JUDGE SUZANNE PARISIEN
Noted for hearing 9 a.m. Feb. 23, 2018

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CHONG and MARILYN YIM, et al., Plaintiffs, v. CITY OF SEATTLE, Defendant.	No. 17-2-05595-6 SEA AMICUS CURIAE MEMORANDUM OF RENTAL HOUSING ASSOCIATION OF WASHINGTON

I. INTRODUCTION

The City of Seattle argues repeatedly that landlord organizations embrace a "first in time" rule as a best practice. This is misleading. The Rental Housing Association of Washington ("RHA") strongly opposes the ordinance at issue, as this brief is intended to make clear. It is one thing to recommend a voluntary practice that is appropriate in certain cases, and quite another to endorse a rigid requirement that is mandatory in all cases.

RHA is concerned that, by granting a right of first refusal to applicants for advertised housing, the City is taking a valuable property interest for private use in violation of the state Constitution. Under the challenged ordinance, the first qualified applicant can tie up a unit for two full days while deciding whether to rent it. And that's just the initial right of refusal – there could be a second, a third, and so on, keeping the unit vacant just so people can turn it down in the same

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order in which they applied.

Although the right to exclude others is a valuable property right, which ordinarily is bargained for, the ordinance provides no compensation for transferring that right to the first applicant. Rather, in the hot Seattle market, a unit attracting high interest may nevertheless remain vacant – at the owner's expense - while an applicant uses the City-guaranteed time to explore multiple housing options. Even if a particularly motivated applicant offers more money, earlier occupancy or a longer lease in order to acquire a housing opportunity, the owner cannot agree to that potential tenant's terms, but must instead offer occupancy to the first person who meets the landlord's minimum rental standards. Thus, the ordinance does not just remove discretion from tenant screening; it gives a prospective tenant an absolute right to exclude all others from the unit without signing a lease or paying a deposit, exposing landlords to a loss of income as well as a loss of control.

RHA has never embraced a rigid first-in-time rule which rewards speedy applications above all else. When timing is everything, compassion and common sense are removed. For these reasons, and because the Washington Constitution prohibits the taking of property for private use, this Court should find the ordinance to be unconstitutional on its face.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Rental Housing Association of Washington (RHA) is a statewide non-profit organization in existence since 1935. RHA provides education and assistance to comply with rental housing laws, and regularly advocates for uniformity and fairness in state and local policymaking. Most of RHA's over 5,500 members rent out single-family homes, often on a temporary basis for work, personal or financial reasons.

RHA is interested in this case because the challenged ordinance, SMC 14.08.050, wrests

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control of tenant selection from rental housing owners and prevents them from entering leases or collecting rent for a unit while an applicant's refusal period is pending. RHA is concerned that, rather than helping groups already protected by discrimination laws, the ordinance is more likely to help those who can apply quickly because of superior transportation or Internet access. In fact, by transferring the right of refusal automatically from the first applicant to the second, the ordinance prevents an owner from waiting more than two days in a sympathetic case – such as when the top applicant is ill or waiting to confirm a visa extension or job. In general, RHA is concerned that the ordinance goes beyond protecting the public's welfare and takes a property interest for private use. Also, RHA is concerned about safety because, under the FIT Rule, where the first person to apply engages in anti-social or even threatening behavior, the owner is required to disregard that conduct as a factor.

III. STATEMENT OF FACTS

A. The Challenged Ordinance Gives Applicants a Right of First Refusal.

The "First-in-time" ordinance (or FIT Rule) makes it an "unfair practice" to rent housing without posting in advance the owner's criteria for screening prospective occupants, the "minimum threshold for each criterion that the potential occupant must meet," all information and submissions necessary for screening, and how to request additional time. SMC 14.08.050.A.1. The owner must "note the date and time" when each application is completed (treating reasonable requests for extra time the same as completion). SMC 14.08.050.A.2; SMC 14.08.050.B. Then the owner must "screen completed rental applications in chronological order" to determine whether the posted criteria are met, and offer tenancy to the first applicant meeting all criteria. SMC 14.08.050.A.3 and SMC 14.08.050.A.4. This process removes any subjective criteria that the landlord might otherwise apply, and limits his or her decision-making to the previously identified factors. SMC

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14.08.050.A.

The FIT Rule says:

> If the first approved prospective tenant does not accept the offer of tenancy for the available unit within 48 hours of when the offer is made, the owner shall review the next completed rental application in chronological order until a prospective occupant accepts the owner's offer of tenancy.

SMC 14.08.050.A.4. Thus, the first qualified applicant has an exclusive right to rent the unit for two days. *Id*. After two days, the right of refusal shifts to the next applicant on the chronological list. *Id*. There is no restriction on how many units the same applicant may tie up at the same time. *Id*. The City does not compensate the owner for losses caused by the FIT Rule. SMC 14.08.050.

B. Landlord Organizations Did Not Endorse Seattle's Ordinance.

The stipulated record includes publications by RHA, whose members mostly own single-family houses, as well as the Washington Multi-Family Housing Association (WMFHA), whose members mostly own large apartment buildings. SR 271-276. The WMFHA publication, entitled "Fair Housing Best Practices," purported to describe "common sense policies and practices" to avoid complaints. SR 271. For example, it urged: "Never be afraid to ask for help" and "Always use the HUD Fair Housing decal in every poster." *Id*. Regarding tenant selection, WMFHA said:

> Accept the first qualified resident to complete the application process and be approved. Date and time-stamp all applications and any supporting documentation required….Do not make assumptions about your residents. Only use facts based on your screening criteria to determine whether an applicant is qualified.

SR 272. WMFHA did not advocate for mandating these practices. SR 271-272.

The RHA publication, entitled "Application and Lease Signing," advised members to set specific criteria for tenant selection, to inform applicants upfront about the criteria, and to apply the criteria consistently (i.e., "If you run a criminal search on one applicant, you need to do so for all of them"). SR 273. The publication said: "You also need to decide what method you will use

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for screening. Are you going to process one application at a time and take the first qualified tenant? Or are you going to run a series of applications and take the most qualified applicant. Make sure to let your applicants know the method you will be using." SR 274. The RHA publication did not recommend the "first qualified" over the "most qualified" approach, nor did it say anything about guaranteeing two days to decide an offer. SR 273-276.

In sum, the stipulated record does *not* establish that landlord organizations support Seattle's FIT Rule. In fact, a different RHA publication – available at https://www.rhawa.org/blog/seattle-council-forces-rental-owners-to-accept-first-applicant - explains that the FIT Rule "omits several key variables in the screening process, such as being able to interview an applicant, as well as having discretion to rent to a lesser qualified individual who is second in line to give that individual a new housing opportunity." This RHA publication (unlike the more general one in the record) expresses several concerns about the FIT Rule: it "removes a great deal of discretion" from the screening process; it could require accepting an applicant with a "reprehensible life perspective" such as misogyny; it will cause owners to "ratchet up" criteria in an already competitive market; and it favors higher-income people who can apply more quickly.

IV. ARGUMENT

A. The City Misleadingly Frames the Ordinance as Industry-Recommended.

Throughout its opening brief, the City asserts that a first-in-time rule is supported by landlord organizations. City's Opening/Response, pp. 1, 4-5, 16, 22, 32-33, 35, 36, 37, 38.[1] But the City offers no support for these assertions, citing only the RHA and WMFHA publications at SR 271-274 and "quick tips" on the American Apartment Owners Association web site

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1 See, e.g., City's Opening/Response at p. 1 ("Landlord organizations…tout first-in-time decision-making as a best practice to avoid discrimination"); p. 16 ("The Rule merely safeguards the public welfare by requiring landlords to use an acknowledged best practice"); pp. 32-33 (the criteria disclosure requirement "is part of the approach urged by landlord organizations"); and p. 38 ("The FIT Rule codifies a best practice advanced by landlord organizations").

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(https://www.american-apartment-owners-association.org/property-management/landlord-quick-tips/fair-housing-best-practices/). *Id*., pp. 4-5. In fact, the cited publications do not endorse Seattle's rigid FIT Rule, nor even mention a right of refusal.

By the City's logic, WMFHA must want to regulate every "best practice" – even poster decals. SR 271. Such an interpretation is absurd. A voluntary practice is simply not the same as a legal mandate subjecting the owner to penalty. Moreover, RHA has never advocated that its members choose the "first qualified" applicant over one who might be "most qualified," but simply recommended that owners adopt an approach, tell applicants what it is, and apply it consistently. SR 273-274. To be clear, RHA opposes the FIT Rule for the reasons outlined herein, including the constitutional concerns discussed below. Lacking any support in the record, the City's assertions of landlord support should be viewed with extreme skepticism.

B. The FIT Rule Takes a Valuable Property Interest for Private Use.

RHA generally agrees with the plaintiffs' takings analysis and does not repeat their arguments here. To briefly summarize the proper framework, *Manufactured Housing Communities of Wash. v. State*, 142 Wn.2d 347 (2000), is dispositive because five justices agreed that:

1. Article I, section 16 of the Washington Constitution prohibits taking private property for private use – with or without compensation (142 Wn.2d at 357-360, 371, 375);

2. A taking occurs when a regulation deprives the owner of a fundamental attribute of property ownership (*Id*. at 369, 379-380);

3. A right of first refusal is a property interest, and part of the "bundle of sticks" of ownership that includes the right to possess, the right to exclude others, and the right to dispose of property (*Id*. at 364-367, 379); and

4. When the public will not own – or even use - the property taken by a regulation, such as in

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Manufactured Housing where only tenants of a mobile home park would benefit from a statutory right of first refusal, the taking is for private use although it may benefit the public indirectly (*Id*. at 361-362, 383-384).

What may be overlooked in this analysis is the significant value of the right to exclude others from Seattle rental properties. The City utterly discounts this value, arguing incorrectly that once an owner voluntarily opens a property for renting, the right to exclude somehow evaporates. City's Opening/Response, pp. 13, 18. This argument is based on *Yee v. City of Escondido*, 503 U.S. 519 (1992), which is inapposite because it dealt solely with physical occupation of property under federal takings law, and not regulatory taking of property under either the federal or state constitutions. In fact, *Yee* acknowledged that the "right to exclude" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," 503 U.S. at 528, quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Contrary to the City's arguments, Seattle landlords do have a right to exclude others from rental properties.

The FIT Rule takes away that right by bestowing a right of first refusal on applicants. The first qualified applicant gets to exclude all other applicants from renting the property for up to two days while deciding whether to accept the City-mandated offer. Without signing a lease or paying a deposit, the first qualified applicant can tie up the unit while shopping around and looking for the best deal. Even if another qualified applicant is ready to move in immediately, the right of first refusal will prevent that from happening.

Ordinarily, such a right of refusal would be bargained for, not freely given. Here, it is taken by the City for the private use of those lucky applicants who manage to complete their applications first, and automatically transfers from one applicant to another until the unit is filled. To appreciate the value of this right to exclude, which is shifted from the owner to the applicant, it is helpful to

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understand that it wipes out bargaining in the rental process. For example, the owner must offer the unit to the first qualified applicant even if the second qualified applicant offers to sign a longer lease. Only the posted criteria can be considered, and only fleetingly, because once qualified applicants are identified the sole consideration is who came first. Thus, the negotiations that normally help find the best matches are no longer possible in Seattle.

This right of refusal is especially valuable in Seattle because home ownership is increasingly out of reach financially and rental housing is highly competitive. Under the FIT Rule, the owner of a vacant unit must simply forego rent if a refusal period is pending, despite high demand. Losses can add up easily. For example, when the first applicant uses the full two days to decline the offer, it is more likely that others will have found other housing by the time their offers come. Moreover, because the ordinance requires that landlords review applications sequentially, they won't even begin to review the next application until they have already approved the first applicant and then allowed him or her the required two days to accept. This can set off an avalanche of delay, as the right of refusal passes from one applicant to another. Also, if an owner needs more information than expected in order to screen an applicant, the ordinance requires giving that applicant at least 72 hours to provide the information and putting the whole process on hold. SMC 14.08.050.A.3. Delay can be particularly costly if the owner misses the opportunity to fill the unit at the beginning of the month when people are most likely to move.

In sum, far from being illusory as the City suggests, the landlord's right to exclude others is a valuable property interest. Because it is has been taken for the private use of rental applicants, contrary to article I, section 16 and *Manufactured Housing*, the FIT Rule should be stricken.

V. CONCLUSION

For the foregoing reasons, summary judgment should be granted to the plaintiffs.

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LCR 7(b)(5)(B)(vi) Certification: I certify that this memorandum contains 2,443 words, in compliance with the Local Civil Rules.

Submitted this 7th day of February, 2018, by:

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CERTIFICATE OF SERVICE

I certify that on February 7, 2018, I served a copy of the foregoing Amicus Curiae Memorandum of Rental Housing Association of Washington, along with the Stipulation and Order Granting Leave to File Amicus Curiae Memorandum of Rental Housing Association of Washington, via electronic court filing on all registered parties.

DATED this 7th day of February 2018.

s/ Katherine A. George
KATHERINE A. GEORGE