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.

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DIVISION II
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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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REPLY OVERVIEW

'There has been no change.' This is the answer given by the City Attorney in response to a pointed question to him from the trial court during final arguments in the hearing on the City's cross-motion for summary judgment requesting some $48,000 in civil monetary fines/penalties against Appellant Robert Kanany. The question posed by the Judge was whether there had been any changes in the use or occupancy of the area above the garage at the duplex from 2004 through November 2009? The clear and concise answer -- no change in use; no change in occupancy. In other words, absolutely nothing had changed in the 5 years the area over the garage had been given express approval and assurances by the City's Directors of Planning and Engineering that the use of such space in accordance with the set of instructions given by them to Kanany would not result in such area being determined an Accessory Dwelling Unit (ADU) in violation of the City Municipal Code.

In good faith reliance on such express assurance and promise, Kanany allowed one of his duplex tenants to have his sibling stay in the area over the garage subject at all times to compliance with the set of standards laid out by the City. For no reason grounded on any violation of those standards, the City breached its promise and assessed outrageous civil fines on Kanany for doing nothing other than what he had been expressly assured by the City he could do with that space. This breach of express promise in good faith relied on by Kanany to his material and substantial financial detriment, and to the unjust enrichment of the City, is the reason why equity must step in and declare the City bound by its express promise and precluded from withdrawing its assurances.

Although equitable estoppel is a fundamental basis for Kanany's appeal, there are several other substantial and more primary statutory and constitutional grounds on which he relies seeking this Court's reversal of the trial court's order granting summary judgment to the City of Bonney Lake.

THE CITY'S PROCEDURE FOR ASSESSING MONETARY FINES FOR CIVIL INFRACTIONS UNDER ITS LAND USE CODE IS NOT A COMPLETE SYSTEM COMPARABLE TO THOSE PROCEDURES AVAILABLE UTILIZING COURTS OF LIMITED JURISDICTION AND IS THEREFORE UNCONSTITUTIONAL ON ITS FACE

Under the Washington Supreme Court's decision in *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), in order for a municipal administrative scheme enforcing civil infractions for land use code violations to pass constitutional muster, the municipal system must be complete and comparable to that available through courts of limited jurisdiction. *Post*, 167 Wn.2d at 312.

Bonney Lake relies on a Hearing Examiner to enforce alleged violations of its land use code. And where, as here, equitable defenses are raised to refute such alleged violations as well as the constitutionality of the ordinances being enforced, the Hearing Examiner is absolutely without legal authority and is powerless to act on and determine the merits of such defenses. *See Chaussee v. Snohomish County*, 38 Wn. App. 630, 737-40, 689 P.2d 1084 (1984) (Hearing Examiner has no authority to hear and decide equitable claims and defenses);

Exendine v. City of Sammamish, 127 Wn. App. 574, 586-87, 113 P.3d 494 (2005) (Hearing Examiner has no authority to determine constitutional issues related to municipal ordinances). A system that enforces civil infractions that relies exclusively on an administrative Hearing Examiner is, on its face, not a complete system and is not in any way comparable to the legal and equitable authority and powers possessed by courts of limited jurisdiction.

The City attempts to not only distinguish *Post* but also tries to convince this Court that Kanany has failed to demonstrate that its Hearing Examiner system of enforcing civil infractions for land use code violations is unconstitutional *as applied*. Both attempts miss the point. *Post* is without doubt relevant and dispositive to Kanany's assertion that the City's system is unconstitutional *on its face*. In the absence of a complete and comparable system, the City can assess, and here has assessed, clearly excessive monetary penalties far greater than ever sanctioned under a complete and constitutional system to enforce civil infractions. Furthermore, Kanany was not required to

pursue and exhaust any administrative remedies under a system of enforcement that is unconstitutional. Moreover, Kanany is not bound by any conclusive presumptions purportedly imposed by the City Municipal Code for reportedly failing to respond to and exhaust such futile remedies.

For the reasons set forth in Kanany's main brief and above, this Court should find and conclude that the City of Bonney Lake's system of enforcing civil infractions for alleged land use code violations is unconstitutional and of no force and effect as to Kanany. Summary judgment in favor of the City must therefore be reversed and this matter remanded to the trial court with directions to dismiss the Complaint against Kanany.

THE CITY'S FAILURE TO JOIN CO-OWNER NAVID KANANY IS FATAL TO THE CITY'S COMPLAINT FOR FAILURE TO JOIN AN INDISPENSABLE PARTY

At no time, and even after Robert Kanany gave the City notice of its deficiency in its Notice of Civil Violation and subsequent Complaint, did the City ever name and join the duplex property co-owner Navid Kanany as a co-party with the right to notice and to be heard as to the alleged violations

of the land use code which would, if proven true, substantially and significantly affect his personal and property rights and interests.

Navid Kanany is an active participant in the ownership, financing, and development of the duplex property. As property co-owner, the City was required to serve him with personal notice of any alleged land use code violations. Actual notice and an opportunity to be heard is not only a constitutional due process guaranteed right, but such is also required under the City Municipal Code. Pursuant to the Bonney Lake Municipal Code, the property owners are responsible and liable for any alleged violations of the land use code. Under the Municipal Code, those persons violating the land use code must be given notice of such violations -- basic and fundamental due process. There is absolutely no dispute to the fact that the City never gave co-owner Navid Kanany, and presumed land use code violator, notice of the alleged ADU violation at his duplex property. Because Navid Kanany's personal, financial, and real property rights and interests are subject to severe prejudice and inva-

sion should such violations be upheld, Navid Kanany is absolutely entitled to due process and be given actual notice of the alleged violation and given an opportunity to be heard in any proceeding. In his absence, it is unjust, unfair, and inequitable to proceed and to penalize and punish his rights and interests *in absentia*.

Navid Kanany is an indispensable party who is required to be joined in any administrative Notice of Civil Violation and in any Complaint seeking to assess substantial monetary fines which, upon entry of a judgment, would as a matter of law become a lien against his duplex property in Pierce County. This would put Navid Kanany in jeopardy of default under the financial Deed of Trust for the duplex property that he co-signed as owner. The absence of an indispensable party required by the Municipal Code (i.e., statute) necessarily divests the superior court of subject matter jurisdiction, and the action must be dismissed as a matter of law. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 942, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017 (2010) (the appropriate remedy is dismissal of

the action).

In addition to the fatal defects of Bonney Lake's system under *Post*, this Court should reverse summary judgment in favor of the City and remand to the trial court with directions to dismiss the City's Complaint for the reason that the City failed to name and join Navid Kanany, an indispensable party, in both its administrative Notice of Civil Violation and in its Complaint.

THE CITY IS SUBJECT TO EQUITABLE ESTOPPEL TO PRECLUDE IT FROM ENFORCING ITS ADU LAND USE CODE AGAINST KANANY'S APPROVED AND UNCHANGED USE OF THE AREA ABOVE THE GARAGE AT THE DUPLEX

'No change' in either the use or the occupancy of the area over the garage at the duplex is admitted by the City. How and why is it now just and fair for the City to unjustly enrich itself by enforcing its ADU land use code contrary to the express assurances and promises that adherence to certain prescribed standards would preclude such area from being an ADU under the land use code? Answer -- it is not, and this Court should therefore apply its equitable powers and estop the City from breaching its assurances and promises and

reaping some $48,000 in unjust benefits from its unreasonable and inequitable acts.

The City yet, and unbelievably still, holds to its contention that Kanany never responded to the City's initial notice of violation sent to him by mail in August 2009. Quite contrary to the City's untenable position, Kanany did receive such notice and did promptly and appropriately respond in writing to the City's Code Enforcement Officer. In fact, in direct action and response to the Officer's phone voice message, *of which a copy thereof is on CD that was admitted as evidence by the trial court in the summary judgment hearing and which will be made available to this Court on request if such is deemed desirable in addition to the verbatim written transcript of such voice message that is included in the Clerk's Papers* (CP at 204-05 ¶ 14), Kanany timely and completely answered the City's initial notice and hand delivered it to the City for the Code Enforcement Officer. CP at 205 ¶ 15; CP at 225. This is a material fact that is essential to the summary judgment proceeding. This clearly shows that Kanany

did in fact timely respond and clearly stated that there was no change in use and occupancy -- the same circumstances that arose in 2007 that resulted in the City summarily withdrawing its notice of civil violation. Kanany understood and believed in good faith that the City would do likewise for its 2009 threatened notice of violation. But the City either ignored or lost/misplaced Kanany's written response, and proceeded to issue its Notice of Civil Violation upon which the underlying Complaint is based for the collection of what the City claims is some $48,000 in monetary fines against Kanany for doing absolutely nothing in contravention of what the City had expressly assured and promised him he could do regarding the use and occupancy of the area over the garage at the duplex.

'No change' -- this is the ground on which the City enforced its ADU land use code in clear violation of its express assurances and promises made to Kanany in 2004 and honored, and in fact restated, over the years since then. It's not fair -- it's not just. In fact, the City's enforcement is manifestly unjust and has resulted in the unjust

enrichment of the City all at Kanany's expense and injury to his rights and property interests.

For these reasons, this Court should invoke the doctrine of equitable estoppel and preclude the City of Bonney Lake from enforcing its ADU land use code thereby breaching its express assurances and promises to Kanany on which he in good faith justifiably relied all now to his detriment. This Court should reverse summary judgment in favor of the City and remand this matter to the trial court with directions to dismiss the City's Complaint against Kanany.

BECAUSE THE CITY'S MUNICIPAL CODE HAS CONFLICTING PROVISIONS REGARDING THE SAME SUBJECT MATTER AND MOREOVER CONFLICTS WITH THE STATE GROWTH MANAGEMENT ACT, THAT PROVISION OF THE MUNICIPAL CODE THE CITY ALLEGES KANANY TO HAVE VIOLATED MUST BE STRUCK DOWN AS UNCONSTITUTIONAL

The City of Bonney Lake cannot have it all ways to the clear detriment of its citizens and property owners by on the one hand stating without equivocation its commitment to providing ADU's in duplex residential zones (BLMC § 18.16.020(A)), while on the other hand denying duplex owners the right to have an ADU on their residential zoned

property (BLMC § 18.22.090(C)(1)). Such internal conflict in its land use code not only violates rules of statutory construction, but also violates the requirements of its own Comprehensive Plan and the State Growth Management Act, and is therefore unconstitutional as a violation of Wash. Const. art. 11, § 11.

Because BLMC § 18.22.090(C)(1) is invalid as unconstitutional and in conflict with other valid municipal code and comprehensive plan provisions, such land use code cannot be used as an enforcement mechanism against Kanany even should this Court consider the area above the garage at the duplex to be an ADU (which, respectfully, it should not).

For the foregoing reasons and should this 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 and, accordingly, the Court should reverse summary judgment in favor of the City and remand this matter to the trial court with directions to dismiss the City's Complaint against Kanany.

CONCLUSIONS

Based on the foregoing, Robert Kanany respectfully asks this Court to reverse summary judgment in favor of the City and remand this matter to the trial court with directions to dismiss the City's Complaint For Monies Owed against him.

Dated this 3rd day of November, 2012.

Respectfully submitted,

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

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Attorney for Appellant Robert Kanany

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Pierce County Superior Court No. 10-2-05228-9

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DECLARATION OF SERVICE

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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 November 3, 2012, I served on the other parties in this action, through their respective counsel, a copy of the REPLY 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 LLP
800 Two Union Square, 601 Union Street
Seattle, Washington 98101

Attorney for Respondent City of Bonney Lake.

4. On November 3, 2012, I also e-mailed a copy of the foregoing documents to Mr. Wiens at grant@dionne-rorick.com.

5. On November 3, 2012, I served on the Court of Appeals, Division II, the original and one (1) copy of the REPLY BRIEF OF APPELLANT and the original DECLARATION OF SERVICE in this matter, by placing in the United States mail the same addressed to:

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:

November 3, 2012
DATE

RHYS A. STERLING (WRITTEN)
WSBA # 13846

Hobart, WA
PLACE OF SIGNATURE

Rhys A. Sterling
RHYS A. STERLING (PRINTED)