

Court of Appeals No. 46340-7-II
Pierce County Superior Court No. 13-2-15880-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT KANANY,
APPELLANT,

v.

CITY OF BONNEY LAKE, a municipal corporation; STEPHEN K.
CAUSSEAU, JR., as Bonney Lake Hearing Examiner; and JOHN P.
VODOPICH, as City of Bonney Lake Community Development
Director/Building Official,

RESPONDENTS.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Robert Kanany (Kanany) owns several parcels of land in the City of Bonney Lake zoned R-2 and on which he has constructed duplex dwelling units each with a detached garage designed and constructed with a second floor suitable for use as a mother-in-law apartment, or in Bonney Lake terminology an Accessory Dwelling Unit (ADU). Such use is consistent with the Bonney Lake Comprehensive Plan and State Growth Management Act goals and policies to increase density and provide affordable housing in urban areas. Such use was also consistent with one provision of the Bonney Lake Municipal Code (BLMC) in effect at the time Kanany applied for and constructed his duplex and garage units, but arguably prohibited under a separate provision of the BLMC. Such prohibition is, however, dependent on the proper interpretation and application of the phrase “*in conjunction with*” in the BLMC.

Kanany applied for a permit to use the area over the detached garages on his duplex properties as an ADU, but was instructed by John P. Vodopich to first request a Code Interpretation. Kanany did as instructed and both Bonney Lake and its Hearing Examiner issued a Code Interpretation¹ denying placement of an ADU on R-2 zoned property upon which was located a

¹ Bonney Lake and its Hearing Examiner construed the phrase “*in conjunction with*” as meaning that no ADU can be located on the same property upon which is located a duplex, regardless of whether the ADU is housed in the same unit as the main dwelling or in a separate detached unit. This same interpretation would, however, allow an ADU to be placed on R-2 zoned property upon which is located either a single family residence (which is not a permitted use in the R-2 zone under the current BLMC) or a Townhouse (a specially defined term under the BLMC consisting of 3 or more connected dwelling units).

duplex.² Pursuant to the Land Use Petition Act (LUPA, RCW 36.70C), Kanany appealed the Hearing Examiner's decisions³ to the Pierce County Superior Court which affirmed the Hearing Examiner's decision. *See* CP at 1 - 3. Kanany's appeal to this Court followed. *See* CP at 271 - 74.

II. ASSIGNMENTS OF ERROR

Kanany filed his appeal raising issue with errors made by the Hearing Examiner in his Findings, Conclusions and Decisions; and by the trial court in its affirmance of the Hearing Examiner's Decisions.

A. ASSIGNMENT OF ERRORS TO HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISIONS

In this LUPA judicial review and pursuant to and in accordance with the standards set forth in RCW 36.70C.130(1)(a) - (f) as further discussed herein, Kanany challenges each of the following Findings, Conclusions and Decision from the Hearing Examiner's Corrected Report And Decision (November 27, 2013) (complete copy at CP at 242 - 250) and the Hearing Examiner's Request For Reconsideration Report And Decision (December 12, 2013) (complete copy at CP at 256 - 258):

A. Challenged Findings of Fact from Corrected Report:

Numbers 3 (CP at 244 - 45); 4 (CP at 245); 8 (CP at 246); 9 (CP at

² *See* Clerk's Papers (CP) at 26 - 28 for a copy of the City of Bonney Lake Code Interpretation, issued by John P. Vodopich.

³ *See* CP at 241 - 252 for a copy of the Hearing Examiner's Corrected Report and Decision on Kanany's appeal, issued by Stephen K. Causseaux, Jr. *See* CP at 255 - 259 for a copy of the Hearing Examiner's denial of Kanany's request for Reconsideration.

246 - 47); and 11 (CP 247 - 48).

B. Challenged Conclusions of Law from Corrected Report:

Numbers 1 (CP at 248); 2 (CP at 248); 3 (CP at 248 - 49); 4 (CP at 249); 5 (CP at 249); and 6 (CP 249 - 50).

C. Challenged Decision from Corrected Report:

Decision (CP at 250).

D. Challenged Additional Findings of Fact from Reconsideration Report:

Numbers 1R (CP at 256 - 57); 2R (CP at 257); and 3R (CP at 257).

E. Challenged Additional Decision from Reconsideration Report:

Decision (CP at 258).

B. TRIAL COURT ERRORS

1. The trial court erred by issuing its Order Affirming Hearing Examiner's Decision dated May 9, 2014. *See* CP at 269 - 70.

C. ISSUES RELATING TO ALL ASSIGNMENTS OF ERROR

1. Whether the lack of procedural rules adopted by the City Council governing hearings conducted by the Bonney Lake Hearing Examiner violates constitutional due process and renders the hearing conducted in this matter void as a matter of law?
2. Whether the Hearing Examiner's omission from his decisions as to their consistency with the Bonney Lake Comprehensive Plan, as mandated by statute, renders invalid and void such decisions as a matter of law?
3. Whether the Hearing Examiner's interpretation of the phrase "*in conjunction with*" in the Bonney Lake Municipal Code so as to prohibit Accessory Dwelling Units only on that R-2 zoned property upon which is located a duplex is constitutional and valid in light of the City's

Comprehensive Plan and other contemporaneously adopted land use documents and ordinances?

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Kanany originally applied to Bonney Lake in 2002 and 2004 for building permits to construct duplex units on his R-2 zoned property located at 7513 191st Avenue East and 19210 75th Street East, each with a detached structure consisting of a garage with an area overhead designed, constructed, and intended for use as a mother-in-law type of residence -- i.e., an Accessory Dwelling Unit (ADU).⁴ At the time the City issued Kanany building permits for his projects the City had a Comprehensive Plan prepared in 1996⁵ pursuant to and in accordance with the State Growth Management Act (GMA), Ch. 36.70A RCW, and a zoning ordinance adopted in 1997 intended to implement the purposes, goals, and objectives set forth in that Plan.⁶ By the rules of vesting,⁷ these official land use control documents form the context within

⁴ See CP at 245, ¶ 6 (Finding of Fact). Kanany's intent always was to use the area above the garage as an ADU, as an outright permitted use under the zoning code in effect at the time of application and construction. See CP at 199 - 205 (Kanany's testimony). The requested Code Interpretation is intended to confirm such permitted use. See CP at 29 - 30.

⁵ Ordinance No. 721 (June 6, 1996), with attached *City of Bonney Lake Comprehensive Plan* (revised May 28, 1996). See RCW 36.70A.020(4); -.210(3)(c). See CP at 108 - 116.

⁶ Ordinance No. 747 (November 5, 1997). See BLMC § 18.22.090(A). See CP at 99 - 106.

⁷ RCW 19.27.095(1) (an application for a building permit shall be considered under the zoning and other land use control ordinances in effect on the date of the application). See, e.g., *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251-53, 218 P.3d 180 (2009); *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986). Land use control ordinances generally include those ordinances that exert a restraining or directing influence over land use, including comprehensive plans and zoning codes. *New* (continued...)

which the zoning codes regarding ADUs on duplex property in the R-2 zone must legally be interpreted.⁸

In order to resolve a dispute over the use of the area over the detached garages on his duplex property as an ADU, Kanany submitted to the City a request for Code Interpretation. *See* CP at 29 - 30. The Code Interpretation requested by Kanany asked for a formal interpretation and application of the BLMC § 18.22.090(C)(1) phrase “in conjunction with” to a detached structure suitable for residential purposes located on a duplex property zoned R-2. Following a mutual hold put on that application, in August 2013 Kanany requested that the City proceed to issue the Code Interpretation as requested. The City of Bonney Lake, by and through John P. Vodopich, its Director of Community Development and Building Official, issued its Code Interpretation on September 20, 2013. *See* CP at 26 - 28. On October 4, 2013, Kanany filed an appeal of the Code Interpretation to the Bonney Lake Hearing Examiner, Stephen K. Causseaux, Jr. *See* CP at 32 - 43. Following a hearing conducted *sans* Rules of Procedure, *see* CP at 206 - 07, the Bonney Lake Hearing Examiner issued a Corrected Report And Decision on Novem-

⁷(...continued)

Castle Investments v. City of LaCenter, 98 Wn. App. 224, 229, 989 P.2d 569 (1999).

⁸ 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]”).

ber 27, 2013. *See* CP at 241 - 252. Following Kanany's submittal of a Request for Reconsideration, *see* CP at 254, the Hearing Examiner denied such request and issued a Request For Reconsideration Report And Decision on December 12, 2013. *See* CP at 255 - 259.

B. PROCEDURAL BACKGROUND

Following the Hearing Examiner's denial of Kanany's motion for reconsideration, Kanany timely commenced an action in the Pierce County Superior Court for judicial review of the Hearing Examiner's decisions under and pursuant to the Land Use Petition Act (LUPA), Chapter 36.70C RCW. After briefing and hearing with oral arguments, the trial court issued an Order affirming the Hearing Examiner's decision. Kanany then timely appealed the trial court's decision to this Court. *See* CP at 271 - 74.

IV. STANDARD OF REVIEW

The Court of Appeals finds itself in the exact position as was the trial court in considering *de novo* an appeal of a Hearing Examiner's decision under LUPA.⁹ Under LUPA, the Court reviews the Certified Record¹⁰ and may grant relief where Kanany has established that at least one of the six standards set forth below has been met:

⁹ *Satsop Valley Homeowners Association v. Northwest Rock, Inc.*, 126 Wn. App. 536, 541, 108 P.3d 1247 (2005); *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999).

¹⁰ The Court reviews the Hearing Examiner's decision on the basis of the administrative record that was before the Examiner. RCW 36.70C.130(1); *Weyerhauser v. Pierce County*, 95 Wn. App. 883, 889, 976 P.2d 1279 (1999); *King County v. State Boundary Review Board*, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993).

1. The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;¹¹
2. The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;¹²
3. The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;¹³
4. The land use decision is a clearly erroneous application of the law to the facts;¹⁴
5. The land use decision is outside the authority or jurisdiction of the body or officer making the decision;¹⁵ or
6. The land use decision violates the constitutional rights of the party

¹¹ RCW 36.70C.130(1)(a). Challenges to unlawful procedure or failure to follow a prescribed process are questions of law, reviewed by the Court *de novo*. *Moss v. City of Bellingham*, 109 Wn. App. 6, 26-27, 31 P.3d 703 (2001), *review denied*, 146 Wn.2d 1017 (2002).

¹² RCW 36.70C.130(1)(b). A City's interpretation of its code presents a question of law and is reviewed by the Court *de novo*, but deference is nevertheless given to determinations necessarily drawing on the local jurisdiction's expertise, if and where applicable. *Abbey Road Group*, 167 Wn.2d at 250; *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). No deference is given, however, where the ordinance is unambiguous and a pure question of law is presented in the interpretation. *Hoberg v. City of Bellevue*, 76 Wn. App. 357, 359-60, 884 P.2d 1339 (1994).

¹³ RCW 36.70C.130(1)(c). The Court must find substantial evidence in sufficient quantity to persuade a fair-minded person of the truth of the finding or statement asserted or of the correctness of the order. *City of Redmond*, 136 Wn.2d at 46; *Abbey Road Group*, 167 Wn.2d at 250.

¹⁴ RCW 36.70C.130(1)(d). The clearly erroneous test is whether the Court is left with the definite and firm conviction that a mistake has been committed, viewing the evidence in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997); *Davidson v. Kitsap County*, 86 Wn. App. 673, 680, 937 P.2d 1309 (1997).

¹⁵ RCW 36.70C.130(1)(e). Authority and jurisdictional claims are issues of law reviewed *de novo*. *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 434, 219 P.3d 675 (2009); *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768, 193 P.3d 1077 (2008).

seeking relief.¹⁶

The Court should also note that for it to grant relief under LUPA, “it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct.” RCW 36.70C.130(2).

Moreover, and particularly applicable here, in reviewing municipal ordinances, the Court applies the same rules of construction that are applied to State statutes.¹⁷ The primary duty of the Court in interpreting any statute or ordinance is to discern and implement the legislative intent.¹⁸ In arriving at the intent of the legislative body, the court's first resort is to the context and subject matter of the legislation, because the intention of the lawmaker is to be determined, if possible, from what the legislative body has said. *Hatzenbuhler v. Harrison*, 49 Wn.2d 691, 306 P.2d 745 (1957). Words used in a statute are to be given their usual and ordinary meaning absent statutory definition.¹⁹ All provisions of an act must be considered in their relation to each other and, if possible, harmonized to ensure proper construction for

¹⁶ RCW 36.70C.130(1)(f). Constitutional violations are issues of law reviewed *de novo*. *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999).

¹⁷ *Seattle v. Green*, 51 Wn.2d 871, 322 P.2d 842 (1958); *City of Gig Harbor v. North Pacific Design, Inc.*, 149 Wn. App. 159, 167, 201 P.3d 1096, *review denied*, 166 Wn.2d 1037 (2009).

¹⁸ *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001); *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992); *Department of Transportation v. State Employees' Insurance Board*, 97 Wn.2d 454, 645 P.2d 1076 (1982); *Amburn v. Daly*, 81 Wn.2d 241, 501 P.2d 178 (1972); *Williams v. Pierce County*, 13 Wn. App. 755, 537 P.2d 856 (1975).

¹⁹ *Garrison v. State Nursing Board*, 87 Wn.2d 195, 550 P.2d 7 (1976); *John H. Sellen Construction Company v. Department of Revenue*, 87 Wn.2d 878, 882-83, 558 P.2d 1342 (1976).

each provision.²⁰ *Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 645 P.2d 697 (1982). The entire sequence of ordinances enacted by the same legislative authority relating to a given subject must be considered in determining legislative purpose. *In re Marriage of Little*, 96 Wn.2d 183, 634 P.2d 498 (1981).

“The basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit.”²¹ Specifically with respect to zoning ordinances, government restrictions imposed on the use of private property under its police powers must bear a substantial relation to the public health, safety, and welfare to avoid an affront to constitutionally protected rights.

Zoning measures must find their justification in the police power exerted in the interest of the public. *Euclid v. Ambler Realty Co.*, supra, 387 [272 U.S. 365]. ‘The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.’ *Nectow v. Cambridge*, supra, p. 188 [277 U.S. 183]. Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.

Washington ex rel. Seattle Title Trust Company v. Roberge, 278 U.S. 116,

²⁰ 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).

²¹ *Norco Construction, Inc. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982).

120-21, 73 L. Ed. 210, 49 S. Ct. 50 (1928).²² Accordingly, zoning ordinances cannot be administratively interpreted to prohibit lawful uses contrary to legislative intent.

Such [zoning] ordinances are in derogation of the common law right to so use private property as to realize the highest utility, and while they should be liberally construed to accomplish their plain purpose and intent, they should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.

Hauser v. Arness, 44 Wn.2d 358, 370, 267 P.2d 691 (1954).²³ The ultimate objective is to avoid strained, unlikely, or unrealistic consequences from a particular interpretation. *Muckleshoot Indian Tribe v. Department of Ecology*, 112 Wn. App. 712, 721, 50 P.3d 668 (2002).

V. ARGUMENT AND DISCUSSION

Based on the Certified Record and relevant principles of law applicable to Code Interpretations, the Hearing Examiner's decisions denying Kanany the right to use the area over the detached garages on his duplex property in the R-2 zone cannot stand, as such decisions (1) are based on a hearing that was grounded on fatal procedural defects; (2) are grounded on clearly

²² Consistent with this rule of construction is the general rule that because zoning ordinances are in derogation of the right of private ownership of property, they must be strictly construed in favor of the property owner. *City of West Monroe v. Ouachita Association for Retarded Children, Inc.*, 402 So.2d 259 (La.App. 1981). *Accord, Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978) (tax ordinance must be construed most strongly against the taxing authority and in favor of the taxpayer).

²³ "The regulation of land use must proceed under an express written code and not be based on *ad hoc* unwritten rules so vague that a person of common intelligence must guess at the law's meaning and application." *City of Seattle v. Crispin*, 149 Wn.2d 896, 905, 71 P.3d 208 (2003).

erroneous interpretations and applications of the law; (3) are not supported by substantial competent evidence in the record; and (4) violate the constitutional rights of Kanany and is a taking of private property without just compensation.

A. Because The City Of Bonney Lake Has Not Adopted Rules Of Procedure For Hearing Examiner Hearings As Mandated By State Law, And Because Kanany Repeatedly Asked For Such Rules Of Procedure Both Prior To And At The Hearing And Was Denied Each Time As Such Rules Do Not Exist, Kanany's Due Process Right To A Fundamentally Fair Hearing Based On Known Standards Was Denied And The Hearing Examiner's Hearing Was Constitutionally Deficient And Fatally Defective

The Hearing Examiner system for municipalities, including the City of Bonney Lake as a Code City, BLMC § 1.08.010, was created and established by the State Legislature under and pursuant to RCW 35A.63.170(1).²⁴ A fundamental due process requirement for such municipal Hearing Examiner system mandated by the Legislature is that “the [local] legislative body *shall* prescribe procedures to be followed by a hearing examiner.” RCW 35A.63.170 (1); RCW 35.63.130(1); RCW 58.17.330(1) (emphasis added).

Notwithstanding this clear legislative mandate, the City of Bonney Lake has not adopted any Rules of Procedure for its Hearing Examiner hearings. This issue was brought up repeatedly both pre-hearing and during the hearing, as Kanany was at a loss to have in hand time frames and procedural

²⁴ Although the City cites RCW 35.63.130 and RCW 58.17.330 as the relevant enabling statutes for its Hearing Examiner system, BLMC § 2.18.010, the relevant requirements are identical to RCW 35A.63.170.

protocol. *See* CP at 206, and at 207, lines 21 - 26.²⁵ Kanany requested a copy of such Rules prior to the hearing in order to determine his rights and responsibilities regarding continuances, disclosure of evidence, witness lists and examination, etc. *See* CP 133 - 134. No Rules of Procedure were ever produced by the City or the Hearing Examiner, Kanany's request for continuance grounded on unavailability of witnesses was denied, and no answers were ever provided as to what Rules in fact applied. All that Kanany could garner from the Hearing Examiner when once again he raised the issue of the lack of Rules of Procedure, was a response that "pretty much we are handling this hearing the same way as we do every hearing." *See* CP at 207, lines 25 - 26. Under this *ad hoc* approach to procedure, the Hearing Examiner proceeded to query the City's legal counsel to elicit answers to leading questions on matters failed to be addressed in counsel's presentation (*e.g.*, *see* CP at 194 - 97); cut off Kanany's witnesses on purported grounds of irrelevance (*e.g.*, *see* CP 209 - 14; CP at 217 - 18); and yet allowed the City's counsel, unsworn and not subject to cross-examination, to venture forth in his presentation of materials that were irrelevant and immaterial, and prejudicial to Kanany, personally (*e.g.*, *see* CP 219, lines 14 - 19). And

²⁵ Compare and contrast the City of Bonney Lake's omission to other local jurisdictions which have formally adopted and published Hearing Examiner Rules of Procedure, including *inter alia* City of Seattle, King County, City of Bellevue, Whatcom County, Kitsap County, and Island County. In fact, the Municipal Research and Services Center of Washington (MRSC) has an entire Internet webpage devoted to the Hearing Examiner system, including several examples of Rules of Procedure, at www.mrsc.org/subjects/planning/hearex.aspx#Rules. Model Rules of Procedure are thus readily available and there is absolutely no excuse for the City of Bonney Lake not to have formally adopted and published such Rules for its Hearing Examiner system.

again, Kanany's objection to the denial of a continuance based on witness unavailability fell on deaf ears; witnesses that, *inter alia*, would have enlightened the Hearing Examiner as to the applicability of allowing ADUs with duplex units in order to meet the City's commitments under State law and its own Comprehensive Plan to provide affordable housing in all zones, not just associated with single family residences (*e.g.*, *see* CP at 206 - 207).

Our State Legislature has unequivocally determined and mandated what minimum process is due those members of the public who have administrative land use decisions directly and adversely affecting their valuable property rights and interests appealed to a municipal-appointed and employed Hearing Examiner (*see* BLMC §§ 2.18.020 (appointment by mayor), -.040 (compensation)) for, what should and must be, a fair and impartial determination and resolution. ***Substantively***, the Legislature has mandated that:

Each final decision of a hearing examiner **shall** be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions **shall** also set forth the manner in which the decision would *carry out and conform to the city's comprehensive plan* and the city's development regulations.

RCW 35A.63.170(3) (emphasis added). *See also* RCW 35.63.130(3) (identical except for inclusion of additional reference to county's comprehensive plan). And as previously noted, ***procedurally*** the Legislature has mandated that "the [local] legislative body **shall** prescribe procedures to be followed by a hearing examiner." RCW 35A.63.170(1) (emphasis added).

See also RCW 35.63.130(1); RCW 58.17.330(1) (identical mandate).

The foregoing substantive and procedural requirements set forth by the Legislature are essential to provide and meet minimum due process and, moreover, these requirements are mandatory and impose an absolute, non-discretionary duty on each local government body electing to have a Hearing Examiner system as its land use appellate tribunal.

The word “shall” means the requirement is mandatory.

State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). It is obvious that uniform, standard, published procedural rules are an essential element of due process to ensure and safeguard a citizen’s rights and property protected under and pursuant to U.S. Const. amend. XIV and Wash. Const. art. I, § 3. The absence of such procedural rules is fatal to the administrative decision-making process and undermines the due process requirement of a fair and impartial hearing.

In the absence of statutorily mandated procedures, courts must often set the minimum procedural requirements for informal adjudications. The Court borrows the term “informal adjudications” from Professor Paul R. Verkuil to signify those “administrative decisions that are not governed by statutory procedures but which nevertheless affect an individual’s rights, obligations, or opportunities.” . . . In so doing, Courts are not so naive or presumptuous as to believe that procedures alone will ensure rational decisions. The court’s role is not to require correct or rational decisions, . . . but “to preserve the integrity of the decision-making process.” . . . The guiding light, albeit a dim one at times, for discerning the procedural adequacy of informal adjudication is the Due Process Clause Due process is called into play in the instant case by the degree of interference with plaintiff’s property interests, specifically their right to the use and enjoyment of their property. . . . “Due process means that administrators must do what they can to structure and confine their discretionary powers through

safeguards, standards, principles, and rules.” . . . This principle employs no balancing approach but simply holds that due process requires some standards, both substantive and procedural, to control agency discretion. . . . Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. . . . [T]he use of personal unwritten standards [is] violative of due process. . . . [Legislatively mandated promulgation of rules of procedure] provides . . . that no person may be adversely affected by administrative action taken pursuant to unpublished procedures . . . [or] informal procedures [developed] on an *ad hoc* basis as the matter [goes] along. . . . The timely notice of rules of procedure . . . contemplates a reasonably complete code of procedures set out in advance by which action can be guided and strategies planned.

Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 852-56 (E.D. Va. 1980). See also *State of Michigan v. Bayshore Associates, Inc.*, 533 N.W.2d 593 (Mich. App. 1995) (the lack of properly promulgated procedural rules does not provide due process); *State v. Klemmer*, 566 A.2d 836 (N.J. Super. 1989) (procedural rules that are nonexistent and legally unavailable to those persons required to abide by them are more offensive to constitutional due process than enactments which are only vague). The fundamental component of administrative fairness – adequate prior notice of what is expected of and from parties and their rights and responsibilities thereunder – applies to procedural as well as substantive standards that must be set pursuant to legislative mandate:

[The principle underlying the promulgation of rules of procedure is that those subject to them] know in advance all the rules of the game, so to speak, and may act with reasonable assurance.

Boller Beverages, Inc. v. Davis, 183 A.2d 64, 71 (N.J. 1962). It is very clear that Washington courts have long-adhered to the foregoing fundamental legal

principles underlying the necessity for a variety of decision-making tribunals to have known, published standard Rules of Procedure so that their hearings may be held to satisfy minimum due process requirements.

A fundamental rule in arbitration of disputes, however, is that the duty of arbitrators is to make a fair and impartial award. An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute and difference. . . . Parties, independent of statute, have a right to be heard and opportunity to present evidence as to all matters submitted. . . . Unless obviated by statute, agreement or waiver, the parties to an arbitration are entitled to reasonable notice of the time and place of hearings and have an absolute right to be heard and to present evidence before the board. . . . While the law favors and encourages settlement of controversies by arbitration and arbiters are not expected or required to always follow the strict and technical rules of law, they still must proceed with due regard to the rights of the parties. . . . In the present case, the Board failed to establish "rules and procedures" for submission of the dispute to the Board for ruling. . . . This failure violated the Board's duty under the agreement to establish "rules and procedures" and its common-law obligations as well. Its subsequent actions were a nullity.

Tombs v. Northwest Airlines, Inc., 83 Wn.2d 157, 161-62, 516 P.2d 1028 (1973).

Here, it is undisputed that the City of Bonney Lake has failed to comply with the statutorily mandated adoption of Rules of Procedure governing the hearings conducted by and before its Hearing Examiner. Having no such Rules available to him even though specifically requested, Kanany was without any procedural standards to uniformly guide and fairly regulate/control the conduct of both pre-hearing procedures (*e.g.*, discovery, exchange of witnesses and evidence, briefing schedules, continuances) and

the hearing itself (*e.g.*, order of presentation of witnesses/evidence, rules of evidence/hearsay, examination and cross-examination of witnesses, right of Hearing Examiner to pose questions), as well as post-hearing procedures (*e.g.*, reconsideration). All procedures are thus subjective *ad hoc* creations by the Hearing Examiner made up as each particular case progresses, a clear violation of due process.²⁶ *Harnett v. Board of Zoning*, 350 F. Supp. 1159 (D.V.I. 1972).

The abject lack of adopted procedural rules undermined the fundamental fairness of the proceedings directly affecting Kanany's constitutionally protected property rights and interests. In light of the admitted fact that Bonney Lake has no Rules of Procedure governing hearings conducted by the Hearing Examiner, in clear violation of the mandate of RCW 35A.63.170(1), Bonney Lake and the Hearing Examiner engaged in unlawful procedures and failed to follow prescribed requirements set forth in statute, thereby resulting in legally erroneous, arbitrary and capricious acts and conduct in a quasi-judicial proceeding. RCW 36.70C.130(1)(a); RCW 36.70C.130(1)(e). Based on this clear constitutional violation alone, RCW 36.70C.130(1)(f), the Court

²⁶ Instances of such violations include, *inter alia*, (a) although Kanany expressly requested a continuance both prior to the commencement of the hearing and at the hearing itself grounded on witness unavailability and need for additional time to review and respond to exhibits and briefs, there were no rules to guide the presentment and consideration of continuances; (b) objections could have been interposed during the hearing to various witness statements and/or evidence, but Kanany had no evidentiary rules upon which such objections could be made; (c) the City was allowed to present uninterrupted its testimony and evidence, including an unwarranted and prejudicial attack on the character of Kanany and fielding leading questions from the Hearing Examiner, whereas Kanany's witnesses were cut off by the Hearing Examiner and not allowed to complete their oral testimony; and (d) no rules governed reconsideration of the initial Hearing Examiner's Decision, and thus the content, time frame, and rules governing any response from the City were unavailable.

should reverse the Hearing Examiner's decisions and remand this matter to the City with instructions to proceed immediately with the proposal and proper adoption of Rules of Procedure for the conduct of hearings conducted by its Hearing Examiner. Once such rules are in place, published and made available to Kanany and all other citizens of the City of Bonney Lake, a new hearing on Kanany's appeal of the Code Interpretation may be noticed and conducted, with a proper and protected presentation of evidence and witnesses made before a different Hearing Examiner, to ensure a fundamentally fair and impartial hearing and decision.

B. Contrary To The Statutorily Mandated Requirement That The Hearing Examiner's Decision Shall Set Forth The Manner In Which The Decision Would Carry Out And Conform To The City's Comprehensive Plan, The Hearing Examiner Expressly Omitted From His Decisions Any Analysis Of Such Required Conformity With Affordable Housing Plan Components

The Legislature mandated that "each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision[; and that] such findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the city's comprehensive plan and the city's development regulations." RCW 35A.63.170(3). *See also* RCW 35.63.130(3) (identical except also includes additional reference to the county's comprehensive plan).

In direct contravention and disregard of this statutory mandate, the Hearing Examiner in his decisions on Kanany's appeal of the City's Code

Interpretation specifically and expressly declined to allow relevant testimony from an expert witness on affordable housing, CP at 217 - 19 (Connie Brown, Executive Director of the Tacoma-Pierce County Affordable Housing Consortium), and further declined and failed to make any finding and conclusion that his decision would carry out and conform to the City's Comprehensive Plan, particularly with respect to the provision of affordable housing under and pursuant to the applicable and relevant Comprehensive Plans and Development Regulations that Kanany, his witnesses, and his evidence competently and substantially supported.²⁷ See CP at 247 - 48, Findings of Fact ¶¶ 10 and 11; CP at 249, Conclusions of Law ¶ 5; CP at 256 - 57, Additional Findings of Fact ¶ 1R. Although expressly declined to be addressed by the Hearing Examiner, in clear violation of his statutory duties under and pursuant to RCW 35A.63.170(3), Kanany's interpretation of "in conjunction with" in BLMC § 18.22.090(C)(1) as allowing ADUs in detached structures on duplex property in the R-2 zone fully complies with and conforms to the requirements for affordable housing set forth in the City's Comprehensive Plans and Development Regulations applicable and relevant at the time Kanany applied for and obtained his building permits, as herein-below clearly shown.

²⁷ See CP at 90 - 156 (witness statements and evidence supporting Kanany's interpretation as supporting affordable housing and conforming with the City's Comprehensive Plans). The Hearing Examiner decisions are thus clearly erroneous, an error of law, and unsupported by competent substantial evidence.

C. The City's and Hearing Examiner's Code Interpretation Of The Phrase "In Conjunction With" Is Inconsistent With And Is Contrary To The Clear And Unambiguous Objectives, Goals And Policies Set Forth In Contemporaneously Adopted Ordinances And Comprehensive Plans Regarding The Provision Of Affordable Housing In All Zoning Districts Through The Use Of Accessory Dwelling Units

The zoning code enacted by Ordinance No. 747 in 1997 adopted two provisions addressing ADUs in the R-2 zone. The first provision was BLMC § 18.16.020(A) which set forth all those **"Uses permitted outright . . . in an R-2 zone"** and expressly permitted residential uses including **"Duplexes (two-family residences); [and] Accessory dwelling units."** See CP at 101 - 102. (ADU was originally defined in BLMC § 18.04.021. See CP at 101.) The second provision enacted also by Ordinance No. 747 in 1997 is the section for which the Code Interpretation was requested and given:

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.***

See CP at 105 (BLMC § 18.22.090(C)(1) (emphasis added)).²⁸

At first blush, there appears to be a direct conflict between these two concurrently-enacted provisions of the BLMC; a conflict that must be reconciled and harmonized for failure to do so would allow the exception in

²⁸ 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 applications in 2002 and 2004.

18.22.090(C)(1) to swallow the general rule set forth in 18.16.020(A),²⁹ thereby creating a direct and substantial adverse impact on Kanany's constitutionally-protected individual and property rights.

[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).³⁰

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

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.

See CP at 99 (Ordinance No. 747, at p. 1). 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.

²⁹ 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).

³⁰ 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).

See CP at 115 - 16 (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)).³¹ See also CP at 103 (BLMC § 18.22.090(A)).

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 ADUs in R-2 zones unrestricted with duplex units. See CP at 126 - 27 (Ordinance No. 1011 (effective February 3, 2004), with attached *Bonney Lake Comprehensive Plan, Housing Element* at p. 5-4 (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)).³² See also Countywide Planning Policies for Pierce County, Washington, Part III (August 27, 2012); BLMC § 18.22.090 (A)(2) - (4).

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 permitted ADUs 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

³¹ 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].” See CP at 113 (Ordinance No. 721, *City of Bonney Lake Comprehensive Plan, “How to Use the Comprehensive Plan”*).

³² See CP at 118 - 127.

intent and would necessarily result in a constitutional dilemma unless the exception was properly construed and reasonably limited in its application. Saving the exception from resulting in unlikely or unrealistic consequences and constitutional infirmity lies in the proper interpretation and application of the phrase “*in conjunction with*”.

D. Kanany’s Interpretation Of The Phrase “In Conjunction With” Is Consistent With The History Of The Adoption Of This Provision And With The Clear And Unequivocal Intent Of Bonney Lake To Provide For Affordable Housing In All Zoning Districts Through The Use Of Accessory Dwelling Units

The proper interpretation of the phrase “*in conjunction with*” is correctly set forth by Kanany in his appeal and position taken before the Hearing Examiner; namely, that “*in conjunction with*” means where an ADU would be physically attached or connected to a duplex unit. Such interpretation is consistent with the common use and meaning of this phrase as found by courts and as defined in dictionaries.³³

The phrase “in conjunction with” means conjointly . . . (Webster’s New Collegiate Dict., (supra), p. 237, col. 1; *see also* Black’s Law Dict., (supra), p. 273, col. 2).

Orange Unified School District v. Rancho Santiago Community College District, 54 Cal.App.4th 750, 763, 62 Cal.Rptr.2d 778 (Cal.App. 1997). And the word conjoint is defined as meaning “joined together”. Webster’s College Dictionary, at p. 287 (Random House, 1995).

³³ The BLMC contains no definition of this phrase; accordingly, resort to judicial and dictionary definitions is proper under such circumstances.

Construing the phrase “*in conjunction with*” as meaning joined together saves the exception in BLMC § 18.22.090(C)(1) from being a total taking of a valuable property right and interest from Kanany, negating an unlikely and strained consequence that would result from an exception swallowing an outright permitted use, and denying the City increased density and the public an affordable supply of housing. Under the proper interpretation and application of BLMC § 18.22.090(C)(1), an ADU is a permitted use in the R-2 zone on property upon which a duplex is built provided it is located in a separate structure. Accordingly, the area over the detached garage on Kanany’s duplex property may legally be used as an ADU.

Recent changes to the City’s zoning code provide further clear, cogent, and convincing proof that ADUs are not and can not be prohibited under all circumstances in the R-2 zone on property upon which a duplex is built. Amendments to Title 18 in 2011 (Ordinance No. 1416) deleted certain provisions, including BLMC § 18.16.020(A), preserved other provisions, including BLMC § 18.22.090(C)(1), and redefined other provisions relating to the placement of ADUs in residential zones. Newly added to the City’s zoning code in 2011 is BLMC § 18.08.020 – Land Use Matrix. *See CP at 145.* This graphic “identifies uses permitted in each individual zoning district.” BLMC § 18.08.010(A).

If the letter “P” appears in the box at the intersection of the column [zoning district] and the row [use], the use is permitted in that district.

BLMC § 18.08.010(C). According to the Land Use Matrix, both “Duplexes

(two-family residences)” and “Townhouses”³⁴ are denoted with a “P” in zoning districts R-2 and R-3. The Land Use Matrix designates the specific use of “Accessory dwelling unit” as “P¹” in both the R-2 and R-3 zoning districts, and denies such use in all other zoning districts.³⁵

[The letter] P¹ = No accessory dwelling units are allowed in conjunction with a duplex.

BLMC § 18.08.020, footnotes.³⁶ Strictly construing the Land Use Matrix alone, the City will outright permit an ADU on R-2 and R-3 zoned property upon which a Townhouse is built (3 or more attached units), but categorically deny an ADU on R-2 and R-3 zoned property upon which a duplex is built. This makes no sense whatsoever, under whatever means are employed in any attempt to justify such patently disparate treatment. However, if “*in conjunction with*” is interpreted as Kanany suggests -- where physically joined together as a single structural unit -- then an ADU is a permitted use in the

³⁴ Note also that the new Land Use Matrix does not permit single-family residences in the R-2 and R-3 zones. The City’s rationale for increasing density by allowing ADUs with SF dwellings alone thus fails and is unsupported by substantial evidence. A “Townhouse” is defined as “a type of attached dwelling in a row of at least three such units in which each unit has its own front and rear access to the outside, no unit is located over another unit, and each unit is separated from any other unit by one or more vertical common fire-resistant walls.” BLMC § 18.04.200 “T”. The BLMC does not contain an express definition of “multiple-family dwelling units” as that phrase is used in BLMC § 18.22.090(C)(1). Because the term “Townhouse” is specifically defined as a separate term, we must assume that a Townhouse as such is used in the BLMC is to be distinguished and treated different from the undefined multiple-family dwelling unit.

³⁵ “If the box at the intersection of the column and the row is empty, the use is not permitted in that district.” BLMC § 18.08.010(B).

³⁶ “If a footnote appears in the box at the intersection of the column and the row, the use may be permitted subject to the appropriate review process indicated above and the specific conditions indicated by the corresponding footnote.” BLMC § 18.08.010(F).

R-2 and R-3 zoning districts on land upon which a duplex is built provided that the ADU is located in a separate, detached structure -- just as the Kanany duplex property. This interpretation of the Land Use Matrix would allow affordable housing and increased density on R-2 and R-3 zoned property with a duplex unit because the exception would be applied only to preclude an otherwise duplex unit from by definition becoming and being treated as a Townhouse and thus being subject to all the zoning and building code requirements associated with a Townhouse (including, *inter alia*, increased land area under zoning code and fire-resistant walls under the building code). Absolutely the only way to increase density in the R-2 zone is either by a Townhouse on larger lots or with a duplex and ADU on all lots.

VI. CONCLUSIONS

Based on the foregoing, the Hearing Examiner's collective decisions do not pass either statutory or constitutional muster and must be set aside and vacated as a matter of law as a result of this Court's appellate review pursuant to LUPA.

The absence of adopted Rules of Procedure uniformly governing the Bonney Lake Hearing Examiner system is a defect and deficiency directly contrary to a statutory mandate that was unfairly prejudicial to Kanany and directly affected the conduct and outcome of the hearing. Without set Rules governing the process and as to which all participants and citizen observers are given advance notice, Kanany was subjected to an *ad hoc* on-the-fly set of procedural decisions both prior to and during the hearing by the Hearing

Examiner as to which Kanany, or even seasoned attorneys, was ill-prepared and equipped to timely respond and meet; *e.g.*, the lack of discovery and short time frame given to file hearing exhibits and briefs; the denial of a continuance necessary for additional witnesses having direct and essential knowledge to participate; the Hearing Examiner's direct query to the City's legal counsel to elicit answers to leading questions on matters failed to be addressed in counsel's presentation; and summarily cutting off Kanany's witnesses on purported grounds of irrelevance while allowing the City's counsel, unsworn and not subject to cross-examination, to venture forth in his presentation of materials that were irrelevant and immaterial, and prejudicial to Kanany. The lack of mandatory Rules of Procedure is a clear violation of constitutional due process,³⁷ can never constitute harmless error,³⁸ and alone constitutes sufficient grounds for vacating the Hearing Examiner's final decision on Kanany's Code Interpretation appeal. RCW 36.70C.130(1)(a); RCW 36.70C.130(1)(f); *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161-62,

³⁷ *Harnett*, 350 F. Supp. 1159 (*ad hoc* rule-making is arbitrary and violates due process); *Boller Beverages*, 183 A.2d 64 (participants in quasi-judicial hearings are entitled to know in advance the so-called Rules of the game); *Historic Green Springs*, 497 F. Supp. 839 ("The timely notice of rules of procedure . . . contemplates a reasonably complete code of procedures set out in advance by which action can be guided and strategies planned"); *Bayshore Associates*, 533 N.W.2d 593 (the lack of properly promulgated procedural rules does not provide due process); *Klemmer*, 566 A.2d 836 (procedural rules that are nonexistent and legally unavailable to those persons required to abide by them are more offensive to constitutional due process than enactments which are only vague).

³⁸ This deficiency is fatally defective under both statute, RCW 35A.63.170(1), and the due process requirements of U.S. Const. amend. XIV and Wash. Const. art. I, § 3. Kanany's due process right to a fundamentally fair and impartial hearing that is governed by known, published uniform standards of procedure was clearly violated, and such violation cannot, under well-established law, be held harmless.

516 P.2d 1028 (1973) (failure to adopt mandatory Rules of Procedure voids the hearing and any decisions made thereunder).³⁹

Furthermore, the Hearing Examiner patently failed to comply with his statutorily mandated duty to enter specific findings and conclusions setting forth the manner in which his decisions would carry out and conform to the City's Comprehensive Plans and Development Regulations. RCW 35A.63.170(3). There is no question that Kanany has proven this violation and that such patent omission was not harmless error, as the provision of affordable housing in all zoning districts is central to the proper interpretation of the phrase "*in conjunction with*" under the BLMC. RCW 36.70C.130(1)(a).

The City's Code Interpretation leads to strained, unlikely and unrealistic consequences; borders on patently disparate treatment of duplexes and Townhouses under the City zoning code which would be unconstitutional; denies a large segment of the population affordable housing in contravention of both GMA and Pierce County CPP requirements, which in turn constitutes a violation of Wash. Const. art. 11, § 11; and is inconsistent with contemporaneously applicable and relevant provisions of both the zoning code and

³⁹ Any attempt by the City to point to other similarly sized jurisdictions in Washington that have Hearing Examiner systems comparable to its own fails to hold sway, as each of these other jurisdictions' hearing examiner system is likewise in direct violation of the statutory mandate and fails to pass constitutional muster. The claimed company of equally defective Hearing Examiner systems can be of no legal solace to the City of Bonney Lake (in other words, the City's defense that because other cities are doing equal to or less than we are, then our system must *ipso facto* be procedurally sufficient to meet due process requirements, fails to pass constitutional muster). Procedural due process mandated by State statute is not dependent upon the size of the municipality because of the property interests at stake. Perhaps this is the reason why these other jurisdictions are not listed as examples for Rules of Procedure on the <http://www.mrsc.org/subjects/planning/hearex.aspx> website.

the City Comprehensive Plan relating to and regarding the provision of cost-effective, affordable housing to the City's residents. RCW 36.70C.130(1)(a) - (f). The interpretation suggested by Kanany is well-grounded in not only the law but in common sense. Defining "*in conjunction with*" to preclude only an ADU that is physically attached to a duplex, thus preventing a duplex from becoming a Townhouse, is a rational and appropriate means of interpreting, applying, and limiting an exception such that it does not totally deprive duplex property owners from the same rights and privileges afforded Townhouse owners of having an ADU as an outright permitted use on their property.⁴⁰ Moreover, according to the City's zoning matrix, Townhouses (as specially defined by the BLMC) are an outright permitted use in the R-2 zone and on such property may also be located an ADU; as it is only with respect to duplex units in the R-2 zone that, according to the City, would be precluded from having located an ADU on the same property. *See* CP at 95 - 96, 145. This restrictive interpretation not only makes no logical sense, it is directly contrary to the express stated intent of the City's Comprehensive

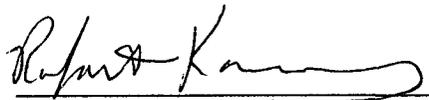
⁴⁰ The City argues that Kanany's suggested interpretation of the phrase "in conjunction with" is nonsensical and results in unintended consequences. Far from that perspective, Kanany's interpretation is the only logical construction and application of the phrase that results in (1) increased density (*see* CP at 213 - 14), and (2) conformance with the City's Comprehensive Plan's intent to provide affordable housing in all of its zones, including the R-2 with duplexes and without limitation on the location of ADUs. The City's contention that only allowing ADUs in the R-2 zone as an adjunct to single family residences belies belief, as the City's adopted zoning matrix as a matter of law does not allow single family residences in the R-2 zone as an outright permitted use, thus making those existing residences a nonconforming use and subject to eventual discontinuance. "The policy of zoning legislation is to phase out a nonconforming use." *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 150, 995 P.2d 33 (2000). Generally, "nonconforming status . . . will not grant the right to significantly change, alter, extend, or enlarge the existing use." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998).

Plan to increase density and provide affordable housing in the R-2 zone and denies the owners of duplex properties in the City, including Kanany, a valuable and constitutionally-protected property development right.⁴¹ RCW 36.70C.130(1)(f); *see, e.g., Valley View Industrial Park v. Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987) (development rights constitute a valuable property right protected by constitutional due process guarantee).

Respectfully, Robert Kanany has met his burdens and satisfied the standards set forth in RCW 36.70C.130(1)(a) - (f) for this Court to grant him the relief he has requested in his Petition for Judicial Review under LUPA. This Court may fashion suitable relief under the circumstances as suggested in Kanany's LUPA Petition and as provided by law.⁴²

DATED this 29th day of July, 2014.

Respectfully submitted,


Robert Kanany, Pro Se

⁴¹ "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Washington ex rel. Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 121, 73 L. Ed. 210, 49 S. Ct. 50 (1928).

⁴² Once such rules are in place, published and made available to Kanany and all other citizens of the City of Bonney Lake, a new hearing on Kanany's appeal of the Code Interpretation may be noticed and conducted, with a proper and protected presentation of evidence and witnesses made before a different Hearing Examiner, to ensure a fundamentally fair and impartial hearing and decision.

Court of Appeals No. 46340-7-II
Pierce County Superior Court No. 13-2-15880-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT KANANY,
APPELLANT,

v.

CITY OF BONNEY LAKE, a municipal corporation; STEPHEN K.
CAUSSEAU, JR., as Bonney Lake Hearing Examiner; and JOHN P.
VODOPICH, as City of Bonney Lake Community Development
Director/Building Official,

RESPONDENTS.

DECLARATION OF SERVICE

ROBERT KANANY, Pro Se

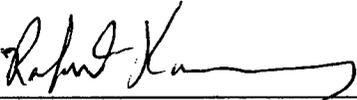
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Clerk/Administrator

5. Pursuant to the provisions of RAP 10.2(a), 10.2(h), and 10.4(a)(1), Appellant's Brief has been properly filed and all parties required to be served with a copy of both the BRIEF OF APPELLANT and this DECLARATION OF SERVICE have been served as set forth above.

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

August 5, 2014
DATE



ROBERT KANANY (WRITTEN)
PRO SE

Bonney Lake, WA
PLACE OF SIGNATURE

Robert Kanany

ROBERT KANANY (PRINTED)