. (CP 104-106) Rejecting argument in opposition, (VRP, 5/25/10, p. 14, from line 3 to p.17, line 7) an offer of proof that Muslim America's refusal was based on religious prohibition (CP 123-124) and on a lack of justiciable interest in the action, (CP 122) and assertion that complete relief could be obtained through the issuance of the requested Writs, (CP 123) the Superior Court ordered Muslim America joined as a plaintiff. (CP 252-253)

Immediately thereafter, Mr. Hatem moved to intervene as a plaintiff. (CP 145-158) The Town then filed Motions to Disqualify Mr. Ahmad and Dawud Ahmad & Associates as well as a Motion to Strike pleadings pertaining to Muslim America's appearance, claiming that Appellants were barred from appearing on behalf of Muslim America as they were not licensed attorneys. (CP 215-241) This motion was soon granted by the Court. (CP 278-279) Shortly afterward, Muslim America appeared by and through its attorney Robert A. Simeone, who filed the Refusal CR 19(a) original Appellants were disqualified from filing. (CP 280-281)

Following Muslim America's joinder, the Superior Court set July 9, 2010 for a "hearing on the Application for the Writ." (VRP 6/11/10, p. 42,

lines 5-18) Muslim America then sent a letter to Judge Moreno, explaining its religiously mandated prohibition against joining this action. (CP 254-256) Advancing Appellants' Motion to Reconsider Joining Muslim America, Mr. Ahmad reiterated the subject matter of the Application: the Town's disturbance of appellants' religious exercise of providing sanctuary for indigent persons. (CP 282-285, 286) His Motion was quickly denied. (CP 296)

The Town then sought dismissal of the action for Appellants' failure to state a claim upon which relief may be granted. (CP 305-317) During the July 9, 2010 hearing on the merits, the Court, in addressing Nathan Smith, counsel for the Town, cognized the cause of Appellants' action: the Town's infringement upon their religious exercise. (VRP 7/9/10, p. 33, lines 4-16) There is no prior mention by the Court of the cause of their action and later, the Court dismissed its singular mention as a curiosity. (VRP, 1/7/11, p.21, lines 20-25) On October 6, 2010, the Court sent by facsimile a copy of its Opinion to the Clerk, annotated "File stamp today." (CP 378-380) Five days after expiration of the 90-day period within which a decision must be rendered, the Court's decision denying Appellants' application for the requested writs was filed as entered. (CP 381-383)

Moving for an Order Awarding Costs and Attorneys' Fees for

Frivolous Action, (CP 406-477) the Town speculated that Appellants knew from the beginning of the action they had advanced their case without reasonable cause. (CP 415) The Superior Court, granting the Motion, entered a Judgment and Order awarding the defendant Town the sum of $23,916.66 in reasonable expenses against the appellants and involuntary plaintiff Muslim America, jointly and severally. (CP 562-566, VRP 1/7/11, p.19 from line 5 to p.21, line 15) Appellants then filed their Notice of Appeal in this Court. (CP 488-494)

On December 28, 2010, Appellants filed with the Superior Court a Narrative Report of Proceedings ("NRP") providing details about the May 19, 2010 scheduling conference. (CP 495-500) They asserted the NRP reflected an *ab initio* denial both of their standing and of the equity jurisdiction invoked by a Special Proceeding pursuant to RCW 7.16, and as such, included information dispositive of the case result. Once again, the eventual outcome of the contention before the court favored the Town, and all portions of the NRP, excepting its verbatim transcription were ordered stricken from the court record. (CP 677-679)

In this Court, Ahmad, Iman and Hatem, as well as Muslim America, objected to the trial court decision relating to the NRP. Subsequent

proceedings led to Oral Argument held before Commissioner Steven Goff on October 6, 2011, who thereafter denied discretionary review. Appellants' Motions to Modify Ruling were also denied.

Mr. Ahmad, who from the beginning of this action, shouldered the burden of preparing appellants' pleadings and instruments almost single-handedly, passed away on May 1, 2012. Surviving Appellants Iman and Hatem now continue his work. It is from the Superior Court's Findings of Fact, Conclusions of Law and Order Dismissing Applications for Writs of Prohibition and Mandamus (CP 490-493) and its Judgment and Order Granting Defendant's Motion for Award of Reasonable Expenses Including Fees of Attorney Under RCW § 4.84.185 (CP 562-565) that Appellants seek direct review.

STANDARD OF REVIEW

The Superior Court did not identify the Town's harassment of Appellants on account of their religious exercise as the subject matter of the underlying action. Whether a court has subject matter jurisdiction is a question of law reviewed de novo. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). Additionally, any party to an

appeal may raise the issue of lack of subject matter jurisdiction at any time. RAP 2.5(a)(1). Both Appellants' provision of sanctuary for indigent persons and their prohibition against calling upon Muslim America to join this action are religious exercises and, as such, constitutionally-protected rights, yet the Superior Court disregarded these rights in rendering its Judgment. Constitutional challenges are questions of law and are reviewed de novo. *City of Redmond v. Moore*, 91 P. 3d 875, 878, 151 Wash.2d 664 (2004).

The Superior Court denied Appellants' standing to apply for a Writ of Prohibition and a Writ of Mandamus. Such denial is reviewed for abuse of discretion. *Leskovar v. Nickels*, 166 P.3d 1251, 1253 (Wash. Court of Appeals, 1st. Div. 2007). The Court determined that the Town's adoption of RCW §19.27.042 was discretionary by its use of the word "may," yet Appellants contest this given the *prima facie* circumstances of their religious land use protected by statutory and constitutional law. Construction of a statute is a question of law which is reviewed de novo. *Rettkowski v. Dep't Of Ecology*, 128 Wn. 2d 508, 515, 910 P. 2d 462 (Wash. 1996). The Court awarded the Town $23, 916.66 in "reasonable expenses" against individual Appellants and involuntary Appellant Muslim America for "frivolous" action. The reasonableness of an award of attorneys' fees is reviewed by an appellate

court on an abuse of discretion standard. *Id.* at 519. Appellants' sought equitable relief from the Town's enforcement actions that would have accorded all parties a fair remedy that balanced the interests of each. A court in equity has broad discretion to fashion a remedy to do substantial justice and end litigation. *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn.App. 384, 390, 220 P.3d 1259 (2009).

ARGUMENT

I. The Superior Court erred in ignoring evidence of deliberated official harassment in a proceeding seeking prohibition of that harassment.

A. The Court's failure to properly assume subject matter jurisdiction

In their Application for a Writ of Prohibition, Appellants set forth the subject matter of this case: the Town of Springdale's proceedings intended to prohibit religious practices of the members of Muslim America to the material harm of Appellants' beneficial interests and deprivation of rights secured to them by state and federal law. (CP 9) Yet the Superior Court didn't even mention this subject until the July 9, 2010 hearing on the merits:

> Putting aside the procedural problems here, the jurisdictional problems here, one question that I have that is raised by the plaintiffs is the city's actions or failure to act, the interfering with the right of Muslim America, et cetera, to exercise freedom of religion. Can you speak to that at all? And I didn't really see much in your response.

> But that's really the undertone of all of this, is that the plaintiffs want to be able to be free to practice their religion, a tenet of their religion is the ability to provide shelter for its religious members, the failing – failure of the Town to recognize that, and to enact any exemption from the ordinance – Are you – Are you able to speak to that?

VRP, 7/9/2010, p. 33, lines 4-16. Afterward, it relegated mention thereof to mere "curiosity," claiming this subject was "really not part of" Appellants' "cause of action":

> MR. AHMAD: You did acknowledge one -- one cause of action that was not frivolous, if you will recall, on July 9th. It's in my response.
>
> THE COURT: Yes. But that -- **that's really not part of your cause of action**. It was a comment by me. **I was curious**, and I had a question about it.

VRP, 1/7/11, p. 21, lines 20-25. (emphasis added).

The Court exposed its misidentification of the underlying action's subject matter during the May 25, 2010 hearing:

> It appears to me that the owner of **the building** is – that is at issue, **that is the subject of this request – request for a writ** – absolutely a necessary party, even without looking at the statute.

Verbatim Report of Proceedings ("VRP") 5/25/10, p. 21, lines 7-10. (emphasis added) Neither the owner of the cottage, nor the cottage *per se* were the subject of Appellants' Application for a Writ of Prohibition. Excepting its aforementioned singular curiosity, the Superior Court consistently ignored the very subject that was the Appellants' primary cause

of action. Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it. *Skagit Surveyors v. Friends of Skagit*, 135 Wn.2d 542, 556, 958 P.2d 962, 969 (1998) and a court lacking such jurisdiction may do **nothing other** than enter an order of dismissal. *Deschenes v. King County*, 83 Wn.2d 714, 716, 521 P.2d 1181 (1974). (emphasis added) As such, the Superior Court's Judgment and Order Awarding Costs and Fees (CP 562-565) should be nullified as a matter of law.

B. The Town violated Article I § 11 and the First Amendment.

Respondent Town has stated that it is "not questioning the claimed intent of the [] applicants to use" the cottage "for religious purposes," (Verbatim Report of Proceedings ("VRP") 7/9/10, p. 33, lines 21-23) yet, if not arrested with finality, its enforcement actions will eventually serve to prohibit Appellants' religious exercise in that very regard, thereby dispossessing Mr. Iman of shelter and depriving Mr. Hatem of his right to provide sanctuary for indigent persons.

From the moment the Town initiated its enforcement action on February 9, 2010, it has disturbed Appellants under color of law on account of their religious exercise. Every subsequent action threatening to penalize

Appellants for this exercise constitutes an irrefutable violation of Article I § 11 of the Washington State Constitution. Because these actions effectively prohibit free exercise of religion by attending Appellants' provision of sanctuary with punitive ultimatums, the Town has also infringed upon Appellants' First Amendment rights.

Any law found to place a penalty on the exercise of a constitutional right is invalid. *Sanitation Men Assn., Inc. v. Sanitation Commissioner*, 392 U.S. 280, 284 (1968). Moreover, the United States Supreme Court has determined that a citizen faced with a licensing law for the practice of a constitutional right may "ignore [the law] and engage with impunity in the exercise of the right ... for which the law purports to require a license." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

C. The Town violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc.

It is worth noting that both Article I § 11 and the First Amendment of the United States Constitution protect individual rights. They do not predicate enjoyment thereof upon any test of fee simple property ownership. The same is true of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") 42 U.S.C. 21C § 2000cc, which is unambiguous in its accordance of religious land use rights to individual persons:

> 42 U.S.C. 21C § 2000cc. – Protection of land use as religious exercise
> (a) Substantial burdens
> (1) General rule
> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise **of a person**, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –
>
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. 21C § 2000cc. (emphasis added)

In the immediate case, it is certain that the Town's enforcement actions constituted a substantial burden upon Appellants' religious land use. The Town did not argue a "compelling interest," though Town counsel, Nathan Smith, approximated a relevant "issue" during the July 9, 2010 hearing on the merits:

> The issue is the Town's ability to assure that all structures within Town limits comply with the State Building Code and other ordinances of the Town, for purposes of the protection of public health, safety and welfare. And that is the fundamental purpose of the State Building Code.

Verbatim Report of Proceedings ("VRP"), 7/9/10, from p. 33, line 25 to p. 34, line 5. Well before the Town initiated its enforcement proceedings, (CP

12 § 7) Mr. Ahmad had informed its Mayors of the least restrictive means of furthering its interest in ensuring "that all structures within Town limits comply with the State Building Code ... for purposes of the protection of public health, safety and welfare":

> RCW §19.27.042 Cities and counties -- Emergency exemptions for housing for indigent persons.
>
> (1) Effective January 1, 1992, the legislative authorities of cities and counties may adopt an ordinance or resolution to exempt from state building code requirements buildings whose character of use or occupancy has been changed in order to provide housing for indigent persons. The ordinance or resolution allowing the exemption shall include the following conditions:
>
> (a) The exemption is limited to existing buildings located in this state;
> (b) Any code deficiencies to be exempted pose no threat to human life, health, or safety;
> (c) The building or buildings exempted under this section are owned or administered by a public agency or nonprofit corporation; and
> (d) The exemption is authorized for no more than five years on any given building. An exemption for a building may be renewed if the requirements of this section are met for each renewal.
>
> (2) By January 1, 1992, the state building code council shall adopt by rule, guidelines for cities and counties exempting buildings under subsection (1) of this section.
>
> [1991 c 139 § 1.]

RCW § 19.27.042. (CP 26) Adoption of this statute would have been the most equitable means of balancing the interests of both Appellants and Respondent Town. Yet, to date, the Town has demonstrated no willingness

to adopt an ordinance or resolution pursuant to this statute. In so doing, it has acted in direct violation of RLUIPA, failing to adopt the least restrictive means of furthering its implied "compelling interest."

D. State decisional law relevant to this action

In their Memorandum of Law: Evolution of the State Building Code and Regulation of Religious Land Uses, (CP 87-97) Appellants provided evidence of this Court's historical recognition and defense of constitutionally protected religious land use. In *Sumner v. First Baptist Church*, 97 Wn.2d 1, 639 P.2d 1358 (1982), this Court found that the City of Sumner's "uncompromising enforcement of the (state) building code" imposed an unconstitutional burden on the religious community's exercise of religion. *First Covenant Church v. Seattle*, 120 Wn.2d 203, P.2d 174 resulted in a determination that requiring a religious organization to seek secular approval of matters potentially affecting its practice of religion created an infringement on the Church's constitutional right of free exercise. Finally, in *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 211 P.3d 406 (Wash. 2009), this Court found that the City's total moratorium on land use permit applications categorically prevented the Church from its religious practice of providing shelter for indigent persons, thereby violating

the Church's constitutional rights under Article I § 11.

As in *Sumner*, the Town's unconditional enforcement of building code ordinances without respect for the provisions of RCW § 19.27.042 imposes an unconstitutional burden upon Appellants' exercise of religion. The Town's demand that Appellants seek its approval in matters affecting their practice of religion is analogous to the City of Seattle's imposition in *First Covenant* and its consistent pattern of rejection vis a vis Appellants' civil requests for adoption of RCW § 19.27.042 is akin to the City of Woodinville's effective prohibition of Northshore United Church's religious land use, one also intended to provide emergency housing for indigent persons.

II. The Superior Court erred in refusing to accept Appellants' Writ Applications for "lack of standing."

A. The Court's revelation of January 7, 2011

During a hearing on Respondent Town's Motion for Attorneys' Costs and Fees, the Superior Court revealed the rationale underlying its Opinion filed on October 6, 2010:

> In essence [] the difficulty with really getting past go on this was the refusal of Muslim America as a beneficial – as a party to participate in this. ...
>
> In that respect I guess you could say that the matter really couldn't go any further; the parties that were listed as plaintiffs **really had no standing** to bring either of these issues before the court.

Verbatim Report of Proceedings ("VRP"), 1/7/11, p. 19, lines 13-16, 20-23.

B. Appellants' standing in equity

1. Where standing in equity resides

Standing to assert a claim in equity resides in the party entitled to equitable relief. *Smith v. Monson* 157 Wn.App. 443, 445 (2010). As a consequence of the Town's continued imposition of a substantial burden upon Appellants' religious exercise without demonstrating a compelling interest furthered by the least restrictive means, Appellants are entitled to equitable relief in the form of a Writ of Prohibition arresting the Town's enforcement actions and a Writ of Mandamus, compelling the Town's adoption of RCW §19.27.042.

2. Appellants suffered injury-in-fact

Of themselves, the Town's actions serve to accord standing to Appellants under 42 U.S.C. § 1983:

> Every person who, under color of [law] ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. It is not necessary that Appellants suffer actual deprivation

of their right; the threat of imminent deprivation thereof is sufficient to establish the injury. The potential prohibition of their practice is both "concrete" and "particularized," as the Town's enforcement actions functioned to eventually prevent Appellants from using the cottage for the purpose of housing indigent persons. Finally, the cause of Appellants' injury is clearly traceable to the actions of the Town.

C. The Writ of Prohibition

1. The Town's disturbance exceeded its authority

> The first requirement for a statutory writ of prohibition is that the party to whom it is directed must be acting, **or about to act**, in excess of his jurisdiction.

County of Spokane v. Local No. 1553, American Federation of State, County and Mun. Employees, AFL-CIO, 76 Wn.App. 765, 768-769, 888 P.2d 735 (Wash.App. Div. 3 1995). (emphasis added)

By March 20th, 2010, it was evident to Appellants Ahmad and Iman that the Town was proceeding toward issuing a citation against their religious organization, Muslim America, for violation of a Town Ordinance relating to their use and occupancy of the cottage. (CP 8) The Town demonstrated no willingness to accommodate Appellants' religious land use and acted well in excess of its enforcement authority in disturbing Appellants in their persons

and property on account of religion.

2. The Town's enforcement of an *ab extra* code

Throughout the Superior Court proceedings, Appellants repeatedly informed the Court that the Town was attempting to enforce an ordinance that was not the State Building Code: on June 9, 2010, in Plaintiffs' Reply to Defendant's Response to Motion to Join Necessary Party State of Washington; (CP 208) on July 8, 2010, in Plaintiffs' Response to Defendant's Request for Dismissal of Proceedings; (CP 325-326) on July 9, 2010, during the hearing on the merits and in the Plaintiffs' Hearing Brief; (CP 372) and on November 18, 2010, in Plaintiffs' Objection to Proposed Order. (CP 397-398)

In Plaintiffs' Comments for Presentment Hearing of January 21, 2011, (CP 577-584) appellants called to the attention of the Superior Court comments made by Springdale Mayor Douglas Buche during the Town Council meeting of June 28, 2010. Official minutes of the meeting reveal that Mr. Buche stated "As advised by the Town Attorney ... the Town needs to adopt the State of Washington Building Code(s) ..." (CP 578)

This constitutes definitive proof that, prior to June 28, 2010, the Town acted without jurisdiction in enforcing the 2006 International Building Code ("IBC 2006"), an *ab extra* "model" building code that does not

comprise the State Building Code Council's amendments thereto and is not the State Building Code per se. It also fulfills the first requirement for a Writ of Prohibition to lie, yet the Superior Court failed to acknowledge this.

3. The Superior Court's error concerning the Town's jurisdiction

> In its Opinion dated October 6, 2010, the Superior Court stated the Town has an affirmative duty to adopt and enforce the International Building Code. RCW 19.27.031. **In that regard**, the Town cannot be said to be acting in excess of its jurisdiction. (CP 382) (emphasis added)

Arguendo, were the Town actually enforcing the IBC as amended by the State Building Code Council, the Court's statement may appear correct. Yet "in that regard," its unconditional enforcement thereof with respect to Appellants' religious land use still exceeds the limits of its jurisdiction in that it fails to adopt the least restrictive means by which to further its compelling interest: namely, RCW § 19.27.042. Additionally, even if the Town had not exceeded its enforcement authority until issuing a citation actionable in the District Court, a Writ of Prohibition may lie to prevent its *imminent* breach of jurisdiction, as cited *supra* in *Spokane v. Local No. 1553*.

4. The "adequate remedy at law" argument

As the remedy they seek is equitable, appellants' standing is in equity. Thus, the Superior Court should have exercised its equity jurisdiction from the

beginning of this case in recognition of the nature of Appellants' rights and their entitlement to extraordinary relief given the harassment they countenanced. Prior to their Application for the Writs, Appellants had no recourse to complete relief from the Town's actions other than that obtainable through a Special Proceeding.

When the Town's action against Mr. Ahmad for "Failure to Obtain a Business License" was *in limine* at the Stevens County District Court, he moved to strike those portions of Appellants' Application for the Writs pertaining to it, readily admitting that "a plain and speedy remedy is available in the District Court, disqualifying this issue from this Writ action." (CP 126) Mr. Ahmad could not similarly efface the Town's Notice of Infraction for Violation of Building Ordinance 343, (CP 365) as the Town quickly withdrew its Notice for failure to "state an appeals process" (CP 367) prior to issuance thereof. (CP 364) Withdrawing on a technicality two days after Judge Moreno's pre-assignment, the Town left itself opportunity to issue a similar Notice prefaced by the previously excluded appeals process pending the outcome of this case. In the interim, Appellants still have no adequate remedy by which to ensure the Town's disturbance of them under color of law is terminated forthwith other than issuance of the requested Writs. The

Superior Court itself admitted this, saying

> [T]he plaintiffs **will have** a plain, speedy and adequate remedy upon commencement of enforcement proceedings by the Town. **At that time**, plaintiffs can raise issues and defend against Town action with the right to appeal therefrom. (CP 383) (emphasis added)

Appeal may be a "plain, speedy and adequate remedy" in cases where an enforcement action has already been taken into a proceeding subject to judicial review. In such a proceeding,

> [t]he question of whether an appeal is an adequate remedy depends on whether: (1) the error was so clear that reversal would be "unquestioned" if the case were already before the Superior Court on a post-judgment appeal; and (2) the litigation will terminate once the error is corrected by means of interlocutory review.

Butts v. Heller, 69 Wash. App. 263, 268, 848 P.2d 213 (1993). Yet, were it guaranteed that both criteria would have been met in appeal of an enforcement action, the Superior Court could have issued the Writs in order to prohibit wrongful prosecution certain to be dismissed or overturned, particularly since the Town's actions constitute an injury-in-fact for which Appellants are entitled to expeditious redress and they should not be compelled to sleep on their rights in order to obtain relief. This Court has found that Prohibition may lie to preclude unnecessarily protracted litigation:

> [T]he extraordinary relief granted in *Mack* was necessary to

> "forestall the necessity of two trials" and to prevent a waste of the litigant's funds and judicial time. We recognized in *Mack* that a defendant should not be required to relitigate the merits of a criminal charge in Superior Court in order to determine whether a municipal court trial should have occurred in the first place.

State ex rel. Moore v. Houser, 91 Wn.2d 269, 272-273, 588 P.2d 219 (Wash. 1978). In the immediate case, the Superior Court's issuance of a Writ of Prohibition would have prevented similar waste that, to date, continues to needlessly accrue.

Moreover, the Court's coerced joinder of Muslim America as a "Necessary Party" occurred in spite of Appellants' explanation that they were prohibited by their own religious law from calling upon Muslim America to participate in this action. (CP 123-124) Thereafter, Muslim America refused to participate (CP 280) and the Court predicated its judgment against Appellants upon this refusal. This provides conclusive proof that Appellants had no adequate remedy at law by which to obtain complete relief from the Town's harassment, as the Superior Court itself conditioned the acquisition of such relief upon action which Appellants were religiously forbidden from undertaking.

D. The Writ of Mandamus

1. The Court's opinion of RCW § 19.27.042

> The clear language of RCW 19.27.042 makes the adoption of exemptions from building code requirements optional. Because adoption of the exemption that plaintiffs seek is discretionary, the application for the writ of mandamus must be denied. (CP 383)

2. RCW § 19.27.042: Not discretionary in this case

The Court construes the words "may adopt" in RCW §19.27.042(1) to provide a legislative option. It is, rather, a delegation of a necessary additional legislative authority.

> As a general rule, the word 'shall,' when used in a statute, is imperative and operates to impose a duty which may be enforced, while the word 'may' is permissive only and operates to confer discretion. These words, however, are frequently used interchangeably in statutes, and without regard to their literal meaning. **In each case the word is to be given that effect which is necessary to carry out the intention of the legislature as determined by the ordinary rules of construction**. 59 C.J. 1079, § 635; 25 R.C.L. 767, § 15.

Spokane County ex rel. Sullivan v. Glover, 2 Wn.2d 162, 169, 97 P.2d 628 (Wash. 1940)(emphasis added). The intention of the legislature in RCW §19.27.042 is quite clear. It is to exempt from requirements of the State Building Code buildings whose character of use or occupancy has been changed to provide housing for indigent persons. Prior to its enactment, counties and cities did not have the legislative authority to amend the State Building Code regarding buildings used for residential purposes. RCW

§19.27.042 states:

> Effective January 1, 1992, the legislative authorities of cities and counties may adopt an ordinance or resolution to **exempt from state building code requirements** buildings whose character of use or occupancy has been changed in order to provide housing for indigent persons.

RCW §19.27.042 in pertinent part. (emphasis added) The phrase "may adopt" is to be given "that effect which is necessary to carry out the intention of the legislature as determined by the ordinary rules of construction." *Sullivan, supra.*

The word "may" occurs in Chapter 19.27 several times referring to legislative authority delegated to cities – *supra* in RCW §19.27.042; in RCW §19.27.060:

> (1) The governing bodies of counties and cities **may amend** the codes enumerated in RCW 19.27.031 as amended and adopted by the state building code council as they apply within their respective jurisdictions, but the amendments shall not result in a code that is less than the minimum performance standards and objectives contained in the state building code.
>
> (3) The governing body of each county or city **may limit the application** of any portion of the state building code to exclude specified classes or types of buildings or structures according to use **other than single family or multifamily residential buildings**.
>
> (6) The provisions of the state building code **may be preempted** by any city or county to the extent that the code provisions relating to the installation or use of sprinklers in jail cells conflict with the secure and humane operation of jails.
>
> (7)(a) Effective one year after July 23, 1989, the

> governing bodies of counties and cities **may adopt an ordinance or resolution to exempt** from permit requirements certain construction or alteration of either group R, division 3, or group M, division 1 occupancies, or both, as defined in the uniform building code, 1988 edition, for which the total cost of fair market value of the construction or alteration does not exceed fifteen hundred dollars.

RCW §19.27.060 in pertinent part (emphasis added); and in RCW §19.27.160:

> Any county with a population of from five thousand to less than ten thousand that had in effect on July 1, 1985, an ordinance or resolution authorizing and regulating the construction of owner-built residences **may reenact such an ordinance or resolution** if the ordinance or resolution is reenacted before September 30, 1989.

RCW §19.27.160 in pertinent part. (emphasis added) Each such use of the word "may" is permissive, delegating limited legislative amendment authority to the legislative bodies that the State Building Code would otherwise reserve to the Washington State Building Code Council. Each such permission is granted for a purpose set forth in the surrounding language that indicates the Legislature's intention. All Chapter sections allowing amendment delegate this authority with language limiting the scope of that authority:

> The governing body of each county or city **is authorized** to amend the state building code as it applies within the jurisdiction of the county or city. The minimum performance standards of the codes and the objectives enumerated in RCW 19.27.020 shall not be diminished by any county or city

> amendments.

RCW §19.27.040 (emphasis added); and

> (1) The governing bodies of counties and cities **may amend** the codes enumerated in RCW 19.27.031 as amended and adopted by the state building code council as they apply within their respective jurisdictions, but the amendments shall not result in a code that is less than the minimum performance standards and objectives contained in the state building code.
>
> (a) No amendment to a code enumerated in RCW 19.27.031 as amended and adopted by the state building code council **that affects single family or multifamily residential buildings** shall be effective unless the amendment is approved by the building code council under RCW 19.27.074(1)(b).

RCW §19.27.060 (emphasis added). Here, the congruence of the language "The governing body of each county or city **is authorized to amend**" with "The governing bodies of counties and cities **may amend**" shows clearly that the term "may" is permissive in each use, while any discretionary "option" implicated by the term is found elsewhere in the statutory context, in the object and effect of the amendment.

In RCW §19.27.042, residential use of buildings is addressed. Prior to the enactment of this section, legislative authority for any amendment of the adopted Building Code affecting single family or multifamily residential buildings was reserved to the State Building Code Council. After enactment of this section, legislative authority for any *other* amendment of the adopted

Building Code affecting single family or multifamily residential buildings remains reserved to the State Building Code Council. The "may adopt" of RCW §19.27.042 delegates to legislative bodies a circumscribed and limited legislative amendment authority that the State Building Code would otherwise reserve to the Washington State Building Code Council.

The intent of the Legislature is clear: the RCW §19.27.042 amendment is directed to a specific use of property owned or administered by a nonprofit corporation or public agency, which in the case of a religious organization may not be burdened *at all* without a showing of a compelling governmental interest satisfied by the least restrictive means. The intent of the Legislature is to exempt such buildings from requirements of the State Building Code while satisfying its compelling State interest. Exemption may be granted only if:

> Any code deficiencies to be exempted pose **no threat to human life, health, or safety**.

RCW §19.27.042(1)(b)) (emphasis added). Viewed in the context of the entire State Building Code, as adopted by the State Building Code Council in WAC 51-50 et. seq., RCW §19.27.042 provides the Town with the least restrictive means of satisfying its compelling State interest in safeguarding the lives, health and safety of the occupants of buildings used by religious or other

nonprofit corporations or public agencies to provide housing for indigent persons. The Town's duty to satisfy that compelling State interest is not "discretionary" and the Superior Court erred in determining this.

III. The Superior Court abused its discretion by failing to exercise its equity jurisdiction.

A. Appellants' equitable rights in property and religious exercise

As established throughout the trial court record, appellants Ahmad and Iman provided substantial evidence that the Town of Springdale acted in excess of its jurisdiction by enforcing "regulatory ordinances for which their delegated authority [had] been materially altered by the Legislature to preclude enforcement in the prima facie circumstances of their proceeding." (CP 38) The Town "intended to prohibit obligatory religious practices of the members of Muslim America ... to the material harm of the beneficial interests of the plaintiffs ... depriving them of rights secured to them by Washington Statutes and the Constitutions of the State of Washington and the United States." (CP 38) This was the cause of appellants' action and the subject matter of this case. Ahmad, Iman and Hatem enjoy equitable rights in two ways.

First, the sole purpose for which Muslim America owns property is for others' use of the property for religious purposes. The Board of Directors,

officers, and members of the corporation, members of the ministry of the religious community served by the corporation, and members of that religious community, have an absolute right, protected by the Washington State Constitution, to use the property for religious purposes. Appellants' use of the property is identified in state and federal law as a "religious land use." This *in personam* right to that use is a justiciable interest that is the subject of state and federal legislation.

The right of the appellants to use the property derives from and is dependent on Muslim America's legal right, as owner of the property, to its beneficial use, and is thus a true equitable right, rather than a right *in rem*, a legal right in the property itself:

> A true equitable right is always derivative and dependent, i.e., it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part.

C. C. Langdell, *A Brief Review of Equity Jurisdiction*, 1 Harvard Law Review 55, 59 (1887). In this respect, the standing of the appellants is in equity. Appellants enjoy "naked ownership" in Muslim America's property, also referred to as "usufruct equity":

> A "naked ownership" is an imperfect ownership subject to a usufruct. LSA-C.C. *Art. 490* (West 1973). Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the

> same all the profit, utility, and advantages which it may produce, provided it be without altering the substance of the thing. LSA-C.C. *Art. 533* (West 1973).

Zemurray Foundation v. United States of America, 687 F.2 97 (U.S. Court of Appeals, Fifth Circuit, 1982).

The general right of the appellants to an exercise of religion is also an equitable right, protected by the Washington State Constitution, Article I § 11; and the specific religious purpose that is the object of this action, providing housing for indigent persons, has been particularized in Washington State statutory and decisional law as a constitutionally-protected religious exercise.

B. Applying equity jurisdiction would have yielded the best result for all parties.

> When equity assumes jurisdiction over the subject matter of an action and the parties to be affected by its decree, it will retain jurisdiction for all purposes. Jurisdiction having attached, it extends to the whole controversy, and whatever relief the facts warrant will be granted. *Jordan v. Coulter*, 30 Wash. 116, 70 P. 257; *Davies v. Cheadle*, 31 Wash. 168, 71 P. 728; *Phillips v. Blaser*, 13 Wash.2d 439, 125 P.2d 291; *In re Schnoor's Estate*, 31 Wash.2d 565, 198 P.2d 184.

Hubbell v. Ward, 40 Wn.2d 779, 246 P.2d 468 (Wash. 1952).

> The rule is that once a court of equity has properly acquired jurisdiction over a controversy, such a court can and will grant whatever relief the facts warrant. *Zastrow v. W.G. Platts, Inc.*, 57 Wash.2d 347, 357 P.2d 162 (1960).

Brazil v. City of Auburn, 93 Wn.2d 484, 610 P.2d 909 (Wash. 1980). On the basis of the aforementioned and other equitable interests, the equity jurisdiction of the Superior Court should have attached *ab initio* to all aspects of the case, giving the Court wide latitude in fashioning a remedy according all parties the relief to which they are entitled.

Trial courts have broad discretionary power to fashion equitable remedies. *Rabey v. Labor & Industry*, 101 Wn. App. 390, 396, 3 P.3d 217 (2000). The superior court is a court of general equity jurisdiction and has the power to "grant and enforce its decrees in such manner as the justice of the particular case requires." *Hoggatt v. Flores*, 152 Wn.App. 862, 869, 218 P.3d 244 (2009) (citing *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 228, 86 P. 632 (1906)).

Had equity jurisdiction inhered, the Superior Court could have determined from the outset of this case that the Town (a) disturbed appellants in their religious land use and (b) failed to adopt the least restrictive means by which to meet its interest in ensuring that no buildings within its enforcement jurisdiction present a threat to human life, health or safety: namely, RCW § 19.27.042.

Had the Court mandated the Town's adoption of this statute, the Town

could have satisfied its interest pursuant to RCW §19.27.042 (1)(b) and appellants could have enjoyed free exercise of their religion without molestation or disturbance under color of law.[1]

Yet the Superior Court did not share this perspective of balancing interests, claiming the Town's adoption thereof was "optional." (CP 383)

C. The May 19th Scheduling Conference and subsequent events

The Town's enforcement actions constitute an injury-in-fact that should have guaranteed appellants immediate standing in the Superior Court. Had the Court proceeded in equity, pursuant to the statutory provisions of RCW 7.16, it would have sought the fairest and most expeditious path to terminating the Town's disturbance. Instead, it declined to apply its equity jurisdiction and subordinated the paramount significance of appellants' religious exercise rights to an insensitive application of civil procedure.

Respondent's submission of a non-obligatory Answer and Affirmative Defenses pleading (CP 70-74) raised a question of jurisdiction for appellants. Mr. Ahmad then filed a Note for Hearing appellants' Application for a Writ

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1 Prior to February 9, 2010, Mr. Ahmad repeatedly notified Town officials of the change in character of use and occupancy of the cottage, providing statutory authority to the latter. (CP 12 § 7) As per Deputy Murray's request given on February 9, he formally petitioned the Town for adoption of RCW §19.27.042 on February 20, 2010. (CP 28) The Town subsequently denied his formal request, (CP 67) but not before ordering the Town Marshal to evict Mr. Iman from the cottage. (CP 12 § 10)

of Prohibition and Writ of Mandamus, (CP 85) thereafter sending a letter addressed to the presiding Honorable Maryann C. Moreno, requesting clarification as to the jurisdiction under which parties subject to the action were proceeding:

> For the May 25th hearing, are we proceeding under the statutory Equity Rules, or setting aside the statutory hearing on the plaintiffs' pleadings and evidence and proceeding under the normal adversary Civil Rules?

Correspondence of 5/15/10. (CP 141) Mr. Ahmad received no response to this question from the Court. During the Scheduling Conference of May 19th, 2010, Mr. Ahmad once more requested clarification from the Court:

> MR. AHMAD: Are we proceeding in equity under the statutory provisions, or are we proceeding in law under the Civil Rules?
> THE COURT: Mr. Riley?
> MR. RILEY: I think he's asking for legal advice your Honor.
> THE COURT: I think you're right. (To Mr. Ahmad:) Proceed as you think you should.
> MR. AHMAD: Thank you, your Honor.

Narrative Report of Proceedings ("NRP"), 5/19/10, lines 5-13. (CP 498) This exchange is the sole portion of the NRP that survived the adjudication of both the Superior Court and this Court following lengthy contention between opposing parties extending from May 23, 2011 to February 7, 2012. In moving to object to the trial court's striking all portions of the NRP excepting the abovementioned dialogue, Mr. Ahmad wrote

> The importance of the NRP is that it reflects an *ab initio* denial of standing and of the equity jurisdiction invoked by a Special Proceeding pursuant to Chapter 7.16 of the Revised Code, a failure to assume subject matter jurisdiction, and a complete disregard for and peremptory dismissal of the plaintiffs' claims of Constitutional infringement and Constitutional tort. These jurisdictional determinations are reflected by absence of consideration and explicit disregard in the entire record, and are made explicit on the record only after a contrived Application, attributed to refusing involuntary plaintiff Muslim America, had been denied, and the plaintiffs' proceedings dismissed. ...
>
> The absence from the record on appeal of this seminally determinative proceeding would impose on the appellants the burden of inferring its actualities from an extensive array of occurrences elsewhere in the record. In the absence of the NRP, the probity of these occurrences to the issues raised may be questioned to the prejudice of the appellants. The occurrences recorded in the NRP are the "best evidence" of errors of the trial court upon which the appellants' issues are raised, and **prejudice inheres in their omission**.

Appellants' Motion on Objection to Trial Court Decision Relating to The Record RAP 9.13. (emphasis added) The Scheduling Order (CP 130), signed by the Court on the day of the Conference, is but one result of the "occurrences" to which Mr. Ahmad refers.

Appellants' Amended Application was ripe for hearing on May 25, 2010, (CP 85) as they had already provided sufficient proof of the Town's infringement of their constitutional right to free exercise of religion. Unfortunately, the Court effaced this Special Proceeding as a standard adversarial law proceeding, entertaining and quickly granting (CP 252-253)

a Motion to Join Necessary Party Muslim America (CP 99-106) in spite of being provided evidence of Appellants' religious prohibition against calling upon Muslim America to join this action as well as Muslim America's religious prohibition against entering this action. (CP 120-124)

Addressing this matter required invocation of the Court's equity jurisdiction, as Mr. Ahmad was not a licensed attorney. Yet the Superior Court disqualified Mr. Ahmad from representation of Muslim America "in all ways, shapes and forms," (VRP, 6/18/10, lines 2-4). However much the Court's action may possess the veneer of legal validity, it served inequitable ends, failing to prioritize strict scrutiny of a constitutionally protected religious prohibition and demonstrating a callous disregard for the standing of individual appellants in equity.

On July 9, 2010, during the fifth hearing in this action, the Superior Court asked the following question of Nathan Smith, counsel for respondent Town:

> Putting aside the procedural problems here, the jurisdictional problems here, one question that I have that is raised by the plaintiffs is the city's actions or failure to act, the interfering with the right of Muslim America, et cetera, to exercise freedom of religion. Can you speak to that at all? And I didn't really see much in your response. But that's really the undertone of all of this, is that the plaintiffs want to be able to be free to practice their religion, a tenet of their religion is the ability to provide shelter for its religious members, the failing – failure of the Town to recognize that, and to enact any exemption from the ordinance – Are you – Are you able to speak to that?

Verbatim Report of Proceedings ("VRP"), 7/9/2010, p. 33, lines 4-16. Mr. Smith thereafter answered that "procedural issues are tantamount to the issuance of the writ" (*Id.*, lines 18-19.) and denied that the Town was "questioning the claimed intent of the [] applicants to use the structures for religious purposes." (*Id.*, lines 22-23.)

Aside from this singular query, the Superior Court never came close to cognizing appellants' equitable rights. Adding insult to injury, the Court later denied that its question implied anything more than "curiosity":

> MR. AHMAD: You did acknowledge one -- one cause of action that was not frivolous, if you will recall, on July 9th. It's in my response.
>
> THE COURT: Yes. But that -- **that's really not part of your cause of action**. It was a comment by me. **I was curious**, and I had a question about it.

VRP, 1/7/11, p. 21, lines 20-25. (emphasis added). During the same hearing, the Court explained its rationale for denying appellants' writ application:

> In essence the difficulty with really getting past go on this was the refusal of Muslim America as a beneficial – as a party to participate in this. I think once that was made clear it was pretty obvious that [] this issue really couldn't move past [] it really couldn't get off the ground.
>
> In that respect I guess you could say that the matter really couldn't go any further; **the parties that were listed as plaintiffs really had no standing to bring either of these issues before the court**.

Id., p. 19, lines 13-23. (emphasis added) Having at its disposal a readily

available option that would have spared all parties needless tribulation and pecuniary damage, nothing within the statutory provisions of RCW 7.16 prevented the Court from exercising its discretion to terminate litigation on the basis of this purported "lack of standing" from the onset of the action.

Given the Court's authority to arrive at an expeditious solution that would have fashioned equitable remedies for both appellants and respondent in the earliest stages of this Special Proceeding, its essentially prodigal application of jurisprudence remains as inexcusable as the Town's blithesome disregard for appellants' equitable rights. Ever since the Court awarded respondent Town attorneys' costs and fees for an allegedly "frivolous" action in which Muslim America had never claimed interest, an entire faith community has lived under threat of property dispossession. The Court should have exercised its equity jurisdiction and erred egregiously in failing to do so.

IV. The Superior Court erred in determining this action was "frivolous" so as to award the Town "reasonable expenses."

A. Frivolous actions must be frivolous in their entirety.

> RCW 4.84.185 authorizes the trial court to award to the prevailing party "the reasonable expenses, including fees of attorneys, incurred in opposing" a frivolous action. Sanctions against a party, not that party's attorney, are available under RCW 4.84.185. *Havsy v. Flynn*, 88 Wash.App. 514, 521, 945 P.2d 221 (1997).
>
> The statute is designed to discourage abuses of the legal system by

> providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite. *Suarez v. Newquist*, 70 Wash.App. 827, 832-33, 855 P.2d 1200 (1993). It is not, however, a substitute for more appropriate pretrial motions, CR 11 sanctions, or complaints to the bar association. *Biggs v. Vail*, 119 Wash.2d 129, 137, 830 P.2d 350 (1992).
>
> "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." *Tiger Oil*, 88 Wash.App. at 938, 946 P.2d 1235. It must be frivolous **in its entirety**; if any of the asserted claims are not frivolous, the action is not frivolous. *Biggs,* 119 Wash.2d at 136-37, 830 P.2d 350; *Forster v. Pierce County*, 99 Wash.App. 168, 183-84, 991 P.2d 687 (2000).

Skimming v. Boxer, 119 Wn.App. 748, 756, 82 P.3d 707, 711 (Wash.App. Div. 3 2004). (emphasis added)

B. Appellants' reasonable cause cognized, then denied by Superior Court

The central justiciable issue brought by the individual appellants in their Applications for Writs of Prohibition and Mandamus was raised in argument during the merits hearing of July 9, 2010:

> MR. AHMAD: The Town could not take any enforcement action that would burden the plaintiffs' exercise of religion without showing a compelling state interest and that the means of satisfying that interest were the least restrictive means, and prohibition of that exercise would be unlawful under state and federal law ...

Verbatim Report of Proceedings ("VRP"), 7/9/10, page 14, lines 19-25. The Court, in cognizing this issue, asked Counsel for the Town, Mr. Nathan

Smith, to address it:

> MR. SMITH: Your Honor, I'll briefly speak to that, but I think that the procedural issues are tantamount to the issuance of the writ – of prohibition and a writ of mandamus.
>
> But I will say that the Town is certainly not questioning the claimed intent of the application – the applicants to use the structures for religious purposes. That's not the issue here.

VRP 7/9/10, page 33, lines 17-24. Article I § 11 of the Washington State Constitution provides that "no one shall be molested or disturbed in person or property on account of religion." Appellants alleged that the respondent's actions unlawfully infringed upon their religious liberty as protected by the Washington State Constitution. Evidence was also offered that the Town's actions violated federal law:

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

42 U.S.C. § 2000cc. This claim of individual Appellants can be termed neither "frivolous" nor "unreasonable." Yet the Superior Court ignored their claims to religious liberty throughout the trial court proceedings, dismissing its singular question about the subject as a "curiosity."

C. The Court's rationale in finding this action "frivolous"

During this same hearing, the Court repeated its litany of reasons for granting the Order Dismissing Applications for Writs of Prohibition and Mandamus: Muslim America's refusal to be made a party, nullifying petitioners' standing; the Town's "enforcement of the building code" and the "discretionary" nature of RCW § 19.27.042. (VRP, 1/7/11, p. 19, line 9 to p. 20, line 13)

A separate issue related to petitioners' alleged "frivolity" concerned part of an eMail sent by Mr. Ahmad to the Town, in which Mr. Ahmad stated:

> A 'Motion to Join Necessary Party' is needed when a plaintiff should be joined by an interested party – another heir to a commonly-inherited estate, for example – who refuses to sue. A 'Motion to Dismiss for Failure to Join Necessary Party' is what is filed by a defendant, and those dismissals are regularly upheld on appeal. Riley could have filed a Motion to Dismiss and ended the case in the Town's favor, but instead chose to make it more expensive for the Town and more expensive for myself and Bedreddin. And now that Muslim America has been made a party, at his insistence, he can't file a motion to dismiss for failure to join necessary party.

(CP 415) The Superior Court later agreed with the Town's allegation that these comments constitute an admission that the action was "frivolous from inception":

> In *Reid v. Dalton* we had an admission by the plaintiff that he knew the action that he was filing was barred and and that frankly it was frivolous. And similarly we have a writing by Mr. Ahmad, who

> basically admits that the – the Town would have prevailed had they brought a motion to dismiss early on. Quite similar to the previous case that I've cited.

VRP, 1/7/11, p. 21, lines 3-9. Yet *Reid v. Dalton* isn't similar at all. In *Reid*, the plaintiff

> ... conceded more than once in open court that no justiciable controversy was before the court. He knew he had no standing to challenge Mr. Harris's title to the office and conceded that he had no basis for doing so. ... And he acknowledged that the court could provide no remedy.

Reid v. Dalton, 100, P.3d 349, 352, 124 Wn.App. 113 (2004). Mr. Ahmad's comments were not an admission of lack of justiciable controversy, standing or available remedy, nor can any such inference be drawn from his comments without entertaining speculation. The subject of his comments was Mr. Riley, not himself, and his eMail was not proffered in open court. His eMail is dated August 4, 2010, almost one month after the hearing on the merits, while both parties awaited the Opinion of the trial court. Mr. Ahmad offers no more than a retrospective reflection upon past events, including a hypothesis that was never realized. His statements reveal a conclusion he drew as a result of his trial court experience, in which he witnessed the Superior Court unexpectedly deprive both him and his fellow petitioners of standing, thereafter coercing Muslim America's joinder. His words were

entirely reasonable given the circumstances to which he was subject and the Court's agreement with Mr. Riley's non-sequitur is indicative of baseless suspicion.

The Superior Court's comparison of Mr. Ahmad's comments to those of a burglar blaming his victims for not locking the deadbolt on their door (VRP 1/7/11, p. 20, lines 18-24) attempts to turn their reality on its head. After the hearing on the merits, Mr. Ahmad merely recognized that Mr. Riley could have acted to end the action at an early stage in the proceedings. Likening his words to the rationale of a criminal is particularly offensive given the Town's continued offense against Appellants under color of law, one that could result in the loss of a family's home.

Ironically, Mr. Riley never contested the validity of Mr. Ahmad's comments. It is difficult to accept the possibility that Mr. Riley, a veteran attorney with more than three decades of experience in Washington Courts, (CP 421, § 14) had no knowledge that he could have ended this action just as Mr. Ahmad suggested. It is also difficult to accept the Superior Court's failure to see this. Even more difficult to accept is the possibility that petitioners advanced this action without any measure of reasonable cause or that Mr. Ahmad "admitted" to so doing in his eMail.

D. Superior Court precluded from awarding costs and fees

If the Superior Court determined its own lack of personal jurisdiction over appellants, it has no authority to award attorneys' costs and fees. The Court's lack of personal and/or subject matter jurisdiction voids its orders. *Marley v. Dept. of Labor and Industries*, 125 Wn.2d 533, 538 (1994). At most, the Court can dismiss the case:

> The rule is well known and universally respected that a court lacking jurisdiction of any matter may do **nothing other** than enter an order of dismissal.

21 C.J.S. *Courts* § 118 (1940). (emphasis added) Additionally, RCW § 7.16.260 provides that the applicant for a writ of prohibition or a writ of mandamus is entitled to fees and costs should he prevail and the writs are ordered by the Court. The statute does not provide an award of costs and fees for a defendant in such cases should the Court deny the application. As such, there is no statutory basis for the Court's award of costs and fees in this action.

CONCLUSION

For the foregoing reasons, Mr. Iman and Mr. Hatem respectfully pray the Court (1) reverse or vacate the Superior Court's Findings of Fact, Conclusions of Law and Order Dismissing Applications for Writs of Prohibition and Mandamus; (2) reverse or vacate the Superior Court's Judgment and Order Granting Defendant's Motion for Award of Reasonable Expenses Including Fees of Attorney Under RCW § 4.84.185; and (3) grant other relief as it may determine.

Dated this 13th day of July, 2010 at Springdale, Washington.

Respectfully Submitted,

BEDREDDIN IMAN
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CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the foregoing **Appellants' Opening Brief** to the parties of this proceeding or their counsel as shown:

Jeffry Finer
West 35 Main, Suite 300
Spokane, Washington 99201

By eMail attachment to
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Dated this 13th day of July, 2012.

RAQEEBAH AMATALLAH

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, July 13, 2012 3:35 PM
To: 'Bedreddin Iman'
Subject: RE: Case No 85417-3_Appellants' Opening Brief

Received 7/13/12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.
-----Original Message-----
From: Bedreddin Iman [mailto:bedreddin@muslimamerica.net]
Sent: Friday, July 13, 2012 3:34 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Case No 85417-3_Appellants' Opening Brief

To The Clerk of The Supreme Court:

Herein attached is the Opening Brief of Mr. Bedreddin Iman and Mr. Sameer Hatem, Appellants pro se seeking direct review of the Court in Case No. 85417-3.

May your weekend be wonderful.

Sincerely,
Bedreddin Iman
(509) 258-9031