

NO. 827821

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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RENTAL HOUSING ASSOCIATION OF WASHINGTON,

Appellant/Cross-Respondent,

v.

CITY OF BURIEN,

Respondent/Cross-Appellant.

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RESPONDENT/CROSS-APPELLANT CITY OF BURIEN'S  
REPLY BRIEF

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Hillary J. Evans  
WSBA No. 35784  
Michael R. Kenyon  
WSBA No. 15802  
Kenyon Disend, PLLC  
11 Front Street South  
Issaquah, Washington 98027-3820  
(425) 392-7090  
Attorneys for Respondent/Cross-Appellant City of Burien

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## I. ARGUMENT

### A. BMC 5.63.070 Is Not Preempted by Chapter 59.12 RCW or Chapter 59.18 RCW.

This Court should reverse the Superior Court’s finding that Burien Municipal Code (“BMC”) 5.63.070(1) is preempted to the extent that it restricts an Association member’s prima facie case for eviction under Chapter 59.12 RCW or Chapter 59.18 RCW (the Residential Landlord-Tenant Act “RLTA”) (CP 612).

#### 1. The City’s Ordinance is not preempted by Chapter 59.18 RCW.

Burien Ordinance 716 (the “City’s Ordinance”) “is presumed constitutional and the ‘burden of showing otherwise rests heavily’” on Rental Housing Authority of Washington (“RHA”). Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991) (quoting Louthan v. King Cy., 94 Wn.2d 422, 428, 617 P.2d 977 (1980)).

BMC 5.63.070 cites specifically to the RLTA when addressing just cause eviction procedures:

5.63.070 Just cause eviction.

(1) Pursuant to provisions of the Washington State Residential Landlord-Tenant Act (RCW 59.18.290), owners may not evict residential tenants without a court order, which can be issued by a court only after the tenant has an opportunity in a show cause hearing to contest the eviction (RCW 59.18.380). . . . The reasons for termination of tenancy listed below, and no others, shall constitute just cause under this section:

. . .

The City's Ordinance then lists grounds for "just cause" evictions in BMC 5.63.070(1)(a)-(n), all of which are consistent with existing state law. The City's Ordinance acknowledges the RLTA and identifies affirmative defenses to unlawful detainer actions, but does not limit the grounds upon which a tenant may be liable.

In this appeal, RHA has failed to carry its heavy burden to demonstrate that the City's Ordinance is preempted by state law.

Under Const. art. 11, § 11, cities have the right to enact ordinances prohibiting the same acts prohibited by state law so long as the state enactment

was not intended to be exclusive and the city ordinance does not conflict with the general law of the state. An ordinance must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized.

City of Tacoma v. Luvene, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992) (internal citations omitted). Washington courts have recognized that the RLTA does not preempt local jurisdictions from creating affirmative defenses to unlawful detainers. *See Kennedy v. City of Seattle*, 94 Wn.2d 376, 617 P.2d 713 (1980).

In the absence of state preemption as is the case here, the Luvene decision next asks whether the state law and local ordinance can be harmonized. Here, the RLTA and the City's Ordinance can be harmonized.

[The Supreme Court] has repeatedly stated that a local ordinance does not conflict with a state statute in the constitutional sense merely because the ordinance prohibits a wider scope of activity . . . .

Brown, 116 Wn.2d at 562. Put another way, the Supreme Court in City of Bellingham v. Schampera, 57 Wn.2d 106, 356 P.2d 292 (1960), held:

The statute, as well as the ordinance, in the case at bar, is prohibitory, and the difference between them is only that the ordinance goes farther in its prohibition—but not counter to the prohibition under the statute. The city does not attempt to authorize by this ordinance what the Legislature has forbidden; not does it forbid what the Legislature has expressly licensed, authorized, or required. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail.

57 Wn.2d at 111 (internal citations omitted).

Here, the City's Ordinance was written to work in tandem with the RLTA. The City does not authorize what the Legislature has forbidden, nor does the City prohibit what the Legislature

expressly allows.<sup>1</sup> The City’s Ordinance was drafted to build on the RLTA by providing affirmative defenses for the protection of tenants. *See Margola Associates v. City of Seattle*, 121 Wn.2d 625, 652, 854 P.2d 23 (1993).

The City’s Ordinance prescribes the bases for a “just cause” eviction while the RLTA includes at least two other bases for eviction without the necessity of a finding of just cause. The City’s Ordinance provides a regulatory mechanism, including penalties for non-compliance, to address equitable housing issues important to the City Council and related bases for “just cause” evictions. The state statute provides two additional means under which a landlord may choose to seek to evict a tenant. This is not a conflict. Because the City’s Ordinance aligns with state

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<sup>1</sup> By way of example, Division Two of the Court of Appeals found an irreconcilable conflict *did* exist in *Ritchie v. Markley*, 23 Wn. App. 569, 574, 597 P.2d 449 (1979) (overruled on other grounds). There, the local government’s actions conflicted with state law when it required a substantial development permit for a project that the Shoreline Management Act of 197, Chapter 90.58 RCW, expressly exempted from the permit requirement.

law, it should be upheld, and the Superior Court’s decision should be reversed.

2. Stare decisis requires a finding that the City’s Ordinance is not preempted by Chapter 59.18 RCW.

In Margola Associates, the State Supreme Court rejected the argument that Seattle’s Ordinance was preempted by the RLTA – a case where the language of Seattle’s ordinance is virtually identical to BMC 5.63.070. Both the City’s Ordinance and Seattle’s ordinance use the same language, which the Washington Supreme Court found constituted an additional affirmative defense rather than a conflict. Margola Associates, 121 Wn.2d at 652. In Margola Associates, RHA specifically argued Seattle’s ordinance “irreconcilably conflicts with the RLTA’s provisions on unlawful detainer, which establish procedures for evicting a tenant . . . .” Id. at 651-52.

RHA’s attempt to distinguish Margola Associates on the basis that “the Court in Margola Associates was looking at a completely different type of ordinance” is unpersuasive.

Appellant’s Response Brief to Cross Appeal and Reply Brief (“Response Brief”) at 4; *see also* Response Brief at 9. The City of Seattle’s ordinance at issue in Margola Associates adopted a registration program, including fees and inspections, for rental buildings to “ensur[e] that conditions of neglect and deterioration are not allowed to develop in occupied rental housing.” CP 465. The issue decided in Margola Associates was whether a tenant could be evicted if the landlord failed to register the building; there, the plaintiffs argued that Seattle’s ordinance conflicted with the RLTA. Plaintiff’s arguments in Margola Associates mirror what’s at issue in the present case: RHA’s allegation that Burien’s Ordinance conflicts with the RLTA, because it allegedly “restricts landlords’ ability to evict tenants . . . .” CP 204.

Because the language from the City’s Ordinance at issue in this appeal is the same as that in the Seattle ordinance addressed in Margola Associates, and because RHA makes the same preemption challenges involving unlawful detainer under

the RLTA, the Court’s ruling here should be guided by and consistent with the Court’s ruling in Margola Associates.

Consistency, as the City urges here, is the very basis of the doctrine of stare decisis. “Stare decisis” is a Latin phrase, meaning “to stand by things decided.” Black’s Law Dictionary 1626 (10th ed. 2014). Adherence to past decisions through the doctrine of stare decisis promotes clarity and stability in the law, thereby enabling those impacted by the courts’ decisions – including city councils crafting legislation to reflect their public policy preferences – to make decisions that comply with legal mandates. *See* Matter of Arnold, 198 Wn. App. 842, 846–47, 396 P.3d 375 (2017), rev’d, 190 Wn.2d 136, 410 P.3d 1133 (2018) (citing In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

RHA argues the analysis of the RLTA in Kennedy, 94 Wn.2d 376, “might be” dicta. Response Brief at 7. Margola Associates acknowledged that possibility, and determined that whether or not it was dicta, the logic should and would extend to

the RLTA. Margola Associates controls here. See Margola Associates, 121 Wn.2d at 652.

## II. CONCLUSION

The City respectfully requests that this Court reverse the Superior Court's decision that BMC 5.63.070(1) is preempted to the extent that it restricts an Association member's prima facie case for eviction under Chapter 59.12 RCW or the RLTA (CP 612).

As further argued in the City's other briefing on this appeal, RHA's challenge to BMC 5.63.040 is moot and is also precluded by collateral estoppel. This Court should affirm the Superior Court's dismissal of RHA's challenge to BMC 5.63.040 for those reasons as well. (CP 589–90).

\*This document contains 1,434 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of January,  
2022.

KENYON DISEND, PLLC

By /s/ Hillary J. Evans

Hillary J. Evans  
WSBA No. 35784  
Michael R. Kenyon  
WSBA No. 15802  
Attorneys for City of Burien  
11 Front Street South  
Issaquah, WA 98027-3820  
Phone: (425) 392-7090  
Fax: (425) 392-7090  
Hillary@kenyondisend.com  
Mike@kenyondisend.com

## DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

1. I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

2. On the 6<sup>th</sup> day of January, 2022, I sent for service a true copy of the foregoing RESPONDENT/CROSS-APPELLANT CITY OF BURIEN'S REPLY BRIEF on the following counsel of record by e-mail as indicated below:

*Attorneys for Rental Housing Association of Washington:*

Richard M. Stephens, WSBA # 21776  
stephens@sklegal.pro

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6<sup>th</sup> day of January, 2022, at Brookline, MA.

*/s/ Margaret C. Starkey* \_\_\_\_\_

Margaret C. Starkey

**KENYON DISEND, PLLC**

**January 06, 2022 - 1:26 PM**

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Sender Name: Margaret Starkey - Email: Margaret@KenyonDisend.com

**Filing on Behalf of:** Hillary J. Evans - Email: hillary@kenyondisend.com (Alternate Email: Margaret@kenyondisend.com)

**Address:**

11 Front Street So.

Issaquah, WA, 98027

Phone: (425) 392-7090 EXT 2207

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