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 ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come on before the undersigned judge of the above entitled Court on Cross-Motions for Summary Judgment. The Court reviewed the supporting and responsive pleadings filed herein as follows:

1. The Plaintiffs' complaint and amended complaint;

2. The City's Answers;

3. The Plaintiffs' Motion for Summary Judgment and supporting documents;

4. The City's Motion for Summary Judgment and supporting documents;

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5. Pertinent portions of the stipulated facts and stipulated record; and,

6. Relevant case law and other authorities cited by the parties.

The Court having heard oral argument, makes the following FINDINGS based on the above submissions and Stipulated Facts and Record:

1. There is no genuine issue as to any material fact.

2. Plaintiffs mount a facial challenge to Seattle Municipal Code Section 14.08.050 enacted in August, 2016. The law, often called the First-in-Time or "FIT" rule, requires landlords to establish screening criteria and offer tenancy to the first applicant meeting them regardless of other factors such as whether other applicants are more qualified or offer a longer lease or more favorable terms.

3. The FIT rule has a laudable goal of eliminating the role of implicit bias in tenancy decisions. In certain respects, the FIT rule attempts to codify industry-recommended best practice by requiring landlords to establish screening criteria and offer tenancy to the first applicant meeting them.

4. While the Rental Housing Association of Washington ("RHA") which submitted an amicus memorandum, recommends screening candidates in chronological order, the Association opposed mandating first-in-time as a matter of law: "For rental housing owners this poses a serious threat to the screening process, and removes a great deal of discretion owners would typically be allowed to determine whether or not an applicant is someone they would wish to rent to."

5. It is undisputed, and specifically acknowledged by the City, that the FIT rule affects a landlord's ability to exercise discretion when deciding between potential

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tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class.

6. Plaintiffs claim the FIT rsule, on its face, violates the Washington Constitution by: taking their property without compensation; taking their property for an improper public use; violating their rights to substantive due process; and violating their free speech rights.

7. Though the City argues to the contrary, *Manufactured Housing Communities v. State*, 142 Wn.2d 347, is binding precedent that this Court must follow. It is a plurality opinion in which five justices joined in the rationale and holding in that case. A plurality opinion is often regarded as highly persuasive, even if not fully binding. *See Texas v. Brown,* 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (holding that while one particular plurality opinion was "not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue").

8. Our Supreme Court itself has cited the lead opinion in *Limstrom* as an interpretation by "this court", and saying "we have held," even while recognizing it as a plurality opinion. See *Soter v. Cowles Publishing Co.*, 162 Wash.2d 716, 733, 740, 174 P.3d 60 (2007).

9. In *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000) the Supreme Court held that an owner's right to sell a property interest to whom he or she chooses is a fundamental attribute of property ownership, which cannot be taken without due process and payment of just compensation.

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10. The Washington Supreme Court's opinion in *Manufactured Housing* is the most recent and on-point decision regarding this "fundamental attribute" doctrine. There, a state law granted mobile-home park tenants the power to exercise a right of first refusal if the park owner decided to sell the property. *Manufactured Housing*, 142 Wn.2d at 351-52. The Court held that the law constituted a facial taking because it took "from the park owner the right to freely dispose of his or her property and [gave] to tenants a right of first refusal to acquire the property." The right to freely dispose of property, the Court reasoned, is a fundamental attribute of property ownership, and the right of first refusal law caused a taking when it destroyed that attribute.

11. Choosing a tenant is a fundamental attribute of property ownership. Like a sale of a fee interest, a lease is a disposition of a property interest. *Manufactured Housing* held that selecting a buyer to purchase a property interest is a fundamental attribute of property ownership. Similarly, the right to grant a right of first refusal in the context of a leasehold is just as fundamental as the right to sell fee title in *Manufactured Housing*.

12. The FIT rule's few concessions to landlords' interests do not redeem it. While landlords are permitted to set their own rental criteria. See SMC § 14.08.050(A). This preliminary, general rental criteria does not substitute for the discretion to choose a specific tenant. Notably, the ability to negotiate, for instance—a key element of the right to freely dispose of property—is extinguished by the FIT rule. Even if landlords can impose some limits on the pool of qualified applicants, landlords and tenants still cannot bargain for an arrangement that suits their interests.

13. The FIT rule also violates the "private use" requirement. Article I, Section 16, of the state constitution says, "[p]rivate property shall not be taken for private use."

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This provision offers greater protection to property owners than its federal counterpart. See *Manufactured Housing*, 142 Wn.2d at 360. Our state Supreme Court has described Article I, Section 16, as an "absolute prohibition against taking private property for private use."

14. In *Manufactured Housing*, the mobile-home law gave "tenants a right to preempt the [mobile-home park] owner's sale to another and to substitute themselves as buyers." *Manufactured Housing*, 142 Wn.2d at 361. The law therefore was a private use taking because it took the right to freely dispose of property and handed a corollary right of first refusal to the tenants. *Id.* at 361-62. Rather than placing property in public hands or increasing public access, "[t]he statute's design and its effect provide a beneficial use for private individuals only."

15. A taking is not for a public use just because it offers a "public benefit." *Manufactured Housing*, 142 Wn.2d at 362. "[T]he fact that the public interest may require it is insufficient if the use is not really public." In *re City of Seattle*, 96 Wn.2d 616, 627, 638 P.2d 549 (1981). The state in *Manufactured Housing* defended the right-of-first-refusal law by lauding its public benefits: preserving housing stock for the poor. *Manufactured Housing*, 142 Wn.2d at 371. The Court held that such benefits could not transform the private nature of the taking into a public one. Similarly, the FIT rule is a taking for private use, regardless of any public benefit.

16. Due process embodies a promise that government will pursue legitimate purposes in a just and rational manner. As set forth in *Presbytery*, 114 Wn.2d at 330 to determine if a law violates due process, courts must address three questions:

a. Is the regulation aimed at achieving a legitimate public purpose?

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b. Does the regulation use means reasonably necessary to achieving that purpose?

c. Is the regulation unduly oppressive?

17. As to the first question, the court finds that the regulation is aimed at achieving a legitimate public purpose.

18. As to the second question, the court finds it does not. The principle that government can eliminate ordinary discretion because of the possibility that some people may have unconscious biases has no limiting principle—it would expand the police power beyond reasonable bounds. While the City can regulate the use of property so as not to injure others, a law that undertakes to abolish or limit the exercise of rights beyond what is necessary to provide for the public welfare cannot be included in the lawful police power of the government. See *Ralph v. Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949). Moreover, a law is not reasonably necessary if its rationale and methodology have no meaningful limiting principle. See *Beard v. Banks*, 548 U.S. 521, 546, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006) (Scalia, J., concurring).

19. The FIT rule is also an unreasonable means of pursuing anti-discrimination because of its sweeping overbreadth. "The overbreadth doctrine involves substantive due process and asks whether a statute not only prohibits unprotected conduct, but also reaches constitutionally protected conduct." *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 768, 63 P.3d 142 (2002); Am. *Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 217, 777 P.2d 1046 (1989). The FIT rule is overbroad since with few exceptions, landlords renting to the general population cannot deny tenancy to the first qualified applicant, period.

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20. As to the third question, the court finds the FIT rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias. The court reaches this conclusion in analyzing the following non-exclusive factors to weigh as set forth in *Presbytery*:

On the public's side:

- The seriousness of the public problem.
- The extent of the landowner's contribution to the problem.
- The degree to which the chosen means solve the problem.
- The feasibility of alternatives.

On the landowner's side:

- The extent of the harm caused.
- The extent of remaining uses.
- The temporary or permanent nature of the law.
- The extent to which the landowner should have anticipated the law.
- The feasibility of changing uses.

21. The FIT rule mandates the methods by which landlords communicate with prospective tenants and controls the content of those communications. See SMC § 14.08.050(A)(1)-(2). The rule must therefore face intermediate scrutiny as a commercial speech restriction. See generally *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151, 197 L. Ed. 2d 442 (2017).

22. Under the FIT rule, landlords must post written notice of all rental criteria in the leasing office or at the rental property, as well as in any website advertisement of

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the unit. SMC § 14.08.050(A)(1). The information that must be communicated via these means is comprehensive, including all "the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion that the potential occupant must meet to move forward in the application process." Id. § 14.08.050(A)(1)(a). The notice must also include "all information, documentation, and other submissions necessary for the owner to conduct screening using the criteria stated in the notice." Id. § 14.08.050(A)(1)(b).

An application is deemed "complete" once the applicant has provided all the information stated in the mandatory notice. The landlord must offer the unit to the first applicant who satisfies the criteria in the advertisement. Id. § 14.08.050(A)(4).

23. The FIT rule not only constrains the means by which landlords communicate, it also controls the content of that communication. A landlord may not post a rental on the web and say, "call to learn how to apply" or "email me for further details." Rather, the landlord must list online all information regarding how to apply and all criteria by which applications will be assessed. It is undisputed that the FIT rule violates landlords' speech rights by prohibiting advertisements based on content and dictating how landlords can advertise.

24. Regulations that burden commercial speech must satisfy intermediate scrutiny. The state constitution protects advertising because "society has a strong interest in preserving the free flow of commercial information." *Kitsap Cty. v. Mattress Outlet/Gould*, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005).

To protect that interest, the state constitution requires that commercial speech regulations satisfy a four-part test:

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- Whether the speech is about lawful activity and is not deceptive;
- Whether the government interest at stake is substantial;
- Whether the speech restriction "directly and materially" serves that interest; and
- Whether the restriction is "no more extensive than necessary."

Id. at 513. A landlord's advertisement for a vacant unit is commercial speech because it "propose[s] a commercial transaction." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993). Because the FIT rule burdens that commercial speech, it must satisfy the four-part test.

25. The first and second factors are clear: the speech affected by the FIT rule is neither misleading nor related to unlawful activity and the City has a legitimate interest in preventing discrimination. As to the last two steps, the speech restriction does not "directly and materially" advance the City's interest in stopping discrimination, and it restricts more speech than necessary.

26. The FIT rule does not "directly and materially" advance the City's interest in preventing discrimination because it precludes the use of landlord discretion.To satisfy this component of the commercial speech test, the City must offer more than "mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Mattress Outlet*, 153 Wn.2d at 513 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)). The City cannot sustain this burden.

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27. Finally, the City must show that the speech restriction is not more extensive than necessary. A government restricting commercial speech must shoulder the burden of demonstrating that the law is narrowly tailored to achieve its ends. *Mattress Outlet,* 153 Wn.2d at 515. The FIT rule is not narrowly tailored. The City conceded as much in the record when it stipulated to a staff memo stating that the "first in time policy affects a 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." SR 000064.

28. The FIT rule restricts far more speech than necessary to achieve its purposes in stopping discrimination. It imposes sweeping advertising restrictions on all Seattle landlords, restricting their speech without any individualized suspicion of disparate treatment. It forbids valuable speech activities like case-by-case negotiation and tells landlords how to communicate their criteria. Therefore, the City's decision to restrict speech cannot survive intermediate scrutiny.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiffs' Motion for Summary Judgment is hereby GRANTED and the Defendant's Motion for Summary Judgment is DENIED.

SIGNED on this 28th day of March, 2018.

Honorable Suzanne R. Parisien

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Kiren Mathews

From: Ethan W. Blevins
Sent: Wednesday, March 28, 2018 2:03 PM
To: All PLF
Subject: FW: Yim, et al. v City of Seattle #17-2-05595-6SEA
Attachments: Scanned from Xerox.pdf

Just in—we won in *Yim v. City of Seattle*.

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From: Court, Parisien [mailto:Parisien.Court@kingcounty.gov]
Sent: Wednesday, March 28, 2018 2:02 PM
To: Brien P. Bartels <BBartels@pacificlegal.org>; kathy@johnstongeorge.com; Wynne, Roger <Roger.Wynne@seattle.gov>; Ethan W. Blevins <EBlevins@pacificlegal.org>; O'Connor-Kriss, Sara K <Sara.OConnor-Kriss@seattle.gov>; Johnson, Marisa <Marisa.Johnson@seattle.gov>
Subject: RE: Yim, et al. v City of Seattle #17-2-05595-6SEA

Attachment:

Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant' Motion for Summary Judgment.

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