Honorable Suzanne Parisien
Dept. 42
Trial Date: March 5, 2018

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	Case No. 17-2-05595-6 SEA **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

I. INTRODUCTION

PLAINTIFFS, BY AND THROUGH THEIR ATTORNEYS, make this Complaint against the City of Seattle, seeking a declaration that the City's "first in time" rule, enacted as part of Council Bill 118755, violates the Takings, Due Process, and Free Speech Clauses of the Washington State Constitution, and also seeking a permanent injunction forbidding the City from enforcing its unconstitutional rule.

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1. Landowners have a constitutionally protected right to rent or sell their property, in a non-discriminatory manner, to whom they choose, at a price they choose—which includes a right of first refusal. *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000).

2. The City's first-in-time rule mandates that landlords must offer a rental unit to the first applicant who satisfies the landlord's advertised rental criteria. The rule then gives the first qualified applicant a right of first refusal. The rule declares it an "unfair practice" for a landlord to choose from among qualified applicants. The City Code states that the first-in-time rule is a mandatory condition on permission to rent property and is automatically imposed whenever a landlord advertises a vacancy.

II. PARTIES

3. The plaintiffs in this action, Chong and MariLyn Yim, Kelly Lyles, Beth Bylund, CNA Apartments, LLC, and Eileen, LLC, are landlords who own and manage small rental properties in Seattle and are subject to Seattle's Open Housing Ordinance.

4. The City of Seattle is a Washington state municipality located in King County and chartered by the State of Washington.

5. Plaintiffs reserve the right to name additional defendants as needed.

III. JURISDICTION AND VENUE

6. This civil action is a case of actual controversy between Plaintiffs and Defendant arising under the Washington State Constitution.

7. This Court has jurisdiction over this matter pursuant to RCW 4.28.020, RCW 7.24.010, 7.40.010, and Article IV, Sections 1 and 6, of the Washington State Constitution.

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8. Under RCW 4.12.020, venue is proper in King County Superior Court because the City of Seattle sits within county limits.

IV. FACTUAL BACKGROUND

Seattle's "First-in-Time" Ordinance

9. To rent residential units in Seattle, landlords must register with the Seattle Department of Construction and Inspections. SMC 22.214.040. To register, landlords must submit an application along with a fee and renew every five years. *Id*. The City may revoke registration for failure to comply with the Rental Registration and Inspection Ordinance. SMC 22.214.045.

10. On August 9, 2016, the City Council amended Seattle's Open Housing Ordinance in Council Bill 118755. These amendments were designed to address the city's ongoing affordable housing crisis and to affirm Seattle's "longstanding commitment to race and social justice." The amendments add anti-discrimination protections based on a renter's source of income, such as subsidies, child support payments, Social Security, and so on.

11. The Council Bill also contains a section titled "First in time." That section requires landlords to "offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for the approval of the application." SMC 14.08.030. If this first applicant does not accept the offer within 48 hours, then the landlord must offer the unit to other qualified applicants in chronological order. SMC 14.08.040(A)(4). The Ordinance declares it an "unfair practice" for a landlord to choose from among the qualified tenants that apply for a rental unit and deems such a choice "contrary to the public peace, health, safety and general welfare." SMC 14.08.030; 14.08.040(A)(4).

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12. The stated purpose of the first-in-time rule is to police against "both explicit and implicit (unintentional) bias" in tenant selection by eliminating a landlord's right to select whom he or she will rent to.[1] City Council Member Lisa Herbold explained on the City Council webpage that she sponsored the bill because she believed that when a landlord selects a tenant using his or her "gut instinct," the decision may be based on implicit or unconscious bias.

13. According to Council Member Herbold, the City's decision to take away landlords' right to select their tenants provides an opportunity for landlords to "unlearn" any "implicit associations" they may have. Or, as the study she cites says, taking away an individual's choice allows the government to "intervene" in an individual's unconscious mental constructs in order to "debias" or "reprogram" any "existing cognitive associations."[2]

14. In the full council meeting in which the City Council adopted the rule, Council Member Debora Juarez said the first-in-time rule's purpose is to ensure that landlords do not "cherry pick which residents they deem 'worthy' and to level the playing field for those looking for housing." A city staffer likewise stated in a city council committee meeting that the rule was designed to "remove the discretion that a landlord has when deciding between two or more potential tenants."

15. Council Member Herbold shared a similar sentiment, that by eliminating the landlord's right to make that choice, the first-in-time rule was meant to "limit the likelihood of creaming the

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[1] Lisa Herbold, Council Passes Source of Income Legislation (http://herbold.seattle.gov/council-passes-source-of-income-legislation-delridge-day-35th-avenue-sw-follow-up-sw-spokane-street-re-paving/).

[2] Cheryl Staats et al., State of the Science: Implicit Bias Review 2015 (Kirwan Institute for the Study of Race and Ethnicity 2015) (available at http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf).

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application pool and going through a stack of applications to find the best one even if [the landlord has] already identified somebody . . . that meets their qualifications."

16. The City Council expressly recognized that the first-in-time rule limits landlord discretion even when the pool of qualified applicants contains no members of a protected class. Council Member Juarez said that discretion would be eliminated "even in cases when the landlord is deciding between tenants on factors not part of a protected class." Indeed, a City of Seattle Staff Report, dated June 14, 2016, warned that the "[u]se of a first in time policy affects the [] landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class."

17. The first-in-time rule lays out various rules about timing, notice, and record-keeping. When advertising, landlords must offer notice of the criteria that an applicant must satisfy to qualify for tenancy. SMC 14.08.050(A)(1). Landlords must note the date and time when they receive an application. They must then screen rental applications in chronological order and offer tenancy to the first eligible candidate. SMC 14.08.050(A)(2). If a prospective tenant needs a reasonable amount of extra time to complete an application or the landlord makes further inquiries, the applicant may keep her place in line. SMC 14.08.050(B).

18. The first-in-time rule has a few exceptions that do not affect these plaintiffs. A landlord does not need to follow the rule if the landlord is legally obligated to or voluntarily sets aside the rental unit for "specific vulnerable populations." SMC 14.08.050(A)(4)(a), (b). Accessory dwelling units and detached accessory dwelling units are also exempted.

19. The Open Housing Ordinance creates both public and private causes of action exposing landlords to liability if they exercise discretion when selecting a tenant. Private individuals

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aggrieved by an "unfair practice" have a cause of action under the Ordinance. If an aggrieved applicant can show that he or she was subjected to an "unfair practice," he or she may be entitled to a permanent or temporary injunction, temporary restraining order, or other order, "including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate." SMC 14.08.095(f). The aggrieved applicant may also recover damages, "including damages for humiliation and mental suffering, damages for the loss of the right to be free from discrimination in real estate transactions, and any other appropriate remedy set forth in the federal Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 et seq." *Id*. The Ordinance also provides for an award of attorneys' fees and costs to the prevailing party. *Id*.

20. The Ordinance also authorizes the City's Director of the Office of Civil Rights to pursue a claim against a landlord accused of an "unfair practice." The Ordinance directs the City Hearing Examiner to grant whatever relief it deems "necessary to correct the practice, effectuate the purpose of [the Open Housing Ordinance], and secure compliance therewith." SMC 14.08.180(C). Upon finding that a landlord engaged in an "unfair practice," the Examiner is additionally authorized to impose civil penalties of up to $11,000 for the first offense, $27,500 if another "unfair practice" had occurred in the prior five years, and $55,000 if two "unfair practices" occurred in the prior seven years. SMC 14.08.185.

Plaintiffs Are Suffering Immediate and Ongoing Harm

21. Each of the plaintiffs has suffered immediate and ongoing harm because the City appropriated their constitutionally protected right to choose whom they will house and work with in these often lengthy and interpersonal landlord-tenant relationships. The inability to exercise the right of discretion increases various risks faced by plaintiffs when renting their property.

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22. Chong and MariLyn Yim own a duplex and a triplex in Seattle. They and their three children live in one of the triplex units. They rent out the other two units. The Yim family could not afford to live in Seattle without the rental income from these properties. The Yims have never denied tenancy to anyone based on membership in a protected class.

23. The Yims value their right to select their tenants. The Yim family cannot afford to absorb losses because of a tenancy gone bad. And for a family with three children, selecting a tenant who will also be their close neighbor requires careful discretion. The Yims share a yard with their renters, and the Yim children are occasionally at home alone when their renters are home. The Yims treasure their right to ensure compatibility and safety by choosing among eligible applicants.

24. The first-in-time policy has an immediate impact on the Yim family and their current tenants. The Yims have long rented their units well below market rate. Because of the first-in-time rule, they have to raise rents in order to build up a larger cushion of reserves to absorb the risks they face under the first-in-time rule.

25. The rule has also affected the Yim's rental practices. One of the Yim's tenants recently lost a roommate and needs to find a new one. The Yims drafted up new screening criteria in response to the first-in-time rule. To protect their investment, the Yims increased the stringency of their rental criteria. As a consequence, their tenant has had difficulty finding a new roommate, which may result in the tenant's displacement. The Yims have found that the rule has made it difficult for them to offer flexibility and compassion or consider special cases.

26. Kelly Lyles is a single woman who owns and rents a home in West Seattle. Ms. Lyles has never discriminated based on a protected class.

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27. Ms. Lyles is a local artist who relies on rental income to afford living and working in Seattle. The $1,300 in rent she receives monthly makes up most of her income.

28. Discretion in selecting tenants is vital to Ms. Lyles's livelihood. She cannot afford to miss even a month's rent, and she does not have the resources to pursue an unlawful detainer action. As a single woman who interacts frequently with her tenants, she also considers personal safety when choosing them. Such considerations cannot be adequately addressed through general rental criteria. The first-in-time policy has an immediate impact on Ms. Lyles's decisions about how much she charges for her rent because she wants to avoid filling a vacancy with someone that she has not personally chosen as a tenant. Hence, she is less inclined to increase rent as market rates rise.

29. CNA Apartments, LLC, is owned by Thomas, John, George, and Penelope Benis for college investment. The LLC manages a six-unit apartment building in Seattle. The three Benis children—ages 13, 14, and 15—use the rental income they receive from their ownership interests in the LLC as their college fund. The children each have a 20 percent ownership interest in the LLC. Their father, Chris Benis, acts as the LLC's manager, and their mother owns the remaining 40 percent interest. The Benis family values the discretion they have enjoyed in selecting tenants. They have never discriminated based on protected classes. Rather, they have used that discretion to select people that they believe will be long-term tenants and help them to build on the investment in the children's future education.

30. Scott Davis and his wife own and manage Eileen, LLC, through which they operate a seven-unit residential complex in the Greenlake area of Seattle. Mr. Davis also owns and runs a

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small business, the Davis Sign Company. The rental property serves as an important supplement to the Davis family's income. They have never discriminated on the basis of a protected class.

31. As a small family venture, the Davises treasure their ability to decide who they will rent their units to. The first-in-time rule will significantly disrupt their rental business. When a tenant notifies the Davises of a move-out, they typically have less than three days to advertise, show the unit, and screen potential applicants so the applicants can notify their current landlords early in the month, as is often required by lease agreements. That means the Davises must act quickly to avoid losing a month's worth of rent. The first-in-time rule, however, slows down this process because the Davises will no longer advertise publicly in order to maintain some control over the rental process. They will only advertise by word-of-mouth through current and past tenants and friends and family.

32. By removing the reasonable exercise of discretion, the first-in-time rule forces the Davises to make strict screening requirements that will in fact exclude good tenants who could overcome deficiencies in their application by making a good impression. Currently, the Davises rent a unit to two young men from separate minority groups. They have lived in the unit over three years, but they would not satisfy the Davises' screening requirements today. Both were recent graduates with no prior rental history and no solid credit history. The Davises liked them because they were polite, took off their shoes when they viewed the apartment, and seemed excited to live there. The Davises decided to take a chance, even though the pair did not satisfy their typical rental criteria. Under the first-in-time rule, the Davises cannot make that kind of judgment call.

33. Beth Bylund owns and rents out two single-family homes in Seattle. She has never discriminated on the basis of any protected class. Ms. Bylund filled a vacancy in one of her rentals

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in late January of 2017 and thus has had to comply with the first-in-time policy. Ms. Bylund chose not to advertise the unit because of the first-in-time rule. Rather than advertising broadly on large, public websites—which would give her less control over who applied—Ms. Bylund relied on word of mouth in hopes that she could narrow the pool of applicants. This slowed down the process of renting, but she would prefer to keep a unit vacant for a month than face the risk associated with opening up the pool of applicants without discretion to choose among them.

34. The first-in-time rule also affects Ms. Bylund's ongoing management of her rental properties. Ms. Bylund hesitates to raise rents along with the market because she fears losing her current tenants and being forced to take on a tenant not of her own choosing.

35. The plaintiffs in this action have suffered immediate and ongoing harm.

V. DECLARATORY RELIEF ALLEGATIONS (Ch. 7.24 RCW)

36. Under Article 1, Section 16, of the Washington State Constitution, the City of Seattle can only appropriate an individual's property right if the city offers just compensation and can justify the taking as a public use. Takings for private use are prohibited.

37. The first-in-time rule constitutes a taking of a valuable property interest for a private use in violation of Article I, Section 16, on its face.

38. Under Article 1, Section 3, the City cannot deprive landlords of property without due process of law. By enacting an unduly oppressive rule that is not reasonably necessary to fulfilling a legitimate public purpose, the City has facially violated the plaintiffs' due process rights.

39. The first-in-time rule also imposes a burden on protected commercial speech in contravention of Article 1, section 5, of the Washington State Constitution, which protects the freedom of speech. If landlords engage in commercial speech activity, such as advertising a

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tenancy on Craigslist or similar venues, they suffer a loss of control over who will live on their property. This burdens and chills the exercise of commercial speech rights by reducing landlord discretion as a consequence of the exercise of a protected right. Alternatively, the rule constitutes an unconstitutional condition on the exercise of the right to advertise by imposing the first-in-time requirements on landlords who advertise publicly.

40. A declaratory relief judgment as to whether the City may enforce the first-in-time rule to ensure that landlords do not choose among eligible applicants will serve a useful purpose in clarifying and settling the legal relations between plaintiffs and the City. A declaratory relief judgment will also afford relief from the uncertainty and insecurity giving rise to this controversy.

VI. PERMANENT INJUNCTIVE RELIEF ALLEGATIONS (Ch. 7.40 RCW)

41. The Yims and the other landlord-plaintiffs have no adequate remedy at law to address the City's unlawful taking of their right to lease their property to the eligible candidate of their choosing.

42. The Yims and the other landlord-plaintiffs will suffer irreparable injury absent an injunction restraining the City from enforcing this uncompensated taking with no public use.

VII. CAUSES OF ACTION

COUNT I

The City's Appropriation of Landlords' Right To Lease Their Property to the Applicant of Their Choice—Without Just Compensation—Violates the Takings Clause of the Washington State Constitution

43. The plaintiffs reallege the preceding paragraphs as though fully set out here.

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44. Article I, section 16, of the Washington State Constitution says: "Private property shall not be taken for private use" and "[n]o private property shall be taken . . . for public or private use without just compensation."

45. The Supreme Court of Washington has held that the right to sell or lease property to a person of your choosing is a protected property right. *See Manufactured Housing Communities v. State*, 142 Wn.2d 347, 364-68 (2000). By taking this right from the Yims and the other landlord-plaintiffs and granting a right of first refusal to the first eligible applicant, the City has taken property without just compensation.

46. The City's adoption of a first-in-time rule appropriates a right of first refusal and gives it to the first qualified person to apply for a tenancy and thereby deprives the landlord plaintiffs of their right to lease property to a person of their choosing, a valuable and protected property right, in a manner that constitutes a taking under Washington Supreme Court precedent.

47. The City has failed to offer any just compensation or method of seeking compensation for this taking.

48. The first-in-time rule therefore violates Article I, section 16 on its face. Plaintiffs have and will continue to suffer irreparable harm until this law is declared unconstitutional and void.

49. This constitutional claim is ripe for resolution because it presents no facts in need of further development.

COUNT II

The City's First-in-Time Rule Grants a Right of First Refusal to the First Qualified Applicant and Constitutes a Prohibited Private Taking

50. The plaintiffs reallege the preceding paragraphs as though fully set out here.

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51. Article I, section 16, of the Washington State Constitution forbids the government from taking private property for a "private use."

52. The City's first-in-time rule appropriates a right of first refusal from landlords and grants that right to the first qualified applicant—a private individual. A right of first refusal is a valuable and protected property interest. *See Manufactured Housing Communities of Washington*, 142 Wn.2d at 364-67. A governmental attempt to transfer such a right from one private individual to another is a forbidden private taking and is void.

COUNT III

The City's First-in-Time Rule Violates Substantive Due Process Because It Uses an Improper, Overbroad, and Unduly Burdensome Means to Achieve an Illegitimate Public Purpose

53. The plaintiffs reallege the preceding paragraphs as though fully set out here.

54. Article I, section 3, of the state constitution states: "No person shall be deprived of life, liberty, or property, without due process of law." The guarantee of due process requires that all government actions that restrict individual's liberty or property rights must sufficiently relate to a legitimate end of government; otherwise, the action is void. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-31 (1990).

55. The City's first-in-time rule seeks to address the possibility that rental decisions may be based on an individual's implicit or unconscious bias—without first having gathered any evidence that rental decisions are in fact being made based upon invidious implicit bias. Indeed, the study relied on by the City in promulgating the first-in-time rule concludes that implicit bias, by its very nature as an unconscious mental process, is unprovable. Its rectification is therefore not a legitimate public purpose.

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56. The City's first-in-time rule employs improper, overboard, and unduly burdensome measures to achieve its stated goal of policing against implicit bias. The first-in-time rule attempts to curtail the possibility that rental decisions may be motivated by negative unconscious associations by depriving all landlords—whether they hold any implicit biases or not—of the protected property right to choose the person they want to offer a tenancy to. The City's rule also burdens all landlords in exercising their protected right to advertise vacancies to the public. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980).

57. The City's first-in-time rule is overbroad, unduly burdensome, and not "reasonably necessary" to combat the risk of implicit bias. As conceded by members of the Council, the Ordinance forbids landlords from choosing among a pool of qualified applicants even if none of those applicants belong to a protected class. The rule also burdens landlords' exercise and enjoyment of constitutionally protected rights without any proof of discrimination against a protected class. The first-in-time rule also exposes landlords to damages and penalties for the exercise of constitutionally protected speech and property rights without any proof of discrimination against a protected class, implicit or otherwise. The rule is therefore far broader than necessary to halt discrimination against a protected class.

58. The rule is also unduly oppressive. The City has not proven that any of the landlords subject to the first-in-time rule engage in discrimination, implicit or otherwise. The harm visited upon plaintiff landlords—the deprivation of a fundamental constitutional right—is significant. Yet the study the City relied on to promulgate the rule offered several less onerous means of addressing implicit discrimination. The impact upon landlords is thus grossly disproportionate to any public benefit and unduly oppressive.

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59. The first-in-time rule violates the state constitutional guarantee of due process on its face.

COUNT IV

The City's First-in-Time Rule Burdens and Chills Protected Speech by Forcing Landlords To Contract with the First Eligible Applicant Who Responds to an Advertisement

60. The plaintiffs reallege the preceding paragraphs as though fully set out here.

61. Article I, Section 5, of the Washington State Constitution says: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." This right includes the right to advertise and propose commercial transactions. *Kitsap Cty. v. Mattress Outlet/Gould*, 153 Wn.2d 506, 511, 104 P.3d 1280 (2005).

62. Government action that chills or burdens commercial speech must face constitutional scrutiny.

63. The first-in-time rule burdens and chills plaintiffs' commercial speech rights on its face. A landlord who chooses to publicly advertise available units on widely viewed websites or other venues has no control over the pool of eligible applicants. In the ordinary course of business, a wide range of possible tenants would be a benefit. The first-in-time rule, however, effectively penalizes public advertising by forcing landlords to take the first eligible applicant. Thus, the more widespread the exercise of commercial speech by landlords, the less control they have over who they must do business with. Imposing such a burden on the free speech rights of landlords facially violates the state constitution.

64. Alternatively, the first-in-time rule creates an unconstitutional condition in violation of Plaintiffs' speech rights. A landlord may publicly advertise an available unit only if they relinquish valuable property interests—the right to decide who can enjoy a right of first refusal and the right

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to choose whom to lease property to. This condition facially violates the freedom of speech enshrined in the state constitution.

VIII. PRAYER FOR RELIEF

Plaintiffs pray for the following relief:

1. For a declaration that section 14.08.050 (the first-in-time rule) of Seattle City Council Bill 118755 (the source-of-income-discrimination ordinance) facially violates Article I, sections 3, 5, and 16 of the Washington State Constitution;

2. For a permanent injunction forbidding the City from enforcing the first-in-time rule and its implementing regulation;

3. For an award of reasonable attorney fees, expenses, and costs as allowed by law and equity, including RCW 4.84.010 and RCW 7.24.100; and

4. For such other relief as the Court deems just and proper.

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Date: August 16, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel for the Defendant City of Seattle,

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via the Court's e-Service application, on August 16, 2017

s/ Ethan W. Blevins
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