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No. 74360-1-I
King County Superior Court Case No. 14-2-34463-5 SEA

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

MICHELLE J. KINNUCAN,

Petitioner/Appellant,

v.

CITY OF SEATTLE,

Respondent/Appellee.

APPELLANT'S REPLY BRIEF

Vanessa Soriano Power, WSBA No. 30777
Karl F. Oles, WSBA No. 16401
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

Attorneys for Appellant

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I. INTRODUCTION

The City concedes that RCW 59.18.440 "requires that a municipality adopt policies or regulations for administrative hearings to resolve disputes between tenants and property owners relating to unlawful detainer actions *during the relocation period*." Response, p. 7 (emphasis added). The City also concedes that its administrative appeal process is limited to only the "*first portion* of the relocation process . . . before [the] City issues [a] tenant relocation license to [the] landlord." *Id.* (emphasis added). However, the City does not permit tenants to be relocated before the issuance of a tenant relocation license. SMC 22.210.120, 22.210.140. In effect, the City only offers pre-relocation hearings.

In an attempt to reconcile these positions, the City asks this Court to accept that the City's admittedly limited provision of administrative hearings, during what it characterizes as the "first portion" of the relocation process, is sufficient to meet the mandate of RCW 59.18.440(5) to provide such procedures "during relocation." As with its truncated procedures that, as a practical matter, only offer administrative hearings before relocation is permitted, the City's argument falls short.

II. ARGUMENT

A. The City's Procedures Fall Short Of Mandatory Requirements Under RCW 59.18.440(5).

1. In Requiring Cities To Provide Administrative Hearings During Relocation, The Legislature Did Not Create The Discretion To Limit Hearings To Only The "First Portion" Of Relocation.

The City claims that its provision of pre-relocation administrative hearings during what it characterizes as the "first portion" of relocation is permissible because the Legislature intended municipal discretion to establish the scope of administrative hearings. *See* Response, pp. 7-8. The statute plainly reflects otherwise.

The mandatory language of RCW 59.18.440(5) reflects a duty imposed on cities that opt to require relocation assistance. *See Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 519, 852 P.2d 288 (1993) (holding that the word "shall" in a statute is presumptively imperative and operates to create a duty unless contrary legislative intent is apparent). RCW 59.18.440(5) provides that a city requiring the provision of relocation assistance "*shall* adopt policies, procedures, or regulations to implement such requirement." (Emphasis added).

The Legislature mandated the parameters of those required policies, procedures, or regulations. RCW 59.18.440(5) requires that "[s]uch policies, procedures, or regulations *shall* include provisions for

administrative hearings." (Emphasis added). The Legislature then directed the procedural and substantive scope of such administrative hearings. As to process, the Legislature directed that "such policies, procedures, or regulations . . . *shall* require a decision within thirty days of a request for a hearing." *Id.* (emphasis added). In addition, the Legislature set forth the scope of judicial review of administrative hearing decisions. *Id.* As to substantive scope, the Legislature required that a city's policies, procedures, or regulations "*shall* include provisions for administrative hearings to resolve disputes between tenants and property owners relating to relocation assistance or unlawful detainer actions during relocation." *Id.* (emphasis added). This mandatory language does not support the City's position that the Legislature intended for it to have discretion in determining the scope of administrative hearings under RCW 59.18.440.

A discretionary function was defined in *Moloney v. Tribune Publishing Co.,* 26 Wn. App. 357, 360, 613 P.2d 1179 (1980), as "one involving a basic governmental policy, program, or objective requiring the exercise of a basic policy evaluation, judgment, and expertise on the part of the officer or agency." There is no such policy evaluation, judgment, or expertise required in this instance.

The City relies on *Mower v. King County,* 130 Wn. App. 707, 125 P.3d 148 (2005), to support the proposition that while mandamus "can direct an officer or body to exercise a mandatory discretionary duty, it may not direct the manner of exercising that discretion." Response, p. 8. Ms. Kinnucan does not dispute the City's recitation of the rule, but as a practical matter *Mower* is distinguishable on its face.

In *Mower,* the plaintiff sought to compel release of performance bonds and financial guarantees. *Mower,* 130 Wn. App. at 712. The basis for the plaintiff's demand was contractual. *Id.* at 719. The *Mower* Court denied the request for a writ of mandamus based on the plaintiff's failure to meet all contractual conditions precedent. *Id.* at 719-20. To that end, the Court found that the county had discretion in the issuance of punch lists, in which the plaintiff's failure to remedy violations caused the denial of final permit approval. *Id.* at 720. That reasoning is inapplicable here.

In this case, the basis for Ms. Kinnucan's request for a writ of mandate is not contractual in nature; it is purely statutory. In *Mower,* the exercise of discretion turned on whether the plaintiff himself had met specific contractual prerequisite conditions. *Id.* Here, however, the City posits that its exercise of discretion is not specific to the facts of Ms. Kinnucan's case, or that of any other individual who seeks an administrative hearing "during relocation." Instead, the City argues that

RCW 59.18.440 allowed it to exercise discretion at the outset in redefining the scope of administrative hearings upon enactment of SMC 22.210.150. There is simply no corollary between the *Mower* Court's denial of a writ of mandamus based on specific contractual conditions and the facts presented here.

Freeman v. Gregoire, 171 Wn.2d 316, 256 P.3d 264 (2011), is similarly inapposite. The City relies on *Freeman* for the proposition that mandamus is only appropriate where an official is under a mandatory ministerial duty to perform an act required by law, and where the mandate specifies the precise thing to be done so as to leave nothing to the exercise of discretion. Response, p. 8. Again, Ms. Kinnucan does not dispute the City's recitation of the rule. It just does not apply here.

In *Freeman,* the Washington Supreme Court was asked to broadly prevent the governor or Department of Transportation from transferring lanes on I-90. The *Freeman* Court found that the petitioners were, in essence, "asking this court to manage DOT's potential discretionary decisions." 171 Wn.2d at 333. There is no such request here.

Here, the City is under a mandatory ministerial duty to perform an act required by law, namely, to adopt policies, procedures, or regulations that "include provisions for administrative hearings to resolve disputes between tenants and property owners relating to relocation assistance or

unlawful detainer actions during relocation." RCW 59.18.440(5). While the City has some discretion in establishing those policies, procedures, or regulations, it does not have discretion in determining the timeframe for any required administrative hearing. As such, there can be no argument that, as in *Freeman,* the writ of mandate would amount to managing discretionary decisions by the City.

2. The City's Procedures Fail To Give Effect To The Plain Meaning Of "During Relocation."

Contrary to the City's contention, the statute is not silent on the timeline during which administrative hearings are required. *See* Response, p. 11. Indeed, the Legislature mandated that such hearings be available "during relocation." *See* RCW 59.18.440(5). This dispute arises because the City has improperly misconstrued that timeframe, thus failing to give effect to the plain meaning of the term "during relocation." Indeed, as a practical matter, the only time period during which the City provides administrative hearings is the period before a tenant relocation license is issued, and therefore before any mandatory relocation could in fact occur.

To start, the parties do agree on several points. They agree that "during relocation," as an undefined statutory term, must be given its plain meaning. Response, pp. 11-12. They also agree that to ascertain the Legislature's intent, the statute as a whole must be considered. *Id.,* p. 12.

Finally, they agree that administrative procedures "during relocation" certainly include hearings addressing "issues regarding tenant relocation assistance or attempts to circumvent the obligation of landlords to pay tenant relocation monies for low-income tenants being displaced." *Id.*, pp. 13-14. The parties differ significantly, however, in the *effect* they give the term "during relocation."

As a threshold matter, beyond defending its position that the City has the discretion to limit administrative hearings to the "first portion" of the relocation process and contesting Ms. Kinnucan's analysis, the City fails to offer any answer to the question of what "during relocation" actually means. Further, in claiming that Ms. Kinnucan "interprets the term ["during relocation"] differently in her own brief," the City misstates Ms. Kinnucan's argument and ignores the context of the references. *Id.*, p. 9. To be clear, Ms. Kinnucan's position is that the Legislature's use of the term "during relocation" is plain on its face – it means "during [the period of] relocation," not what the City calls the "first portion" of relocation. Opening Brief, pp. 11-12. Consistent with the tenets of statutory interpretation, Ms. Kinnucan looked to the statute as a whole in considering the Legislature's intent. *Id.*

The statute as a whole, namely RCW 59.18, includes references to "relocation" arising in the context of a tenant moving. *Id.* As a result, it

follows that any plain language interpretation of a phrase that uses the term "relocation" includes the time during which an individual may in fact be moving. *See* RCW 59.18.440(7) (twice referencing "[p]ersons who move"). The City's mis-application of "during relocation" to only the "first portion" of the relocation process cuts off administrative hearings during the period when tenants are permitted to be relocated and, thus, moving. Read as a whole under RCW 59.18.440(5), and construed liberally in accordance with the underlying legislative purpose, "during relocation" means just that. *See Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002) (citing *Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 450-51, 815 P.2d 1362 (1991)) (remedial statute to be liberally construed).

Finally, the City contends that "[n]owhere in RCW 59.18.440 does it modify the unlawful detainer provisions, set forth at RCW 59.12.170." Response, p. 16. Ms. Kinnucan agrees and does not argue otherwise. In authorizing cities to require relocation assistance to low-income tenants, the Legislature recognized that disputes may arise related to both relocation assistance (for example, the amount or timing of payment) and unlawful detainer during relocation (for example, whether a property owner may withhold relocation assistance to a tenant wrongfully holding over). In sum, the statutes are parallel and consistent.

B. Ms. Kinnucan Has No Plain, Speedy, And Adequate Remedy.

In contending that deference should be given to the trial court's statement that Ms. Kinnucan has an "alternative" remedy, and thus is not entitled to a writ of mandate, the City applies the wrong standard of review and ignores the trial court's failure to address all three of the prongs required for this element.

First, the City incorrectly asks the Court to give deference to a statement made by the trial court at a hearing on the City's motion to dismiss under CR 12(b)(6). While determination of whether a plain, speedy, and adequate remedy exists is generally left to the trial court's discretion and not disturbed on review unless it was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons (*see Eugster v. City of Spokane,* 118 Wn. App. 383, 403, 76 P.3d 741 (2003)), that standard does not apply here. This case arises in the context of a CR 12(b)(6) motion and calls for statutory interpretation of whether Ms. Kinnucan has a plain, speedy, and adequate remedy to compel the City to provide administrative hearings under RCW 59.18.440(5) "during relocation." In cases such as this, where determination of whether a plain, speedy, and adequate remedy exists turns on statutory interpretation, "the question is one of law that we review de novo." *Cost Mgmt. Servs., Inc. v. City of Lakewood,* 178 Wn.2d 635, 649 n.5, 310 P.3d 804 (2013). As

such, no deference should be afforded to the trial court's statement that Ms. Kinnucan had an "alternative" remedy.

Second, even if the deferential standard were applied, the trial court's statement should be reversed because an "alternative" remedy does not equate to a remedy that is "plain, speedy and adequate" as required under RCW 7.16.170. *See State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 27, 482 P.2d 775 (1971) (reversing trial court's discretionary decision as unsupported by "adequate reasons or tenable grounds of sufficient weight . . . to overcome the public and private interests in . . . legislatively assured confidentiality and privacy"). At best, the trial court found that Ms. Kinnucan had an "alternative" remedy to file a lawsuit in superior court. RP 24. Any such "alternative" remedy, however, is not adequate and was based on unreasonable and untenable grounds. It is inadequate and untenable because a lawsuit filed by a tenant against a landlord, even if successful, can never provide the relief requested in the writ application - an order compelling the City to comply with RCW 59.18.440.

To deny a writ, the trial court had to find that all three elements were met. There can be no reasonable dispute that the trial court made no finding that filing a tenant-landlord lawsuit constituted a plain, speedy, ***and*** adequate remedy. Ms. Kinnucan properly alleged and set forth sufficient evidence that in fact no plain, speedy, and adequate remedy

exists to compel the City to comply with RCW 59.18.440(5) by providing administrative hearings during the course of a tenant's relocation as opposed to the City's so-called "first portion" pre-relocation hearings.

C. Ms. Kinnucan Is "Beneficially Interested."

In asserting that Ms. Kinnucan lacks standing to bring this case, the City misstates the minimal standing requirement for a party to be "beneficially interested" to seek a writ of mandamus under RCW 7.16, *et seq.* *See* Response, pp. 19-20; *cf. Sierra Club v. Morton,* 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) (applying "injury in fact" test for standing under Administrative Procedure Act). "An individual has standing to bring an action for mandamus, and is therefore considered to be beneficially interested, if he has an interest in the action beyond that shared in common with other citizens." *Retired Pub. Emps. Council of Wash. v. Charles,* 148 Wn.2d 602, 616, 62 P.3d 470 (2003) (citing *State ex rel. Lay v. Simpson,* 173 Wash. 512, 513, 23 P.2d 886 (1933)). That standard was met here.

The City asserts that Ms. Kinnucan "provides no evidence" of specific injury or specialized interest, and that Ms. Kinnucan cannot establish that she bears greater risk of injury than "any other tenant in being threatened with unlawful detainer action." *See* Response, pp. 20-21. But this action was before the trial court on the City's CR 12(b)(6) motion

to dismiss, under which allegations in the complaint (application for writ and supporting affidavit) are accepted as true. *Becker v. Cmty. Health Sys., Inc.,* 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015) (factual allegations accepted as true). Ms. Kinnucan alleged that she was both "[l]ow income" and a "[t]enant" under SMC 22.210.030(G), (N). That means she does have an interest beyond that of other citizens not similarly situated.

Save a Valuable Environment (SAVE) v. City of Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978), relied upon by the City, supports a finding that Ms. Kinnucan sufficiently alleged beneficial interest. In *SAVE,* the Washington Supreme Court considered whether a nonprofit corporation had standing to seek a writ of mandamus. In finding that the nonprofit had standing, the Court considered whether members of the nonprofit had "adequately alleged direct and specific harm" that would result from the city's actions. 89 Wn.2d at 868. Ms. Kinnucan did the same here, meeting the requisite test. *See* CP 1-13; *Retired Pub. Emps. Council of Wash.*, 148 Wn.2d at 620 (finding standing where *potential* actuarial unsoundness, rather than *immediate* actuarial unsoundness, was sufficient).

D. Ms. Kinnucan Sought One Writ; The Court Should Direct Issuance Of That Writ.

The City argues that Ms. Kinnucan "alleged no error associated with dismissal of Writ 2" and asks for dismissal to be upheld on that basis. Response, p. 21. The City's position is puzzling. Ms. Kinnucan filed one petition seeking a writ of mandamus with two components. CP 5, 6. The City's characterization of that one petition as a request for two writs presumes a disconnection that does not exist. Under her one petition, Ms. Kinnucan asked for several forms of relief, including:

- Finding the City "in violation of RCW 59.18.440 for failing to adopt policies, procedures, or regulations that include provisions for administrative hearings between tenants and property owners relating to relocation assistance or unlawful detainer actions during relocation." CP 5;

- Finding that the City's "refusal to hear [Ms. Kinnucan's] appeal unlawfully deprived her of the administrative hearing mandated under RCW 59.18.440." CP 6;

- Seeking entry of a writ of mandamus "compelling [the City] to grant, with immediate effect, administrative hearings to all tenants who, after September 30, 2014, file or have filed appeals to resolve disputes relating to relocation assistance or unlawful detainer actions during relocation within the meaning of RCW 59.18.440(5)." *Id.*; and

- Seeking entry of a writ of mandamus "compelling [the City] to adopt, within ninety days of the date the Writ is issued, policies, procedures, or regulations that include provisions for administrative hearings to resolve disputes between tenants and property owners relating to relocation assistance or unlawful detainer actions during relocation." *Id.*

Ms. Kinnucan alleged error, generally, with the trial court's dismissal of her petition under CR 12(b)(6), as well as with respect to the specific elements required for a writ. Opening Brief, pp. 2-3. As to the specific relief sought, Ms. Kinnucan has fully briefed the error detailing the City's historic failure to provide administrative hearings during the timeframe required by law. To address this issue, the Court must address whether Ms. Kinnucan is entitled to a writ of mandamus directing the City to come into compliance with RCW 59.18.440(5). If so, the only distinction between Ms. Kinnucan's specific requests is that one reaches back retroactively three months from the date this action was filed to require allowance of administrative hearings since that date to tenants who may been denied hearings by the City, and the other applies prospectively, giving the City ninety days after the issuance of the writ to bring its policies, procedures, or regulations into compliance with RCW 59.18.440. A statute may be applied retroactively if the Legislature intended such a result. *See Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd. for King Cty.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995). Such application is proper here.

E. The Appeal Is Not Moot.

The City contends that Ms. Kinnucan's appeal is moot because her "opportunity for an administrative hearing . . . has long passed" and Ms.

Kinnucan moved to a new residence. Response, p. 21. In the instant case, Ms. Kinnucan is not seeking an administrative hearing to resolve a previous or ongoing dispute. The City's conclusory argument misstates both the facts and the law.

As a factual matter, contrary to the City's representation that the relief Ms. Kinnucan sought from the City administratively before this action was filed was not based on the TRAO, that was precisely the basis. *See* CP 71-74 (contending that because no tenant relocation license application was properly submitted by the owner, the license issued by the City was in error; seeking revocation of the license and all subsequently issued permits). Ms. Kinnucan challenged the City's issuance of the tenant relocation license under SMC 22.210, the TRAO.

As a legal matter, the appeal is not moot because the Court can provide the basic relief sought – an order compelling the City to comply with RCW 59.18.440(5) by adopting "policies, procedures, or regulations [that] include provisions for administrative hearings to resolve disputes between tenants and property owners relating to relocation assistance or unlawful detainer actions during relocation" and providing tenants with administrative hearings during relocation. *See Eugster v. City of Spokane,* 115 Wn. App. 740, 751, 63 P.3d 841 (2003) (request for relief was not

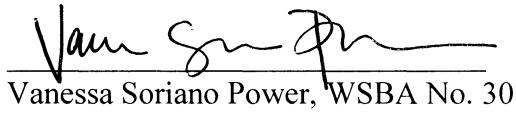
moot where relief sought was recognition of statutory and constitutional right).

Even if this appeal were deemed moot, the City made no effort to address Ms. Kinnucan's argument that the Court may and should still decide the appeal because the relief Ms. Kinnucan seeks is recognition of a statutory right and the case involves matters of continuing and substantial public interest. *See* Opening Brief, pp. 18-19; *Eugster,* 115 Wn. App. at 751 (moot appeal may be decided if it involves matters of continuing and substantial public interest; factors considered include public or private nature of issue, whether authoritative determination is desirable for future guidance of public officers, and whether issue is likely to recur). Because each of the factors to be considered by the Court weighs in Ms. Kinnucan's favor, the appeal should be decided.

III. CONCLUSION

For all the foregoing reasons, the trial court's order granting the City's motion to dismiss Ms. Kinnucan's petition for a writ of mandamus should be reversed: (a) with direction to the trial court to issue a writ requiring the City to provide for administrative hearings in full accordance with RCW 59.18.440(5); (b) granting recovery of fees and costs incurred in seeking the writ; and (c) for further proceedings on outstanding matters.

Respectfully submitted this 20th day of June, 2016.



Vanessa Soriano Power, WSBA No. 30777
Karl F. Oles, WSBA No. 16401
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

Attorneys for Appellant Michelle Kinnucan

CERTIFICATE OF SERVICE

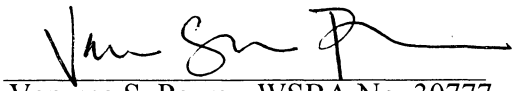
I certify that I caused to be served a true and correct copy of the foregoing **Appellant's Opening Brief** on the following counsel of record in the manner specified below:

Elizabeth E. Anderson, Liza.anderson@Seattle.gov	via: Email/pdf

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

DATED at Seattle, WA: June 20, 2016.

STOEL RIVES, LLP



Vanessa S. Power, WSBA No. 30777