SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiff, v. CITY OF BURIEN, Defendant.	No. 19-2-29207-5 KNT **SECOND AMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENT** [Clerk's Action Required]

Plaintiff Rental Housing Association of Washington ("the Association") and defendant City of Burien each moved for summary judgment. Both parties asked the Court to fully resolve the case based on the parties' summary-judgment motions, as opposed to proceeding to trial. The Court carefully considered the motions, all papers filed in support of and opposition to the motions,[1] and oral argument from counsel. The Court issued an Order on Motions for Summary Judgment and an Amended Order on Motions for Summary Judgment.

[1] Sub ##36-37, 39-40, 42-45, 50, 53-54, 57. See CR 56(h).

Each party then filed a motion for reconsideration. The Court has carefully considered the reconsideration motions, all papers filed in support of and opposition to the motions,[2] and oral argument from counsel. In light of the reconsideration motions, the Court issues this Second Amended Order on Motions for Summary Judgment, which replaces both the Amended Order on Motions for Summary Judgment and the initial Order on Motions for Summary Judgment.

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

Uniform Declaratory Judgments Act

The UDJA allows a person "whose rights, status or other legal relations are affected by statute [or] municipal ordinance" to "have determined any question of construction or validity arising under the [statute or ordinance] and obtain a declaration of rights, status or other legal relations thereunder."[3] A party seeking relief under the UDJA must show the four prongs of a justiciable controversy, including standing and ripeness:

> The UDJA requires a justiciable controversy, meaning (1) one presenting an actual, present, and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties

[2] Sub ##61-62, 65-66, 69, 71, 73, 75.
[3] RCW 7.24.020.

> having genuine and opposing interests, (3) involving interests that are direct and substantial, rather than potential, theoretical, abstract, or academic, and (4) of which a judicial determination will be final and conclusive. [This] test encompasses the concepts of ripeness (the first prong) and standing (the third prong).[4]
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> The concept of *standing* pertains to whether an injury exists:
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> The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity. To establish standing under the UDJA, a party must demonstrate that: (1) the interest they seek to protect is within the zone of interests regulated by the ordinance in question, and (2) they have suffered or will suffer an 'injury in fact.'[5]

When a party is an organization, and does not have standing itself, the party may establish "representational" standing by demonstrating that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[6]

In determining *ripeness*, a court must "consider if the issues raised are primarily legal, and do not require further factual development, and if the challenged action is final," as well as "the hardship to the parties of withholding court consideration."[7]

In this case, the Association is the only plaintiff; there are no individual plaintiffs. The Association does not assert its own, non-representational

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[4] Alim v. City of Seattle, 14 Wn. App. 2d 838, 847 (2020) (citations omitted).
[5] Id. at 851-52 (quotation marks and citations omitted).
[6] Id. at 855 (quotation marks and citation omitted).
[7] Id. at 856 (citations omitted).

standing—e.g., the Association is not a landlord. Instead, most of the Association's members are landlords. Thus, to establish standing—representational standing—the Association must show that "its members would otherwise have standing to sue in their own right"[8]—i.e., "(1) the interest [the members] seek to protect is within the zone of interests regulated by the ordinance in question, and (2) they have suffered or will suffer an 'injury in fact.'"[9]

As explained below, as to the Association's second, fifth, sixth, and seventh causes of action, the Court finds that the Association does not have standing and the claims are not ripe for resolution.

***First Cause of Action*:**
The claim that BMC 5.63.040 and BMC 5.63.070 are preempted under RCW 35.31.830, RCW 59.18, RCW 59.12, and Article XI, Section 11, of the Washington Constitution

The Association asserts that BMC 5.63.040 and BMC 5.63.070 are preempted under RCW 35.31.830, RCW 59.18, RCW 59.12, and Article XI, Section 11, of the Washington Constitution.[10] Section 11 states: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."[11] Even though Section 11 speaks of what is allowed—what a city "may" do—the Washington Supreme Court has interpreted Section 11 to prohibit any city

[8] Id. at 855.
[9] Id. at 851-52 (quotation marks and citations omitted).
[10] The parties have not made any arguments about the effect of amendments to RCW 59.12 and RCW 59.18 made in 2021, and the Court does not make any ruling—under any cause of action—about the effect of those amendments.
[11] Const. art. XI, § 1.

ordinance that conflicts with state law.[12] Thus, the Association argues that BMC 5.63.040 and BMC 5.63.070 violate Section 11 because these Burien code provisions are in conflict with—and, thus, preempted by—provisions in the Revised Code of Washington.

A. Preemption of BMC 5.63.040 under RCW 35.31.830.

RCW 35.31.830 states: "The imposition of control on rents is of state-wide significance and is preempted by the state."[13] The Association asserts preemption under RCW 35.21.830 as to a specific portion of BMC 5.63.040: the portion that "impose[s] a control on *the last month's rent* by forcing landlords to take that rent in *installment payments* after the tenancy has begun and the tenant has moved in."[14] In 2017, the Association sued the City of Seattle about a nearly identical installment-payments provision. In that lawsuit, the Association asserted preemption under RCW 35.21.830 because Seattle Municipal Code ("SMC") 7.24.036 allowed tenants to pay "*last month's rent over six months' time* . . . rather than [the landlord] collecting the amounts in full at the beginning of the tenancy. . . ."[15] The Association explained this argument in a summary-judgment motion in the 2017 lawsuit.[16] And in a 12-page summary-judgment order, the

[12] Brown v. City of Yakima, 116 Wn.2d 556, 559 (1991).
[13] RCW 35.31.830.
[14] Sub #1 at 4 ¶ 12 (emphasis added).
[15] King Co. Super. Ct. No. 17-2-13662-0 SEA, sub #1 at 15-16 ¶¶ 4.21, 4.25 (emphasis added).
[16] No. 17-2-13662-0 SEA, sub #31 at 10 ("The Ordinance directly controls how and when that rent is distributed, including the amount of it that may be collected each month, i.e. one-sixth of the total amount in the case of installment plans extending six months.").

Superior Court thoroughly addressed the Association's argument.[17] The Superior Court denied the Association's summary-judgment motion and granted Seattle's summary-judgment motion, fully resolving the case.[18] The Association then "chose not to pursue [the ruling] on appeal."[19]

Under the doctrine of collateral estoppel, the City argues that the Association cannot again litigate the preemptive effect of RCW 35.31.830 because the Association already litigated this issue to final judgment in the 2017 lawsuit against Seattle.

> A party asserting collateral estoppel must establish four elements: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.[20]

The Association argues that it is not estopped because the 2017 lawsuit involved a Seattle ordinance and this lawsuit involves a Burien ordinance. But the Association does not explain any material difference in the *issue* in the 2017 lawsuit and in this lawsuit—i.e., whether RCW 35.31.830 preempts an ordinance that requires a landlord to accept last month's rent in installments. The Association's argument in each lawsuit is the same and the material portions of

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[17] No. 17-2-13662-0 SEA, sub #45 at 3, 5-7.
[18] Id. at 11-12.
[19] Sub #42 at 3:12-13; sub #36 Exhibit ("Ex.") E.
[20] See Weaver v. City of Everett, 194 Wn.2d 464, 474 (2019) (quotation marks and citation omitted).

the Seattle and Burien ordinances are nearly verbatim.[21] The 2017 lawsuit ended in a judgment on the merits, the Association was the plaintiff in the 2017 lawsuit, and applying collateral estoppel does not work an injustice on the Association, especially where it made a choice not to pursue an appeal. The Association is estopped from relitigating preemption under RCW 35.21.830.

B. Field preemption of BMC 5.63.040 under RCW 59.18.

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

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

The Association concedes that there is no express legislative intent to occupy this field. Looking for implied intent, the Association argues that RCW 59.18 demonstrates an intent "to standardize the rights and responsibilities of

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[21] Compare SMC 7.24.036(A) ("For any rental agreement term that establishes a tenancy for six months or longer, the tenant may elect to pay the last month's rent in six consecutive, equal monthly installments that begin at the inception of the tenancy"), with BMC 5.63.040(2) ("For any rental agreement term that establishes a tenancy for three months or longer, the tenant may elect to pay . . . last month's rent . . . in three consecutive, equal monthly installments that begin at the inception of the tenancy").

[22] Sub #1 at 4 ¶ 13.

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

landlords and tenants," and "[t]here is no hint that the legislature was intending that landlord/tenant relations would vary from city to city."[24] Even if accurate, "standardizing" rights does not necessarily mean that the Legislature intended, even impliedly, to leave *no* room for concurrent jurisdiction by a city or that there not be *any* variation from city to city. Moreover, within this very field—financial relations between landlords and tenants—the Legislature has demonstrated its ability to clearly preempt city ordinances when it intends to do so.[25]

The Association has not shown that "there is express legislative intent to occupy the entire field, or [that] such intent is necessarily implied."[26] Thus, the Association has failed to show field preemption of BMC 5.63.040 under RCW 59.18.

C. Conflict preemption of 5.63.040 under RCW 59.18.270.

The Association asserts that BMC 5.63.040 is in conflict with—and, thus, preempted by—RCW 59.18.270.[27] "Conflict preemption" occurs when a statute and ordinance cannot be reconciled:

> [A] state statute preempts an ordinance on the same subject . . . if a conflict exists such that the statute and the ordinance may not be harmonized. . . . Conflict preemption occurs when an ordinance permits what state law forbids or forbids what state law permits. An ordinance is constitutionally invalid when it directly and irreconcilably conflicts with the statute. However, if the statute and ordinance may be read in harmony, no conflict will be found.[28]

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[24] Sub #39 at 8.
[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).

In relevant part, BMC 5.63.040(1) states: "Upon a tenant's written request, tenants may pay security deposits . . . in installments. . . . Landlords may not impose any fee, charge any interest, or otherwise impose a cost on a tenant because a tenant elects to pay in installments."[29] The Association says this language conflicts with the following language from RCW 59.18.270:

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

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

The Association has not shown preemption of RCW 5.63.040 under RCW 59.18.270.[31]

[29] BMC 5.63.040(1).
[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.

D. Conflict preemption of BMC 5.63.070 under RCW 59.12 and RCW 59.18.

Under RCW 59.12.070 and related statutes, a landlord can commence a lawsuit to evict a tenant due to the tenant's unlawful detainer, forcible entry, or forcible detainer. RCW 59.12.030 states seven bases for finding that a tenant "is liable for unlawful detainer."[32] RCW 59.12.010 and .020 address "forcible entry" and "forcible detainer." The Association asserts that BMC 5.63.070 conflicts with—and, thus, is preempted by—RCW 59.12 and RCW 59.18 because BMC 5.63.070 adds eviction requirements that are not in RCW 59.12 or RCW 59.18.[33]

The Association is correct that the following text from BMC 5.63.070(1) conflicts with RCW 59.12 and RCW 59.18:

> Owners of housing units *shall not* evict or attempt to evict any tenant, or otherwise terminate or attempt to terminate the tenancy of any tenant *unless* the owner can prove in court that just cause exists. . . . The reasons for termination of tenancy listed below, and *no others*, shall constitute just cause under this section. . . .[34]

The plain language of BMC 5.63.070(1) means that, even if RCW 59.12 or RCW 59.18 allows an eviction—e.g., under RCW 59.12.030—a landlord cannot evict unless the landlord has "just cause," a term defined in BMC 5.63.070(1) and one that does not appear in RCW 59.12 or RCW 59.18. For example, RCW 59.12.030(1) allows eviction when a tenant continues in possession of property even after the lease term has expired.[35] In this situation, the landlord is not

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[32] RCW 59.12.030.
[33] See sub #1 at 5 ¶ 16; sub #39 at 6-7; sub #43 at 3.
[34] BMC 5.63.070(1) (emphasis added).
[35] See also RCW 59.18.290(2).

required to give a 14-day, 10-day, or three-day notice before commencing an unlawful detainer action.[36] But the Burien code does not allow eviction for the reason stated in RCW 59.12.030(1).[37] In fact, BMC 5.63.070(1) incorporates some bases from RCW 59.12.030, but specifically omits the bases under RCW 59.12.030(1)-(2).[38] Instead, BMC 5.63.070(1) states other reasons for eviction and states that these are the "only" allowed bases for eviction.

One might argue that the situation addressed by RCW 59.12.030(1) is addressed by BMC 5.63.070(1)(c), which allows eviction when a "tenant fails to comply with a 10-day notice to comply or vacate that requires compliance with a material term of the rental agreement"—i.e., fails to vacate when the lease expires.[39] But BMC 5.63.070(1)(c) requires a 10-day notice prior to commencing suit; RCW 59.12.030(1) does not. Moreover, where a landlord seeks to evict simply because the lease has expired—which RCW 59.12.030(1) allows—BMC 5.63.070 imposes additional requirements and restrictions depending on what the landlord wishes to do with the property.[40] And BMC 5.63.070(2) states: "Any rental agreement provision which waives or purports to waive any right, benefit or entitlement created by this section shall be deemed void and of no lawful force or effect." The straightforward basis for eviction under RCW 59.12.030(1) is not allowed by BMC 5.63.070.

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[36] Compare RCW 59.12.030(1)-(2), with RCW 59.12.030(3)-(5).
[37] BMC 5.63.070.
[38] BMC 5.63.070(1)(a).
[39] BMC 5.63.070(1)(c).
[40] BMC 5.63.070(1)(e)-(f), (h)-(i), (k), (n); BMC 5.63.070(3)-(4), (6)-(7).

The City's view is that BMC 5.63.070 "simply creates affirmative defenses to unlawful detainer actions and does not limit the grounds upon which a tenant may be liable."[41] To support this view, the City makes three primary arguments. First, the City points to BMC 5.63.070(5): "In any action commenced to evict or to otherwise terminate the tenancy of any tenant, it shall be a defense to the action that there was no just cause for such eviction or termination as provided in this section."[42] But this provision merely reiterates that without "just cause" under BMC 5.63.070(1), an eviction cannot occur. BMC 5.63.070(5) does nothing to alleviate the conflict between BMC 5.63.070 and state law.

Second, the City argues that a landlord need not prove compliance with BMC 5.63.070 unless and until a tenant raises the issue:

> The landlord doesn't have to prove that it's complied with the statute [i.e., ordinance] unless it's raised by the tenant as an affirmative defense. . . . The landlord will come in [to court to] evict for nonpayment; [if] the tenant does not show up, [the landlord] get[s] to evict. But if the tenant comes in with a valid affirmative defense . . . the landlord then has to do something to affirmatively prove [compliance with the ordinance].[43]

This argument is at odds with the plain language of BMC 5.63.070(1), which says that an owner cannot even *attempt* to evict "unless the owner can prove in court that just cause exists" under BMC 5.63.070(1). Moreover, even if the City were correct, the City concedes that BMC 5.63.070 imposes the burden of proof on the landlord—i.e., to prove things that state law does not require. The City's

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[41] Sub #40 at 4.
[42] BMC 5.63.070(5).
[43] Audio Record, Apr. 19, 2021, 9:26 a.m.

second argument does not alleviate the conflict between BMC 5.63.070 and state law.

Third, the City argues that RCW 59.12 and RCW 59.18 do not preempt BMC 5.63.070 because the Washington Supreme Court did not find preemption in Kennedy v. City of Seattle and Margola Associates v. City of Seattle. In Kennedy, Seattle enacted an ordinance that, in section 2, made it unlawful "to evict a houseboat except for six specific reasons."[44] The court held this section to be an unconstitutional taking of private property because complying with portions of the ordinance was "an impossibility."[45] In the course of its decision, the court also briefly addressed the plaintiffs' claim that "RCW 59.12, dealing with forcible entry and forcible and unlawful detainer, preempts the field."[46] The court found no preemption.[47] Instead, it said: "A defendant in an unlawful detainer action may assert any defenses available. RCW 59.16.030; 59.18.380. The ordinance does not raise further procedural barriers between landlord and tenant but simply represents another defense for the tenant."[48] The court cited to legislative history showing that "the Governor vetoed portions of the act which would have specifically preempted Seattle ordinance No. 107012."[49]

[44] Kennedy v. City of Seattle, 94 Wn.2d 376, 379 (1980).
[45] Id. at 384-87.
[46] Id. at 384.
[47] Id.
[48] Id.
[49] Id.

There are three important things to note about Kennedy. First, it is debatable whether Kennedy's one-paragraph preemption discussion is dicta.[50] Whether dicta or not, it is clear that Kennedy's primary, dispositive holding—which received the most analysis—was that the ordinance was an unconstitutional taking.[51] Second, although Kennedy mentions conflict preemption, the argument that the plaintiffs made—and, presumably, the one the court ruled on—was one of field preemption.[52] Third, the court emphasized a unique scenario specific to the Seattle ordinance at issue: The Legislature apparently viewed RCW 59.12 as *not* preempting the Seattle ordinance and then passed legislation to specifically preempt the ordinance. But the Governor vetoed that attempt, maintaining the status of no preemption.[53]

In Margola, building owners challenged a Seattle ordinance that precluded an owner from evicting a tenant until the owner registered its building with the city.[54] The plaintiffs argued that the registration ordinance conflicted with state law:

> The registration ordinance prohibits a landlord from evicting a tenant unless the landlord has obtained a rental housing registration for that building. Margola argues this prohibition irreconcilably conflicts with [RCW 59.18's] provisions on unlawful detainer, which establish

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[50] See, e.g., City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 53 n.7 (1998).
[51] Kennedy, 94 Wn.2d at 385 ("But the limitations on the use by the moorage owner are so restrictive as to amount to a taking under Const. art. 1, s 16, and the Fifth Amendment."); id. at 386-87.
[52] Id. at 384 ("Plaintiffs claim RCW 59.12 . . . preempts the field.").
[53] Id.
[54] Margola Assoc. v. City of Seattle, 121 Wn.2d 625, 630-32 (1993), abrogated on other grounds, Yim v. City of Seattle, 194 Wn.2d 651 (2019).

> procedures for evicting a tenant without regard to compliance with rental registration requirements.[55]

In ruling that RCW 59.18 did not preempt the ordinance, the Margola court quoted almost all of Kennedy's brief preemption discussion, and then concluded that the registration ordinance "likewise creates an additional affirmative defense for a tenant: the tenant cannot be evicted unless the building has a rental housing registration."[56] Thus, in Margola, the Supreme Court viewed the "defense" language in Kennedy as a reference to an affirmative defense. And the Margola court viewed the registration requirement as an affirmative defense that did not conflict with the procedures for evicting a tenant under RCW 59.18.[57]

Thus, Margola's preemption holding is narrow: a requirement that a landlord register its building before proceeding with an eviction does not conflict with RCW 59.18 (or RCW 59.12). And BMC 5.63.070 contains a licensing provision that falls within this narrow holding.[58] But Margola's narrow holding about an affirmative defense based on lack of registration has little to no bearing

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[55] Margola, 121 Wn.2d at 651-52.
[56] Id. at 652.
[57] See Black's Law Dictionary (11th ed. 2019) (under definition of "defense," defining "affirmative defense" as "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense."); Lake Hills Inv. LLC v. Rushforth Constr. Co., Inc., 14 Wn. App. 2d 617, 626-27 (2020) ("Because the defendant asserting an affirmative defense presents an independent legal theory based on evidence extraneous to the plaintiff's case, it bears the burden of proof.") (footnote omitted), rev. granted, 196 Wn.2d 1042 (2021).
[58] BMC 5.63.070 ("Owners may not evict residential tenants from rental housing units if the units are not licensed with the city of Burien. . . A court may grant a continuance in an eviction action in order to give the owner time to license the rental housing unit.").

on the permissibility of the 14-point, "just cause" requirements of BMC 5.63.070(1)(a)-(n).

In its reconsideration motion, the City argues that the Margola court found that state law did not preempt the "good cause" provisions of SMC 22.206.160(C);[59] that SMC 22.206.160(C) and BMC 5.63.070(1) are very similar; and, thus, state law does not preempt the the "just cause" provisions of BMC 5.63.070(1). But this argument is erroneous. Margola does not mention SMC 22.206.160(C) or "good cause" for eviction.[60] "Just cause" appears once, in passing.[61] Margola says nothing about whether imposing additional "good cause" or "just cause" requirements—not found in RCW 59.12 or RCW 59.18—results in a conflict that then results in preemption. Margola's narrow preemption holding is limited to the affirmative defense of lack of registration.

BMC 5.63.070's limiting, exclusive requirements for "just cause" result in BMC 5.63.070 "forbid[ding] what state law permits."[62] Because BMC 5.63.070 forbids bases for eviction that RCW 59.12 and RCW 59.18 permit, BMC 5.63.070 is preempted to the extent that it restricts an Association member's prima facie case for eviction under RCW 59.12 or RCW 59.18.[63]

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[59] See sub #62 Ex. A at A-3.
[60] Margola, 121 Wn.2d 625.
[61] Id. at 632.
[62] Watson, 189 Wn.2d at 171 (quotation marks and citations omitted).
[63] See McCoy v. Courtney, 25 Wn.2d 956, 963 (1946) ("'prima facie case' is one where the evidence is sufficient to justify, but not to compel, an inference of liability") (citation omitted); Black's Law Dictionary (11th ed. 2019) (defining "prima facie case" as "1. The establishment 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."); id. (defining "prima facie" as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted . . .").

It may be that portions BMC 5.63.070 have some permissible, non-preempted effect in providing an affirmative defense, apart from limiting what constitutes a prima facie case for eviction under RCW 59.12 and RCW 59.18. Determining that would require an actual dispute with a factual record, as well as briefing that addresses the nuances of BMC 5.63.070(1)(a)-(n) and (2)-(7). In that regard, the Court finds that further factual development is necessary, the Court withholding further consideration does not impose a significant hardship on the parties, and there is no ripe dispute before the Court that would allow the Court to further tease out the competing meanings of RCW 5.63.070 versus RCW 59.12 and RCW 59.18.[64]

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

The Association argues that BMC 5.63.060 violates Article I, Section 5, of the Washington Constitution, which protects the right to "freely speak, write and publish on all subjects."[65] BMC 5.63.060 applies to a narrow, specific set of landlords:

[64] 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"); see Sabri v. United States, 541 U.S. 600, 608-09 (2004) ("[L]aws should not be invalidated by reference to hypothetical cases. . . . Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of premature interpretatio[n] of statutes on the basis of factually barebones records.") (quotation marks and citations omitted).

[65] Const. art. I, § 5.

> *Owners of a multifamily rental housing building having five or more housing units, any one of which rents for an amount that is affordable to households at or below 80 percent of area median income, as median income was most recently determined by the United States Department of Housing and Urban Development for the Seattle metropolitan statistical area, as adjusted for household size*, shall notify the director of the owner's intent to sell the building. The notice shall be in writing and include the owner's name, phone number, and the address of the rental housing building that will be listed for sale. The notice shall be mailed no later than 60 days prior to the building being listed with any real estate service or advertised for sale either in a printed newspaper or website.[66]

The evidence before the Court does not show that any Association member owns a lower-income, "multifamily rental housing building having five or more housing units."[67] In fact, the Association says it average "member owns between 2 and 3 units" and "the vast majority of [members] are basically 'mom and pop' owners of one or two rental units. . . ."[68] Nor does the evidence show that any Association member is planning to buy, or wants to buy, a five-unit building.[69] Thus, the Association has not shown that, as to BMC 5.63.060, any member has "suffered or will suffer an 'injury in fact.'"[70] Therefore, the Court finds that the Association does not have standing to assert that BMC 5.63.060 violates Article I, Section 5.[71]

The Association argues that while under normal rules, it might not have standing for this claim, there are special standing rules for free-speech claims.

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[66] BMC 5.63.060 (emphasis added).
[67] Sub ##39, 57.
[68] Sub #39, Martin Declaration ("Decl.") at 2; see sub #57, Exs. A-C.
[69] Sub ##39, 57.
[70] Alim, 14 Wn. App. 2d at 851-52 (quotation marks and citations omitted).
[71] Id.

The Association argues that "the law is clear that a party may assert the free speech interests of nonparties."[72] This argument is only partially accurate. The Association cites Broadrick v. Oklahoma, State v. Hegge, and State v. Immelt. A close reading of these cases shows that they do not support suspending the normal rules of standing as to the Association.

Broadrick involved a state statute that restricted the political activities of civil servants.[73] The State Personnel Board charged three civil servants with violating the statute; the civil servants then sued.[74] They argued that even if the statute properly restricted their expressive conduct—which the statute "obviously covered"[75]—the statute was overbroad because it "purport[ed] to reach protected, as well as unprotected conduct," and, thus, was unconstitutional on its face.[76] The U.S. Supreme Court confirmed the normal standard that a court will consider a claim only "when raised by someone whom it concerns":

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.[77]

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[72] Sub #66 at 4.
[73] Broadrick v. Oklahoma, 413 U.S. 601, 602 (1973).
[74] Id. at 609.
[75] Id.
[76] Id. at 610.
[77] Id. at 609-11 (quotation marks and citations omitted).

Despite these principles, the court considered the plaintiffs' argument under a narrow exception: "the Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."[78]

In Hegge, the State charged defendants with assault.[79] Subsequently, the State charged the defendants with the felony of tampering with a witness to the assault.[80] The defendants argued that regardless of whether Article I, Section 5, and the First Amendment protected their conduct, the statute was overbroad on its face because it criminalized some speech that was constitutionally protected.[81] Relying on Broadrick, the Washington Supreme Court entertained the Hegge defendants' overbreadth challenge.[82]

In Immelt, a defendant was convicted of violating a county noise ordinance based on sounding her car horn.[83] The defendant challenged the ordinance, arguing that that is was overbroad because it prohibited some speech that was constitutionally protected.[84] Relying on Broadrick, the Washington Supreme

[78] Id. at 612 (quotation marks and citations omitted).
[79] State v. Hegge, 89 Wn.2d 584, 585 (1978).
[80] Id. at 585-86.
[81] Id. at 589-90.
[82] Id. at 589-91.
[83] State v. Immelt, 173 Wn.2d 1, 4-5 (2011).
[84] Id. at 7.

Court considered the overbreadth challenge, noting that it was unnecessary "to determine whether Immelt's particular actions amounted to protected speech."[85]

Thus, the Association is correct that in Broadrick, Hegge, and Immelt, the court allowed a party to challenge a statute on the basis that the statute went too far by prohibiting the hypothetical, constitutionally-protected speech of others. But each court did so only where *the statute in question regulated the party's conduct*—i.e., the party's own conduct or expression was within the parameters of the conduct or expression regulated by the statute. In each of Broadrick, Hegge, and Immelt, the party making the overbreadth challenge was in court because the government charged the party with violating a statute. And there is no indication that any of these parties argued, or could have reasonably argued, that their conduct did not fall within the parameters of the statute. Instead, in making a defense, the party challenged the full breadth—or overbreadth—of the statute that the party was charged with violating.[86]

That is far different from the Association's challenge to BMC 5.63.060. As noted above, there is no evidence before the Court that any Association member owns the kind of "multifamily rental housing building" that BMC 5.63.060 regulates. There is no evidence that the government has charged the Association or any Association member with a violation of BMC 5.63.060. Indeed, how could

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[85] Id.

[86] See Broadrick, 413 U.S. at 609 (appellants' conduct was "obviously covered" by statute in question); Sabri, 541 U.S. at 609 (criminal defendant could make constitutional "overbreadth challenge" where "acts charged against [defendant] himself were well within the limits of legitimate congressional concern").

the government do so when—unlike the accused in Broadrick, Hegge, and Immelt—no Association member falls within the definition of the owners that BMC 5.63.060 regulates? Broadrick, Hegge, and Immelt provide no basis for allowing the Association to avoid the normal requirements for standing. Under Alim, the Association does not have standing to challenge BMC 5.63.060.[87]

In addition, the Court finds that the BMC 5.63.060 challenge is not ripe because resolving it requires "further factual development" and because there is no "hardship to the parties [from] withholding court consideration."[88] That is, if in the future, an Association member owns a "multifamily rental housing building" subject to BMC 5.63.060, the member will be free to challenge the ordinance, which includes the right to seek relief under the UDJA. Likewise, any person who currently owns such a building is free to challenge the ordinance under the UDJA. Requiring further factual development—evidence of a qualifying owner—is reasonable, and there is no unreasonable hardship to that owner, or the Association, in withholding court consideration now.

Third Cause of Action:
The claim that Ordinance 716 violates Article I, Section 16, of the Washington Constitution

In part, Article I, Section 16, of the Washington Constitution states: "No private property shall be taken or damaged for public or private use without just

[87] Alim, 14 Wn. App. 2d at 851-52.
[88] Id. at 856 (citations omitted).

compensation having been first made. . . ."[89] In Yim v. City of Seattle ("Yim I"), the Washington Supreme Court clarified the status of its takings jurisprudence:

> [T]here are only two categories of *per se* regulatory takings: (1) where government requires an owner to suffer a permanent physical invasion of her property and (2) regulations that completely deprive an owner of all economically beneficial us[e] of her property. If an alleged regulatory taking does not fit into either category, it must be considered on a case-by-case basis in accordance with the Penn Central factors.[90]

The Association asserts a claim under the first *per se* category (physical invasion of property), not under the second *per se* category or under the Penn Central factors.[91] The Association says this invasion occurs because Ordinance 716 severely restricts an owner's right to exclude people from the owner's property and by delaying the right to sell property until after giving 60 days' notice to the City.[92]

As discussed above, provisions such as BMC 5.63.070 add significant restrictions that do not exist under state law (RCW 59.12 and 59.18). And the Association's argument has merit based on the text of Article I, Section 16. But under the binding precedent of Yim I, the Association has not shown a *per se* permanent physical invasion.[93] Thus, its claim fails.

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[89] Const. art. I, § 16.
[90] Yim v. City of Seattle, 194 Wn.2d 651, 672 (2019) ("Yim I") (quotation marks, emphasis, and citations omitted) (referring to Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).
[91] Sub #39 at 15-16; sub #43 at 6.
[92] See, e.g., sub # 1 at 6.
[93] Yim I, 194 Wn.2d at 672.

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

The Association asserts that BMC 5.63.040 and BMC 5.63.070 violate Article I, Section 3, of the Washington Constitution, which states: "No person shall be deprived of life, liberty, or property, without due process of law."[94] Under the binding precedent of Yim I and Yim v. City of Seattle ("Yim II"),[95] and for reasons explained by the City,[96] the Association's claim fails.

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

The Association asserts that BMC 5.63.070 violates Article I, Section 23, of the Washington Constitution, which prohibits a "law impairing the obligations of contracts."[97]

> A contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value. [Courts] look for a substantial impairment. An impairment may be substantial if a party relied on the supplanted clause. However, a party who enters into a contract regarding an activity already regulated in the particular [way] to which he now objects is deemed to have contracted subject to further legislation upon the same topic.[98]

The factual record about an allegedly impaired contract is extremely thin. It consists only of an unsigned, undated Lease/Rental Agreement, with multiple

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[94] Const. art. I, § 3.
[95] Yim I, 194 Wn.2d at 673-77; Yim v. City of Seattle, 194 Wn.2d 682, 688-701 (2019) ("Yim II").
[96] See, e.g., sub #37 at 27-31.
[97] Const. art. I, § 23.
[98] Estate of Hambleton, 181 Wn.2d 802, 831-32 (2014) (quotation marks and citations omitted).

blanks not filled in.[99] The Association's Executive Director, who attached the sample lease to his declaration, says, "[The Association] supplies members with sample leases, such as . . . Exhibit A."[100] And out of the Association's 5,100 members, "I know of at least one [Association] member who has used this lease form for rental property in the City of Burien before the enactment of Burien Ordinance 716 and that lease is currently in effect."[101] There is no other evidence, including no testimony from the landlord who has used this sample lease.[102]

As an initial matter, the Executive Director's testimony about the use of the sample lease is objectionable under ER 602 and 802. Assuming, for argument, that ER 602 and 802 do not bar the testimony for purposes of determining standing, the record here is still insufficient. Without a factual record, the Court cannot evaluate whether there has been substantial impairment. As one example only, the term of the lease is not stated.[103] The boxes that would indicate a fixed period of time, or an indefinite month-to-month period, are left blank.[104] Without knowing this, the Court does not know whether eviction at the end of the lease would fall under RCW 59.12.030(1) (fixed term) or (RCW 59.12.030(2) (indefinite period). An eviction under .030(1) does not require notice prior to filing an

[99] Sub #39, Martin Decl. Ex. A.
[100] Sub #39, Martin Decl. at 2.
[101] Id.
[102] See sub #39.
[103] Sub #39, Martin Decl. Ex. A § 1.
[104] Id.

unlawful-detainer action; thus, a contract subject to .030(1) might be "substantially impaired" by an ordinance that requires, at the least, a 10-day notice to comply with the rental agreement.[105] An eviction under .030(2) already requires a 20-day notice that the landlord is ending the indefinite period; thus, a new requirement for a 10-day notice might not substantially impair that contract. This is but one example of why the factual record is insufficient.

The Court finds that the Association has not shown that it has a member that has suffered or will suffer an injury in fact. Thus, the Court finds that the Association does not have standing.[106] In addition, the Court finds that the claim under Article I, Section 23, requires further factual development and the hardship to the parties of withholding court consideration is reasonable and appropriate. Thus, the Court finds that the matter is not ripe for determination.[107]

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

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

> The director is authorized to request records from [a] landlord and the landlord shall allow the director access to such records, as well as a complete roster of tenants' names and contact information, when requested, with at least five business days' notice and at a mutually agreeable time, to investigate potential violations of the requirements of this chapter.[108]

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[105] See BMC 5.63.070(1)(c).
[106] See Alim, 14 Wn. App. at 851-52.
[107] See id. at 856.
[108] BMC 5.63.080(1)(c).

The Association asserts that this provision violates Article I, Section 7, of the Washington Constitution, which states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[109] But the ordinance merely authorizes the director to request records; it does not *require* that the director do so. And there is no evidence before the Court that that the director has requested records from any Association member (or from anyone else).[110]

The evidence does not show that the Association or any Association member has suffered or will suffer an injury in fact. Likewise, the Court finds that further factual development is needed and the Court withholding consideration will not cause significant hardship to the parties. Therefore, the Court finds that the Association does not have standing to bring this claim and this claim is not ripe for resolution.[111]

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

Ordinance 716 states that it went into effect five days after publication.[112] The Association asserts that, under certain statutes and ordinances, Ordinance 716 could not lawfully go into effect until 30 days after publication and that Burien citizens had the right—during those 30 days—to file a referendum petition, which

[109] Const. art. I, § 7.
[110] Sub #39, Martin Decl. and Shadbolt Decl.; sub #57 Exs. A-C.
[111] See Alim, 14 Wn. App. 2d at 847, 856.
[112] Sub #36 Ex. A.

would then prevent the ordinance from becoming effective until the City held an election on the referendum. The Association reasons that, thus, Burien citizens were deprived of the opportunity to obtain a referendum on Ordinance 716.

There is no evidence before the Court that the Association or any Association member submitted a referendum petition within 30 days of Ordinance 716's publication or even sought to submit a petition within this period.[113] Nor is there any evidence that the Association or any Association member planned to submit a petition within the 30-day period but then saw the five-day effective date and abandoned the effort to submit a petition.[114]

The evidence does not show that the Association or any Association member has suffered or will suffer an injury in fact. Likewise, the Court finds that there is a need for further factual development (e.g., evidence of an actual attempt to file a petition), and that withholding court consideration now will not cause significant hardship to the parties. Therefore, the Court finds that the Association does not have standing to bring this claim and this claim is not ripe for resolution.[115]

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[113] Sub #39, Martin Decl. and Shadbolt Decl.; sub #57 Exs. A-C; cf. CLEAN v. City of Spokane, 133 Wn.2d 455, 461 (1997) (group challenging ordinance submitted referendum petition three days after ordinance approved).

[114] Sub ##39, 57.

[115] See Alim, 14 Wn. App. 2d at 847, 856.

Ruling

Therefore, it is ORDERED that:

1. Plaintiff Rental Housing Association of Washington's motions for summary judgment[116] and reconsideration[117] are granted in part and denied in part as follows.

2. Defendant City of Burien's motions for summary judgment[118] and reconsideration[119] are granted in part and denied in part as follows.

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

4. Except as stated in the previous paragraph, the Association's claims are dismissed.

5. The Order on Motions for Summary Judgment[120] and Amended Order on Motions for Summary Judgment[121] are withdrawn and vacated.

May 20, 2021

Judge Chad Allred
King County Superior Court
e-signature on following page

[116] Sub #39.
[117] Sub #66.
[118] Sub #37.
[119] Sub #61.
[120] Sub #58.
[121] Sub #60.

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Case Title:	RENTAL HOUSING ASSN OF WASHINGTON VS CITY OF BURIEN
Document Title:	ORDER RE SUMMARY JUDGMENT - SECOND AMENDED

Signed By:	Chad Allred
Date:	May 20, 2021

Judge: Chad Allred

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