NO. 42988-8-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT KANANY,

Appellant,

v.

CITY OF BONNEY LAKE,

Respondent.

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BRIEF OF RESPONDENT

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I. INTRODUCITON

The City of Bonney Lake (the "City") respectfully requests that this Court uphold the trial court's judgment against Robert Kanany on behalf of the City for monies owed totaling $48,000.

In 2009, the City investigated and determined a violation of the Bonney Lake Municipal Code (the "BLMC"), concluding that the Mr. Kanany was maintaining an illegal accessory dwelling unit ("ADU") in conjunction with a duplex or multiple-family dwelling unit located on his property. Despite notice that the City was willing to consider a voluntary correction, notice that fines would be imposed, and notice of all appeal rights, Mr. Kanany chose to ignore the situation. He refused to make any effort to contact the City, allowing the 15-day deadline for appealing the Notice of Civil Violation to pass and waiving his due process rights to challenge the City's determination of the underlying code violation. With fines owed and the situation unresolved, the City filed a lawsuit with the trial court to collect all monies owed pursuant to that code violation.

Responding to the City for the first time on this matter, Mr. Kanany raised several constitutional and procedural arguments before the trial court. The trial court remained unconvinced, holding that the City's

enforcement provisions were constitutional and that Mr. Kanany did owe the City $48,000 in unpaid fines.

In his brief, Mr. Kanany comes now and raises the same constitutional and procedural arguments before this Court. Once again, however, Mr. Kanany obfuscates the procedural posture of this litigation, misinterprets the City's municipal code, and fails to articulate a convincing argument that would allow him to circumvent the monetary judgment ordered by the trial court.

II. COUNTER STATEMENT OF CASE

A. Factual Background.

In the summer of 2009, the City received a complaint that Mr. Kanany was allowing occupancy of his residential property located at 7513 191st Avenue East, Bonney Lake, Washington, 98391 (the "Property") in violation of the Bonney Lake Municipal Code. CP 271. The complaint alleged that Mr. Kanany maintained an impermissible ADU, allowing occupancy of a space above a detached garage on the Property. *Id.*

Section 18.04.010 of the Residential Development Standards in the BLMC defines an ADU 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." CP 271.

The BLMC imposes certain requirements and limitations on where an ADU can be located within the City of Bonney Lake. Pursuant to BLMC 18.22.090(C)(1), ADUs are limited to one unit per legal building as a subordinate use in conjunction with a single-family residence and are not permitted in conjunction with a duplex or multiple-family dwelling unit. CP 271.

The City investigated the complaint and determined Mr. Kanany was in violation of BLMC 18.22.090(C)(1). CP 271. The City concluded Mr. Kanany was maintaining an illegal ADU in conjunction with a duplex or multiple-family dwelling unit located on the Property. *Id.*

The City initially sought a voluntary correction of the code violation pursuant to BMLC 14.130.060. CP 271-72. On August 5, 2009, the City's Code Enforcement Officer sent a letter (the "August Letter") to Mr. Kanany explaining the City's determination of an ADU violation of the Bonney Lake Municipal Code. CP 272; 275-76.

The August Letter offered Mr. Kanany forty-five (45) days to voluntarily correct the ADU violation and to arrange for a City inspection

of the Property to confirm compliance. CP 275-76. Additionally, it explained the legal and financial repercussions if Mr. Kanany failed to voluntarily correct the code violation, including the issuance of a Notice of Civil Violation and the subsequent imposition of a $1,000 fine for each day of a continuing violation, pursuant to BLMC 14.130.030 & 14.130.070. *Id.*

Attempts to deliver the August Letter to Mr. Kanany by certified mail were unsuccessful, with Mr. Kanany refusing to accept delivery. CP 272. Mr. Kanany was eventually served in person with the August Letter through a process server on or about September 29, 2009. CP 272; 277-78.

Mr. Kanany did not contact the City within forty-five (45) days of receipt of the August Letter, either to dispute the determination of a code violation or to arrange for an inspection of the Property to confirm voluntary compliance. CP 272.[1]

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[1] There appears to be a dispute between the City and Mr. Kanany as to whether or not Mr. Kanany delivered to the City a letter dated August 20, 2009. *Cf.* Appellant's Brief, pg. 8; CP 324-27. As noted in the City's Opposition to Mr. Kanany's Motion for Summary Judgment, there are discrepancies in the letter itself, discrepancies based on undisputed facts or facts admitted by Mr. Kanany: (i) the letter is dated and was allegedly delivered on August 20, 2009 in response to the City's voluntary correction letter which was not delivered to Mr. Kanany until September 29, 2009 (CP 272; 277-78); and (ii) the letter states that prior to 2009, the last communication regarding the Property occurred in March 2007, even though Mr. Kanany admitted and filed exhibits demonstrating communications between the City and Mr. Kanany about the Property in 2008 (Appellant Brief, pgs. 6-7). Additionally, Mr. Kanany claims to have a copy of a voicemail he left for the City in August 2012 after receiving the August letter. *See* Appellant Brief, pgs. 7-8. This voicemail is directly contradicted by testimony of City officials (CP 324-327) and is claimed inexplicably

After the forty-five (45) grace period for voluntary correction passed without any contact by Mr. Kanany, the City issued a Notice of Civil Violation pursuant to BLMC 14.130.070. CP 272; 279-87. The Notice of Civil Violation informed Mr. Kanany of the City's determination that an illegal ADU was located on the Property, in violation of BLMC 18.22.090. *Id.* Additionally, the Notice of Civil Violation imposed a penalty of $1,000 fine for each day of a continuing violation, pursuant to BLMC 14.130.030. *Id.*

The City included with the Notice of Civil Violation an explanation of Mr. Kanany's appeal rights pursuant to BLMC 14.130.080 and 14.120.020. CP 279-87. If made within fifteen (15) days of receipt of the Notice of Civil Violation, Mr. Kanany had the right to appeal the City's determination of a code violation as well as the City's imposition of $1,000 fine per day penalty. *Id.* Absent a written appeal within fifteen (15) days of receipt, the City's determination of a violation and imposition of penalty is considered final. *Id.* A complete copy of BLMC 14.130 and 14.120.020 was attached to the Notice of Civil Violation. *Id.*

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to have been left prior to the date Mr. Kanany actually received the August letter (CP 272; 277-78).

The Notice of Civil Violation was personally served on Mr. Kanany through a process server on or about November 21, 2009. CP 288-89. The City did not receive an appeal, written or otherwise, from Mr. Kanany with respect to the Notice of Civil Violation and the imposition of penalty. The City did not receive any contact from Mr. Kanany until the filing of the action underlying this appeal with the trial court. CP 273.

B. Procedural History.

Without any response from Mr. Kanany and with the City's determination of a violation and imposition of penalty considered final under the BLMC, the City filed a lawsuit with the trial court on January 8, 2010. Due to a scrivener's error, the original complaint misidentified the property at issue, i.e., the property owned by Mr. Kanany on which the City determined an illegal ADU was located. CP 1-6. The City moved for leave to file an amended complaint with the corrected property listed. *Id.* Mr. Kanany objected to the motion, asserting a failure to join the co-owner of the Property, Mr. Navid Kanani, as a necessary party pursuant to CR 19. CP 76-92.

Upon review of the City's motion for leave, the trial court requested additional briefing from the parties to address whether or not a recent Supreme Court case – *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d

1179 (2009) – was applicable to the City's lawsuit. CP 93-174. After a careful consideration of the ample briefing provided by both parties along with oral argument, the trial court concluded that the City's civil enforcement system, as contained in chapter 14 of the BLMC, was constitutional under the analysis and ruling of *Post* and granted leave for the City to file an amended complaint.

The parties stipulated that the trial court could determine the lawsuit on cross-motions for summary judgment. CP 177-269. The trial court denied Mr. Kanany's motion for summary judgment and entered judgment on behalf of the City for the total amount of fines owed in connection to the Notice of Civil Violation, totaling $48,000.

III. ARGUMENT

A. Chapter 14 of the BLMC is Constitutional.

In the appellant's brief, Mr. Kanany raises the same constitutional arguments as he argued below at the trial court. Responding to the trial court's request, sua sponte, for additional briefing regarding *Post v. City of Tacoma*, Mr. Kanany asserted constitutional defects with chapter 14 of the BLMC, i.e., the City's civil violation enforcement system. CP 93-174. Mr. Kanany's continued argument against the constitutionality of the City's

enforcement system relies on a misapplication of the *Post* decision and a misreading of the City's municipal code.

1. Pursuant to *Post v. City of Tacoma*, the BLMC provides sufficient due process rights.

In *Post v. City of Tacoma*, the Supreme Court held in a divided opinion that "where local jurisdictions issue infractions (finding violations and assessing penalties), there must be some express procedure available by which citizens may bring errors to the attention of their government and thereby guard against the erroneous deprivation of their interests." *Post*, 167 Wn.2d at 315. In this matter, the City provided express procedures for Mr. Kanany to raise any alleged errors in the City's issuance of the civil violation. Mr. Kanany, however, consistently declined to take advantage of these procedures and never tried to raise any errors. Mr. Kanany's due process rights simply were not violated.

In *Post*, the Court examined the application of Tacoma's Minimum Building and Structures Code ("MBSC") to several properties owned by Post. *See Post*, 167 Wn.2d at 304. In 1999, Tacoma officials began inspecting Post's properties and assigning each penalty points for violation of the MBSC. Different code violations were worth a different number of

points. Once a property totaled above 50 points for combined code violations, Tacoma classified the property as substandard. *Id.*

Tacoma delivered initial notices of violations to Post for each property classified as substandard or derelict. *Id.* As explained in the notices, Post had 30 days from each notice to negotiate a schedule for repairs or to appeal the underlying violation. *Id.* For some properties, Post responded and agreed to a schedule for repairs. Those properties were not fined by Tacoma. For other properties, Post failed to follow-through on the agreed-to schedule of repairs. *Id.*

For the properties where Post failed to respond to the initial notice or failed to follow through on a repair schedule, Tacoma imposed four mandatory fines pursuant to MBSC. *See Post*, 167 Wn.2d at 305. These fines escalated in monetary value, while reducing the time allowed for Post to correct the code violation before a subsequent fine was issued. Pursuant to the MBSC, Post could appeal the first fine, but none of the subsequent mandatory fines. *Id.*

After the four mandatory fines had been imposed, Tacoma next imposed discretionary daily fines. The MBSC included no rationale or criteria for when Tacoma would impose or not impose these subsequent

daily fines. Pursuant to the MBSC, Post could not appeal the subsequent daily fines. *Id.*

In effect, then, Tacoma made initial determinations that some of Post's properties were substandard and in violation of the MBSC. Once Post agreed to and began repairs, Tacoma would conduct further inspections of the property and make subsequent determinations if Post was maintaining his agreed-to repair schedule. If not, Tacoma would re-total the penalty point totals for code violations, and determine once again if the property remained above the 50-point threshold for combined code violations. This additional inspection and determination occurred at the discretion of Tacoma and was not appealable. Indeed, Tacoma intermittently imposed on Post non-appealable daily fines based on re-inspections over a 6-year duration, from 1999 to 2005. *See Post*, 167 Wn.2d at 306.

In reviewing these facts, the Court concluded:

> The MBSC violates Post's procedural due process rights. The sections of the MBSC purporting to authorize the unlimited and unreviewable issuance and enforcement of ***subsequent civil infractions and penalties*** without any system of procedural safeguards are unconstitutional on their face and as applied to Post.

Post, 167 Wn.2d at 315 (emphasis added). In holding that the MBSC violated the due process rights of Post, the Court focused on Tacoma's

imposition of subsequent civil infractions after the initial (and appealable) civil infraction. The Court provided an illustration to emphasize this point:

> A notable illustration is when the owner has made some repairs – as Post did with many of his properties – but the inspector finds the property (still) noncompliant. Owners such as Post may be heard to contend that such repairs have brought the property into compliance, without being allowed to relitigate previous violations.

Post, 167 Wn.2d at 314.

In determining a violation of Post's due process rights, the Court clearly relied heavily on the ability of Tacoma under the MBSC to make subsequent determinations as to code violations (i.e., subsequent inspections) and the inability of Post to challenge or appeal such subsequent determinations. Despite Mr. Kanany's arguments to the contrary, that concern is not present in the instant case.

Here, the City conducted an initial investigation and determined Mr. Kanany was in violation of BLMC 18.22.090(C)(1) for maintaining an illegal ADU in conjunction with a duplex or multiple-family dwelling unit. CP 270-74. First, the City attempted to secure a voluntary correction of the code violation pursuant to BMLC 14.130.060. *Id.* The City personally served the letter on Mr. Kanany on September 29, 2009, explaining the City's determination of an ADU violation and offering Mr. Kanany forty-five (45) days to voluntarily correct the ADU violation or to arrange for a

City inspection of the Property to confirm compliance. *Id.* Additionally, it explained the legal and financial repercussions if Mr. Kanany failed to voluntarily correct the code violation, including the issuance of a Notice of Civil Violation and the subsequent imposition of a $1,000 fine for each day of a continuing violation, pursuant to BLMC 14.130.030 & 14.130.070. *Id.* Mr. Kanany failed to respond, either to dispute the determination of a code violation or to arrange for an inspection of the Property to confirm voluntary compliance. *Id.*

After the forty-five (45) day grace period for voluntary correction passed without any contact by Mr. Kanany, the City issued a Notice of Civil Violation pursuant to BLMC 14.130.070. *Id.* The Notice of Civil Violation informed Mr. Kanany of the City's determination of an illegal ADU in violation of BLMC 18.22.090 and imposed a penalty of $1,000 fine for each day of a continuing violation, pursuant to BLMC 14.130.030. *Id.* The City included with the Notice of Civil Violation an explanation of Mr. Kanany's appeal rights pursuant to BLMC 14.130.080 and 14.120.020. *Id.* If made within fifteen (15) days of receipt of the Notice of Civil Violation, Mr. Kanany had the right to appeal the City's determination of a code violation as well as the City's imposition of $1,000 fine per day penalty. *Id.* Absent an appeal, the penalties would begin to run from the

date of the Notice of Civil Violation, which was personally served on Mr. Kanany on November 21, 2009. *Id.* And again, Mr. Kanany failed to respond to the Notice of Civil Violation and did not assert any of his appeal rights pursuant to BLMC 14.130.080 and 14.120.020. *Id.*

Accordingly, there is a crucial difference between the facts of this case and the *Post* case. In *Post*, the defendant was refused the opportunity to challenge or appeal subsequent determinations made by the municipality as to further non-compliance and code violations. The municipality inspected and re-inspected Post's properties several times over 6 years, and continued to impose intermittent fines based on the original code violation. Even after the defendant made additional repairs, there was no mechanism to appeal the municipality's subsequent determinations of a continued violation.

Here, the City has not made subsequent determinations about the property. Mr. Kanany had not been in any contact with the City until this litigation was filed, and thus no subsequent inspections have been conducted. No arrangements for repairs or corrective actions were discussed or agreed to by the parties. Unlike the MBSC, the BLMC allows for appeal of subsequent determinations of code violations. BLMC 14.130.080 states that one of the issues contestable in an appeal from a

notice of civil violation is the corrective action ordered. Applying this section of the BLMC to the illustrative scenario from *Post* – i.e., subsequent re-inspection of repairs made by individual in an attempt to correct the initial notice of civil violation – the individual would have 15 days to appeal such a subsequent determination.

The issue, here, is that Mr. Kanany has simply ignored the entire problem. He did not respond to the City's first attempt, voluntary cooperation. He did not respond to the City's next attempt, the Notice of Civil Violation. Mr. Kanany never contacted the City, and thus the City was never put in the position considered in *Post* – subsequent determinations of civil infractions.

Post is inapplicable to this case in light of the factual differences. Mr. Kanany's failure to take advantage of his due process rights is not a failure on the part of the City to afford Mr. Kanany his due process rights. Chapter 14 of the BLMC accounts for the due process issues raised in *Post*, and therefore Mr. Kanany cannot successfully claim a due process violation.

2. The BLMC complies with the requirements of chapter 7.80 RCW.

As a second issue, Mr. Kanany asserts that the City's civil violation enforcement system is unconstitutional because an appeal of a Notice of Civil Violation is initially conducted by a hearing examiner. Mr. Kanany

argues that because the authority of a hearing examiner in an administrative hearing is more limited than that of a municipal judge in district court, an individual is precluded from offering defenses based on constitutional or equity issues. *See* Appellant's Brief, pgs. 15-21. This is misinterpretation of the City's enforcement system.

Chapter 7.80 RCW presents an enforcement system for the imposition of civil infractions by localities. Pursuant to RCW 7.80.010(5), localities have the discretion to establish by ordinance their own enforcement systems for civil infractions.

Here, the City has established its own enforcement system, as articulated in chapter 14 of the BLMC. This enforcement system allows an individual to request a hearing before a hearing examiner as an initial challenge to a notice of civil violation (and the corresponding fines). *See* BLMC § 14.130.080(A). If an individual is not satisfied with the hearing examiner's decision, however, the individual can appeal that decision to district or superior court. *See* BLMC §14.120.020(G). Assuming, arguendo, that an individual is precluded from raising certain constitutional or equity defenses before the hearing examiner in a challenge to a notice of civil violation, those defenses can certainly be raised on subsequent appeal to state court.

Mr. Kanany's argument about the constitutionality of the City's civil infraction enforcement system ignores the second appeal step to state court. Mr. Kanany's claim that the system is somehow not "complete" as required by chapter 7.80 RCW focuses solely on the first appeal challenge to a hearing examiner. When viewed in total, an individual is not precluded by the City's enforcement system from offering any constitutional or equity defense. Again, in this matter, there is no claim that Mr. Kanany was denied an opportunity to present any type of defense to the City's determination of a civil violation. Instead, Mr. Kanany simply ignored the City's notice and chose not to present any defense at all.

B. Co-Owner of Property is not a Necessary Party under CR 19 in an Action to Collect Monies Owed.

Mr. Kanany argues that the trial court erred in ruling that the City did not need to join as a party Mr. Navid Kanani, co-owner of the Property. This argument is based on misunderstanding of the necessary party rule under CR 19 and a misreading of the City's municipal code.

Mr. Kanany's argument that Mr. Kanani is a necessary party under CR 19 incorrectly assumes that the City's municipal code requires all co-owners of a property to be served with a Notice of Civil Violation. Mr. Kanany cites to BLMC 14.130.020(B) to support this argument. *See* Appellant Brief, pg. 28. This section, however, does not articulate which

parties are required to be served notice of a code violation. Instead, it states as follows:

> 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. However, this shall not relieve or prevent enforcement against any other responsible person.

BLMC 14.130.020(B) (quoted in its entirety; Mr. Kanany quotes only the first sentence in his brief).

BLMC 14.130.020(B) simply states that a code violation on a property is *prima facie* evidence that the owner of the property is the violator. It allows the City to make the initial assumption that a code violation on a property is the legal responsibility of the owner of said property. The second sentence highlights, however, that the City is clearly free to enforce a code violation against "any other responsible person." There is absolutely no requirement that all owners or co-owners of a property must be issued a Notice of Civil Violation for a code violation on a specific property.

In this matter, the City determined Mr. Kanany to be the responsible party for the code violation. Mr. Kanany, on his own, submitted the permitting request to the City for the property. CP 48-51. The City issued to Mr. Kanany, on his own, the permit for the property

which explicitly noted that Bonney Lake Municipal Code did not allow for the space above the garage to be converted into living space. *Id.* The City determined Mr. Kanany, on his own, rented out the property and allowed occupancy of the space above the detached garage, in express violation of the permit issued by the City for the property and BLMC 18.22.090(C)(1). CP 324-327. Mr. Kanany failed to respond to the Notice of Civil Violation issued by the City for this violation, thereby rendering the City's determination of a code violation final and all fines collectible pursuant to BLMC 14.130.070.

Despite Mr. Kanany's protestations to the contrary, then, the underlying lawsuit in this appeal is a collections matter for monies owed by Mr. Kanany to the City. Accordingly, Mr. Kanani is an irrelevant party. Mr. Kanany cannot make Mr. Kanani a necessary party simply because he is a co-owner of a property with Mr. Kanany. There is no requirement under the City's municipal code that by default, all co-owners of a property must be issued notice for any code violation occurring on said property. The requirement under the municipal code is that the City must provide notice to the party it determines to be responsible for the code violation. *See* BLMC 14.130.070. The City did not determine Mr. Kanani to be a responsible party for the code violation.

Furthermore, Mr. Kanany's argument that Mr. Kanani is a necessary party because his property interests are at stake in this matter is legally untenable. *See* Appellant Brief, pgs. 27-28. If this Court upholds the trial court's monetary judgment against Mr. Kanany, the judgment will be a personal obligation owed by Mr. Kanany. The City may attempt to enforce that obligation through all legal means, including collections or a lien.[2] *See, e.g.*, BLMC 14.130.100. Simply because the City may attempt to enforce this monetary judgment against Mr. Kanany with a lien against property jointly owned by Mr. Kanany and Mr. Kanani, however, does not make the joint owner a necessary party to the underlying monetary judgment action. Joint ownership includes the inherent risk of debt obligations of the co-owner.

C. ADU Existed on the Property in Violation of the City's Zoning Code.

Next, Mr. Kanany makes a brief argument that "as a matter of fact and law," the area above the garage in the Property cannot qualify as an ADU under the City's municipal code. This argument ignores the procedural posture of this lawsuit.

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[2] In his brief, Mr. Kanany states that any monetary judgment will automatically become a lien on the Property: ". . . notwithstanding the fact that any judgment obtained by [the City] will become a lien against the [Property] . . . ." Appellant Brief, pg. 27.

When Mr. Kanany chose not to respond to the City's Notice of Civil Violation, the City's factual determination of a violation became final under the municipal code. *See* BLMC 14.130.080 and 14.120.020. Mr. Kanany cannot challenge that factual determination in this appeal. Moreover, as explained below, Mr. Kanany's argument as to whether or not an ADU existed on the Property fails to account for the definition of an ADU under the City's municipal code, defining an area as an ADU by both its provisions and by its use.

D. Equitable Estoppel is Inapplicable in this Matter.

Apart from his constitutional arguments, Mr. Kanany asserts that the City should be equitably estopped from collecting on the fines arising from Mr. Kanany's code violations. Mr. Kanany asserts that he operated under a "good faith belief" when he failed to respond to any of the notices sent by the City in 2009. See Appellant's Brief, pgs. 35-36.

"Equitable estoppel requires a party to prove by clear, cogent, and convincing evidence that a statement or act, inconsistent with a later claim, induced the party justifiably to rely on the statement to the party's detriment." *Wolfe v. Bennett PS & E, Inc.*, 95 Wn. App. 71, 80, 974 P.2d 355 (1999) (internal citations omitted). Equitable estoppel against the

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Pursuant to BLMC 14.130.100, a lien is one of several options for the City in pursuing

government is disfavored. *In re Martin*, 154 Wn.App. 252, 223 P.3d 1221 (2009); *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). "Estoppels must be certain to every intent, and are not to be taken as sustained by mere argument or doubtful inference." *Wolfe*, 95 Wn. App. at 80 (internal citations omitted).

Here, despite his assertion of a "good faith belief," Mr. Kanany cannot show the required elements of estoppel. Mr. Kanany alleges there was an "express agreement" with City officials in 2004, when Mr. Kanany first sought a permit to develop the Property and to build a duplex. The building permit for the Property (issued contemporaneously with the alleged discussion and agreement) explicitly stated that "per code, detached garage may not be converted to living space." CP 52.

As stated in BLMC 18.04.010, an ADU is defined by both its provisions and by its use: "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.**" (emphasis added).

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payment on a fines owed for a civil violation.

Mr. Kanany's subsequent interactions with the City regarding possible ADU violations at the Property in 2007 and 2008 specifically addressed both provisions and use of the space above the garage. CP 324-327. In his response letter in 2007, after receiving the initial Notice of Civil Violation in February 2007, Mr. Kanany noted not only whether or not the space had a "stove," but also commented that the space was being used by the tenant only as a "bedroom and rec. room." CP 217. In 2008, the City and Mr. Kanany again discussed whether or not the space above the garage contained the requisite provisions and use to be considered an ADU. This is confirmed in an internal communication between City staff, as submitted into evidence before the trial court by Mr. Kanany: "I spoke with [Mr. Kanany]. The space above the garage is included as part of rent for unit "B" of his duplex. A family member of that unit uses that space as a bedroom. There is no range/washer or dryer . . . . [I]t was determined that the following arrangement was not in violation." CP 219.

Despite Mr. Kanany's assertions as to what he believed or understood from the 2004 conversations with City officials, the official permit and the subsequent interactions with the City in 2007 and 2008 all speak to the definition of an ADU as including both the use of the space and the provisions included in the space. Mr. Kanany could not reasonably

expect that simply because he had not altered the provisions included in the space, the City could not find a violation of the ADU limitation. It was not reasonable or justifiable for Mr. Kanany to rely on just part of that ongoing conversation. Moreover, it was not reasonable or justifiable for Mr. Kanany to conclude that he did not need to respond to the letters and notices sent by the City in regards to the Notice of Civil Violation. In both of the cases in 2007 and 2008 where the City investigated allegations of an ADU violation, the situation was resolved by communication between Mr. Kanany and the City.

E. The City's Zoning Code is Consistent with the City's Comprehensive Plan, Washington's Growth Management Act, and the Washington Constitution.

Finally, Mr. Kanany attempts to persuade the Court that BLMC 18.22.090(C)(1) – the section of the BLMC under which the City determined that Mr. Kanany was maintaining an illegal ADU – somehow contradicts with another section of the City's code, BLMC 18.16.020(A). From this alleged conflict, the argument spins out further and claims BLMC 18.22.090(C)(1) violates the City's Comprehensive Plan, Washington's Growth Management Act, and the Washington Constitution. This entire argument, however, is predicated on a misinterpretation of the City's code.

Title 18 of the City's Municipal Code provides zoning regulations for the City. With respect to ADUs located in residential sections of the City, BLMC 18.22.090 imposes certain requirements and limitations. Of relevance to this matter, BLMC 18.22.090(C)(1) limits one accessory unit per legal building as a subordinate use in conjunction with a single-family residence and explicitly prohibits any ADU in conjunction with a duplex or multiple-family dwelling unit.

Mr. Kanany argues this limitation is in "direct conflict" with another section of the zoning code, BLMC 18.16.020(A). That section of the code addresses land uses permitted by the City in R-2 "medium density" residential districts, the type of residential district in which the Mr. Kanany's property is located. BLMC 18.16.020(A) includes ADUs as one of four residential uses permitted in R-2 districts.

Mr. Kanany highlights the heading of BLMC 18.16.020(A): "Uses permitted outright." *See* Appellant's Brief, pg. 36. From there, Mr. Kanany argues that because an ADU is a permitted use in R-2 districts, and because the heading of that section of the code uses the word "outright," the City cannot limit or restrict the permitted uses in any manner.

The section's heading, however, is not part of the City's zoning code and has no legal effect: "Title, chapter and section headings contained in

this code shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any title, chapter or section of this code." BLMC 1.01.060. Mr. Kanany's argument improperly relies on the wording of the section heading of BLMC 18.16.020(A), which cannot and should not be used to interpret the underlying section itself.

Moreover, returning to the specific language of BLMC 18.16.020(A), it is unequivocal that the City intended to limit the permitted uses within R-2 districts. In his argument, Mr. Kanany fails to quote or reference the first sentence of BLMC 18.16.020:

> The following uses are permitted in an R-2 zone, subject to the off-street parking requirements, bulk regulations and other provisions and exceptions set forth in this code . . . .

BLMC 18.16.020, then, explicitly states that all permitted uses for R-2 residential districts – including ADUs – are subject to limitations based on other provisions and exceptions in the City's code. BLMC 18.22.090(C)(1) provides precisely such a limitation. Mr. Kanany cannot argue his way around that limitation, ignoring the language of the City's code and looking only to the wording of a section's heading.

Likewise, Mr. Kanany fails in his expanded argument that the limitations on ADUs articulated in BLMC 18.22.090 violate the City's Comprehensive Plan, the Growth Management Plan, and the Washington

Constitution. Mr. Kanany does not provide a single citation to any language in those documents that restricts the City's authority or ability to regulate the use of ADUs within the City. The sections quoted by the Mr. Kanany state that it is the City's intent to provide affordable housing and that ADUs will be allowed in residential districts to assist in that endeavor. These quoted sections, however, do not state that the City is unable to impose reasonable limitations on the use of ADUs. Consistent with the stated intentions of the Comprehensive Plan, the City does permit ADUs in its residential districts. Like all permitted uses, of course, ADUs are regulated by the City as to how and where they can be constructed in these residential districts.

Ultimately, Mr. Kanany has not provided any legal authority to support a finding that BLMC 18.22.090(C)(1) is impermissible under the City's code, the City's Comprehensive Plan, or state law.

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court affirm the trial court's decision to deny Mr. Kanany's summary judgment and enter judgment against him on behalf of the City for the total amount of fines owed in connection to the Notice of Civil Violation.

RESPECTFULLY SUBMITTED this 5th day of October, 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent via *Email/U.S. Mail*, the Brief of Respondent to the following:

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Dated this 5th **day of October, 2012.**

Brittany J. Tornquist

By: Brittany Tornquist

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