313395

COURT OF APPEALS DIV III OF THE STATE OF WASHINGTON

DAWUD AHMAD, BEDREDDIN IMAN and SAMEER HATEM,

Appellants,

and

MUSLIM AMERICA, Appellant

v.

TOWN OF SPRINGDALE, a municipal corporation,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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TOWN OF SPRINGDALE'S RESPONSE BRIEF TO OPENING BRIEF OF APPELLANTS BEDREDDIN IMAN AND SAMEER HATEM

John M. Riley, III, WSBA No. 10804
Nathan G. Smith, WSBA No. 39699
Witherspoon • Kelley
422 West Riverside, Suite 1100
Spokane, WA 99201
Telephone: (509) 624-5265
Facsimile: (509) 458-2728

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I. BACKGROUND

Appellants Dawud Ahmad ("Ahmad"), Bedreddin Iman ("Iman") and later, Sameer Hatem ("Hatem"), petitioned the Stevens County Superior Court for a writ of prohibition or mandamus directed to the respondent Town of Springdale ("Town"), challenging the Town's building code notices relating to a shed on property owned by Muslim America that was being used for living quarters.[1] Ahmad lived in a residence on the property, while Iman and Hatem, or both lived in the shed. The petitions sought a writ of prohibition barring the Town from enforcing building codes and a writ of mandamus to force the Town to adopt an ordinance exempting the shed from the operation of the building codes.

The Town filed a motion with the Superior Court to add the owner of the property and shed, Muslim America, as a plaintiff in the action. The motion was granted.

The Court heard the merits of the Appellants' petitions and dismissed the action on the grounds that neither mandamus nor prohibition would lie under the circumstances.

The Court later awarded reasonable expenses to the Town on the grounds that the entirety of the action was frivolous.

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[1] "Appellants" collectively refer to Ahmad, Iman and Hatem.

II. STATEMENT OF THE CASE

The Town issued a Notice of Violation (CP 68) which indicated that the shed on Appellant Muslim America's property, which was being used as a residence, did not comply with Town building, fire and safety codes. No action was undertaken by the Town other than to issue the Notice of Violation. The Town issued a Notice of Infraction to appellant Ahmad (CP 46-48) and to Appellant Muslim America for failure to obtain a Town business license. The Town withdrew those Notices. Appellants dismissed those claims from their application (CP 126-128) and they are, therefore, not part of this appeal.

The Town issued a Notice of Infraction to Appellant Hatem (CP 69) claiming that his occupancy of the shed on the Muslim America's property was in violation of the Town's building code ordinance 343. The Town subsequently withdrew the Notice of Infraction. (CP 151)

The gravamen of the amended petition for writ of prohibition was that the Town should be prohibited from enforcing the State Building Code, because the Town did not adopt the Washington State Building Code, Chapter 19.27 RCW. The amended petition of the writ of mandamus sought to obligate the Town to prepare and adopt an ordinance under RCW 19.27.042.

At no time throughout this case have the appellants Iman and Hatem been unable to use the shed on the Muslim America property. The Town did not bar

their use and brought no action in any court to obtain a court order finding an infraction and requiring vacation of the shed or modification thereof to bring it into compliance with the State Building Code.

Iman and Hatem claim that during an off record scheduling conference on May 19, 2010, they, via Appellant Ahmad, submitted a written (CP 139-140) and oral request for ruling on jurisdiction. No appellant filed a motion regarding jurisdiction, filed a note for hearing, scheduled a hearing, or served any such motion and notices upon the Town.

The claimed oral request is in its entirety as follows:

> MR. AHMAD: Are we proceeding in equity under the statutory provisions, or are we proceeding in law under 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.

(NRP May 19, 2010, ln. 5-13).[2]

Appellants were well aware of the Superior Court civil rule requirements, having previously filed a motion for change of judge (CP 682), accompanied by an affidavit of prejudice, (CP 683), affidavit of registered agent (CP 33-34),

[2] The Narrative Report of Proceedings was settled by order of Department I of the Supreme Court on February 7, 2012.

affidavit of appellant Hatem (CP 35-36), a memorandum in support of their application for writ (CP 16-31), a supplemental memorandum regarding the same (CP 40-52), proposed findings, conclusions, judgment and order (CP 53-58), a second supplemental memorandum (CP 59-68), a motion to strike the Town of Springdale's answer (CP 76-81), together with the note for hearing of same (CP 85-86), all in advance of the May 19, 2010 scheduling conference.

The Town, after researching the record title to the property upon which the shed was located, discovered that title to that property was held by a Washington non-profit corporation, Muslim America. The Town moved to add Muslim America as a party, because the shed was on the Muslim America property. (CP 108-116) Muslim America also was the requestor of the exemption to the State Building Code. (CP 17, 397). Apparently, petitioner Ahmad has his home on that property and lived there with his family. Appellant Ahmad objected to the Town's motion to join, on behalf of Muslim America. Twice the Town moved to disqualify him as counsel for Muslim America (CP 215-217, 218-222, 223-241, 267-273, 274-275). Both motions were granted. (CP 278-279, 375-377).

After briefing on and oral argument, including Appellants' claims of violation of free exercise of religious beliefs, the Court on November 23, 2010 entered Findings of Fact, Conclusions of Law and Order dismissing the writ application case (CP 401-405).

Subsequently, the Town moved for an award of reasonable expenses under RCW 4.84.185. (CP 406-408, 409-416, 418-464, 544-550). The Court, on January 21, 2011, entered Findings of Fact, Conclusions of Law and Order and Judgment against Appellants and Muslim America. (CP 562-566).

III. STATEMENT OF ISSUES

A. Whether or not the Trial Court Properly Entered an Order Dismissing Appellants' Writ Applications.

B. Whether the Trial Court abused its discretion in entering an Order awarding reasonable expenses to the Town of Springdale on the basis that the action was advanced in violation of RCW 4.84.185 and made without any rational argument on the law or the facts?

C. Whether the Town is entitled to sanctions and attorneys' fees and costs defending the frivolous appeal advanced by Appellants pursuant to RAP 18.9, RAP 18.1 and RCW 4.84.185?

IV. ARGUMENT

A. ALL FINDINGS ARE VERITIES

Error must be assigned separately to each Finding of Fact a party contends was improperly made or refused referring to each by number. RAP 10.3(g). A finding or material portion thereof should be set out verbatim in the text or appendix of the Brief. RAP 10.4(c). An assignment of error to a Conclusion of

Law does not bring up for review the facts upon which it is founded. *McIntyre v. Plywood Co.*, 24 Wn. App. 120, 600 P.2d 619 (1979). Unchallenged Findings are the established facts of the case. *In re Marriage of Elam*, 97 Wn.2d 807, 650 P.2d 213 (1982). Failure to assign error forecloses consideration. RAP 10.3(g); *Estate of Jones*, 152 Wn.2d 1, 8, 100 P.3d 805 (2004).

Appellants have assigned no error to findings of fact Nos. 1-11 in the November 23, 2010 Decree (CP 401-405) or the findings of fact Nos. 1-9 in the January 21, 2011 Judgment and Order. (CP 562-566) Thus, these findings of fact are verities on this appeal.

B. THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISMISSAL OF WRIT APPLICATIONS WERE CORRECT AND SHOULD BE UPHELD.

1. The Court's determination on the application for writ of prohibition was correct and should be upheld.

The Town is a duly organized town established by the Revised Code of Washington and operated pursuant to Chapter 35.27 RCW. Pursuant to Chapter 19.27 RCW, the Town of Springdale is required to enforce the State Building Code. The 2006 International Building Code was adopted by the town pursuant to Ordinance 343C. (CP 307). Iman and Hatem requested the Court issue a writ of prohibition to restrain the town from issuing violations of the 2006

International Building Code, as adopted by the Town, against property owned by Muslim America.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such persons are without or in excess of the jurisdiction of such tribunal, corporation, board or person." RCW 7.16.290. It requires that an applicant have "no plain, speedy and adequate remedy in the ordinary course of the law." RCW 7.16.300. In order for a writ of prohibition to issue, both requirements must be satisfied. *Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996). An applicant for a writ of prohibition must also file an affidavit identifying that they are beneficially interested. RCW 7.16.300. The denial of a writ of prohibition is reviewed under the abuse of discretion standard. *City of Olympia v. Thurston County Bd. of Comm'rs*, 131 Wn.App. 85, 91, 125 P.3d 997 (2005).

i. The Town has the explicit authority to adopt and enforce ordinances related ot the State Building Code including the 2006 International Building Code.

Moreover, when a municipality or an actor has the explicit authority to act, a writ of prohibition must be denied as the party is deemed to be acting within the statutorily conferred authority. *See e.g., Herron v. McLanahan*, 28 Wn. App. 555, 558, 625 P.2d 707 (1981). The Town is not acting in excess of its jurisdiction by enforcing the provisions of the International Building Code. As discussed below,

the Town is statutorily required to adopt the 2006 International Building Code and enforce the requirements identified therein within the corporate limits of the Town. Iman and Hatem could not and did not point to any facts demonstrating that the Town was enacting ordinances outside its statutorily conferred authority to enforce the 2006 International Building Code. Rather, as discussed below, the Town has the affirmative obligation to adopt and enforce the 2006 International Building Code and all of the other codes under the State Building Code within its jurisdiction. The Court properly ruled that the writ of prohibition must be denied as Iman and Hatem did not show that the town was acting in excess of its jurisdiction.

ii. Iman and Hatem provided no proof that they had no plain, speedy, or adequate remedy at law.

The November 23, 2010, Findings of Fact, Conclusions of Law and Order noted that Iman and Hatem failed to identify a plain, speedy or adequate remedy at law that was unavailable to them for a violation of the International Building Code. An applicant is required to identify that there is something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ. *State ex rel. O'Brien v. Police Court*, 14 Wn.2d 340, 347-48, 128 P.2d 332 (1942).

The courts describe the adequacy of a remedy requirement as follows:

> A remedy is <u>not</u> inadequate merely because it is attended with delay, expense, annoyance or even some hardship. There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.

City of Kirkland v. Ellis, 82 Wn. App. 819, 827, 920 P.2d 206 (1996) (emphasis added. Furthermore, if an available judicial review path is provided for, a writ of prohibition shall not lie. *City of Moses Lake v. Grant County Boundary Review Board*, 104 Wn. App. 388, 393, 15 P.3 716 (2001). As the Superior Court properly noted, Appellants' claims could be asserted in an enforcement action, if any. The trial court properly recognized that that was and is Iman and Hatem's plain, adequate and speedy remedy at law. At oral argument on July 9, 2010, Appellant Ahmad, speaking for Iman and Hatem and Muslim America admitted they had an adequate and speedy remedy at law. (VRP, July 9, 2010, p. 38, lines 23-25; p. 39, ln. 1-2). Because Iman and Hatem have this alternative remedy available to them, the Court properly found they failed to meet the plain, adequate and speedy remedy prong of a writ prohibition action.

iii. Iman and Hatem failed to set forth a claim for relief prohibiting the enforcement of the International Building Code.

Iman and Hatem sought the writ of prohibition to restrain the town from enforcing the provisions of the State Building Code, Chapter 19.27 RCW. The

Town is required by statute, to enforce the provisions of the 2006 International Building Code within its municipal limits. *See e.g.*, RCW 19.27.031 and RCW 19.27.050. The Town is acting within its statutory obligation and jurisdiction to enforce the provisions of its ordinances and the 2006 International Building Code. Thus, no writ of prohibition could be issued whatsoever. RCW 7.16.290.

iv. Applicants have failed to file affidavits identifying that they are beneficially interested.

RCW 19.27.042 states:

> (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 non-profit corporation*;
>
> (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.

RCW 19.27.042. (Emphasis added). Muslim America filed no documentation or affidavits one way or the other proving that the building for which the exemption was sought was owned or administered by a public agency or non-profit corporation. Muslim America filed no affidavit in that regard. Likewise, neither Iman and Hatem, or for that matter, Ahmad, who permanently or occasionally reside at the property, filed affidavits indicating they were owners, describing the basis of their occupancy, or establishing by affidavit that they were beneficially interested. To the contrary, the affidavits that they filed evidence that Muslim America is the owner of the property. Even if they were guests or tenants of the owner, such interests do not constitute a legally sufficient basis to seek a writ, an extraordinary remedy. Only the owner has such interest. Only the owners should be allowed to do so. Plaintiffs cite to *Sumner v. First Baptist Church*, 97 Wn.2d 1, 639 P.2d 1358 (1982), *First Covenant Church v. Seattle*, 120 Wn.2d 203, 840 P.2d 174 (1992), and *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 211 P.3d 406 (2009). In all those cases, the owner of the land upon which the housing was going to occur was a party to the action.

Thus, the trial court correctly noted that Iman and Hatem failed to satisfy the statutory requirements in order for a writ of prohibition to be issued as the Town is and was acting within its statutory authorized jurisdictional limits, the applicants had a plain adequate and speedy remedy at law should the Town bring an action attempting to compel the owner of the shed's compliance with the applicable codes, and no affidavit or insufficient affidavits have been filed. The Court properly dismissed the application for writ of prohibition.

2. The applicant's writ of mandamus failed as a matter of law as the Town was not required to adopt the amendments to the Building Code.

A writ of mandamus is appropriate only when the applicant is seeking to have an official perform a duty that the law specifically requires. *Dept. of Ecology v. State Financial Comm.*, 116 Wn.2d 246, 251-52, 804 P.2d 1245 (1991); RCW 7.16.160. A writ will issue when the act to be performed is non-discretionary in nature. *State v. Murphy*, 138 Wn.2d 800, 804-805, 982 P.2d 611 (1999) (use of the word "shall" in statute makes mandamus appropriate remedy to compel action in compliance with statute); *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982).

The determination of whether there is a duty that must be performed is reviewed *de novo*. *River Park Square, LLC. v. Miggins*, 143 Wn.2d 68, 77, 17

P.3d 1178 (2001). Whether there is a plain, speedy and adequate remedy is left to the discretion of the court in which the proceeding is instituted. *Id.*

This Court has recognized that there are "strict limits" on the circumstances under which the courts will issue writs. *SEIU Healthcare 775 NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3 774 (2009). The Court in *Walker v. Munro* stated as follows:

> Mandamus *may not* be used to compel the performance of acts or duties which involve discretion on the part of a public official.

Walker v. Munro, 124 Wn.2d 402, 424, 879 P.2d 920 (1994) (Emphasis added). Moreover, Washington courts hold that even if there is a mandatory duty, courts are further required to make a finding that the action is also ministerial in nature. *Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310 (2009) ("where we find a mandatory duty, we must further determine whether that duty is ministerial or discretionary in nature.").

In the land use context, courts recognize that the adoption of an ordinance that has the effect of rezoning a parcel of property is discretionary in nature and thus not subject to the Court's power to issue a writ of mandamus. *Lillions v. Gibbs*, 47 Wn.2d 629, 289 P.2d 203 (1955); *Besselman v. Moses Lake*, 46 Wn.2d 279, 280 P.2d 689 (1955); *Lund v. Tumwater*, 2 Wn. App. 750, 472 p.2d 550 (1970).

A writ of mandamus is an exercise of the Court's compulsory power, similar to an injunction. It will be granted where there is no plain, complete, speedy and adequate remedy at law. *Ellis*, 82 Wn. App. at 827 (1966) (statutory writ is an extraordinary remedy and should issue when there is no plain, complete, speedy and adequate remedy in the ordinary course of law). An applicant bears the "demanding" burden of proving all three elements justifying mandamus. *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 309, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). The application is required to be made upon an affidavit on the application of the party beneficially interested. RCW 7.16.170.

The writ of mandamus remedy must indicate the precise thing to be done. *Eugster v. City of Spokane*, 118 Wn. App. 383, 404, 76 P.3d 741 (2003). As a matter of law, Iman and Hatem failed to identify the precise activity that the Town is required to refrain or engage in if either the writ of prohibition or the writ of mandamus is issued or is fatal to their claims. Mandamus does not authorize the Court to "assume general control or direction of official acts." *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490, 98 P.2d 658 (1940).

This Court, in *SEIU Healthcare 775 NW v. Gregoire* recognized the limits on the ability for courts to issue writs of mandamus as follows:

> Even if mandamus were a suitable remedy, we would necessarily exercise judicial discretion and refuse to issue the writ here. A mandamus action

> lies in equity, and the court may refuse to grant relief where private rights would be unwisely advanced at the expense of public interests.

SEIU Healthcare 775 NW, 168 Wn.2d at 601 (*citing, R.T.K.*, Annotation Court's Control Over Mandamus as Means of Avoiding the Enforcement of Strict Legal Right to the Detriment of the Public, 113 A.L.R. 209 (1938)).

i. RCW 19.27.030 requires the adoption and enforcement of the International Building Code.

RCW 19.27.031 provides as follows:

> Except as otherwise provided in this chapter, there **shall** be in effect in all counties and cities the State Building Code which shall consist of the following . . .
>
> (1)(a) the International Building Code.

RCW 19.27.031(1)(a) (emphasis added).

This is an affirmative obligation imposed upon the Town to adopt and enforce the provisions of the International Building Code. The Town adopted the 2006 International Building Code pursuant to Ordinance 343C on October 22, 2007.

ii. RCW 19.27.042 is permissive on its face.

Appellants sought the writ of mandamus to compel the Court to compel the Town to adopt an ordinance which is discretionary on its face, giving the

Town the discretion to exempt indigent housing from the requirements of the State Building Code, including the International Building Code. RCW 19.27.042 states:

> (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.

RCW 19.27.042 (emphasis added).

In order for the Town to be compelled to adopt an ordinance exempting indigent housing from the State Building Code by the Court, the requirement at law must be mandatory. RCW 7.16.160. RCW 19.27.042 is clearly discretionary and permissive in nature as it utilizes the phrase "may." *See, e.g., Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 168, 97 P.2d 628 (1940). The Town does not have an affirmative duty to adopt such an ordinance. Without an affirmative duty imposed by law, mandamus shall not lie.

iii. Lack of or insufficient affidavits.

The Town reasserts its position in Section C.1.d above.

In sum, the applicants did not satisfy the "demanding" standards required for the issuance of a writ of mandamus. The Court properly dismissed their application with prejudice.

Iman and Hatem cite to *Ex rel. Moore v. Houser*, 91 Wn.2d 269, 272-273, 588 P.2d 219 (1978). That case is inapposite. That case held that extraordinarily relief had been granted in a prior case, *Mack*, to prevent the necessity of two trials to relitigate the merits of a criminal charge. There has been no trial. Indeed, the position of the Town and the correct position of the Trial Court was that no enforcement action had been taken by the Town. There cannot be two trials when there had not been one.

Iman and Hatem, in their argument with respect to the writ of mandamus (Appellants' Opening Brief, pp. 27-29) make arguments that support the Town's position. As the Town above notes, in *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940), the Court held that the use of the word "may" is permissive only and operates to confer discretion. That is the effect to be given that the word in RCW 19.27.042 as that is what was used by the legislature to carry out the intention of the statute. Iman and Hatem also note there are several other provisions in Chapter 19.27 RCW that use the word "may" rather than "shall". Iman and Hatem admit that each such use of the word "may" is permissive. Opening Brief, pp. 28, 29. Looking at Chapter 19.27 RCW as a whole, that is another reason why the "may" in RCW 19.27.042 should be found to be permissive in nature.

Iman and Hatem's citations to these numerous provisions within Chapter 19.27 RCW also provide additional proof that (1) the determination of the trial court to join Muslim America, the non-profit corporation owning the property, was a proper decision and (2) the failure of Muslim America to file an affidavit showing beneficial interest, as required under the statutes applicable to each writ, was a fatal failure.

At page 32 of Appellants' Opening Brief, Iman and Hatem assert purposes for which Muslim America owns property. There is no evidence in the record to support these claims. They should be stricken, being made for the first time on appeal. *Lunsford*, 139 Wn.App. at 338.

As well, this argument should be stricken as it is argument on behalf of Muslim America, which argument cannot be asserted by Iman and Hatem because they are not attorneys at law. Appellants have been admonished by the Trial Court previously for undertaking such conduct. (CP 215-217, 218-222, 223-241, 267-273, 274-275, 278-279, 375-377); *Church of New Testament v. United States*, 783 F.2d 771, 774 (9th Cir. 1986), *Advocates for Responsible Development, et al. v. Western Washington Growth Mgmt. Hearings Boards, et al.*, 170 Wn.2d 577, 579-80, 245 P.3d 764 (2010); *Lloyd Enterprises, Inc. v. Longview Plumbing & Heating Co., Inc.*, 91 Wn. App. 697, 701-02, 958 P.2d 1035 (1998) (striking pleadings filed by a non-lawyer on behalf of a corporation under CR 11). Further,

in Appellants' Opening Brief, at page 32, second full paragraph, Iman and Hatem admit that their right to use the Muslim America property derives from and is dependent upon Muslim America's legal right as owner of the property to its beneficial use.

Iman and Hatem make reference to a claimed right based on a "usufruct equity," citing to *Zemurray Foundation v. United States of America*, 687 F.2d 97 (5th Cir. 1982). This case is inapposite. The issue in that case was the taxability of a timberland sale. The term "usufruct" was used as it is a legal term of art under Louisiana law. Such a term is not recognized under Washington law.

C. THE COURT'S JANUARY 21, 2011, JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION FOR AN ORDER OF REASONABLE EXPENSES INCLUDING FEES OF ATTORNEY UNDER RCW 4.84.185 WAS PROPERLY DETERMINED AND SHOULD BE UPHELD.

The award of reasonable expenses by the Trial Court is reviewed for an abuse of discretion. *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn.App. 925, 937-38, 946 P.2d 1235 (1997).

Iman and Hatem assert three reasons why the January 21, 2011, judgment and order should be reversed: (1) the appellants' claim that the Town's issuance of the two notices constituted an enforcement action, thereby interfering with the plaintiffs' free exercise of religion and violating 42 U.S.C. § 2000cc, constitute claims that prevent the claims of Iman and Hatem from being "frivolous" or

"unreasonable", (2) that the email sent by Ahmad to the Town (CP 415) in which Ahmad stated in part:

> 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 . . .

does not constitute evidence supporting the January 21, 2011 Judgment and Order because (a) in the case of *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004), the plaintiff there found to have filed a frivolous action had engaged in additional conduct, i.e., conceding in open court that his suit was frivolous which Ahmad had not done; and (b) Iman and Hatem opine that the Ahmad email is a "retrospective reflection upon past events" rather than an admission of frivolity and the trial court's analysis that Ahmad's comments are comparable to those of a burglar blaming his victims for not locking the deadbolt on the door are personally unacceptable to them; and (3) that since they allege that the Superior Court determined it lacked personal jurisdiction, it therefore had no authority to award attorney's costs and fees.

In the January 21, 2011, Judgment and Order the Court entered lengthy findings, numbers 1 through 9. (CP 562-566). Since Iman and Hatem did not assign error to any of the findings, they are verities. (See Section A.1 above).

As the findings in the January 21, 2011, Judgment and Order clearly state, the Court found that the critical issue was whether or not the Appellants had asserted rational argument on the law or facts in support of their attempt to satisfy the requirements for issuance of a writ of prohibition and a writ of mandamus. Regarding the writ of prohibition, Iman and Hatem do not assert on appeal that the Town was acting in excess of its jurisdiction, or that they did not have a plain, adequate and speedy remedy at law. Iman and Hatem do not assert or appeal that the property and building owner plaintiff Muslim America filed no affidavit of beneficial interest or any other facts to support the application for writ. Those are the legal requirements to obtain a writ of prohibition. Iman and Hatem do not assert any rational argument with respect to these elements on appeal, just as they did not before the trial court. Regarding the writ of mandamus, Iman and Hatem do not assert that the exemption authorized under RCW 19.27.042 is not discretionary. They do not disagree with or contradict that they, through Ahmad, admitted in hearing before the trial court that they had a plain, adequate and speedy remedy at law. (VRP July 9, 2010, p. 38, ln. 23-25, p. 39, ln. 1-2). They do not argue that plaintiff Muslim America, the owner of the land and the building, did not file an affidavit of beneficial interest or any other facts supporting the application for the writ. Thus, with respect to the application for a writ of mandamus, they, on appeal, provide no rational argument on the law or on

the facts supporting their application for writ of mandamus. As the trial court found that their action was in its entirely frivolous, this Court should affirm the trial court decision. As Iman and Hatem make no rational argument on appeal, it is also frivolous and without reasonable cause.

With respect to Iman and Hatem's assertion that Ahmad's letter is evidence different than that relied upon by the appeals court in *Reid v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004), the trial court's Finding of Fact No. 4, states:

> 4. Plaintiff Ahmad's letter to the Town of Springdale, in which he stated that the Town could dismiss the action and end the case is an admission that the action in its entirety was frivolous and advanced without reasonable cause. Plaintiff's assertion in the letter that the Town could have dismissed the case but did not is like a burglar arguing that he would not have burgled a home if the owner had not forgotten to lock the door. *See, also, Reed v. Dalton*, 124 Wn. App. 113, 100 P.3d 349 (2004).

As noted above, this Finding of Fact is a verity. As well, this evidence was found sufficient by the trial court to constitute an admission of frivolity and lack of reasonable cause. The fact that another appellate court may have relied on additional information, in addition to a letter admission, is no basis for finding the trial court's determination in this regard was error. Iman and Hatem make no argument that this finding is not supported by substantial evidence. The Court should not review issues for which inadequate argument has been briefed and

only passing treatment has been made. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005). Iman and Hatem's own personal opinions about what Ahmad said or meant in his letter to the Town of Springdale are irrelevant, (ER 401-2), and hearsay (ER 801, 802).

Likewise, Iman and Hatem did not make these arguments to the trial court. To the contrary, in Appellant Ahmad's Oral Argument at the hearing on Defendant's Motion for an Order Awarding Costs and Attorney's Fees for Frivolous Action at page 3 (CP 535), he states:

> . . . plaintiff Ahmad wrote a letter to Mayor Buche, pointing out that had Mr. Riley filed a Motion to Dismiss for Failure to Join a Necessary Party, the Town could have saved thousands of dollars in fees. Mr. Riley did not file such a Motion which might have been denied or made moot by a joinder of Muslim America. . . .

In this filed pleading, Ahmad admits he wrote the email to Mayor Buche, admits it means what he said it means, and goes even further to admit that joinder of Muslim America would be a proper action for the Court to take. This is an astounding admission in light of the numerous pleadings filed by the Appellants objecting to the respondent Town's motion to join, objecting to the form of the order granting the motion, and the subsequent pleadings filed by Ahmad, and by attorney Robert Simone with respect to joinder.

Iman and Hatem's assertions that their causes of action were not frivolous because the Town's notices alone constitute enforcement actions unlawfully infringing upon their right to free exercise of their religion were correctly denied by the Court in both its November 21, 2010, Findings of Fact, Conclusions of Law and Order and in its January 21, 2011 Judgment and Order. As noted above in Section III(B), the Town had not taken any enforcement action with respect to the two notices and Iman and Hatem at all times made use of the shed on the Muslim America property.

With respect to Iman and Hatem's claim that a determination of frivolity cannot be made against them because the Superior Court may have determined its own lack of personal jurisdiction, they do not reference any order or decision in the record where the Court made such a determination. *See* Section IV.D.2 above. As noted in Argument Section IV.D.2, the Court never in this case ruled it lacked jurisdiction. It never dismissed any of the parties.

Last, Iman and Hatem's claim that attorney's fees and costs are not awardable under RCW 7.16.260 is irrelevant. The Town sought an award of reasonable expenses under RCW 4.84.185, not RCW 7.16.260.

D. THE SUPERIOR COURT DID NOT ERR BY IGNORING EVIDENCE IN THIS PROCEEDING.

1. No impairment of free exercise of religious beliefs occurred in this case.

Hatem and Iman ask this Court, as they asked the trial court, to ignore the legal methodology Appellants chose to use, i.e., seeking writs of prohibition and mandamus. The Findings of Fact in the Court's November 23, 2010 Decree find that the Town never brought any action against any of the Appellants asking the Court to enforce State Building Code against (1) Muslim America for allowing persons to reside in the shed on the Muslim America property and (2) Iman and Hatem for residing in the shed when the shed did not comply with the building code requirements for buildings used as residences. Had the Town brought an action in Stevens County Superior or District Court seeking to enforce the notice of violation or notice of infraction, Appellants could have (and no doubt would have) asserted that their use of the shed as a residence was exempt from the application of the State Building Code because it was allegedly being used by the owner of the property, Muslim America, as shelter for housing for indigent persons. No such action was brought. No infringement of their religious rights occurred in this case. The trial court wisely found that this was not a case of interference with free exercise rights under the federal or state constitutions. Because appellants sought writs of prohibition and mandamus, the Court properly

analyzed whether or not they met the legal requirements necessary to qualify for issuance of the writs, found and concluded they did not, denied their request and dismissed their case.

The Religious Land Use and Institutionalized Person's Act (RLUIPA) 42 U.S.C. § 2000cc does not apply unless a ". . . government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person." For the first time on appeal Iman and Hatem assert that they had a cause of action under 42 U.S.C. § 1983 (Appellants' Opening Brief, pp. 19-20). This claim, being made for the first time on appeal and not "arguably related" to any other claims should not be heard. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn.App. 334, 338, 160 P.3d 1089 (2007).

Since the Town never took any legal steps to impose or implement the State Building Code or the town building ordinances on the shed on the Muslim America property, there was no imposition, no implementation, and no burden, let alone a substantial burden, on the religious exercise of Hatem and Iman. The Town not having filed any action seeking to enforce the notices, and no judgment or order having been entered enforcing the notices, no impairment of the free exercise of religion occurred. Had such an action been filed, the issue would have been ripe for proper analysis, adjudication and determination. *First United Methodist v. Hearing Examiner*, 129 Wn.2d 238, 244-45, 916 P.2d 374 (1996).

Appellants assert the Town took enforcement actions, which is simply untrue. Had the Town sought to enforce the notices in an action, the Court there could have properly weighed and balanced Hatem and Iman's claim of free exercise of religion and the Town's likely defense, that it has a duty and a legal obligation, as the enforcer of the State Building Code, and the Town's building code ordinances, to ensure that all structures within the 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.

The Court specifically recognized this in Conclusion of Law No. 4 (November 23, 2010, Findings of Fact, Conclusions of Law and Order Dismissing Applications for Writs of Prohibition and Mandamus, p.3, ¶ 4). The Court said:

> The plaintiffs, in the event the Town of Springdale commences any enforcement proceeding with respect to the property of Muslim America and said outbuilding, will have the right to raise issues and defend against such town action with the right to appeal therefrom.

(CP 403).

In *Sumner v. First Baptist Church*, 97 Wn.2d 1, 639 P.2d 1358 (1982), the City of Sumner, unlike here, did enforce the State Building Code. It sought to enjoin the use of a basement of a church building as a school for violation of the City's building code and zoning ordinance. In *City of Woodinville v. Northshore*

United Church of Christ, 166 Wn.2d 633, 211 P.3d 406 (2009), unlike here, the City refused to process a permit application by the Church for a homeless encampment on church property. It also sought an injunction when the church and others went ahead and started the encampment on church property without a permit. Neither of these situations exist in this case.

Iman and Hatem (Appellants' Opening Brief, pp. 11-12) point out that the Trial Court, in oral argument at the hearing on the merits of their amended applications for writs, discussed the issue of their asserted claim of interference with their right to exercise freedom of religion. Thus, Iman and Hatem admit the Court was aware of this claim and included it in its deliberations prior to entering the November 23, 2011, Order of Dismissal.

2. No jurisdictional issue exists in this case.

Iman and Hatem's amended applications for writs of prohibition and mandamus asked the trial court for two things: (1) a writ of prohibition to restrain the respondent Town of Springdale from enforcing the provisions of the 2006 International Building Code and other Town Ordinances; and (2) a Writ of Mandamus to compel the Town to adopt a discretionary local amendment to the State Building Code. As noted above, Iman and Hatem had previously voluntarily dismissed their request for writ of prohibition to restrain the Town from enforcing its business license ordinance.

As noted above, at no time during the entire proceedings did Ahmad, Iman or Hatem file a motion with the Court, supported by authority, and noted for hearing (CR 7, 12, 56; Stevens County Local Rules 5, 16) seeking a court ruling on jurisdiction. Appellants cannot claim the Court failed to address their alleged jurisdiction claim when they failed to properly bring it before the Court under the civil rules.

Second, the portion of the Narrative Report of Proceedings that has been allowed into the record after various motions in the Superior Court and in this Court states:

> MR. AHMAD: Are we proceeding in equity under the statutory provisions, or are we proceeding in law under 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.

(NRP May 19, 2010, ln. 5-13).

Thus, Iman and Hatem did not, as they allege, at the off record scheduling conference, assert and/or argue jurisdiction. They asked the Court a question. The Court allowed the Town to participate in the colloquy. The Town's participation is set forth above. The Court, in a proper response to Appellant

Ahmad's inquiry, refrained from giving the requesting Appellant Ahmad legal advice and advised him to proceed as he sought fit.

Iman and Hatem's argument that the Court failed to properly assume subject matter jurisdiction is meritless.

3. Appellants' standing argument fails.

Iman and Hatem assert the Trial Court erred in refusing to accept their writ applications for lack of standing. The Appellants' entire argument regarding their standing to bring the case should be disregarded as issues of standing of parties cannot be raised on appeal in their first instance. *Tyler Pipe Industries, Inc. v. State Dep't. of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), judgment vacated on other grounds, 983 U.S. 232 (1987).

In its November 23, 2010 order, the Court did not base its final decision on whether or not any of the Appellants did or did not have standing to bring the action. All parties were given a full and fair opportunity to argue the merits of their claims. All claims were included. All parties were included. As the November 23, 2010, Order indicates, the action was dismissed because Iman and Hatem had failed to meet the legal elements necessary to entitle them to the issuance of the writs they were seeking. At no time in the case in chief did the Court prevent the plaintiffs from asserting their claim based on a lack of standing.

E. RESPONDENT TOWN OF SPRINGDALE IS ENTITLED TO ATTORNEY'S FEES AND COSTS PURSUANT TO RAP 18.1 AS PREVAILING PARTY.

RAP 18.9 provides authority to the appellate courts to sanction frivolous appeals. RAP 18.9. RAP 18.1 provides authority to the Court to award reasonable attorney fees and expenses. These requests are to be advanced as part of an opening brief. RAP 18.1(a), (b). The Town also requests an award of reasonable expenses pursuant to RCW 4.84.185.

An appeal is frivolous "if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility for reversal." *In re Marriage of Foley*, 84 Wn.App. 839, 847, 930 P.2d 929 (1997). Conduct below at the trial court level is a proper basis for an attorney fee award on appeal. *Buchanan v. Buchanan*, 150 Wn.App. 730, 740, 207 P.3d 478 (2009) ("A party's intransigence at the trial level may support an award of attorneys' fees on appeal.").

Respondent Town of Springdale requests an award of statutory attorney fees pursuant to RCW 4.84.010 and RCW 4.84.080, which allows $200.00 in attorney's fees and an award of costs to be awarded to the prevailing or substantially prevailing party on appeal before the Appellate Court. Respondent Town further requests an award of attorney's fees and costs under RAP 18.9(a) and RCW 4.84.185 against appellants Bedreddin Iman and Sameer Hatem,

Muslim America and the estate of Dawud Ahmad, on the basis that respondent Town is the prevailing party in this appeal and that the claims asserted on appeal, which are the same claims that were asserted in the trial court, are frivolous under RAP 18.9(a) and RCW 4.84.185 and applicable case law.

IV. CONCLUSION

The trial court's November 21, 2011, Findings of Fact, Conclusions of Law and Order and the trial court's January 21, 2012, Judgment and Order granting defendant's Motion for Award of reasonable expenses including fees of attorney under RCW 4.84.185 should be affirmed.

Respectfully submitted this 27 day of August, 2012.

WITHERSPOON · KELLEY, PS

John M. Riley, III, WSBA No. 10804
Nathan G. Smith, WSBA No. 39699
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 27 day of August, 2012, I caused a copy of the foregoing TOWN OF SPRINGDALE'S RESPONSE TO OPENING BRIEF OF APPELLANTS BEDREDDIN IMAN AND SAMEER HATEM to be served on the following by the method indicated:

Bedreddin Iman
c/o Dawud Ahmad & Associates
610 N. Main Street
Springdale, WA 99173-0522
Pro Se

VIA US MAIL
BEDREDDIN@MUSLIMAMERICA.NET
GALAM@MUSLIMAMERICA.NET

Sameer Hatem
c/o Dawud Ahmad & Associates
610 N. Main Street
Springdale, WA 99173-0522
Pro Se

VIA US MAIL
BEDREDDIN@MUSLIMAMERICA.NET
GALAM@MUSLIMAMERICA.NET

Jeffry K. Finer
Law Offices of Jeffry K. Finer
35 W. Main, Suite 300
Spokane, WA 99201
Attorney for Muslim America

VIA HAND DELIVERY
VIA EMAIL TO:
JEFFRY@FINER-BERING.COM

Karina Hermanson

Karina Hermanson

OFFICE RECEPTIONIST, CLERK

To: Karina Hermanson
Cc: 'BEDREDDIN@MUSLIMAMERICA.NET'; 'GALAM@MUSLIMAMERICA.NET'; 'JEFFRY@FINER-BERING.COM'; Nathan G. Smith; John M. Riley III
Subject: RE: Ahmad v. Town of Springdale; Supreme Court Cause No. 85417-3

Rec. 8-27-12

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.

From: Karina Hermanson [mailto:karinah@witherspoonkelley.com]
Sent: Monday, August 27, 2012 4:51 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'BEDREDDIN@MUSLIMAMERICA.NET'; 'GALAM@MUSLIMAMERICA.NET'; 'JEFFRY@FINER-BERING.COM'; Nathan G. Smith; John M. Riley III
Subject: Ahmad v. Town of Springdale; Supreme Court Cause No. 85417-3

Good afternoon,

With regard to *Ahmad, et al. v. Town of Springdale*, Supreme Court No. 85417-3, attached please find the following document for filing:

1. Town of Springdale's Response to Opening Brief of Appellants Bedreddin Iman and Sameer Hatem

The above pleadings are filed by Attorneys for Town of Springdale:

John M. Riley, III, WSBA No. 10804
jmr@witherspoonkelley.com
Nathan G. Smith, WSBA No. 39699
ngs@witherspoonkelley.com
Witherspoon Kelley
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201
(509) 624-5265

Please feel free to contact me with any questions or concerns. Thank you.

Karina Hermanson
Legal Assistant to Stanley M. Schwartz, F.J. Dullanty Jr., Michael L. Loft, and Nathan G. Smith

WITHERSPOON·KELLEY
422 W. Riverside Avenue, Suite 1100
Spokane, WA 99201
Phone: (509) 624-5265
Fax: (509) 458-2728
www.witherspoonkelley.com

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