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6 SUPERIOR COURT OF WASHINGTON
7 COUNTY OF KING

8 RENTAL HOUSING
9 ASSOCIATION OF
10 WASHINGTON,

11 Plaintiff,

12 v.

13 CITY OF BURIEN,

14 Defendant.
15

No. 19-2-29207-5 KNT

**AMENDED ORDER ON
MOTIONS FOR SUMMARY
JUDGMENT**

[Clerk's Action Required]

16
17 Plaintiff Rental Housing Association of Washington (“the Association”) and
18 defendant City of Burien each moved for summary judgment. The Court has
19 carefully considered the motions, all papers filed in support of and opposition to
20 the motions,¹ and oral argument from counsel. Both parties ask that the Court
21 fully resolve the case based on the parties’ summary judgment motions, as
22 opposed to proceeding to trial. This Amended Order on Motions for Summary
23 Judgment replaces the Court’s previous Order on Motions for Summary
24 Judgment.
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¹ Sub ##36-37, 39-40, 42-45, 50, 53-54, 57. See CR 56(h).

1 The Association challenges various provisions of Ordinance 716 (adopted
2 in 2019), which have been codified in the Burien Municipal Code (BMC). As to
3 each of seven causes of action, the Association seeks a declaratory judgment
4 under the Uniform Declaratory Judgments Act, RCW 7.24 (“UDJA”).

6 **Uniform Declaratory Judgments Act**

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8 The UDJA allows a person “whose rights, status or other legal relations are
9 affected by statute [or] municipal ordinance” to “have determined any question of
10 construction or validity arising under the [statute or ordinance] and obtain a
11 declaration of rights, status or other legal relations thereunder.”² A party seeking
12 relief under the UDJA must show the four prongs of a justiciable controversy,
13 including standing and ripeness,
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15 The UDJA requires a justiciable controversy, meaning (1) one
16 presenting an actual, present, and existing dispute, or the mature
17 seeds of one, as distinguished from a possible, dormant,
18 hypothetical, speculative, or moot disagreement, (2) between parties
19 having genuine and opposing interests, (3) involving interests that
20 are direct and substantial, rather than potential, theoretical, abstract,
21 or academic, and (4) of which a judicial determination will be final
22 and conclusive. [This] test encompasses the concepts of ripeness
(the first prong) and standing (the third prong).³

22 The concept of *standing* pertains to whether an injury exists:

23 The kernel of the standing doctrine is that one who is not adversely
24 affected by a statute may not question its validity. To establish
25 standing under the UDJA, a party must demonstrate that: (1) the
26 interest they seek to protect is within the zone of interests regulated
27 by the ordinance in question, and (2) they have suffered or will suffer
an ‘injury in fact.’⁴

28 ² RCW 7.24.020.

³ *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 847 (2020) (citations omitted).

⁴ *Id.* at 851-52 (quotation marks and citations omitted).

1 When a party is an organization, and does not have standing itself, the party may
2 establish “representational” standing by demonstrating that “(a) its members
3 would otherwise have standing to sue in their own right; (b) the interests it seeks
4 to protect are germane to the organization’s purpose; and (c) neither the claim
5 asserted nor the relief requested requires the participation of individual members
6 in the lawsuit.”⁵
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9 In determining *ripeness*, a court must “consider if the issues raised are
10 primarily legal, and do not require further factual development, and if the
11 challenged action is final,” as well as “the hardship to the parties of withholding
12 court consideration.”⁶
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14 In this case, the Association is the only plaintiff; there are no individual
15 plaintiffs. The Association does not assert its own, non-representational
16 standing—e.g., the Association is not a landlord. Instead, most of the
17 Association’s members are landlords. Thus, to establish standing—
18 representational standing—the Association must show that “its members would
19 otherwise have standing to sue in their own right”⁷—i.e., “(1) the interest [the
20 members] seek to protect is within the zone of interests regulated by the
21 ordinance in question, and (2) they have suffered or will suffer an ‘injury in fact.’”⁸
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27 ⁵ *Id.* at 855 (quotation marks and citation omitted).

28 ⁶ *Id.* at 856 (citations omitted).

⁷ *Id.* at 855.

⁸ *Id.* at 851-52 (quotation marks and citations omitted).

1 As explained below, as to the Association's second, sixth, and seventh
2 causes of action, the Association has failed to provide evidence of standing and
3 the claims are not ripe for resolution.
4

5 ***First Cause of Action:***
6 **The claim that BMC 5.63.040 and BMC 5.63.070 are preempted under**
7 **RCW 35.31.830, RCW 59.18, RCW 59.18.270, and Article XI, Section 11,**
8 **of the Washington Constitution**

9 The Association asserts that BMC 5.63.040 and BMC 5.63.070 are
10 preempted under RCW 35.31.830, RCW 59.18 generally, and RCW 59.18.270,
11 as well as Article XI, Section 11, of the Washington Constitution. Section 11
12 states: "Any county, city, town or township may make and enforce within its limits
13 all such local police, sanitary and other regulations as are not in conflict with
14 general laws."¹⁴ Even though Section 11 speaks of what is allowed—what a city
15 "may" do—the Washington Supreme Court has interpreted Section 11 to prohibit
16 any city ordinance that conflicts with state law.¹⁵ Thus, the Association argues
17 that BMC 5.63.040 and BMC 5.63.070 violate Section 11 because these Burien
18 code provisions are in conflict with—and, thus, preempted by—provisions in the
19 Revised Code of Washington.
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22 **A. Preemption of BMC 5.63.040 under RCW 35.31.830.**
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24 RCW 35.31.830 states: "The imposition of control on rents is of state-wide
25 significance and is preempted by the state."¹⁶ In its Complaint here, the
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28 ¹⁴ Const. art. XI, § 1.

¹⁵ Brown v. City of Yakima, 116 Wn.2d 556, 559 (1991).

¹⁶ RCW 35.31.830.

1 Association asserts preemption under RCW 35.21.830 as to a specific portion of
2 BMC 5.63.040: the portion that “impose[s] a control on the last month’s rent by
3 forcing landlords to take that rent in installment payments after the tenancy has
4 begun and the tenant has moved in.”¹⁷ In 2017, the Association sued the City of
5 Seattle about a similar code provision. In its Complaint there, the Association
6 asserted that the code violated RCW 35.21.830 because, among other things,
7 the code allowed tenants to pay last month’s rent in installments—i.e., it
8 “require[s] landlords to accept payment of . . . last month’s rent over six months’
9 time . . . rather than collecting the amounts in full at the beginning of the tenancy,
10 as is customary in the residential rental industry. . . .”¹⁸ In that case, in a 12-page
11 summary judgment order, the Superior Court thoroughly addressed the
12 Association’s preemption arguments under RCW 35.21.830.¹⁹ The Association
13 then “chose not to pursue it on appeal.”²⁰

14 Under the doctrine of collateral estoppel, the City argues that the
15 Association cannot again litigate the preemptive effect of RCW 35.31.830
16 because the Association already litigated this issue to final judgment in the 2017
17 lawsuit against Seattle. The Association argues that it is not estopped because
18 the 2017 lawsuit involved a Seattle ordinance and this lawsuit involves a Burien
19 ordinance. While this is true, the material effect of each ordinance is the same
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27 ¹⁷ Sub #1 at 4 ¶ 12.

28 ¹⁸ King Co. Super. Ct. No. 17-2-13662-0 SEA, sub #1 at 15-16 ¶¶ 4.21, 4.25.

¹⁹ No. 17-2-13662-0 SEA, sub #45.

²⁰ Sub #42 at 3:12-13.

1 and the rationale of the Association’s argument in each case is the same. For the
2 reasons explained in the City’s motion,²¹ the City is correct and the Association is
3 estopped from relitigating preemption under RCW 35.21.830.
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5 **B. Field preemption of BMC 5.63.040 under RCW 59.18.**

6 The Association asserts that BMC 5.63.040 is preempted under RCW
7 59.18 because the latter “completely occupies the field of regulation of financial
8 relationships between landlord and tenants.”²² Growing out of Article XI, Section
9 11, “field preemption” exists when a state statute leaves no room for a city
10 ordinance on the subject:
11

12 [A] state statute preempts an ordinance on the same subject if the
13 statute occupies the field, leaving no room for concurrent jurisdiction.
14 . . . Field preemption occurs when there is express legislative intent
15 to occupy the entire field, or when such intent is necessarily implied.
16 Legislative intent may be implied from the statute’s purpose and
17 factual circumstances.²³

18 The Association concedes that there is no express legislative intent to
19 occupy this field. Looking for implied intent, the Association argues that RCW
20 59.18 demonstrates an intent “to standardize the rights and responsibilities of
21 landlords and tenants,” and “[t]here is no hint that the legislature was intending
22 that landlord/tenant relations would vary from city to city.”²⁴ Even if accurate, this
23 does not mean that the Legislature affirmatively intended—even impliedly—to
24 “leav[e] no room for concurrent jurisdiction” by a city, or that the Legislature
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27 ²¹ Sub #37 at 6-10.

28 ²² Sub #1 at 4 ¶ 13.

²³ Watson v. City of Seattle, 189 Wn.2d 149, 171 (2017) (quotation marks and citations omitted).

²⁴ Sub #39 at 8.

1 intended that there *not* be any variation from city to city. Moreover, within this
2 very field—financial relations between landlords and tenants—the Legislature
3 has demonstrated its ability to clearly preempt city ordinances when it intends to
4 do so.²⁵

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6 The Association has not shown that “there is express legislative intent to
7 occupy the entire field, or [that] such intent is necessarily implied.”²⁶ Thus, the
8 Association has failed to show field preemption of BMC 5.63.040 under RCW
9 59.18.
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11 **C. Conflict preemption of 5.63.040 under RCW 59.18.270.**

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13 The Association asserts that BMC 5.63.040 is in conflict with—and, thus,
14 preempted by—RCW 59.18.270.²⁷ “Conflict preemption” occurs when a statute
15 and ordinance cannot be reconciled:
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17 [A] state statute preempts an ordinance on the same subject . . . if a
18 conflict exists such that the statute and the ordinance may not be
19 harmonized. . . . Conflict preemption occurs when an ordinance
20 permits what state law forbids or forbids what state law permits. An
21 ordinance is constitutionally invalid when it directly and irreconcilably
22 conflicts with the statute. However, if the statute and ordinance may
23 be read in harmony, no conflict will be found.²⁸

24 BMC 5.63.040(1) states:

25 Installment Payments, Generally. Upon a tenant’s written request,
26 tenants may pay security deposits, nonrefundable move-in fees,
27 and/or last month’s rent in installments as provided herein. . . .
28 Landlords may not impose any fee, charge any interest, or otherwise

25 See RCW 35.21.830.

26 Watson, 189 Wn.2d at 171 (citation omitted).

27 Sub #1 at 4 ¶ 14.

28 Watson, 189 Wn.2d at 171 (quotation marks and citations omitted).

1 impose a cost on a tenant because a tenant elects to pay in
2 installments. . . .²⁹

3 The Association says this language conflicts with the following language from
4 RCW 59.18.270:

5 All moneys paid to the landlord by the tenant as a deposit as
6 security for performance of the tenant's obligations in a lease or
7 rental agreement shall promptly be deposited by the landlord in a
8 trust account. . . . Unless otherwise agreed in writing, the landlord
9 shall be entitled to receipt of interest paid on such trust account
deposits.³⁰

10 The Association is incorrect. RCW 59.18.270 says that a landlord must put
11 a security deposit in a trust account and the landlord gets interest on the deposit.
12 BMC 5.63.040 does not change this. Instead, BMC 5.63.040 regulates the *timing*
13 of how a tenant pays security deposits, by allowing a tenant to pay security
14 deposits over time. But once a tenant pays a security deposit—whatever the
15 timing—RCW 59.18.270 applies and the landlord is entitled to interest.³¹

16 The Association has not shown preemption of RCW 5.63.040 under RCW
17 59.18.270.

18 **D. Conflict preemption of BMC 5.63.070 under RCW 59.12.**

19 Under RCW 59.12.070 and related statutes, a landlord can commence a
20 lawsuit to evict a tenant due to the tenant's unlawful detainer, forcible entry, or
21 forcible detainer. "Unlawful detainer" is defined in RCW 59.12.030, which states
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27 ²⁹ BMC 5.63.040(1).

28 ³⁰ RCW 59.18.270.

³¹ The Association has not asserted preemption under RCW 59.18.610, and the Court does not
make any ruling about that statute.

1 seven bases for finding that a tenant “is liable for unlawful detainer.”³² RCW
2 59.12.010 and .020 address “forcible entry” and “forcible detainer.” In its
3 Complaint, the Association asserts that BMC 5.63.070 conflicts with—and, thus,
4 is preempted by—RCW 59.12.030 because BMC 5.63.070 adds eviction
5 requirements that are not in RCW 59.12.³³ In its summary judgment briefing, the
6 Association asserts that other provisions of RCW 59.12, and RCW 59.18, also
7 preempt BMC 5.63.070.³⁴

10 The following text from BMC 5.63.070(1) conflicts with RCW 59.12.030:

11 Owners of housing units shall not evict or attempt to evict any
12 tenant, or otherwise terminate or attempt to terminate the tenancy of
13 any tenant unless the owner can prove in court that just cause
14 exists. . . . The reasons for termination of tenancy listed below, and
15 no others, shall constitute just cause under this section. . . .³⁵

16 These provisions of BMC 5.63.070(1) mean that, even if a landlord has grounds
17 for eviction under RCW 59.12 or RCW 59.18—e.g., under RCW 59.12.030—a
18 landlord cannot evict a tenant unless the landlord has “just cause,” a term
19 defined in BMC 5.63.070(1) and one that does not appear in RCW 59.12 or RCW
20 59.18.

22 The City argues against preemption and primarily relies on two cases:

23 Kennedy v. City of Seattle and Margola Associates v. City of Seattle. In Kennedy,
24 Seattle enacted an ordinance that, in Section 2, made it unlawful “to evict a
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27 ³² RCW 59.12.030.

28 ³³ See sub #1 at 5 ¶ 16.

³⁴ Sub #39 at 6-7; sub #43 at 3.

³⁵ BMC 5.63.070(1).

1 houseboat except for six specific reasons.”³⁶ The court held this section to be an
2 unconstitutional taking of private property.³⁷ In the course of its decision, the
3 court also briefly addressed the argument that “RCW 59.12, dealing with forcible
4 entry and forcible and unlawful detainer, preempts the field.”³⁸ The court found no
5 preemption: “[N]or is there an irreconcilable conflict between the statutes and the
6 ordinance. A defendant in an unlawful detainer action may assert any *defenses*
7 available. RCW 59.16.030; 59.18.380. The ordinance does not raise further
8 procedural barriers between landlord and tenant but simply represents another
9 *defense* for the tenant.”³⁹ The court cited to legislative history showing that “the
10 Governor vetoed portions of the act which would have specifically preempted
11 [the] Seattle ordinance.”⁴⁰

15 There are at least two important things to note about Kennedy. First, the
16 court emphasized the Governor’s express rejection of state preemption of the
17 ordinance. The Legislature apparently viewed RCW 59.12 as *not* preempting the
18 ordinance and then sought to preempt; but the Governor vetoed that attempt,
19 maintaining a status of no preemption. Second, the ordinance in Kennedy did not
20 claim to be the exclusive basis for a landlord to state a prima face claim for
21 eviction. The Kennedy court apparently recognized this because the court said
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26 ³⁶ Kennedy v. City of Seattle, 94 Wn.2d 376, 379 (1980).

27 ³⁷ Id. at 384-87.

28 ³⁸ Id. at 384.

³⁹ Id. (emphasis added).

⁴⁰ Id.

1 the ordinance provided a “defense” to unlawful detainer, as opposed to changing
2 the basis for prima facie unlawful-detainer liability in the first place.

3
4 In Margola, building owners challenged Seattle ordinances that required
5 them to register their buildings and pay fees and that precluded an owner from
6 evicting a tenant if the owner did not register its building.⁴¹ In ruling that RCW
7 59.18 did not preempt the ordinances, the court quoted almost all of Kennedy’s
8 preemption discussion, and then concluded: “The registration ordinance likewise
9 creates an additional *affirmative defense* for a tenant: the tenant cannot be
10 evicted unless the building has a rental housing registration.”⁴² Thus, in Margola,
11 the Supreme Court confirmed that the “defense” language in Kennedy refers to
12 an affirmative defense.
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15 It is helpful to understand the concept of an affirmative defense in
16 conjunction with the concept of a “prima facie case.” A plaintiff proves a prima
17 facie case when it “produc[es] enough evidence to allow the fact-trier to infer the
18 fact at issue and rule in the [plaintiff’s] favor.”⁴³ An affirmative defense is a
19 “defendant’s assertion of facts and arguments that, if true, will defeat the
20 plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are
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24 ⁴¹ Margola Assoc. v. City of Seattle, 121 Wn.2d 625, 630-32 (1993), abrogated on other
25 grounds, Yim v. City of Seattle, 194 Wn.2d 651 (2019).

26 ⁴² 121 Wn.2d at 652 (emphasis added).

27 ⁴³ Black’s Law Dictionary (11th ed. 2019) (defining “prima facie case” as “1. The establishment
28 of a legally required rebuttable presumption. 2. A party’s production of enough evidence to allow
the fact-trier to infer the fact at issue and rule in the party’s favor.”); see id. (defining “prima
facie” as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted;
based on what seems to be true on first examination, even though it may later be proved to be
untrue”).

1 true. The defendant bears the burden of proving an affirmative defense.”⁴⁴ Thus,
2 to establish a defendant’s liability, a plaintiff must first prove a prima facie case. If
3 he fails to do so, the defendant is not liable. But *even if* he does so, a defendant
4 may still prevail if the defendant proves an affirmative defense.⁴⁵

6 Building on Margola’s affirmative-defense language, the City points to
7 BMC 5.63.070(5): “In any action commenced to evict or to otherwise terminate
8 the tenancy of any tenant, it shall be a defense to the action that there was no
9 just cause for such eviction or termination as provided in this section.”⁴⁶ The City
10 then argues that “BMC 5.63.070 [a] creates affirmative defenses to unlawful
11 detainer actions and [b] does not limit the grounds upon which a tenant may be
12 liable. . . .”⁴⁷ This second phrase is inaccurate. Limiting the grounds upon which a
13 tenant may be liable—i.e., restricting a plaintiff’s prima facie case—is exactly
14 what BMC 5.63.070(1) purports to do. BMC 5.63.070 makes clear that it is the
15 only basis for a prima facie case of eviction:
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19 Owners of housing units *shall not* evict or attempt to evict any
20 tenant, or otherwise terminate or attempt to terminate the tenancy of
21 any tenant *unless* the owner can prove in court that just cause
22 exists. . . . The reasons for termination of tenancy listed below, *and*
23 *no others*, shall constitute just cause. . . .⁴⁸

24 ⁴⁴ Black’s Law Dictionary (11th ed. 2019) (definition of “affirmative defense,” under definition of
25 “defense”).

26 ⁴⁵ See, e.g., Moore Commercial Aircraft Interiors, LLC, 168 Wn. App. 502, 511 (“Even if [plaintiff]
27 had established all five elements of his prima facie case [of tortious interference with a business
28 expectancy], [defendant] established the affirmative defense of a good faith belief that
[plaintiff’s] employment posed a genuine threat to its trade secrets.”), rev. denied, 175 Wn.2d
1027 (2012).

⁴⁶ BMC 5.63.070(5).

⁴⁷ Sub #37 at 17.

⁴⁸ BMC 5.63.070(1) (emphasis added).

1 Importantly, the ordinances in Kennedy and Margola did not include this kind of
2 limiting language where the text purports to make the ordinance the exclusive
3 means of a prima facie case for eviction. It is this limiting, exclusive language that
4 results in BMC 5.63.070(1) “forbid[ding] what state law permits.”⁴⁹ And the
5 “defense” language in BMC 5.63.070(5) does not do away with the exclusive
6 language in BMC 5.63.070(1) that seeks to restrict the prima facie cause of
7 action.
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10 It may be that BMC 5.63.070 has some permissible effect in providing an
11 affirmative defense, apart from limiting what constitutes a prima facie case for
12 eviction under RCW 59.12 and RCW 59.18. Determining that will likely require an
13 actual dispute with a factual record that is fuller than the very thin factual record
14 here. The Court finds that further factual development is necessary, the Court
15 withholding further consideration does not impose a significant hardship on the
16 parties, and there is no ripe dispute before the Court that would allow the Court
17 to further tease out the competing meanings of RCW 5.63.070 versus RCW
18 59.12 and RCW 59.18.⁵⁰
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22 BMC 5.63.070(1) forbids something that RCW 59.12 and RCW 59.18
23 permit. Thus, BMC 5.63.070(1) is preempted to the extent that it restricts an
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27 ⁴⁹ Watson, 189 Wn.2d at 171 (quotation marks and citations omitted).

28 ⁵⁰ See Alim, 14 Wn. App. 2d. at 856; WT Properties, LLC v. Leganieds, LLC, 195 Wn. App. 344, 354 (2016) (ripeness requirement not met where “further factual development of the record is required”).

1 Association member's prima facie case for eviction under RCW 59.12 or RCW
2 59.18.

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4 ***Second Cause of Action:***
5 **The claim that BMC 5.63.060 violates Article I, Section 5,**
6 **of the Washington Constitution**

7 The Association argues that BMC 5.63.060 violates Article I, Section 5, of
8 the Washington Constitution, which protects the right to "freely speak, write and
9 publish on all subjects."⁵¹ BMC 5.63.060 applies to a specific set of landlords:

10 *Owners of a multifamily rental housing building having five or more*
11 *housing units, any one of which rents for an amount that is*
12 *affordable to households at or below 80 percent of area median*
13 *income, as median income was most recently determined by the*
14 *United States Department of Housing and Urban Development for*
15 *the Seattle metropolitan statistical area, as adjusted for household*
16 *size, shall notify the director of the owner's intent to sell the building.*
17 *The notice shall be in writing and include the owner's name, phone*
18 *number, and the address of the rental housing building that will be*
19 *listed for sale. The notice shall be mailed no later than 60 days prior*
20 *to the building being listed with any real estate service or advertised*
21 *for sale either in a printed newspaper or website.*⁵²

22 The evidence before the Court does not show that any Association
23 member owns a "multifamily rental housing building having five or more housing
24 units." In fact, the Association says it average "member owns between 2 and 3
25 units" and "the vast majority of [members] are basically 'mom and pop' owners of
26 one or two rental units. . . ." ⁵³ Nor does the evidence show that any Association
27 member is planning to buy, or wants to buy, a five-unit building. Thus, the

28 ⁵¹ Const. art. I, § 5.

⁵² BMC 5.63.060 (emphasis added).

⁵³ Sub #39, Martin Declaration ("Decl.") at 2; see sub #57, Exhibits ("Exs.") A-C.

1 Association has not shown that any member has “suffered or will suffer an ‘injury
2 in fact.’”⁵⁴ Moreover, this case is not like cases such as State v. Immelt, where
3 the court allowed a facial challenge, but did so in the context of (1) a criminal
4 defendant (2) who fell within the category of people regulated by the ordinance—
5 a person “sounding [a] vehicle horn[.]”⁵⁵ Here, the ordinance does not impose
6 criminal liability and no Association member falls within the narrow category that
7 BMC 5.63.060 applies to. “[O]ne who is not adversely affected by a statute may
8 not question its validity.”⁵⁶ The Court finds that Association does not have
9 standing to assert its second cause of action.
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13 In addition, the Court finds that the second cause of action is not ripe
14 because resolving it requires “further factual development” and because there is
15 no “hardship to the parties [from] withholding court consideration.”⁵⁷ That is, if in
16 the future, an Association member owns a “multifamily rental housing building”
17 subject to BMC 5.63.060, the member will be free to challenge the ordinance at
18 that time.
19

20
21 ***Third Cause of Action:***
22 **The claim that Ordinance 716 violates Article I, Section 16,**
23 **of the Washington Constitution**

24 In part, Article I, Section 16, of the Washington Constitution states: “No
25 private property shall be taken or damaged for public or private use without just
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27 ⁵⁴ Alim, 14 Wn. App. 2d at 851-52 (quotation marks and citations omitted).

28 ⁵⁵ State v. Immelt, 173 Wn.2d 1, 4-5 (2011) (quoting county ordinance).

⁵⁶ Alim, at 851-52 (quotation marks and citations omitted).

⁵⁷ Id. at 856 (citations omitted).

1 compensation having been first made. . . .”⁵⁸ In its Complaint, the Association
2 asserts that Ordinance 716 takes or damages the property interests of
3 Association members by severely restricting an owner’s right to exclude people
4 from the owner’s property and by delaying the right to sell property until after
5 giving 60 days’ notice to the City (under BMC 5.63.060).⁵⁹

6
7 In Yim v. City of Seattle (“Yim I”), the Supreme Court clarified the status of
8 its takings jurisprudence:
9

10 Pursuant to Chevron U.S.A., there are only two categories of *per se*
11 regulatory takings: (1) where government requires an owner to suffer
12 a permanent physical invasion of her property and (2) regulations
13 that completely deprive an owner of all economically beneficial us[e]
14 of her property. If an alleged regulatory taking does not fit into either
15 category, it must be considered on a case-by-case basis in
16 accordance with the Penn Central factors.⁶⁰

17 In its briefing, the Association clarifies that its claim falls under the first
18 category stated in Yim I—i.e., a claim of *per se* regulatory taking by physical
19 invasion of property.⁶¹ Under the binding precedent of Yim I, and for reasons
20 explained by the City,⁶³ the Association’s claim fails. In addition, as to the
21 Association’s claim for a taking under BMC 5.63.060, the Association lacks
22 standing to assert this claim.⁶⁴

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25 _____
26 ⁵⁸ Const. art. I, § 16.

27 ⁵⁹ Sub # 1 at 6.

28 ⁶⁰ Yim v. City of Seattle, 194 Wn.2d 651, 672 (2019) (“Yim I”) (quotation marks and citations
omitted).

⁶¹ Sub #39 at 15-16; sub #43 at 6.

⁶³ See, e.g., sub #40 at 6-7.

⁶⁴ See supra at 14-15.

1 ***Fourth Cause of Action:***
2 **The claim that BMC 5.63.040 and BMC 5.63.070 violate Article I, Section 3,**
3 **of the Washington Constitution**

4 The Association asserts that BMC 5.63.040 and BMC 5.63.070 violate
5 Article I, Section 3, of the Washington Constitution, which states: “No person
6 shall be deprived of life, liberty, or property, without due process of law.”⁶⁵ Under
7 the binding precedent of Yim I and Yim v. City of Seattle (“Yim II”),⁶⁶ and for
8 reasons explained by the City,⁶⁷ the Association’s claim fails.
9

10 ***Fifth Cause of Action:***
11 **The claim that BMC 5.63.070 violates Article I, Section 23,**
12 **of the Washington Constitution**

13 The Association asserts that BMC 5.63.070 violates Article I, Section 23, of
14 the Washington Constitution, which prohibits a “law impairing the obligations of
15 contracts.”⁶⁸ The Association argues that BMC 5.63.070 adds restrictions that did
16 not exist when Association members entered contracts with some tenants. Under
17 the binding precedent of Margola, this claim fails.⁶⁹
18

19 ***Sixth Cause of Action:***
20 **The claim that BMC 5.63.080(1)(c) violates Article I, Section 7,**
21 **of the Washington Constitution**

22 BMC 5.63.080(1)(c) bestows certain powers and duties on the City of
23 Burien director of planning and community development:
24
25

26 _____
27 ⁶⁵ Const. art. I, § 3.

28 ⁶⁶ Yim I, 194 Wn.2d at 673-77; Yim v. City of Seattle, 194 Wn.2d 682, 688-701 (2019) (“Yim II”).

⁶⁷ See, e.g., sub #37 at 27-31.

⁶⁸ Const. art. I, § 23.

⁶⁹ See Margola, 121 Wn.2d at 653-54.

1 The director is authorized to request records from [a] landlord and
2 the landlord shall allow the director access to such records, as well
3 as a complete roster of tenants' names and contact information,
4 when requested, with at least five business days' notice and at a
5 mutually agreeable time, to investigate potential violations of the
6 requirements of this chapter.⁷⁰

7 The Association asserts that this provision violates Article I, Section 7, of
8 the Washington Constitution, which states: "No person shall be disturbed in his
9 private affairs, or his home invaded, without authority of law."⁷¹ But the ordinance
10 merely authorizes the director to request records; it does not require that the
11 director do so. And there is no evidence before the Court that that the director
12 has requested records from any Association member (or from anyone else).⁷²

13 The evidence does not show that the Association or any Association
14 member has suffered or will suffer an injury in fact. Likewise, the Court finds that
15 further factual development is needed and the Court withholding consideration
16 will not cause significant hardship to the parties. Therefore, the Court finds that
17 the Association does not have standing to bring this claim and this claim is not
18 ripe for resolution.⁷³

27 ⁷⁰ BMC 5.63.080(1)(c).

28 ⁷¹ Const. art. I, § 7.

⁷² Sub #39, Martin Decl. and Shadbolt Decl.; sub #57, Exs. A-C.

⁷³ See Alim, 14 Wn. App. 2d at 847, 856.

1 **Seventh Cause of Action:**
2 **The claim that Ordinance 716 violates RCW 35A.11.090, RCW 35.17.230,**
3 **and BMC 1.10.010**

4 Ordinance 716 states that it went into effect five days after publication.⁷⁴

5 The Association asserts that, under certain state statutes and city ordinances,
6 Ordinance 716 could not go into effect until 30 days after publication and that
7 Burien citizens had the right to file a referendum petition, which would prevent
8 the ordinance from becoming effective until the City held an election on the
9 referendum. The Association reasons that, thus, Burien citizens were deprived of
10 the opportunity to obtain a referendum on Ordinance 716.
11

12
13 There is no evidence before the Court that the Association or any
14 Association member submitted a referendum petition with 30 days of Ordinance
15 716's publication or even sought to submit a petition within this period.⁷⁵ Nor is
16 there any evidence that the Association or any Association member planned to
17 submit a petition within the 30-day period but then saw the five-day effective date
18 and abandoned the effort to submit a petition.⁷⁶
19

20
21 The evidence does not show that the Association or any Association
22 member has suffered or will suffer an injury in fact. Likewise, the Court finds that
23 further factual development is needed and the Court withholding consideration
24 will not cause significant hardship to the parties. Therefore, the Court finds that
25
26

27 _____
28 ⁷⁴ Sub #36, Ex. A.

⁷⁵ Sub #39, Martin Decl. and Shadbolt Decl.; sub #57, Exs. A-C.

⁷⁶ Id.

1 the Association does not have standing to bring this claim and this claim is not
2 ripe for resolution.⁷⁷

3 4 **Ruling**

5 Therefore, it is ORDERED that:

6 1. Plaintiff Rental Housing Association of Washington's motion for
7 summary judgment⁷⁸ is granted in part and denied in part as follows.

8
9 2. Defendant City of Burien's motion for summary judgment⁷⁹ is
10 granted in part and denied in part as follows.

11
12 3. Burien Municipal Code 5.63.070(1) is preempted to the extent that it
13 restricts an Association member's prima facie case for eviction under RCW 59.12
14 or RCW 59.18.

15
16 4. Except as stated in the previous paragraph, the Association's claims
17 are dismissed. Where the Court has found a lack of standing or ripeness as to a
18 claim or sub-claim (explained above), the dismissal of the claim or sub-claim is
19 without prejudice.

20
21 5. The Order on Motions for Summary Judgment⁸⁰ is withdrawn and
22 vacated.

23
24 February 17, 2021

25 Judge Chad Allred
26 King County Superior Court
27 *e-signature on following page*

28 ⁷⁷ See Alim, 14 Wn. App. 2d at 847, 856.

⁷⁸ Sub #39.

⁷⁹ Sub #37.

⁸⁰ Sub #58.

King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-29207-5
Case Title: RENTAL HOUSING ASSN OF WASHINGTON VS CITY OF BURIEN
Document Title: OTHER RE AMENDED ORDER ON MOTIONS FOR SJ
Signed By: Chad Allred
Date: February 18, 2021



Judge: Chad Allred

This document is signed in accordance with the provisions in GR 30.

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