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Supreme Court No. ____
Court of Appeals No. 42988-8-II
Pierce County Superior Court No. 10-2-05228-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE, a Municipal Corporation,

RESPONDENT,

v.

ROBERT KANANY,

PETITIONER.

PETITION FOR REVIEW (RAP 13.4)

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APPENDIX

I. IDENTITY OF PETITIONER

Robert Kanany (Kanany) is the Petitioner and he resides in the City of Bonney Lake and the County of Pierce, at 7410 182nd Avenue East, Bonney Lake, Washington 98391.

II. CITATION TO COURT OF APPEALS' DECISIONS

The Part Published Opinion and Order Denying Motion for Reconsideration of the Court of Appeals, Division II, that Kanany requests this Court to review were filed on December 30, 2014, and on March 12, 2015, respectively. *See* APPENDIX, at APP-1 (Part Published Opinion); and at APP-18 (Order Denying Motion for Reconsideration).

III. ISSUES PRESENTED FOR REVIEW

The issues Kanany presents to this Court for review include:

1. Whether the Hearing Examiner system used by the City of Bonney Lake to enforce civil monetary fines for violation of its zoning code (*i.e.*, civil infractions) is not complete and therefore unconstitutional and unenforceable under the Supreme Court's decision in *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009)?

2. Whether the daily monetary fines of $1,000 assessed by the City of Bonney Lake against Kanany for violation of its zoning code accruing to an amount of $48,000 over an arbitrary period and subject to only a single available administrative appeal under Bonney Lake's Land Use Code and Hearing Examiner system constitutes an excessive fine that is unconstitutional under Wash. Const. art. I, § 14; *Post*, 167 Wn.2d at 312-13; RCW 7.80.120; and Supreme Court Rule, IRLJ 6.2?

3. Whether the co-owner of real property on which the City alleges zoning code violations and the threat of substantial monetary penalties and possible abatement actions must be joined as a necessary and indispensable party to any code enforcement and civil collection action as mandated by the applicable statute (*i.e.*, the BLMC), the absence of whom denies the tribunal subject matter jurisdiction?

4. Whether no ADU exists as a matter of fact, or the City is equitably estopped from denying that the use of the area over the garage on Kanany's duplex property does not constitute an ADU in violation of the zoning code where the City admits that there has been no change to the conditions of use expressly set forth and promised by the City in 2004 and as reaffirmed in writing since then, with the satisfaction of such conditions precluding such area from being an ADU?

5. Whether that provision of the City's zoning code which is the basis for the City's Code Enforcement action against Kanany conflicts with the State Growth Management Act and is inconsistent with its own Comprehensive Plan in violation of Wash. Const. art. XI, § 11?

IV. STATEMENT OF THE CASE

FACTUAL BACKGROUND

In January 2004 Kanany purchased a duplex-zoned R-2 lot on 191st St. E. in the City of Bonney Lake (the "Subject Property").[1] By Quit Claim Deed dated April 16, 2004, Kanany conveyed the Subject Property to himself and to Navid Kanani, a married man as his separate estate, as tenants in common; a co-ownership they share to this day. CP at 202 ¶ 4; CP at 208-09. In March 2004 Kanany contracted with Frontier Contractors Inc to submit building permit applications to the City of Bonney Lake to build a Duplex and a two story detached Accessory Garage with 720 sq. ft. of heated area above on the Subject Property.[2] The permits were issued on May 4, 2004. A copy of the permit for the detached garage that Kanany obtained during the pendency of this lawsuit notes as Condition of Approval #1 that the

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[1] Clerk's Papers (CP) at 202 ¶ 4 (Declaration of Robert Kanany).

[2] Kanany intended to use that area for residential-related purposes , including use by guests of tenants, recreational use, and other such uses, and similar in scope and purpose to at least three other existing duplex-ADU combinations in the City. CP at 202 ¶ 5; CP at 211.

"Detached garage shall not be converted into living space pursuant to Bonney Lake Municipal Code Section 18.22.090(C)(1)".[3] However, it was not until final inspection upon completion of construction that Frontier told him that the City Inspector had just informed the contractor that it was the heated area over the garage that could not be used as living space, and not conversion of the entire garage itself. CP at 202 ¶ 7. This was the first time that anyone brought to Kanany's attention an issue regarding the use of the area above the garage for residential-related purposes. Kanany promptly had a meeting with Planning & Community Development Director Bob Leedy and City Engineer John Woodcock specifically regarding the use of the area above the garage, and at which meeting there was an agreement reached among Kanany and the City officials that the area above the garage could be used for residential-related purposes as long as it did not have a kitchen stove and washer/dryer; as to which Kanany fully complied.[4] It was also agreed at that meeting that Kanany could only have two leases for the duplex and the area above the garage if occupied in any way must be under the same lease as one of the duplexes; as to which Kanany agreed to comply with this restriction as well.[5]

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[3] CP at 202 ¶ 6; CP at 211-12. The Bonney Lake Municipal Code is also referred to hereinafter as the "BLMC".

[4] CP at 203 ¶ 8; CP at 304 ¶ 3 (date of the meeting was actually in May or soon thereafter).

[5] CP at 203 ¶ 9. All that Kanany subsequently did and didn't do with respect to his duplex property was in good faith reliance based on that 2004 meeting with responsible City officials and the City's continued affirmation of that express agreement since that 2004 meeting.

Although Kanany and his tenants of the duplex were in complete compliance with the conditions of the agreement reached in 2004, and the City produced no evidence to the contrary, Kanany received a Notice of Civil Violation and Penalties signed by City Code Enforcement Office Denney Bryan dated February 22, 2007, alleging that Kanany was in violation of BLMC § 18.22.090 for "Utilizing/Converting portion of structure as an Accessory Dwelling Unit (ADU)" as having someone living in the area above the garage at the duplex on the Subject Property. CP at 203 ¶ 10; CP at 214. Kanany promptly contacted Mr Bryan by telephone on March 7, 2007, and then confirmed their conversation by letter sent to him dated March 9, 2007. CP at 203 ¶ 11; CP at 216. Because the space above the garage was in fact rented by one of the tenants of a duplex unit on the Subject Property and no kitchen stove was installed as confirmed by the City's inspection, Kanany was found to be in complete compliance with the terms and conditions mutually agreed to in the meeting with the City back in 2004 and the area above the garage was not an ADU; thus, no violation of City Code existed and the City silently withdrew its Notice of Violation. CP at 203 ¶ 11.

Although the City admits that nothing had changed in the duplex tenancy and use of the area above the garage, in 2008 the City received yet another complaint from, it is assumed, a neighboring property owner prompting Code Enforcement Officer Bryan to contact Kanany again and, once more, discussed and confirmed as allowed the use of the area above the garage by a tenant. CP at 204 ¶ 12; CP at 218. Discovery produced a letter dated June 20,

2008 from Code Enforcement Officer Denney Bryan to Russ Rudolph (the complaining neighbor) confirming to him that "upon investigating your complaint regarding the [Subject Property] it has been determined that no violation is present [and that] upon inspection of the property, including discussions with the planning and building departments, [there is] satisfactory evidence that the area [above the garage] did not violate the ADU provision of the Bonney Lake Municipal Code." CP at 204 ¶ 12; CP at 220. What was now becoming an annual event and bordering on harassment, by letter dated August 5, 2009, Code Enforcement Officer Denney Bryan once again asserted that the City had received a complaint and alleged that the "occupancy of a space above [the] detached garage [was] an accessory dwelling unit."[6] Subsequently there were several exchanges of voice mail messages between Kanany and City Code Enforcement Officer Denney Bryan in which Kanany clearly stated to Bryan that nothing had changed with his tenant who occupied the area over the garage under his lease of one of the duplex units; and in response to which communication Kanany received the following voice message from Code Enforcement Officer Bryan:

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[6] CP at 204 ¶ 13; CP at 222-23. Contrary to any inference in the Declaration of Director of Community Development Department John Vodopich in support of the City of Bonney Lake's Motion for Summary Judgment, mere "occupancy of a space above a detached garage on the Property" is not alone satisfactory use to constitute an accessory dwelling unit under the City Municipal Code, as was clearly explained to Kanany at his 2004 meeting with City officials and in subsequent correspondence with City Code Enforcement (*e.g.*, use of the area as a bedroom and recreation room is a permissible use and does not convert the area to an ADU). CP at 305 ¶ 5; CP at 218 and 220 (Kanany Declaration, *Exhibits 5 and 6*). According to City officials, including Mr. Vodopich, as long as there were no kitchen stove and washer/dryer in the area over the garage, the otherwise residential use of that area would not make such an accessory dwelling unit. CP at 216 (Kanany Declaration, *Exhibit 4*).

> Hi Mr Kanany. Thank you for getting back to me and sorry I didn't get back to you yesterday. This is Denney with the City of Bonney Lake. I do guess the letter you are proposing would definitely be a benefit at this point. Actually today I am meeting with the City Attorney, and I will be discussing this matter briefly with him. But I do think a letter outlining the leases that you have on the duplexes and utilization of the space above the garage could be helpful. At this point it appears to be a non issue but I want to make sure we are on the up and up as we proceed with this. I do have a complainant that keeps making an issue of this and I believe that he's bringing this before the council and I want to make sure all of our bases are covered as we proceed. Anyway, if you can get that letter to me that would be great. If you have any other questions or any information you can go ahead and leave a voice mail and I will do my best to get back to you as soon as possible. Thank you.

CP at 204-05 ¶ 14.[7] Kanany promptly followed up on this response and hand delivered to the City for Mr Bryan a letter dated August 20, 2009 detailing the tenancy, conditions of compliance as agreed in 2004, and a copy of the relevant duplex unit lease. CP at 205 ¶ 15; CP at 225. Nevertheless, in November 2009 Kanany received yet another Notice of Civil Violation from the City alleging once again that he was in violation of BLMC § 18.22.090 (C)(1) stemming from "the above-garage living space at the Property was being illegally used as an ADU". CP at 205-06 ¶ 16; CP at 227-28. The Notice also asserted that Kanany had not contacted the City within its designated 45-day window to confirm compliance[8] – a fact that was simply

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[7] Mr Bryan's voice message to Kanany was recorded on CD and filed with, and admitted by, the trial court as evidence in the summary judgment proceeding. CP at 346-47; CP at 348.

[8] After Kanany hand delivered his letter and supporting documents to the City dated August 20, 2009, and having heard or received nothing further from the City Code Enforcement Officer, Mr Bryan, thereafter, Kanany believed that the issue of residential use of the area over the detached garage at his duplex property had once again been resolved to the satisfac- (continued...)

not true in light of the many voice messages between Kanany and Code Enforcement Officer Denney Bryan, culminating with Kanany's letter to Bryan dated (and hand delivered) August 20, 2009. CP at 225. This collection action stems from that particular Notice of Violation.

In sum, the area above the detached garage on the Subject Property has not been used as an independent living area with the requisite appliances proscribed by the City and has never constituted an Accessory Dwelling Unit consistent with Kanany's many meetings and conversations with City Code Enforcement and Planning Department officials, including their site inspections, since 2004. CP at 206 ¶ 17. Kanany has been in continuous compliance with the express and specific instructions given him in 2004 by the

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[8](...continued)
tion of the City just as had occurred in 2007 and again in 2008. CP at 305 ¶ 4. When Kanany received the City of Bonney Lake's Notice of Violation dated November 18, 2009, he was under the good faith belief that this was an oversight by the City in light of (a) the express agreement between Kanany and responsible City officials in 2004 that so long as there were no kitchen stove and washer/dryer, and only two leases for the two duplex units, that the area over the detached garage on his duplex property could be used for residential purposes and not constitute an accessory dwelling unit; (b) the fact that the City issued and then dropped without giving Kanany further notice a similar Notice of Violation alleging the same violations for his duplex property in February 2007; and (c) Kanany's letter dated and hand delivered to the City on August 20, 2009, with supporting documents, that very clearly restated the facts that the use of the area over the garage was the same as had occurred during the previous 5 years all under the express agreement with the responsible City officials as to what specific appliances must be omitted from the area so as not to constitute an accessory dwelling unit. CP at 305-06 ¶ 6. In good faith reliance on Kanany's express agreement with responsible City officials Leedy and Woodcock, the continuous use of the area over the detached garage on his duplex property for residential purposes during the previous 5 years all with the specific knowledge and approval of City officials and Code Enforcement, and the facts that there were only two leases for the duplex units and the area over the garage had no kitchen stove and washer/dryer pursuant to the City's express promises to him that such omissions would preclude the area over the garage from being an accessory dwelling unit under the City Municipal Code as he once more restated in his August 20, 2009 letter, Kanany put the November 2009 Notice aside and considered the matter closed just as had occurred with the City-issued February 2007 Notice of Violation. CP at 306 ¶ 7.

Planning Director and City Engineer,[9] and the City has produced no evidence of noncompliance with such conditions through its numerous site inspections conducted over the years since 2004.[10]

PROCEDURAL BACKGROUND

The City of Bonney Lake commenced the underlying civil action seeking collection of substantial monetary fines[11] alleging that Kanany's duplex property was in violation of the City's zoning code for having an illegal Accessory Dwelling Unit located thereon. CP at 72 ¶ 3.10. The City contends that the underlying civil action is but a collection effort and is merely adjunct to its Notice of Civil Violation dated November 18, 2009, served solely on and naming only Robert Kanany as the owner of the Subject Property. Because the City initially identified the wrong real property as the situs of the alleged violations, the City moved for leave to amend its

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[9] Kanany has fully and continuously complied with the conditions of the agreement between him and the City made in 2004. This present action is purely political as the City has bowed to neighbor pressure, abrogated its clear application of Code requirements to the use of the area over the garage on Kanany's duplex property, and has breached their express agreement all to Kanany's substantial injury and loss of income. Kanany has been forced at substantial expense and time to defend himself and his property in this collection action by the City attempting to enrich itself unjustly from alleged violations that, according to City officials in 2004, would not and did not occur as it clearly found and concluded over the years.

[10] The City failed to honor its express promise to Kanany made in good faith with its responsible officials Leedy and Woodcock in 2004 regarding the use of the area over the garage and forced him to vacate the tenant-related occupant from that area in about July 2010. The area over the garage was used by the brother of one of the duplex tenants as a bedroom/recreation room, the use of which area for such purpose was included in the single lease of the brother tenant for an additional $750 per month. Since the City forced Kanany to vacate the area over the garage, both brothers have left the duplex and Kanany has lost that added income. The area over the garage has been vacant since July 2010. CP at 307 ¶ 9.

[11] The City contends that the monetary fine to which it is entitled to be assessed as a lien against the Subject Property accrued at the rate of $1,000 per day since November 21, 2009. CP at 74 ¶ 4.4 (Amended Complaint For Monies Owed).

Complaint. Kanany objected to leave being granted because, *inter alia*, Kanany's co-owner Navid Kanani was neither named nor served in any of the proceedings. As part of that motion, the trial court also considered the constitutionality of the City's process and procedure for assessing and reviewing monetary fines under the Supreme Court's decision in *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009). The trial court erroneously ruled that the City's program was constitutional, that Navid Kanani was not a necessary and indispensable party, and granted the City leave to amend its Complaint. Thereafter, the parties agreed to have the trial court dispose of all issues and defenses regarding and relating to the Complaint on cross-motions for summary judgment. After briefing and hearing, the trial court granted the City's motion for summary judgment and denied Kanany's cross-motion for summary judgment, and granted the City judgment for the entire amount of the fine equal to $48,000. Kanany then appealed to the Court of Appeals, Division 2. That Court issued its Part Published Opinion on December 30, 2014. Kanany moved for reconsideration which was denied on March 12, 2015.

V. ARGUMENT

The lower courts have erroneously confirmed the City's entitlement to assessing, enforcing and collecting through its unconstitutional Hearing Examiner "one and done" system excessive monetary fines against Kanany for doing nothing other than what the City had expressly promised him he could do with the space above the detached garage on his duplex property. The lower courts erred as a matter of law because (1) the enforcement system

for assessing civil penalties against citizens for alleged violations of the municipal zoning code is unconstitutional under the Supreme Court's *Post* decision; (2) equitable estoppel was failed to be applied to preclude Bonney Lake from assessing civil fines against Kanany in contravention to its express and continued promises to him that the use of the area over the garage on his duplex property did not constitute an ADU; (3) the City failed to join the co-owner of the Subject Property as an indispensable party; and (4) the provision of the zoning code sought to be enforced against Kanany conflicts with other provisions in the Code, its own Comprehensive Plan, and with general State law, and is therefore unconstitutional and invalid.

A. Because The City's Hearing Examiner System Is Not A Complete System That Is Comparable To The Judicial System Under Chapter 7.80 RCW, The Court Of Appeals' Decision Conflicts With This Court's *Post* Decision – RAP 13.4(b)(1)

Both the Superior Court and the Court of Appeals misconstrued and misapplied this Court's clear holdings in *Post* that require an administrative system employed by a municipality to enforce the assessment of civil fines for alleged violations of municipal code infractions to be a complete system comparable with a system administered by the judiciary under and pursuant to the provisions of chapter 7.80 RCW.

The Court of Appeals opined that the complete system analysis under *Post* was applicable only in the context of a LUPA (Land Use Petition Act, Chapter 36.70C RCW) appeal. *Post* presents no such contextual limitation, and this Court should take this opportunity to correct any such misconcep-

tions regarding the applicability of *Post's* significant holdings. Unlike the property owner in *Post* who brought suit himself against the City of Tacoma seeking declaratory and injunctive relief and recovery of fines paid, here Kanany is defending himself and his property rights and interests in a lawsuit brought against him by the City of Bonney Lake seeking to collect money it claims owed to it by Kanany imposed by the City as civil infraction monetary fines stemming from a land use code enforcement action solely subject to adjudication under a Hearing Examiner system in lieu of under the jurisdiction and administration of a court.[12] Whereas in *Post*, the trial court on summary judgment and this same Court of Appeals affirmed the dismissal of that lawsuit on grounds that it was not brought in accordance with the provisions of LUPA, this Court merely held that LUPA did not bar Post's independent lawsuit for declaratory and injunctive relief and recovery of fines paid to the City of Tacoma. This Court did not limit or otherwise

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[12] The City Municipal Code provides that "any violation of this development code [in Titles 14 through 19 of the BLMC] shall be a misdemeanor and a civil violation." BLMC § 14.130.030(A). "The penalty for a civil violation shall be $1,000 for each day of violation." BLMC § 14.130.030(A). "Each day of violation shall constitute a separate offense." BLMC § 14.130.020(C). The City issued only to Kanany a Notice of Civil Violation dated November 18, 2009. The Notice stated that (1) the alleged "Violation [is an] illegal accessory dwelling unit - occupancy of space above detached garage", (2) the "Penalty [is] $1,000 fine per day until compliance and verification by the City", (3) "[t]his violation is ongoing", (4) "[t]his Notice of Civil Violation is a continuing notice and daily notices are not necessary to access [sic] the daily penalty of a $1,000 fine until you have complied with the Bonney Lake code and until the City has verified vacancy", (5) "[t]his Notice represents a determination that a violation of the Bonney Lake code has been committed", (6) "[t]his determination is final unless you appeal the Notice pursuant to BLMC 14.130.080 and BLMC 14.120.020", (7) "[a]ny appeal must be made in writing to the City's Planning and Community Development Department within 15 days of receipt of this letter", and (8) "[i]f you do not appeal [to the Hearing Examiner], then you waive your right to challenge this Notice." CP at 227-28.

restrict application of its holdings in *Post* with respect to the requirements of Chapter 7.80 RCW and the test of whether the local jurisdictions's means of code enforcement and imposition of monetary fines presents a complete system only to LUPA actions.[13] The Court of Appeals relegated this Court's *Post* holdings as to the absolute necessity for a complete system comparable to that afforded under Chapter 7.80 RCW to but a single footnote that tied this essential element solely to LUPA actions. *See* Part Published Opinion, at APP-11 fn.4.[14] However, Kanany's assertion that the BLMC does not create a ***complete*** system[15] is grounded not only on the undisputed fact of law

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[13] This Court found and concluded in *Post* that a municipal code enforcement system similar to that of Bonney Lake that "provides for the issuance of a notice of violation letter and the assessment and collection of civil penalties . . .are elements of what chapter 7.80 RCW calls 'a system of civil infractions.'" *Post*, 167 Wn.2d at 310. This Court has defined a civil infraction as "noncriminal violations of law defined by statute [or ordinance]." IRLJ 1.1(a), 1.2(i); *Post*, 167 Wn.2d at 310 n.6; and at 311 n.8. This Court observed that "the authority of local jurisdictions to issue civil infraction notices and impose and enforce related penalties is governed by chapter 7.80 RCW." *Post*, 167 Wn.2d at 311. Bonney Lake's zoning code enforcement mechanism does not comport with nor comply with the requirements of Chapter 7.80 RCW as such does not present a **complete system** for enforcing civil infractions and is therefore an unconstitutional violation of due process.

[14] In its footnote discussion, and improperly relying solely on the absence of a LUPA nexus in Kanany's appeal, the Court opined that "[b]ecause neither party in this case raises a land use challenge, this portion of *Post* cannot be read for the remarkable proposition that Hearing Examiner systems throughout the state are unconstitutional because examiners are not authorized to decide equitable or constitutional questions. The BLMC is not unconstitutional for this reason."

[15] Where used as an adjective, the word "*complete*" is defined to mean "full; entire; including every item or element of the thing spoken of, without omissions or deficiencies; . . . not lacking in any element or particular." Black's Law Dictionary, at p. 258 (5th ed. 1979). As so clearly held by this Court, "absent it own **complete** system, [a local municipality] is required by chapter 7.80 RCW to follow the legislature's default system and enforce its infractions in courts of limited jurisdiction." *Post*, 167 Wn.2d at 312 (emphasis added). It is fundamental that "civil due process [requires] notice, open testimony, time to prepare and respond to charges, and a meaningful hearing before a **competent tribunal** in an orderly proceeding." *Department of Social and Health Services v. Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983, emphasis added). A Hearing Examiner is **not** a competent tribunal.

that Hearing Examiners have neither the legal power nor authority to grant full relief to all issues raised in defense to a notice of violation,[16] but as a matter of law, even if in fact a municipality has adopted applicable rules for the uniform and fair conduct of administrative hearings (and **as a matter of public record** it is an undisputed fact that Bonney Lake has **not** adopted any rules of procedure for its Hearing Examiner system), it is further undisputed that the Hearing Examiner system lacks the same fundamental rules of procedure that apply to municipal and district courts, including, *e.g.*, rules for vacation of and relief from judgments/orders; and rules limiting the amount of monetary fines for infractions.[17] *See, e.g.*, Rule IRLJ 6.7(a); Rule IRLJ

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[16] A Hearing Examiner is limited in his power and authority to applying the *black letter* law as enacted by statute and ordinance, and has no authority to adjudicate common law issues such as claims in equity, *Chaussee v. Snohomish County*, 38 Wn. App. 630, 737-40, 689 P.2d 1084 (1984), or a claim of unconstitutionality of the ordinance at issue. *Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-87, 113 P.3d 494 (2005). An administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power. *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1979). Under the Bonney Lake Municipal Code, the Hearing Examiner has only the power to apply existing Codes, not to invalidate them. BLMC § 2.18.090; BLMC § 14.130.080. In defense to the City's alleged zoning code violations, Kanany raises the issues of equitable estoppel and unconstitutionality of the codes sought to be enforced. Neither of these defenses are within the authority of a Hearing Examiner to adjudicate; whereas both of these defenses are certainly within the power and authority of courts to fully entertain and adjudicate.

[17] A principal element upon which the City's code enforcement system is grounded, and that part of its system of review that is fatally deficient under *Post*, is that any appeal of a Notice of Civil Violation is conducted administratively by a Hearing Examiner. BLMC § 14.130.080(A). The Hearing Examiner is appointed by the mayor and "serves at the will of the mayor's discretion." BLMC § 2.18.020. "The examiner shall interpret, review, and implement land use regulations as provided in this chapter or in other ordinances." BLMC § 2.18.010. Regarding the appeal from a zoning code enforcement action, "the appeal may contest that a violation occurred, the penalty, and/or the corrective action ordered." BLMC § 14.130.080 (A). The examiner's power and authority is limited in such appeals only to determine "whether a preponderance of evidence shows that the violation occurred and the required corrective action is reasonable" and to assess daily monetary penalties for such violation. BLMC §§ 14.130.080(C) and 14.130.090. However, where as in the case of Kanany, equitable and constitutional defenses are raised by the property owner to contest the alleged

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3.3(e); Rule IRLJ 6.2; and Rule CRLJ 60(b).[18] Absent legislative intervention,[19] this Court recognizes its constitutional duty and responsibility to apply the requirements of Chapter 7.80 RCW fully, and the lower courts must likewise abide by their duty and responsibility to faithfully and fully apply this Court's *Post* decision. The Court of Appeals failed to do so, and in so doing its decision directly conflicts with this Court's *Post* decision and the application of its significant holdings, all to the detriment and substantial harm to Kanany that demands review by this Court. RAP 13.4(b)(1).

B. Because Daily Fines Of $1,000 Accruing To A Total Monetary Fine Of $48,000 Is Grossly Excessive In Light Of The Actual Alleged Infraction And This Court's Determination Of Maximum Fines For Infractions, A Significant Question Of Constitutional Law Is Presented Under Wash. Const. Art. I, § 14, As Well As Is Presented An Issue Of Substantial Public Interest That Should Be Determined By This Court -- RAP 13.4(b)(3); RAP 13.4(b)(4)

Both of the lower courts affirmed judgment against Kanany in the total

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[17](...continued)
violation of the zoning code, the Hearing Examiner has neither the power nor the authority to even entertain such defenses, much less actually rule on their merits.

[18] What makes Bonney Lakes' Hearing Examiner system fundamentally incomplete and constitutionally invalid is that, unlike courts that all have adopted and published rules of procedure, the Bonney Lake Hearing Examiner has none whatsoever. Not only is this lack of procedural rules a clear violation of RCW 35A.63.170(1), the absence of procedural rules is a clear violation of due process and renders all actions of such tribunal a legal nullity. *See Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 852-56 (E.D. Va. 1980); *State of Michigan v. Bayshore Associates, Inc.*, 533 N.W.2d 593 (Mich. App. 1995); *State v. Klemmer*, 566 A.2d 836 (N.J.Super. 1989); *Boller Beverage, Inc. v. Davis*, 183 A.2d 64, 71 (1962); *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161-62, 516 P.2d 1028 (1973).

[19] If these defects and deficiencies result in the invalidity of Hearing Examiner systems across the State, then any corrections thereof must rest in the hands of the Legislature to address Chapter 7.80 RCW in light of the requirements of *Post*. It is not up to the lower courts to abstain from their constitutional duties simply because there may be repercussions on local government requiring action by the State Legislature.

amount of $48,000 as the monetary fine for violation of the City land use code – a civil infraction under Chapter 7.80 RCW and this Court's *Post* decision. In his Answer to the City's Complaint (at p.3, ¶ 10), Kanany pleaded as an affirmative defense the unconstitutionality of such fine as excessive. Falling by the wayside has been Kanany's constitutional contention in the lower courts that both on a daily basis of $1,000 each day as well as in the aggregate totaling $48,000 as demanded by the City such constitute excessive fines in violation of Wash. Const. art. I, § 14.[20] Under a "one and done" Hearing Examiner system (that is not a complete system and is patently unconstitutional under *Post*),[21] the assessment of daily fines and the cumu-

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[20] It is well-established that a civil penalty which has even a partially punitive purpose is a fine for purposes of constitutional protection. *United States v. Bajakajian*, 524 U.S. 321, 334, 141 L. Ed. 2d 314, 118 S. Ct. 2028 (1998); 4 E. Ziegler, *Rathkopf's The Law of Zoning and Planning*, § 45.01, at pp. 45-48 (4th ed. 1997). Whether a fine is excessive rests on whether the amount of the monetary penalty is grossly disproportionate to the gravity of the offense committed. *Bajakajian*, 524 U.S. at 324. If a penalty is excessive, it does not further a legitimate government purpose and constitutes an arbitrary deprivation of property. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417, 155 L. Ed. 2d 585, 123 S. Ct. 1513 (2003). In determining whether a civil penalty is disproportionate and unreasonable, the penalty is not compared to the actual damages sustained by a private party but, rather, to the public wrong the statute at issue is designed to remedy. *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 66, 64 L. Ed. 139, 40 S. Ct. 71 (1919). "The controlling circumstance is whether the civil penalty . . . bears any rational relation to the damages suffered by the Government." *United States v. Halper*, 490 U.S. 435, 453, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989) (Kennedy, J., Concurring).

[21] The City's contention that an inspection that could be requested by Kanany to demonstrate vacancy is in and of itself an appealable decision, thereby purportedly affording Kanany due process in lieu of a "one and done" system for appeals of a notice of violation, is wholly without merit. *See* Part Published Opinion, at APP-11 fn.5. There is absolutely no provision in the BLMC that would make such an inspection any kind of a "final action" that is subject to separate appeal. The appeal process that the City relies on limits the jurisdictional scope of appeals to its Hearing Examiner only to "final actions of the director(s), including Type 1, 2, or 3 permit decisions, SEPA threshold determinations, code interpretations, notices of violation, and approvals of minor changes to permits". BLMC § 14.120.020. Moreover, there is absolutely nothing in the Notice of Violation issued to Kanany, and upon which the City sues to collect the $ 48,000 in monetary fines imposed against him, that states or even

(continued...)

lative effect of such fines is not only unconstitutionally excessive as a fine for a mere infraction, but also constitutes an unconstitutional taking of property without due process. The issue of excessive fines in the context of infractions for alleged land use code violations presents a significant question of law under the Constitution of the State of Washington. RAP 13.4(b)(3).

Moreover, a municipality assessing monetary fines of $1,000 per day with each day constituting a separate infraction, and subject to but a single appeal under a patently incomplete Hearing Examiner system that, as is readily admitted by the City, is in widespread use throughout the State of Washington, involves an issue of substantial public interest that should be determined by this Court. Generally, an issue that is of substantial public interest arises where the legal rights and/or liabilities, or commercial and/or financial interests, of a substantial segment of the population are potentially affected or at risk. *State v. Watson*, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005). This Court's *Post* decision is at risk of being diminished into oblivion, thus placing all citizens of this State who are subject to the same type of defective Hearing Examiner system charged with enforcing infractions of local land use codes in substantial jeopardy of having assessed against them

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[21](...continued)
implies that the inspection that may be called for to demonstrate vacancy is in any manner appealable as a separate and distinct action should the City determine that such inspection does not confirm vacancy. In short, although an appeal of the Notice of Violation would vest the Hearing Examiner with the authority to review the "corrective action ordered", BLMC § 14.130.080(A), there is nothing in the BLMC that empowers the Hearing Examiner to entertain a separate subsequent appeal regarding whether or not compliance with the "corrective action ordered" had been obtained. The City's system is truly "one and done".

excessive fines resulting in massive financial liabilities and significant deprivation of their valuable property rights in violation of their clear constitutional rights and interests. This is not hyperbole, it is fact. A local system for infraction enforcement by and through a "one and done" Hearing Examiner system that is not a complete system comparable to the judicial system prescribed by Chapter 7.80 RCW is an unconstitutional violation of due process from which Washington citizens are legally entitled to protection. Kanany presents an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

C. Because The Failure Of The City To Join Navid Kanani As An Indispensable Party Deprived The Lower Tribunals Of Subject Matter Jurisdiction, The Lower Courts Refusal To Dismiss The City's Lawsuit Conflicts With Other Appellate Court Decisions – RAP 13.4(b)(2)

The Court of Appeals affirmed judgment against Kanany notwithstanding the superior court's refusal to dismiss the City's lawsuit in light of its failure to join Navid Kanani as an indispensable party as is mandated by the City's land use code. The Court of Appeals' decision conflicts with another Division of the Court of Appeals' decision that failure to join an indispensable party as required by the applicable statute (here, the BLMC) deprives the tribunal of subject matter jurisdiction; the result being that the only remedy is to dismiss the action. RAP 13.4(b)(2).

In its Code Enforcement actions against the Subject Property alleging the existence of an accessory dwelling unit in violation of the City's zoning code, the City has steadfastly refused to include by name or otherwise serve

any notice whatsoever on co-owner Navid Kanani in total and obvious disregard of its own public records. This patent and fatal omission continued as the City refused to join as a party Defendant in its Complaint For Monies Owed, Navid Kanani, co-owner of the Subject Property, notwithstanding the fact that any judgment obtained by it becomes a lien against the subject real property[22] and very substantially and adversely affects his own separate property rights, interests, and contractual obligations under existing financing instruments.[23] As co-owner of the Subject Property, Navid Kanani is absolutely not only a necessary but is an indispensable party[24] and the intentional failure of the City to join him as a party in the underlying proceedings as a matter of law deprived the tribunals of subject matter jurisdiction, as so

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[22] RCW 4.56.200(1). Even a partial lien could result in the forced sale of the realty to satisfy the judgment against a co-tenant resulting in loss of the property for the other co-tenants. RCW 4.56.190.

[23] For example, the recorded Deed of Trust imposes duties on Navid Kanani, personally, to "comply with all laws, ordinances, regulations and requirements of any governmental body applicable to the Property" and to "not allow any lien inferior to the Security Instrument to be perfected against the Property without Lender's prior written permission." CP at 28 ¶ B ("Use Of Property; Compliance With Law"), and ¶ C ("Subordinate Liens").

[24] The BLMC provides that "the owner of the property is the violator" of the land use code, and must be served either personally or by mail with a Notice of Violation informing him/her of the alleged violation with the right to appeal, participate in the hearing and call witnesses. BLMC § 14.130.020(B); BLMC § 14.130.070; BLMC § 14.130.080. The essential term "owner" is expressly defined in the BLMC where "applied to a building or land, **includes any** part owner, joint owner, tenant in common, joint tenant, tenant by the entirety, of the whole or a part of such building or land." BLMC § 1.04.010(I) (emphasis added). And "Washington courts have consistently interpreted the word 'any' to mean 'every' and 'all'." *Cerrillo v. Esparza*, 158 Wn.2d 194, 203, 142 P.3d 155 (2006) (any employee means all employees who deliver agricultural commodities, not just those who work for farmers). *See also Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 884-85, 64 P.3d 10 (2003) (any employee means all employees of a service and retail establishment and not just those who make retail sales); *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 559-60, 59 P.3d 120 (2002) (under the MAR any aggrieved party means all parties are put on notice that they must file a request for trial *de novo* to preserve the right to a jury trial).

clearly and recently held by another Division of the Court of Appeals.

> A court lacks subject matter jurisdiction when a necessary party under a statute is not a party to the action before it. *See Laffranchi v. Lim*, 146 Wn. App. 376, 190 P.3d 97 (2008) (reversing the trial court's grant of unlawful detainer because a tenant in possession of a residence following the sale of his landlord's interest is a necessary party to an unlawful detainer proceeding brought by the purchaser, and without that necessary party, the trial court lacked subject matter jurisdiction).

Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 942, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017 (2010) (the appropriate remedy is mandatory dismissal of the action). An issue of subject matter jurisdiction may be raised in the court at any time. CR 12(h)(3).

Here, the BLMC is the applicable statute and under and pursuant to its clear mandate, Navid Kanani is an indispensable party. The Court of Appeals failed to recognize and apply this well-established rule of law and in so doing, its decision conflicts with a decision of another Division of the Court of Appeals that should be reviewed by this Court. RAP 13.4(b)(2).

D. Because That Part Of The BLMC The City Alleges Kanany To Have Violated Conflicts With State Law, Such Provision Is Unconstitutional, Invalid and Unenforceable Under Wash. Const. Art. XI, § 11 – RAP 13.4(b)(3)

The City alleged that Kanany's use of the area above the detached garage at his duplex violated BLMC § 18.22.090(C)(1). However, this provision is in direct conflict with another specific provision of the Code adopted at the same time, BLMC § 18.16.020(A), as well as being directly in conflict with and contrary to the contemporaneous express provisions of the City's own Comprehensive Land Use Plan and the Washington State

Growth Management Act with respect to the provision of affordable housing through the use of ADUs in all zones, including the R-2 (duplex zone).[25] Such conflicting provisions have a direct and adverse impact on Kanany's pecuniary and property rights and interests and present a significant question of law under the Constitution of the State of Washington (art. XI, § 11) for this Court's review. RAP 13.4(b)(3).

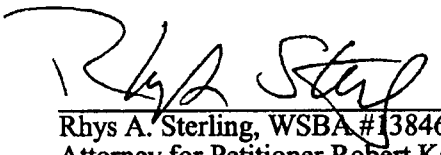
VI. CONCLUSIONS

Based on the foregoing, and under RAP 13.4(b)(1), RAP 13.4(b)(2), RAP 13.4(b)(3), and RAP 13.4(b)(4), this Court should grant Kanany's Petition and review this case to consider the issues presented.

Dated this 3rd day of April, 2015.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling, WSBA #13846
Attorney for Petitioner Robert Kanany

[25] The City's blindly and arbitrarily picking and choosing which code provisions to apply against fewer than all owners of the Subject Property have resulted in unconstitutionally excessive fines assessed solely against Kanany. The Court of Appeals in its unpublished portion of its Opinion gave short shrift to these arguments. However, in so doing, the Court of Appeals failed to recognize that development regulations are required to be consistent with the Comprehensive Land Use Plan and the Growth Management Act. Whereas, BLMC § 18.16.020(A) is consistent with these plans and laws, BLMC § 18.22.090(C)(1) clearly is not and thus cannot be allowed by this Court to be the basis on which the City assessed excessive fines against Kanany for doing nothing other than precisely what the City had expressly promised him he was allowed to do with the space above the detached garage.

* *

APPENDIX

* *

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF BONNEY LAKE, a municipal corporation, Respondent, v. ROBERT KANANY, Appellant.	No. 42988-8-II PART PUBLISHED OPINION

BJORGEN, J. — Robert Kanany appeals the trial court's denial of his summary judgment motion and its grant of summary judgment to the City of Bonney Lake (City), upholding civil penalties assessed by the City for various code violations at Kanany's properties. The published portion of this opinion addresses Kanany's argument that portions of Title 14 of the Bonney Lake Municipal Code (BLMC) deprived him of procedural due process because they did not provide an appeal process for all violations claimed and penalties assessed. On this issue, we hold that the relevant portions of Title 14 BLMC provided Kanany with a full opportunity to appeal the notices of violation and penalties at issue and therefore did not deprive him of due process. In the unpublished portion of the opinion, we reject Kanany's remaining arguments. Accordingly, we affirm the decision of the trial court.

FACTS

Kanany and Navid Kanani[1] are co-owners of property in the City. In 2004, Kanany applied for a residential accessory building permit from the City, indicating his intent to build a duplex and a garage with a heated upstairs unit on the property. The City approved his permit and noted that "per code detached garage may not be converted to living space." Clerk's Papers (CP) at 212. After the duplex and garage were built, Kanany used the duplex as a rental property.

Between 2007 and 2009, responding to complaints about Kanany's property, the City investigated the space above Kanany's garage to determine whether he was in compliance with the BLMC. In February 2007, the City sent Kanany a notice of civil violation, indicating that his property was in violation of BLMC 18.22.090 because he utilized or converted a portion of the garage into an "Accessory Dwelling Unit" (ADU). ADUs are prohibited in conjunction with a duplex. BLMC 18.22.090(C)(1). The City imposed a $1,000-a-day fine until Kanany became compliant. The notice stated that Kanany had 15 days to appeal the notice.

In March 2007, Kanany sent Denney Bryan of the City a letter stating that his attorney had been told by the City that Kanany would not be in violation of the BLMC as long as the space above the garage did not contain a kitchen stove and washer/dryer and that Bryan had told him that the washer/dryer "is not an issue." CP at 216. Kanany stated that his tenants were using the space above the garage as a bedroom and recreational room and that "neither appliances" were in that space. CP at 216. This apparently satisfied the City for 2007. In 2008, responding to a

[1] Because the last names Kanany and Kanani are similar, we refer to Navid Kanani by his first name to avoid confusion, intending no disrespect.

complaint from a neighbor, the City again investigated and concluded that Kanany's property and the space above the garage still complied with the BLMC.

On August 5, 2009, after another complaint, the City issued a letter to Kanany stating that the space above the garage violated BLMC 18.22.090(C)(1). The City asked Kanany to voluntarily comply with its requests to vacate tenants from the space and arrange an inspection of the property to verify the vacancy. The City gave Kanany 45 days to comply.

On November 18, 2009, the City sent Kanany a notice of civil violation indicating that he had failed to respond to its letter within 45 days. The notice stated that under BLMC 14.130.070, it was imposing a $1,000-a-day fine until Kanany complied, and that under BLMC 14.130.080 and BLMC 14.120.020, the City's violation determination and subsequent fine were final unless Kanany appealed within 15 days. Kanany did not appeal.

On January 8, 2010, the City filed a complaint against Kanany in superior court, asserting that he maintained an impermissible ADU in violation of BLMC 18.22.090(C)(1). Alleging Kanany's failure to respond to the November 2009 notice of civil violation, the City stated that its code violation determination and fines were final and collectible under BLMC 14.130.070.

In the complaint, the City misidentified the property's address and in June 2010, it moved under CR 15(a) for leave to file an amended complaint with the property's correct address.[2] Kanany objected to the City's motion because the City had not joined Navid as a necessary party in the lawsuit under CR 19(a).

[2] The City identified Kanany's city mailing address as the address in violation instead of the proper address of the property containing the duplex and garage.

In August, the trial court determined that (1) chapter 14.130 BLMC was constitutional on its face and as applied to Kanany, (2) Navid was not a necessary party to the action under the BLMC or CR 19(a), and (3) the City's motion to amend was proper under CR 15(a). The trial court granted the City's motion to amend.

In November 2011, Kanany and the City filed cross motions for summary judgment. Kanany's motion asked the court to dismiss the City's complaint with prejudice. Kanany contended that beginning in 2004, he communicated with City officials several times about the space above his detached garage and they always told him that he was in compliance with the BLMC until the November 2009 notice of civil violation. Kanany asserted that he was not in violation of the BLMC because his tenants' use of the space above the garage had not changed between 2004 and 2009. Kanany also asserted that equitable estoppel prevented the City from assessing fines against him because it had previously agreed that Kanany was not in violation. Finally, Kanany argued that BLMC 18.22.090(C)(1) was invalid and unenforceable because it directly conflicted with an overriding BLMC provision and was fatally inconsistent with the City's comprehensive plan.

To support his motion, Kanany filed a declaration attaching copies of several documents, including his 2007 and 2008 communication with the City, a June 2008 letter from the City to the complaining neighbor, the August 2009 letter and Kanany's letter in response, and the November 2009 notice of violation from the City. Kanany also supported his motion with a declaration from his attorney and attached copies of several City ordinances and the City's comprehensive plan.

The City's cross motion for summary judgment asked the court to find that Kanany violated the BLMC and owed $48,000 in fines. The City argued that it gave Kanany proper notification of the violation and the consequences for failing to voluntarily correct the violation. The City stated that because Kanany failed to contact the City within 45 days of receiving the notice letter, it issued a notice of civil violation and imposed a $1,000-a-day penalty while the violation continued. In addition to the 45 days given to respond to the City's August 2009 letter, the City gave Kanany 15 days to appeal the November 2009 violation notice and penalty; however, Kanany still failed to respond. The City argued that there was no genuine issue of fact that Kanany failed to appeal the notice and fines and, absent any appeal, the City's notice of civil violation is final and the associated fines are collectible.

In December 2011, the trial court granted the City's motion for summary judgment and denied Kanany's motion for summary judgment. The court entered judgment "against [Kanany] on behalf of the City for $48,000, the total amount of fines owed in connection to the Notice of Civil Violation as of the filing of the original complaint in this matter." CP at 350. Kanany appeals.

ANALYSIS

Kanany argues that under *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), BLMC 14.120.020, 14.130.070, and 14.130.080 are unconstitutional because they allow a single notice of violation to impose subsequent daily penalties without any opportunity to appeal them. The City argues that the BLMC is unlike the Tacoma city ordinances at issue in *Post* because the BLMC provided express procedures for Kanany to raise any argument against the violation determination, but Kanany declined to take advantage of any of the procedures. Kanany also

raises a number of challenges discussed in the unpublished portion of this opinion. We affirm all the challenged rulings of the trial court.

I. STANDARD OF REVIEW

Summary judgment is appropriate where the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We review questions of law de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001). When reviewing a grant of summary judgment, we consider solely the issues and evidence called to the trial court's attention on a motion for summary judgment. RAP 9.12.

II. PROCEDURAL DUE PROCESS

Title 14 BLMC provides the City's enforcement authority for development code violations. BLMC 14.130.010. Each day in violation constitutes a separate offense. BLMC 14.130.020(C). BLMC 14.130.030(A) provides that any development code violation shall be a misdemeanor and a civil violation, the penalty being $1,000 for each day in violation. If the City determines that a person is violating the development code, it attempts to secure voluntary correction of the problem by explaining the violation and requesting correction before issuing a notice of civil violation. BLMC 14.130.060.

A notice of civil violation represents a determination that a violation of the development code has been committed. BLMC 14.130.070(A). A property owner may file a written appeal of the notice to the hearing examiner within 15 days of its issuance. BLMC 14.120.020(A), .130.080. At the hearing before the hearing examiner, the property owner and the City department director may participate and call witnesses. BLMC 14.130.080. The hearing examiner is required to prepare findings as to whether a preponderance of evidence shows that the violation occurred and

that the required corrective action is reasonable. BLMC 14.130.080. The hearing examiner's decision may be appealed to superior court. BLMC 14.120.020(G).

Our state and federal case law holds that the fundamental requirement of procedural due process "is the opportunity to be heard at a meaningful time and in a meaningful manner." *Post*, 167 Wn.2d at 313 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Post, 167 Wn.2d at 313 (quoting *Mathews*, 424 U.S. at 335); *see also Tellevik v. Real Prop.*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992) (adopting and applying the *Mathews* test).

The analysis in *Post* illustrates the application of the *Mathews* test in a setting similar, but not identical to that presented here. In *Post*, the City of Tacoma found many of Post's properties to be in violation of various city standards. *Post*, 167 Wn.2d at 303. Tacoma sent notices of violation for each property, "notifying Post that the properties were either substandard or derelict." *Post*, 167 Wn.2d at 305. These notices "described the violations and advised Post how to seek administrative review of the violation notice." *Post*, 167 Wn.2d at 305. For most of his properties, Post responded to the notices by agreeing to repair schedules. *Post*, 167 Wn.2d at 305. However, he did not respond to at least two of the violation notices. *Post*, 167 Wn.2d at 306.

"Post failed to comply with the agreed repair schedules for 17 properties." *Post*, 167 Wn.2d at 306. In response, Tacoma began issuing civil penalties in the amount of $125 per property pursuant to the Tacoma Municipal Code 2.01.060(D)(4)(b) and (E)(3)(b). *Post*, 167 Wn.2d at 306. As a result, Tacoma imposed hundreds of thousands of dollars in civil penalties. *Post*, 167 Wn.2d at 303, 307. Post attempted to appeal many of the fines, but in most cases Tacoma denied a hearing, taking the position that the appeals were untimely because its municipal code required an appeal within 30 days of the first notice of violation. *Post*, 167 Wn.2d at 306. Post sued, "seeking to bar Tacoma from enforcing its building code against him on numerous grounds," including the claim that his rights to due process were violated. *Post*, 167 Wn.2d at 303-04.

On appeal, the Supreme Court ultimately held that the civil infraction ordinance at issue offended procedural due process under *Mathews*, 424 U.S. at 333, because "it purport[ed] to authorize the unlimited and unreviewable issuance and enforcement of subsequent civil infractions and penalties without any system of procedural safeguards." *Post*, 167 Wn.2d at 315. In its *Mathews* analysis, the court in *Post* relied heavily on the risk of the erroneous deprivation of property rights due to the absence of any procedural safeguards after issuance of the first mandatory fine, including subsequent discretionary fines. *Post*, 167 Wn.2d at 313-15. Because those were separate decisions involving changed facts and risk of error, *Post* held that due process required new appeal opportunities. 167 Wn.2d at 314-15.

The mechanics of Tacoma's flawed system, though, were different in critical respects from that of the City of Bonney Lake. If, after issuance of a notice of violation, the violation was not corrected, the Tacoma ordinance provided for four successive mandatory fines. *Post*, 167 Wn.2d

at 304-05. If the violation remained after the four fines, Tacoma had the discretion either to assess or not to assess fines for each day until the violation was remedied. *Post*, 167 Wn.2d at 305. The owner had the right to seek administrative review only after the initial notice of violation and after the first mandatory fine. *Post*, 167 Wn.2d at 305. The owner had no right to an administrative appeal of any of the wholly discretionary fines Tacoma might impose after the mandatory penalties. *Post*, 167 Wn.2d at 305.

Here, in blunt contrast, there was nothing discretionary about the daily fines at issue. They were automatic, and Kanany had the full opportunity to appeal the continuing fines for his specific violation. The November 18 notice of civil violation characterized itself as continuing in nature and specifically described the nature of the violation, the code section violated, and the nature of the action required for its remedy. The notice imposed a daily fine[3] until compliance was achieved and specifically stated that the violation was ongoing. The notice then expressly advised Kanany that he could appeal under BLMC 14.130.080 and BLMC 14.120.020 by filing an appeal in writing with the Bonney Lake Planning and Community Development Department within 15 days of his receipt of the notice. BLMC 14.120.020 and BLMC 14.130.080 each specifically allow appeals of notices of civil violations.

Thus, the right to appeal that notice under BLMC 14.120.020 and BLMC 14.130.080 afforded the full opportunity to challenge both the determination that the violation was occurring and the imposition of specific daily fines until that violation was remedied. This appeal opportunity provided Kanany the vehicle to challenge the ongoing daily fines, whether accruing before or after the end of the 15-day appeal period.

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[3] No issue is raised whether the total amount of the fines assessed is excessive as a remedial measure.

In sum, Kanany was given the full opportunity to appeal all aspects of the notice of civil violation, including the ongoing daily fine. That opportunity to appeal the entire assessment of fines was the step that was absent in *Post*. The absence of that opportunity, the absence of that safeguard against erroneous deprivation of property, was the flaw that led the court in *Post* to find a due process violation under *Mathews*. Here, that safeguard is fully present.

Returning to the test in *Mathews*, applied by our court in *Post*, 167 Wn.2d at 313, the private interest here is the same as that at stake in *Post*, that of avoiding the "assessment of erroneous or excessive monetary penalties." *Post*, 167 Wn.2d at 313. The government interest is also the same as that in *Post*, "protecting public safety, protecting property values, and preventing declining neighborhoods." *Post*, 167 Wn.2d at 314. The critical weight in the *Mathews* test in the present appeal is the second element, the risk of an erroneous deprivation of the private interest. As noted, *Post* relied on the absence of any procedural safeguards when Tacoma decided whether to issue its discretionary fines. *Post*, 167 Wn.2d at 314-15. As also noted, Kanany had the opportunity to appeal his ongoing fines in full. Requiring multiple opportunities to appeal the same fines for the same violation, which accrue after the appeal period, does little, if anything, to further guard against erroneous deprivation of the private interest at stake. Rather, its principal effect is to burden the municipality with superfluous and costly administrative processes, which directly erode the governmental interest protected by the third element in the *Mathews* test. Such redundancies in procedure are not among the majestic requirements of due process. Under both

Mathews and *Post*, the City here did not deprive Kanany of procedural due process.[4]

Our decision of this appeal, of course, is confined to those issues properly raised by it. Kanany's due process challenge is to the ongoing fines imposed by the notice of civil violation. He does not argue that he has attempted to remedy any lack of compliance or that the City has erred in deeming any such attempt to be inadequate. Thus, his due process challenge fails because he was given the opportunity to appeal his continuing daily fines for the violation found in the notice, as described above. On the other hand, if Kanany were challenging the City's decision on the adequacy of corrective measures he took, due process may well require the City to afford an administrative appeal of that decision and the continuation of the remedial fines.[5] *See Post*, 167 Wn.2d at 315. Kanany, however, is not raising such a challenge, either in an as applied or facial sense. The trial court was correct in ruling that the City's actions before us did not deprive Kanany of procedural due process.

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[4] Alternatively, Kanany argues that the BLMC is also unconstitutional in that it does not provide a complete system for enforcing civil infractions. The system is incomplete, Kanany argues, because the hearing examiner is not authorized to decide constitutional or equitable matters. The City responds that the BLMC comports with chapter 7.80 RCW and is constitutional because constitutional and equitable arguments can still be raised through appeals in the state court system as provided in BLMC 14.120.020(G). Kanany's argument rests on *Post*. The citations he gives from *Post*, however, come from the Supreme Court's discussion of whether the Land Use Petition Act, chapter 36.70C RCW, barred Post from challenging Tacoma's imposition of penalties. *Post*, 167 Wn.2d at 308-12. Because neither party in this case raises a land use challenge, this portion of *Post* cannot be read for the remarkable proposition that hearing examiner systems throughout the state are unconstitutional because examiners are not authorized to decide equitable or constitutional questions. The BLMC is not unconstitutional for this reason.

[5] The City stated at oral argument that its municipal code would afford Kanany an opportunity to appeal in such a situation. Wash. Court of Appeals oral argument, *City of Bonney Lake v. Kanany*, No. 42988-8-II (Sept. 13, 2013), at 15 min., 06 sec. (on file with the court).

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

III. Remaining Issues

Kanany next argues that the trial court improperly granted the City's summary judgment motion, thereby denying his motion for summary judgment, because (1) the space above his garage is not an ADU as defined by the BLMC; (2) equitable estoppel prevents the City from claiming that Kanany's property is in violation of the BLMC; and (3) the portion of the BLMC that the City is enforcing is in direct conflict with the City's comprehensive plan and the state Growth Management Act, chapter 36.70A RCW.

The City responds that the trial court properly granted it summary judgment because (1) Kanany failed to timely challenge whether the space was an ADU; (2) equitable estoppel is unwarranted ; and (3) the BLMC is not in direct conflict with the City's comprehensive plan or the state Growth Management Act, chapter 36.70A RCW. We hold that Kanany is precluded from factually challenging the validity of the initial violation, that Kanany fails to meet all of the elements of equitable estoppel, and that the BLMC is not in conflict with the City's comprehensive plan or the state Growth Management Act.

A. Whether the Space is an ADU

Citing the BLMC's ADU definition, Kanany argues that the space above his garage is not an ADU because it did not have a kitchen stove and washer/dryer appliances. The City responds that because Kanany failed to respond to the City's November 2009 notice of civil violation, as

required by the BLMC, the City's ADU determination was final and conclusive. BLMC 14.130.070(A) flatly states that a notice of civil violation is final, "unless appealed as provided herein." Kanany did not appeal the notice at issue. Therefore, the City is correct that Kanany is precluded from making this factual challenge.

B. Equitable Estoppel

A party claiming equitable estoppel must establish by clear, cogent, and convincing evidence that

> (1) the conduct, acts, or statements by the party to be estopped are inconsistent with a claim afterward asserted by that party, (2) the party asserting estoppel took action in reasonable reliance upon that conduct, act, or statement, and (3) the party asserting estoppel would suffer injury if the party to be estopped were allowed to contradict the prior conducts, act, or statement.

Sorenson v. Pyeatt, 158 Wn.2d 523, 538-39, 146 P.3d 1172 (2006); *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). In addition to satisfying each of the above elements, the party asserting equitable estoppel must have proceeded in good faith and have "clean hands," or be free from fault in the matter. *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 650, 757 P.2d 499 (1988).

The application of equitable estoppel against state or local governments is disfavored. *Kramarevcky*, 122 Wn.2d at 743. Consequently, where a party asserts equitable estoppel against the government, it must meet two additional requirements: (1) equitable estoppel must be necessary to prevent a manifest injustice, and (2) the exercise of governmental functions must not be impaired as a result. *Kramarevcky*, 122 Wn.2d at 743. The promulgation of zoning ordinances is a governmental function and generally estoppel does not apply to government enforcement of zoning ordinances, even when its officers have issued building permits, allowed construction contrary to regulations, have given general approval to regulation violations, or have remained

inactive in the face of such violations. *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973).

Kanany fails to meet the requirements to successfully assert equitable estoppel against the City. He argues that he and the City had an express agreement that absent a kitchen stove and washer/dryer, the City would not consider his property to be an ADU. He asserts that he has "lived up to his side" of the agreement and that therefore the City should be equitably estopped from assessing monetary penalties against him. Br. of Appellant at 35. However, Kanany fails to cite any evidence that was before the trial court at summary judgment which supports his assertion that he has lived up to his side of the agreement as far as these appliances are concerned. Because he failed to appeal the initial violation, he cannot challenge its validity now. Kanany has failed to show any inconsistency in the positions taken by the City, not to mention any manifest injustice if the City is not estopped from enforcing its ordinances. Therefore, he has not met the requirements for equitable estoppel.

C. Whether the BLMC is in Conflict with the City's Comprehensive Plan and State Growth Management Act

Kanany argues that BLMC 18.22.090(C)(1) is in direct conflict with BLMC 18.16.020(A), the City's comprehensive plan, and the Growth Management Act. Former BLMC 18.16.020[6] is titled "Uses permitted outright" for medium density residential districts, and provides, in part,

> The following uses are permitted in an R-2 zone, **subject to** the off-street parking requirements, bulk regulations and **other provisions and exceptions set forth in this code**:
>
> A. Residential Uses:
> 1. Single Family residence;
> 2. Duplexes (two-family residences);

[6] BLMC 18.16.020 was repealed in 2010 but was in effect during the time at issue here.

3. Modular homes on individual lots;
4. Manufactured homes on individual lots;
5. Accessory dwelling units.

(Emphasis added.) BLMC 18.22.090(C)(1) provides, in part,

> One accessory unit shall be allowed per legal building lot as a subordinate use in conjunction with any single-family residence; no ADU will be permitted in conjunction with any duplex or multiple-family residence.

Contrary to Kanany's argument, these two subsections are not in conflict. Rather, former BLMC 18.16.020 allows ADUs in medium density residential districts, subject to other provisions and exceptions set forth in the City's development code. BLMC 18.22.090(C)(1) is one such provision in the development code that limits ADUs. Thus, these provisions are wholly consistent.

Kanany also argues that BLMC 18.22.090(C)(1)'s prohibition of ADUs in conjunction with a duplex violates the Bonney Lake Comprehensive Plan and the Growth Management Act. These arguments also fail. Although comprehensive plan policy 3-7a states the policy of allowing ADUs in all residential zones, the plan does not suggest that ADUs must be allowed in every location and every situation in those zones. Nor does the reasonable regulation of ADUs, including their prohibition in conjunction with duplexes, jeopardize the policy of allowing them in all residential zones. That prohibition is not inconsistent with the Bonney Lake Comprehensive Plan.

Kanany's claim of inconsistency with the Growth Management Act fails for the same reason. He argues that because the City's regulations are inconsistent with its comprehensive plan, they also violate the requirement of RCW 36.70A.040(3)(d), part of the Growth Management Act, that "each city . . . shall adopt a comprehensive plan under this chapter and development

regulations that are consistent with and implement the comprehensive plan." As just held, Kanany has not shown any inconsistency between the City's development regulations and its comprehensive plan. Therefore, he also has shown no violation of RCW 36.70A.040(3)(d).

D. Motion to Amend Complaint

Kanany assigns error to the trial court's order granting the City's motion for leave to amend its complaint. Kanany argues that the trial court should have denied the City's motion because the City failed to join Navid to the lawsuit and, as a co-owner, Navid was a necessary and indispensable party.[7]

We require appellants to argue assignments of error with citations to authority and references to relevant parts of the record. RAP 10.3(a)(6). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012) (quoting *West v. Thurston County*, 168 Wn. App. 162, 275 P.3d 1200 (2012)), *review denied*, 176 Wn.2d 1021 (2013) (alteration omitted).

We do not consider Kanany's argument that the trial court erred when it granted the City leave to amend its complaint because he failed to provide sufficient argument or provide relevant

[7] Kanany argues also that the lack of necessary parties deprived the trial court of subject matter jurisdiction. This argument misunderstands the nature of subject matter jurisdiction. Washington superior courts have broad subject matter jurisdiction. *See* WASH. CONST. art. IV, § 6. The critical factor in determining whether a court has subject matter jurisdiction is the type of controversy. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 209, 258 P.3d 70 (2011). The superior court has original jurisdiction over all cases and proceedings in which jurisdiction has not been vested exclusively in some other court. WASH. CONST. art. IV, § 6; *Wimberly v. Caravello*, 136 Wn. App. 327, 333, 149 P.3d 402 (2006). Therefore, a court's jurisdiction does not depend on the presence or absence of a party. *Wimberly*, 136 Wn. App. at 334. Instead, failure to join affects only the court's authority over the absent party. *Wimberly*, 136 Wn. App. at 334.

authority sufficient to merit further judicial review. Accordingly, we do not address Kanany's arguments on this issue.

CONCLUSION

We affirm the trial court's decision.

BJORGEN, J.

We concur:

PENOYAR, J.P.T.

JOHANSON, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF BONNEY LAKE,

Respondent,

v.

ROBERT KANANY,

Appellant.

No. 42988-8-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **December 30, 2014** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Bjorgen, Penoyar

DATED this 12th day of March, 2015.

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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