

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

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE, a Municipal Corporation,

RESPONDENT,

v.

ROBERT KANANY,

APPELLANT.

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Robert Kanany and Navid Kanani own as tenants in common real property zoned R-2 in the City of Bonney Lake on which a duplex is constructed, together with a detached garage. The area above the garage was used by the sibling of one of the duplex tenants for several years with the express knowledge and permission of the City on meeting certain conditions set forth by City officials, the satisfaction of such conditions precluded the area over the garage from being an Accessory Dwelling Unit (ADU). Kanany continuously met these conditions, as evidenced by inspections made by City Code Enforcement and as expressed in letters from City officials. Although no change in conditions occurred, relenting to neighbor pressure the City issued Kanany a warning letter in August 2009 giving him a limited period of time in which to respond to the allegation that the use of the area over the garage constituted an ADU in violation of its zoning code. In response to a telephone call from City Code Enforcement, Kanany once again gave written notice and hand delivered it to the City that the use of and condition of the area over the garage had been unchanged since the original meeting and express instructions for the use of such area given by the City in 2004. The City contends it never received such written response and proceeded with issuing a Notice of Civil Violation assessing Kanany a monetary fine of \$1,000 per day for the alleged violation of its zoning code. Kanany did not respond to such Notice grounded on the identical occurrence of such action in 2007 and the withdrawal of the Notice by the City based on

the fact that nothing had changed in the use of the area and no violation of the zoning code in fact existed. This time, however, the City did not withdraw the Notice and instead commenced this civil action to collect the monetary penalties it assessed against Kanany, amounting to \$48,000. The trial court erred by granting Bonney Lake summary judgment and an award of \$48,000 in civil penalties against Kanany where (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) the court failed to apply equitable estoppel 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.

II. ASSIGNMENTS OF ERROR

Appellant Robert Kanany filed his appeal raising issue with errors made by the trial court in its grant of summary judgment to Respondent City of Bonney Lake.

A. TRIAL COURT ERRORS

1. The trial court erred by issuing its Order Granting Plaintiff's Motion For Leave To File Amended Complaint dated August 27, 2010. CP at 175.

2. The trial court erred by issuing its Order Granting Plaintiff's Motion For Summary Judgment And Denying Defendant's Motion For Summary Judgment dated December 20, 2011. CP at 349.

B. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether the system used by the City of Bonney Lake to enforce civil monetary penalties for violation of its zoning code (*i.e.*, civil infractions) is not complete and therefore unconstitutional under the Supreme Court's decision in *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009)? (Assignments of Error #1 and #2.)
2. 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, the absence of whom denies the tribunal subject matter jurisdiction? (Assignments of Error #1 and #2.)
3. 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 no changes existed to the conditions of use expressly set forth and promised by the City in 2004 and as reaffirmed in writing since then, the satisfaction of such conditions precluding such area from being an ADU? (Assignments of Error #1 and #2.)
4. 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. 11, § 11? (Assignments of Error #1 and #2.)

III. STATEMENT OF THE CASE

A. 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.²

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 that he intended to have used for any residential-related permitted purpose, including use by guests of tenants, recreational use, and other such uses.³ 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 “Detached garage shall not be converted into living space pursuant to Bonney Lake Municipal Code Section 18.22.090(C)(1)”.⁴ 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

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

² CP at 202 ¶ 4; CP at 208-09.

³ CP at 202 ¶ 5; CP at 211.

⁴ CP at 202 ¶ 6; CP at 211-12. The Bonney Lake Municipal Code is also referred to hereinafter as the “BLMC”.

conversion of the entire garage itself.⁵ 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.⁶ 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.⁷

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

⁵ CP at 202 ¶ 7.

⁶ CP at 203 ¶ 8; CP at 304 ¶ 3 (date was inadvertently stated as occurring in March 2004 where the meeting was actually in May or soon thereafter in 2004 following completion of construction of the duplex and garage).

⁷ 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 over the 5 year period since that meeting.

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.⁸ Kanany promptly contacted Mr Bryan by telephone on March 7, 2007, and then confirmed their conversation by letter sent to him dated March 9, 2007.⁹ 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 withdrew its Notice of Violation.¹⁰

Although 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.¹¹ Discovery produced a letter dated June 20, 2008 from Code Enforcement Officer Denney Bryan to Russ Rudolph (the complaining neighbor)

⁸ CP at 203 ¶ 10; CP at 214.

⁹ CP at 203 ¶ 11; CP at 216.

¹⁰ CP at 203 ¶ 11.

¹¹ CP at 204 ¶ 12; CP at 218.

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.”¹²

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.”¹³ 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

¹² CP at 204 ¶ 12; CP at 220.

¹³ 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*).

Bryan:

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 ¶ 14.¹⁴ 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.¹⁵ 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”.¹⁶ The Notice also asserted that Kanany had not contacted the City

¹⁴ 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.

¹⁵ CP at 205 ¶ 15; CP at 225.

¹⁶ CP at 205-06 ¶ 16; CP at 227-28.

within its designated 45-day window to confirm compliance¹⁷ – a fact that was simply 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 inspec-

¹⁷ 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 satisfaction 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.

tions, since 2004.¹⁸ Kanany has been in continuous compliance with the express and specific instructions given him in 2004 by the Planning Director and City Engineer,¹⁹ and the City has produced no evidence of noncompliance with such conditions through its numerous site inspections conducted over the years since 2004.²⁰

B. PROCEDURAL BACKGROUND

The City of Bonney Lake commenced this civil action seeking substantial monetary penalties²¹ alleging that Kanany's duplex property was in violation of the City's zoning code for having an illegal Accessory Dwelling Unit located thereon.²² The City contends that the underlying civil action is but a collection effort and is merely adjunct to its Notice of Civil Violation

¹⁸ CP at 206 ¶ 17.

¹⁹ 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.

²⁰ 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.

²¹ The City contends that the monetary penalty to which it is entitled to be assessed as a lien against the subject real property accrues at the rate of \$1,000 per day since November 21, 2009. CP at 74 ¶ 4.4 (Amended Complaint For Monies Owed).

²² CP at 72 ¶ 3.10.

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 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 this motion, the trial court also considered the constitutionality of the City's process and procedure for assessing and reviewing civil monetary fines under the Supreme Court's *Post* decision. 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 with oral arguments, the trial court granted the City's motion for summary judgment and denied Kanany's cross-motion for summary judgment. This appeal followed.

IV. STANDARD OF REVIEW

The Court of Appeals finds itself in the exact position as was the trial court in considering the parties' cross-motions for summary judgment and the evidence supporting Kanany's affirmative defenses of (1) constitutional in-

firmities, (2) equitable estoppel, and (3) omission of indispensable party.²³

Summary judgment as sought "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."²⁴ A material fact is one upon which the outcome of the litigation depends, in whole or in part.²⁵ The burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper.²⁶ All facts and reasonable inferences therefrom must be considered in the light most favorable to the non-moving party.²⁷ If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute.²⁸ The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or its affidavits being considered at

²³ Defendant Kanany's Answer And Affirmative Defenses To Plaintiff City's Complaint For Monies Owed, at pp. 2-3.

²⁴ CR 56(c).

²⁵ *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

²⁶ *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

²⁷ *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

²⁸ *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

face value.²⁹ If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion.³⁰

On cross-motions for summary judgment, the Court must consider all the evidence and facts submitted and make all reasonable inferences from such in favor of each nonmoving party respectively.³¹

On a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. . . . This is true even though the court was presented with cross-motions for summary judgment; each movant has the burden of presenting evidence to support its motion that would allow the . . . court, if appropriate, to direct a verdict in its favor.

Barhold v. Rodriguez, 863 F.2d 233, 236 (2nd Cir. 1988).³²

²⁹ *Seven Gables Corporation v. MGM/UA Entertainment Company*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

³⁰ *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990). "A party moving for summary judgment is entitled to the benefit of any relevant presumptions that support the motion." *Coca-Cola Company v. Overland, Inc.*, 692 F.2d 1250, 1254 (9th Cir. 1982). The mere existence of some alleged factual dispute between the parties will not defeat a motion for summary judgment because the requirement is that there be no genuine issue of material fact. Factual disputes that are irrelevant or unnecessary will not be counted. The disputed, material fact must also create a genuine issue, which means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party, the same standard used in evaluating a motion for directed verdict. The mere existence of a scintilla of evidence in support of the nonmoving party's position will be insufficient; there must be evidence on which the jury could reasonably find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

³¹ *Washington Federation of State Employees, Council 28, AFL-CIO v. Office of Financial Management*, 121 Wn.2d 152, 156-57, 849 P.2d 1201 (1993); *Sarruf v. Miller*, 90 Wn.2d 880, 883, 586 P.2d 466 (1978).

³² As to the particular relief sought, each party must prove by uncontroverted evidence that there is no genuine issue of any material fact. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 22, 586 P.2d 851 (1978); *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960).
(continued...)

V. ARGUMENT

SUMMARY

As a threshold and primary issue, because the City's zoning code enforcement process and procedure does not present a complete system for the assessment and review of monetary penalties for what are legally deemed civil infractions, facially and as applied the City's incomplete system violates due process and is unconstitutional.

Also, the trial court lacked subject matter jurisdiction to entertain the City's Complaint because the City failed to join a necessary and indispensable party to its action; namely, Navid Kanani who co-equally owns the Subject Property with Defendant Robert Kanany as a tenant in common.

And based on Kanany's meeting with City officials in 2004 and on the disposition of several complaints and Notice of Violation received prior to November 2009, including City Code Enforcement Officer-conducted inspections of the premises, the use of the area above the detached garage at the duplex on the Subject Property for residential-related purposes neither constituted nor qualified as an Accessory Dwelling Unit under the Bonney Lake Municipal Code. The City must be equitably estopped to now claim otherwise and reap substantial and unjust monetary gains from Kanany.

Finally, even if perchance the Court finds that the use does constitute an

³²(...continued)

A material fact is one upon which the outcome of the litigation depends, in whole or in part. *Cameron v. Downs*, 32 Wn. App. 875, 877, 650 P.2d 260 (1982).

ADU, that part of the BLMC that Kanany is alleged to have violated is, as a matter of law, invalid and unenforceable as it is in direct conflict with an overriding, specific provision of the BLMC and is fatally inconsistent with the Bonney Lake Comprehensive Plan and the State Growth Management Act, and is therefore unconstitutional under Wash. Const. art. 11, § 11.

A. BECAUSE THE CITY OF BONNEY LAKE'S MUNICIPAL CODE ENFORCEMENT ORDINANCES DO NOT PRESENT A COMPLETE SYSTEM FOR THE ASSESSMENT AND REVIEW OF MONETARY PENALTIES IMPOSED FOR CIVIL INFRACTIONS, SUCH ORDINANCES VIOLATE DUE PROCESS AND ARE UNCONSTITUTIONAL AND UNENFORCEABLE

The City of Bonney Lake Municipal Code provides that “any violation of this development code³³ 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 Defendant 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

³³ The “development code” consists of BLMC Titles 14 through 19. BLMC § 14.130.010. The Subject Property owned by Defendant Kanany and co-owner Navid Kanani is alleged to have an accessory dwelling unit in violation of BLMC Title 18.

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.”³⁴

The Supreme Court found and concluded in *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), that a municipal code enforcement mechanism similar to that of Bonney Lake that “provides for the issuance of a notice of violation letter[]³⁵ and the assessment and collection³⁶ of civil penalties . . . are elements of what chapter 7.80 RCW calls 'a system of civil infractions.’” *Post*, 167 Wn.2d at 310. The Supreme 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.6.³⁷ The

³⁴ CP at 227-28. Copy of portions of the Bonney Lake Municipal Code is at CP at 59-65.

³⁵ BLMC §§ 14.130.070(A), -.070(B).

³⁶ BLMC §§ 14.130.030(A), -.100.

³⁷ As noted by the Supreme Court in *Post*, “the legislature enacted chapter 7.80 RCW to decriminalize various violations of law then classified as misdemeanors, [and] its scope is broad and includes all violations of local law and ordinances designated as civil infractions.” *Post*, 167 Wn.2d at 311 n.8.

Supreme 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.

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 de-

fenses are raised by the property owner to contest the alleged 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.

In defense to the City's alleged violation of its zoning code regarding the existence of an ADU on Kanany's duplex property in the R-2 zone, Kanany raises the equitable defense of estoppel,³⁸ the invalidity of BLMC § 18.22.090(C)(1) because it conflicts with the specific provisions of BLMC § 18.16.020(A) and the City's Comprehensive Plan; the unconstitutionality of BLMC § 18.22.090(C)(1) under Wash. Const. art. 11, § 11 as such conflicts with State general laws (namely, the requirements of the Growth Management Act); and the unconstitutionality of the City's Code Enforcement system as a violation of his due process rights. Whereas each of these well-established defenses may certainly be raised in a court by a defendant in a civil action and their merits ruled on by a judge, such individual cannot have any of these defenses at all considered or ruled on by a Hearing Examiner in an administrative appeal. A Hearing Examiner is limited in his power and authority to applying the *black letter* law as enacted by statute and

³⁸ By and through its responsible City officials Leedy and Woodcock, the City of Bonney Lake entered into an express agreement with him in 2004 regarding the specific use of the area over the garage on his duplex property and specifically that the exclusion of a kitchen stove and washer/dryer, and a limitation to only two leases for the two duplex units, would allow that area to be used for limited residential purposes (i.e., as a bedroom and recreation area for the duplex tenant's brother) and would except such use from being an accessory dwelling unit under the City Municipal Code.

ordinance,³⁹ 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).⁴⁰

In order to pass constitutional muster, our Supreme Court held in *Post* that a local municipal code enforcement system must be **complete** in all respects in order to not violate the due process rights of the individual property owner. 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).

Absent its 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:

[C]ivil 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,

³⁹ 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.

⁴⁰ 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).

660 P.2d 315 (1983, emphasis added).⁴¹ And as so clearly and succinctly stated in long-standing and well-established constitutional jurisprudence:

By due process of law is meant an orderly proceeding adapted to the nature of the case, before a tribunal having jurisdiction, which proceeds upon notice, with an opportunity to be heard, **with full power to grant relief.**

Kiespert v. Jenkins, 324 P.2d 283, 284 (Okla. 1958) (emphasis added). As so clearly stated and so long held inviolate, especially where valuable and constitutionally protected property rights and interests are at stake and risk of deprivation great without full due process protections afforded, the tribunal hearing such contested matter must be *competent* and be vested with *full power to grant relief*. A Hearing Examiner by law is **not** vested with such authority and power as to equitable and constitutional defenses, and is therefore **not** a *competent* tribunal to hear and decide such issues in an appeal from a zoning code enforcement action.

Competent [means] duly qualified; answering all requirements; having sufficient ability or authority; . . . adequate; suitable; sufficient.

Black's Law Dictionary, at p. 257. Without the legal authority and power to consider and decide the merits of equitable and constitutional defenses as a matter of law,⁴² municipal code enforcement ordinances relying on a mere

⁴¹ See also *In re Personal Restraint of Sinka*, 92 Wn.2d 555, 565, 599 P.2d 1275 (1979) (minimal due process requires notice and an opportunity to be heard before a competent tribunal).

⁴² As well as having a set of rules in effect comparable to CRLJ 60 (relief from judgments) and CRLJ 55(c) (setting aside default judgments), the administrative means for enforcing civil infractions is further defective and deficient in affording property owners due process (continued...)

Hearing Examiner to hear appeals of civil infractions stemming from alleged violations of a zoning code do not present a complete system of civil infraction enforcement consistent with Chapter 7.80 RCW. Accordingly, because the City of Bonney Lake's ordinances rely solely on a Hearing Examiner to hear and decide appeals of enforcement actions for alleged zoning code violations, the City has failed to have a complete system to enforce its civil infractions. Therefore, the City of Bonney Lake is required under the Supreme Court's *Post* decision "to follow the legislature's default system and enforce its infractions in courts of limited jurisdiction." *Post*, 167 Wn.2d at 312.⁴³ The City of Bonney Lake's present system for enforcing civil infraction zoning code violations is unconstitutional and invalid.

1. Even Assuming The City's Code Enforcement System Is Constitutional As Related To Competent Tribunal Requirements, The City's One-And-Done Appeal Process Not Subject To Procedural Rules Comparable To Courts Of Limited Jurisdiction Violates Due Process And Is Unconstitutional

In addition, even assuming that the City's code enforcement system is deemed complete and meets the competent tribunal due process requirement, the manner in which the City assesses monetary penalties for alleged zoning code violations is itself violative of due process and unconstitutional. The City sends out only a single Notice of Civil Violation letter and immediately

⁴²(...continued)
where facing substantial monetary penalties for alleged zoning code violations.

⁴³ Accordingly, the practice and procedures under the Land Use Petition Act (LUPA), Chapter 36.70C RCW, do not apply to the City's code enforcement actions. *Post*, 167 Wn.2d at 312.

starts accruing the assessment of a \$1,000 monetary penalty each day commencing on the date it sends its initial voluntary compliance letter. Bonney Lake's zoning code enforcement ordinance provides for but only a single appeal of its Notice of Civil Violation.⁴⁴ If for whatever reason a person does not appeal, or as in our case, a necessary co-owner of the subject property was never named and served with any notice or complaint whatsoever alleging any violations of the zoning code and apprising him of the imposition of substantial monetary penalties that could become a lien against his property and put his rights and interests at risk of loss, the determination of violation becomes final and the right of appeal/hearing is summarily extinguished.⁴⁵ BLMC § 14.130.070(A); BLMC § 14.120.020 (A). As succinctly observed by the Supreme Court in *Post*, this procedure does not constitute a “system in the sense intended by the legislature in RCW 7.80.010(5) [as] such . . . would allow [Bonney Lake] to impose unlimited punishment on civil defendants, a result that the legislature did not authorize.” *Post*, 167 Wn.2d at 312.⁴⁶

⁴⁴ BLMC § 14.130.070(A).

⁴⁵ Comparable to a default judgment being entered against a defendant who does not answer; however, there is no comparable procedural rule available in the City's Hearing Examiner ordinances to allow the setting aside of such default or relief therefrom as under the civil rules for Courts of Limited Jurisdiction. CRLJ 55(c) and CRLJ 60.

⁴⁶ In stark contrast, the civil infraction system intended by the Legislature and as promulgated by the Supreme Court in the IRLJ created a system of classes of infraction, the violation of which would be assessed a fixed monetary fine subject to appeal and review. By creating a continuing infraction from a single alleged class of offense of its zoning code not subject to any appeal or review but for the initial Notice issued, and directly and adversely affecting co-owners not served with Notice or joined in its collection suit, the
(continued...)

2. Assessing Civil Monetary Penalties Not Subject To Limitation Results In Excessive Fines In Violation Of Constitutional Rights

Bonney Lake's "one-and-done" zoning code enforcement ordinance permits the imposition of unlimited, excessive fines as punishment for a civil infraction. Not serving and joining all co-owners of the subject real property, yet declaring the alleged violation of its zoning code to be a separate yet continuing offense that may be appealed but once at the time of issuance of the one and only Notice of Civil Violation to fewer than all co-owners, monetary penalties will nevertheless accrue at the rate of \$1,000 per day from, according to the City, the date of the initial voluntary compliance letter. The procedure employed by Bonney Lake not only violates the property owners' procedural due process rights, but also violates our Constitution's prohibition against excessive fines and substantive due process. Wash. Const. art. I, § 14. *See also, Post*, 167 Wn.2d at 312-13. Monetary penalties for civil infractions are prescribed by RCW 7.80.120 and are further provided by Supreme Court Rule in IRLJ 6.2. In particular, IRLJ 6.2(b) states that the "penalty for any infraction not listed in this rule shall be \$42, not including statutory assessments." Bonney Lake's fixed yet continuous and ever-mounting monetary penalty for violation of its zoning code of \$1,000 per day is clearly not "consistent with the philosophy of these

⁴⁶(...continued)
property would be subject to a lien growing at the rate of \$1,000 each and every day. This poses a very real and significant due process issue.

rules”⁴⁷ and is unconstitutionally excessive.⁴⁸ A system of fixed fines for a civil infraction denoted as a zoning code violation each subject to review and reissuance periodically may pass constitutional muster.⁴⁹ Such a system would permit the property owner to contest the continuing nature of an alleged violation where, for example as in our case, the property in question is not vacant yet does not consist of the requisite appliances and other attributes to constitute an accessory dwelling unit pursuant to applicable definitions previously applied by the City to the Subject Property.⁵⁰ Moreover, such a system of civil infraction enforcement would provide under the Municipal Code a uniform and reasonable means by which the alleged violation and any corrective actions undertaken would pass muster or be

⁴⁷ IRLJ 6.2(c). Even Class 1 civil infractions are subject to only a single maximum fixed fine of \$500. RCW 7.80.120(1)(a). Furthermore, “the penalties assessed in this chapter are in addition to any investigative fees provided in the building code.” BLMC § 14.130.030(C).

⁴⁸ 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).

⁴⁹ As the City of Tacoma has now enacted by Ordinance No. 27875.

⁵⁰ See CP at 37; CP at 38; CP at 45 (City's Motion to Amend Complaint -- Exhibits 2-18, 2-19, and 2-26).

subject to appeal and review; as under the existing BLMC there is no prescribed manner to cease the imposition and assessment of the daily fines or discretion given to City Code enforcement personnel.⁵¹ It is therefore very likely that there will be created a situation where the property owner and the City have a good faith dispute as to what constitutes compliance with the zoning code, and under existing law there is absolutely no provision or means for the owner to appeal and/or seek review of such dispute.⁵² In the absence of such a review mechanism after the issuance of the one and only Notice of Civil Violation, the risk of arbitrary enforcement and unlimited punishment for a civil infraction, and the risk of erroneous deprivation, is thus great.⁵³ The existing procedures are clearly inadequate to protect the property owners' rights and interests. Fundamental due process requires and demands a meaningful opportunity to be heard subsequent to the issuance of an initial Notice of Civil Violation. The City's current "one-and-done" system for enforcing zoning code violations and assessing civil penalties is

⁵¹ The only means by which the \$1,000 daily fines could cease was set forth under the City's Notice of Civil Violation as "compli[ance] with the Bonney Lake code and until the City has verified vacancy." See CP at 46-47 (Motion to Amend, Exhibit 2-27). But absolute vacancy is not required under the BLMC and the City has previously stated that a person could sleep in the area above the garage without running afoul of the accessory dwelling unit definition, as there is no kitchen stove and washer/dryer. CP at 37-38 (Motion to Amend, Exhibits 2-18 and 2-19).

⁵² Under the judicial default provision for enforcement of civil infractions, all judgments, even default, would be subject to judicial review and vacation/waiver/suspension where justice requires. IRLJ 6.7(a); CRLJ 60(b), -(c).

⁵³ Substantive due process is violated where a local regulation is an excessive exercise of the police power as not reasonably necessary to achieve a legitimate public purpose and unduly oppressive on the land owner. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990).

woefully and wholly inadequate and violates the owners' substantive and procedural due process rights.

Bonney Lake's existing zoning code enforcement and assessment of civil penalties stemming from civil infractions ordinances fail to pass constitutional due process muster both substantively and procedurally. Its present scheme results in unlimited punishment for civil infractions and, because it does not comprise a complete system in accord with legislative intent as the Hearing Examiner is not a competent tribunal to consider and decide equitable and constitutional defenses, is inconsistent with the requirements of chapter 7.80 RCW and runs afoul of Wash. Const. art. 11, § 11. The Supreme Court's *Post* decision is relevant, persuasive, and dispositive as to Bonney Lake's failure to have a complete system for enforcement of civil infractions thereby invalidating its current non-judicial civil infraction enforcement scheme. Kanany respectfully asks this Court to declare Chapter 14.130 BLMC unconstitutional either on its face or as applied, and remand this matter to the trial court with instructions to dismiss with prejudice the City's Complaint For Monies Owed in this action.

B. THE CITY FAILED TO JOIN A NECESSARY AND INDISPENSABLE PARTY TO ITS CODE ENFORCEMENT AND COLLECTION ACTIONS, AND THEREFORE THE TRIAL COURT SHOULD HAVE DISMISSED THE CITY'S COMPLAINT AS IT LACKED SUBJECT MATTER JURISDICTION

As is so clearly obvious and available in the public record to give notice

to the City of Bonney Lake,⁵⁴ the subject real property located at 7513 191st Street East, Bonney Lake, Washington,⁵⁵ is owned as a tenancy in common⁵⁶ by the following individuals:

Robert Kanany, a single person and Navid Kanani, a married man as his separate estate.

CP at 208-09 (copy of Quit Claim Deed).

In its Code Enforcement actions against the subject real property alleging the existence of an accessory dwelling unit in violation of the City's zoning code, the City never once included by name or otherwise served 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 real property, notwithstanding the fact that any judgment obtained by it will become a lien against the subject real property⁵⁷ and very substantially and adversely affect his property rights,

⁵⁴ It is a long-standing and obvious matter of public record, for which judicial notice may be taken, that Robert Kanany is not the sole owner of the real property on which the duplex exists and the City's Code Enforcement action is directed, as evidenced by the (1) Quit Claim Deed dated April 16, 2004, and recorded in Pierce County under Recording Number 200404270652, (2) Deed of Trust dated March 9, 2004, and recorded in Pierce County under Recording Number 200404270653, and (3) Pierce County Assessor-Treasurer ePIP for Parcel Number 7110000230. CP at 24-35.

⁵⁵ The legal description of the subject real property is "Lot 14, Rainier Vista Addition to Bonney Lake, Washington, according to Plat recorded in Book 20 of Plats at Page 58, Records of Pierce County Auditor." CP at 208.

⁵⁶ RCW 64.28.020(1) (statutorily deemed an "interest in common").

⁵⁷ 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. (continued...)

interests, and contractual obligations under existing financing instruments.⁵⁸

From the very beginning of this controversy the City has ignored relevant and applicable provisions of its own Municipal Code. In particular, the Code states the following relevant presumption:

Proof that a violation of the development code exists on a property shall constitute prima facie evidence that the owner of the property is the violator.

BLMC § 14.130.020(B). And the essential term “owner” is expressly defined by the Municipal Code as follows:

“Owner,” 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); *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

⁵⁷(...continued)
RCW 4.56.190.

⁵⁸ 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”).

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).⁵⁹ It is very clear that the BLMC's use of the phrase “includes any . . . tenant in common” means and encompasses **all** co-tenants. The City cannot pick and choose among all the co-tenants only one or a select few to receive notice of and an opportunity to defend against a code enforcement action or civil action to collect substantial monetary penalties for the alleged violation of the City zoning code on real property owned by all as tenants in common.

Due process requires that litigants have notice and a meaningful opportunity to be heard. *State v. Rogers*, 127 Wn.2d 270, 275, 898 P.2d 294 (1995). The United States Supreme Court describes due process as “[n]otice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Notice to one tenant in common does not generally constitute notice to all co-tenants, and each must be served individually. 86 C.J.S. *Tenancy in Common*

⁵⁹ See also *State v. Sutherby*, 165 Wn.2d 870, 881, 204 P.3d 916 (2009); *State v. Westling*, 145 Wn.2d 607, 611-12, 40 P.3d 669 (2002); *State v. Smith*, 117 Wn.2d 263, 271 n.8, 814 P.2d 652 (1991); *State ex rel. Evans v. Brotherhood of Friend*, 41 Wn.2d 133, 145, 247 P.2d 787 (1952); *Rosenoff v. Cross*, 95 Wash. 525, 528, 164 Pac. 236 (1917); *Jong Choon Lee v. Hamilton*, 56 Wn. App. 880, 884, 785 P.2d 1156 (1990); *S.L. Rowland Construction Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 306, 540 P.2d 912 (1975).

§ 130 (1954); 20 Am. Jur. 2d, *Cotenancy and Joint Ownership* § 113 (1995).

Under the Bonney Lake Municipal Code, a Notice of Civil Violation, if sent, must be served on “the alleged violator” either personally or by mail. BLMC § 14.130.070. An appeal hearing is conducted, if requested, at which “the alleged violator may participate in the hearing and call witnesses.” BLMC § 14.130.080. Co-tenant Navid Kanani was given no notice as was required and not afforded the opportunity to appeal the Notice and contest the alleged zoning code violation to protect his own rights and interests in the subject real property. Pursuant to BLMC § 14.130.100, “a monetary penalty constitutes a personal obligation of the person to whom the notice of civil violation is directed.” Accordingly, co-tenant Navid Kanani is a person to whom the notice of civil violation *was required to be* directed under the Bonney Lake Municipal Code and is thus a necessary party to this civil action for collection of monetary penalties. CR 19(a).⁶⁰ And because the City has steadfastly refused and failed to name and join co-tenant Navid Kanani as an alleged violator in its Notice of Civil Violation and a named Defendant in this lawsuit, the trial court lacked subject matter jurisdiction in this action as a matter of law:

⁶⁰ The facts that Navid Kanani is a co-owner of the subject real property, any judgment against Defendant Robert Kanany will become a lien against that property and its improvements, and he has certain personal contractual obligations and duties under financing instruments relating to that realty, underscore the conclusion that his ability to protect his rights and interests in his property will “as a practical matter [be] impair[ed] or impede[d]” by any judgment entered in his absence. CR 19(a)(2)(A).

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*, 2010 Wash. LEXIS 7 (Wash., Jan. 5, 2010) (the appropriate remedy is dismissal of the action). An issue of subject matter jurisdiction may be raised in the court at any time.

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

CR 12(h)(3). Here, the Bonney Lake Municipal Code is the applicable statute and all tenants in common must be named in a Notice of Civil Violation and joined as Defendants in any civil action seeking to collect monetary penalties purportedly assessed stemming from such Notice. The City's failure to timely and reasonably name and join the subject real property's co-owner Navid Kanani, a known and obvious fact available in the public record, is inexcusable neglect and is a fatal omission that as a matter of law necessitates the dismissal of this action. Kanany respectfully asks this Court to remand this matter to the trial court with instructions to dismiss the City's Complaint For Monies Owed.

C. THE CITY-APPROVED ABSENCE OF CERTAIN ATTRIBUTES DEEMED NECESSARY TO ESTABLISH AN INDEPENDENT LIVING AREA AS A MATTER OF LAW PRECLUDES THE AREA ABOVE THE GARAGE FROM BEING AN ACCESSORY DWELLING UNIT

An Accessory Dwelling Unit (ADU) is defined by the BLMC as:

[A] second dwelling unit either in or added to an existing single-family detached dwelling, or in a separate structure on the same lot as the primary dwelling for use as a complete, independent living facility **with provision within the accessory unit for cooking, eating, sanitation, sleeping and entry separate from that of the main dwelling.** Such a dwelling is an accessory use to the main dwelling. Accessory units are also commonly known as “mother-in-law” units or “carriage houses.”

BLMC § 18.04.010“A” (emphasis added).⁶¹

At their meeting in 2004, responsible City officials expressly agreed with Kanany that so long as the area above the garage had no kitchen stove and washer/dryer that the residential-related use of such area would not constitute or qualify as an ADU. This was confirmed again in 2007 and in 2008 on neighbor complaint-driven City investigations and code enforcement actions; all of which were summarily dismissed as the City concluded that the use of the area above the garage was not an ADU. In good faith reliance on all of the foregoing, Kanany continued to allow his tenants to use that area as an adjunct to the lease of one of the duplex units.⁶² And with no changes

⁶¹ The term “dwelling unit” is defined to mean “one or more rooms designed or occupied by one family for living or sleeping purposes, **and containing kitchen** and bath facilities for use solely by one family.” BLMC § 18.04.040“D” (emphasis added).

⁶² The November 2009 letter from the City was viewed by Kanany no differently from those previous inquiries that were all amicably handled and resolved. For whatever reason, however, the November 2009 complaint was neighbor and politically-driven to the point that
(continued...)

in the limited residential-related use of the area, no kitchen stove or washer/dryer units as proscribed by City officials and as to which Kanany agreed in 2004, and no more than two leases for the duplex unit, the area above the garage as a matter of fact and law neither constitutes nor qualifies as an ADU under the BLMC. Thus, no violation of the BLMC exists.

D. THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES TO THE FACTS AND CIRCUMSTANCES OF THIS CASE TO PRECLUDE THE CITY OF BONNEY LAKE FROM NOW ASSERTING THAT MERE OCCUPANCY OF THE AREA OVER THE GARAGE IS SUFFICIENT TO CREATE AN ADU NOTWITHSTANDING THE ABSENCE OF THOSE FACILITIES AND UTILITIES EXPRESSLY AGREED UPON BY IT AND KANANY IN 2004 AND CONTINUOUSLY COMPLIED WITH BY KANANY OVER THE YEARS

Kanany's good faith reliance on the City's factual application of its Code to the area over the garage gives rise to an estoppel in equity sufficient to preclude the City now abdicating its commitment to the direct and substantial injury to Kanany's personal and property rights and interests.

The doctrine of equitable estoppel applies against both the State and municipal entities acting in either their governmental or proprietary capacity when necessary to prevent a manifest injustice. *Metropolitan Park District of Tacoma v. State*, 85 Wn.2d 821, 827, 539 P.2d 854 (1975) (citing *Finch v. Matthews*, 74 Wn.2d 161, 175, 443 P.2d 833 (1968)). The term “manifest

⁶²(...continued)

the subsequently issued Notice of Violation, that Kanany believed had been satisfactorily resolved in the same manner as had previous complaints and the 2007 Notice of Violation, ultimately led to the City's assessment against Kanany of what would amount to many thousands of dollars in civil penalties and the underlying collection action. CP at 305-06 ¶¶ 4-7.

injustice” is generally defined by Washington courts as “an injustice that is obvious, directly observable, overt, not obscure.” *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (citing *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).⁶³ Long held in Washington jurisprudence is that synonymous with “manifest” are the terms palpable, easily perceptible, plain and obvious. *State ex rel. Pacific Power & Light Company v. Department of Public Works*, 143 Wash. 67, 85, 254 Pac. 839 (1927).⁶⁴ Accordingly, the word “manifest” in qualifying the meaning of the word “injustice” connotes neither quantum nor degree but rather the obvious nature of the injustice that is occasioned upon the individual unless the government is estopped.⁶⁵

The modern trend in both legislative and judicial thinking is toward the concept that the citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with the state or other political entity, which he is legally accorded in his dealing with other individuals. Therefore, the rule against estopping a governmental body should not be used as a device by a municipality to obtain unjust enrichment or dishonest gains at the expense of a citizen.

Finch, 74 Wn.2d at 176 (in the context of competing claims to real property

⁶³ Defined in the criminal law context of withdrawal of plea pursuant to CrR 4.2(f).

⁶⁴ The word “manifest” has been defined to mean “capable of being easily understood or recognized at once by the mind; not obscure; obvious”. Webster's Third New International Dictionary (1967). Further, that which is “readily perceived by the eye or the understanding; evident”. Webster's College Dictionary, at p. 825 (Random House 1995).

⁶⁵ And the term “injustice” has been generally defined to mean “absence of Justice; violation of right or the rights of another; iniquity; unfairness; an unjust act or deed; wrong”. Webster's Third New International Dictionary (1967). Further, “the quality or fact of being unjust; iniquity; violation of the rights of others; unjust or unfair action or treatment; an unjust or unfair act; wrong”. Webster's College Dictionary, at p. 694 (Random House 1995).

between a citizen and a municipality).⁶⁶

Putting this all together in the context of our case, unless the City of Bonney Lake is precluded from now denying that its responsible officials factually applied its Municipal Code to the use of the area over the garage on Kanany's duplex property and made the express commitment and promise to him that absent a kitchen stove and washer/dryer therein, and having only two leases for the duplex, such area would in fact not be considered as and become an Accessory Dwelling Unit, the City will be allowed to unjustly enrich itself by the collection of some \$48,000 in monetary fines from Kanany and prevent him from the continued limited residential use of such area with its attendant increased income to which he is lawfully entitled.

The City and Kanany had an express agreement and clear understanding as to the residential-related use of the area above the garage and what would and would not constitute and qualify as an ADU. Kanany lived up to his side of their agreement; the City lived up to its side until November 2009 and the commencement of its code enforcement action and the underlying lawsuit. Based on the foregoing facts, the City is equitably estopped and precluded from assessing substantial monetary penalties against Kanany and using this action to collect "Monies Owed" where Kanany did not violate the terms of his agreement with the City and under what clearly is the City's material breach of its express agreement with Kanany. This Court should remand this

⁶⁶ See also *Shafer v. State*, 83 Wn.2d 618, 521 P.2d 736 (1974); *City of Seattle v. P.B. Investment Company, Inc.*, 11 Wn. App. 653, 524 P.2d 419 (1974).

matter to the trial court with instructions to dismiss the City's Complaint.

E. THAT PART OF THE BLMC THE CITY ALLEGES KANANY TO HAVE VIOLATED CONFLICTS WITH BOTH A SEPARATE SPECIFIC PROVISION OF THE BLMC AND THE CITY'S COMPREHENSIVE PLAN, AS WELL AS THE STATE GROWTH MANAGEMENT ACT, THEREBY RENDERING SUCH PART INVALID, UNENFORCEABLE, AND UNCONSTITUTIONAL

Even should the Court find that the use of the area above the garage at the duplex on the Subject Property qualifies as an ADU, there is nevertheless no violation of the BLMC. In the City's November 2009 Notice of Violation and its Complaint For Monies Owed, it alleges that the use of the area above the garage qualified as an ADU at the duplex on the Subject Property in violation of BLMC § 18.22.090(C)(1). That provision reads as follows:

Accessory dwelling units. . . . 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 dwelling units.

BLMC § 18.22.090(C)(1) (emphasis added). However, the foregoing part of the BLMC is in direct conflict with another specific provision of the Code; namely BLMC § 18.16.020(A) which sets forth all those “**Uses permitted outright . . . in an R-2 zone**” and expressly permits residential uses including “**Duplexes (two-family residences); [and] Accessory dwelling units.**”⁶⁷

⁶⁷ Emphasis added. There is no discernable hierarchy in applying these two provisions of the BLMC as they were both included in amendments to the Bonney Lake Municipal Code by Ordinance No. 747 (effective date November 5, 1997), pre-dating Kanany's building permit application in March 2004.

There is a direct conflict between these two concurrently-enacted provisions of the BLMC;⁶⁸ a conflict that cannot be reconciled or harmonized for to do so would allow the exception to swallow the general rule⁶⁹ and under which the outcome of their concurrent application is dramatically different having a direct and substantial adverse impact on Kanany's individual and property rights. To adapt a well-known expression: what the City *giveth* in a specific rule it cannot summarily *taketh* away by a general exception.

[E]xceptions to the general rule, especially when the general rule is unambiguous, should be strictly construed with any doubts resolved in favor of the general provision, rather than the exception [else] the exception would swallow the rule.

Converse v. Lottery Commission, 56 Wn. App. 431, 434, 783 P.2d 1116 (1989).⁷⁰

The legislative intent underlying the City's adoption of Ordinance No. 747 is clear and unambiguous, expressly including the following recital:

⁶⁸ Ordinances are subject to the same rules of construction as statutes; and courts will give effect to all language within it so that no portion is rendered meaningless or superfluous. *Muckleshoot Indian Tribe v. Department of Ecology*, 112 Wn. App. 712, 720, 50 P.3d 668 (2002). Courts construe ordinances as a whole with a view toward the purpose of the ordinance and the goal of carrying out the legislative intent underlying the code. *Id.*, at 720-21. Although different provisions of the same act must be harmonized to ensure proper construction, *In re Piercy*, 101 Wn.2d 490, 492, 681 P.2d 223 (1984), any interpretation that would defeat the purpose of the code should be avoided. *Puyallup v. Pacific Northwest Bell Tel. Co.*, 98 Wn.2d 443, 450, 656 P.2d 1035 (1982).

⁶⁹ Here, the general rule is BLMC § 18.16.020(A) (allows duplexes and Accessory Dwelling Units as outright permitted uses in the R-2 zone) and the exception is set forth in BLMC § 18.22.090(C)(1) (excepts ADUs in conjunction with any duplex unit regardless of zone).

⁷⁰ Exceptions which swallow the general rule must be avoided. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 495, 84 P.3d 1231 (2004).

WHEREAS, Goal 2-8 of the Comprehensive Plan states the City will provide residential development that meets community needs and desires through Policy 2-8f which directs the city to provide affordable housing by allowing accessory dwelling units in residential zones including the R-2, R-3 and RC-5 zoning designations.

Ordinance No. 747, at p. 1.⁷¹ The referenced Goal 2-8 and Policy 2-8f of the adopted City Comprehensive Plan in effect at the time the City enacted Ordinance No. 747 are set forth as follows:

GOAL 2-8: Provide Residential Development That Meets Community Needs and Desires.

Policy 2-8f. To further provide affordable housing, allow accessory dwelling units in all residential zones.

Ordinance No. 721 (effective June 6, 1996), with attached *City of Bonney Lake Comprehensive Plan, Element 2: Land Use Part C3* (revised May 28, 1996; underlining added).⁷²

The City's updated Comprehensive Plan in effect at the time Kanany applied for his building permit for the construction of a duplex on his R-2 zoned residential lot continued the clear expression of legislative intent to permit Accessory Dwelling Units in R-2 zones unrestricted in conjunction with duplex units. Ordinance No. 1011 (effective February 3, 2004), with attached *Bonney Lake Comprehensive Plan, Housing Element* at p. 5-4

⁷¹ CP at 233-61 (copy of the relevant portions of Ordinance Nos. 747, 721, and 1011 as formally adopted and published by the City of Bonney Lake).

⁷² The 1996 Comprehensive Plan defines "policies" as "commitments to act in a prescribed manner in working towards those targets or benchmarks [that are set forth as Objectives]." Ordinance No. 721, *City of Bonney Lake Comprehensive Plan, "How to Use the Comprehensive Plan"*.

(Table 5-5 “Permitted Affordable Housing in Bonney Lake”); and Goal 3-3 and Policy 3-3a, at p. 5-5 (revised January 27, 2004).

The foregoing Comprehensive Plan Goals and Policies provide a very clear and unambiguous expression of the legislative intent underlying the enactment of BLMC § 18.16.020(A) which outright permits Accessory Dwelling Units with duplexes in the R-2 zone. The ostensible exception set forth in BLMC § 18.22.090(C)(1) is in clear contradiction to the unambiguous legislative intent and cannot be allowed to swallow up the general rule that ADUs are an outright permitted use with duplexes in the R-2 zone -- the precise circumstance of Kanany's intended use of the area above the detached garage at the duplex on the Subject Property.

Moreover, allowing the exception to swallow the general rule would be unconstitutional as a violation of Wash. Const. art. 11, § 11 because BLMC § 18.22.090(C)(1) conflicts with the general laws of the State of Washington. The general law that BLMC § 18.22.090 (C)(1) finds itself in conflict with is the Growth Management Act, Chapter 36.70A RCW; in particular the following provision:

Any county or city that is initially required to conform with all the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: . . . (d) if the county has a population of fifty thousand or more, the county and **each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan** on or before July 1, 1994

RCW 36.70A.040(3)⁷³ (emphasis added).⁷⁴

Whereas BLMC § 18.16.020(A) is consistent with and implements the Bonney Lake Comprehensive Plan regarding affordable housing by the outright permitting of ADUs with duplexes in the R-2 zone, BLMC § 18.22.090(C)(1) is very clearly inconsistent with and patently fails to implement the Bonney Lake Comprehensive Plan by outright denying ADUs in conjunction with duplexes in the R-2 zone.

Because BLMC § 18.22.090(C)(1) conflicts with the Growth Management Act as a general law of Washington, it violates Wash. Const. art. 11, § 11 and is unconstitutional. Accordingly, BLMC § 18.22.090(C)(1) is invalid and cannot be used as an enforcement mechanism against Kanany to extract from him excessive monetary penalties for having, should the Court consider to be, an Accessory Dwelling Unit in the area above the detached garage at the duplex on the Subject Property consistent with both the Bonney Lake Comprehensive Plan and expressly allowed as an outright permitted use in the R-2 zone under BLMC § 18.16.020(A).

⁷³ Bonney Lake's Development Regulations include BLMC Title 18. BLMC § 14.10.010. The Court should take judicial notice as a commonly known fact that Pierce County has a population of 50,000 or more and Bonney Lake is a city within such county.

⁷⁴ The GMA transformed comprehensive plans from being mere "guides" as such were considered under prior law, to positive substantive law that must be followed in zoning and development regulations. *City of Bellevue v. East Bellevue Community Council*, 138 Wn.2d 937, 983 P.2d 602 (1999) (holding that under the GMA the comprehensive plan is obligatory on local government, and is no longer considered merely a guide); *Ahmann-Yamane, L.L.C. v. Tabler*, 105 Wn. App. 103, 113, 19 P.3d. 436 (2001) (where the court noted that "just as clear is the fact that the comprehensive plan is instrumental in determining what land use patterns will be acceptable within the [planning area]").

For the foregoing reasons and should the Court find that the use of the area above the garage qualifies as an ADU, BLMC § 18.22.090(C)(1) is invalid and unenforceable. Accordingly, the Court should remand this matter to the trial court with instructions to dismiss the City's Complaint against Kanany.

VI. CONCLUSIONS

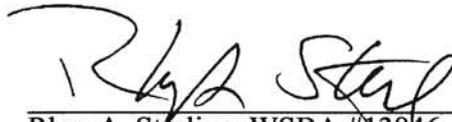
Robert Kanany respectfully asks this Court to reverse the trial court's grant of summary judgment in favor of the City of Bonney Lake for the reasons that (1) the City's enforcement mechanism for assessing monetary penalties for alleged municipal code violations violates due process under the Supreme Court's analysis in *Post*; (2) the City has failed to join a necessary party in both the code enforcement action and the underlying lawsuit and the trial court lacks subject matter jurisdiction; (3) the City is equitably estopped from denying that Kanany's use of the area over the garage on his duplex property does not constitute an ADU in the absence of those facilities and utilities as it expressly agreed with him in 2004; (4) Kanany's use of the area over the garage at his duplex on the R-2 zoned property is fully consistent with the zoning code and does not constitute an ADU; and (5) the specific provision of the City's Municipal Code it grounds its enforcement and collection actions against Kanany on is inconsistent with another express provision of the Code, conflicts with the City's Comprehensive Plan, and conflicts with the State Growth Management Act and is therefore invalid, unenforceable and unconstitutional.

Based on the foregoing, Robert Kanany respectfully asks this Court to remand this matter to the trial court with instructions to dismiss the City's Complaint For Monies Owed.

Dated this 30th day of March, 2012.

Respectfully submitted,

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

A handwritten signature in black ink, appearing to read "Rhys A. Sterling", written over a horizontal line.

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

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

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE, a Municipal Corporation,

RESPONDENT,

v.

ROBERT KANANY,

APPELLANT.

DECLARATION OF SERVICE

RHYS A. STERLING, P.E., J.D.
By: Rhys A. Sterling, #13846
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ORIGINAL

STATE OF WASHINGTON)
) ss. DECLARATION OF RHYS A.
) STERLING
COUNTY OF KING)

RHYS A. STERLING hereby says and states under penalty of perjury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the attorney of record representing Appellant Robert Kanany in the action captioned City of Bonney Lake v. Robert Kanany, Court of Appeals, Division II, No. 42988-8-II.

3. By postage prepaid first class mail on March 30, 2012, I served on the other parties in this action, through their respective counsel, a copy of the BRIEF OF APPELLANT and this DECLARATION OF SERVICE filed in this matter, by placing in the United States mail the same addressed to:

Grant D. Wiens
Dionne & Rorick
900 Two Union Square, 601 Union Street
Seattle, Washington 98101

Attorney for Respondent City of Bonney Lake.

4. On March 30, 2012, I also emailed a copy of the foregoing documents to Mr. Wiens at grant@dionne-rorick.com.

5. On March 30, 2012, I served on the Court of Appeals, Division II, the original and one (1) copy of the BRIEF OF APPELLANT and the original DECLARATION OF SERVICE in this matter, by personally delivering these documents to the individual named below (or to a designated staff or deputy

DECLARATION OF SERVICE

-- PAGE 1

clerk) at the location indicated as follows:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, Washington 98402
Attn: David C. Ponzoha,
Clerk/Administrator

*I certify and declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct:*

March 30, 2012
DATE


RHYS A. STERLING (WRITTEN)
WSBA # 13846

Hobart, WA
PLACE OF SIGNATURE

Rhys A. Sterling
RHYS A. STERLING (PRINTED)