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WASHINGTON STATE SUPREME COURT

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CAN
APARTMENTS, LLC, and EILEEN, LLC,

Respondents,

v.

CITY OF SEATTLE,

Appellant.

**CITY OF SEATTLE'S ANSWER
TO
BRIEF OF *AMICUS CURIAE*
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON**

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I. INTRODUCTION

Amicus curiae Building Industry Association of Washington (“BIAW”) fails to execute both parts of its mission.

First, BIAW urges this Court not to overrule *Manufactured Housing* because developers have relied on its lead opinion. But reliance is no reason to retain precedent that has proven to be incorrect and harmful or whose legal underpinnings have changed or disappeared. Besides, BIAW does not explain how a developer could have changed its position in reliance on *Manufactured Housing*’s lead opinion.

Second, BIAW asks this Court to referee a debate over the efficacy of the City’s First-in-Time (“FIT”) Rule. But that is a role no court should play, especially over a debate premised on something the City never said. BIAW presses that needless debate by mischaracterizing the primary sources it marshals.

II. ARGUMENT

A. BIAW does not explain how a developer could have changed its position in reliance on *Manufactured Housing*’s lead opinion.

BIAW invokes *stare decisis* to urge this Court not to overrule *Manufactured Housing*, claiming industries have relied on *Manufactured Housing*’s lead opinion for almost two decades.¹

¹ BIAW Brief at 4 (citing *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000)).

Although *stare decisis* fosters reliance on judicial decisions,² a person's reliance is no reason to retain a decision if it has proven to be incorrect and harmful or if its legal underpinnings have changed or disappeared.³ Where a change in case law would unduly harm those who have changed their position in reliance on an existing decision, this Court may clarify that the new rule applies prospectively.⁴

But BIAW offers no evidence of reliance or any explanation of how a developer could change its position in reliance on future courts invoking *Manufactured Housing's* lead opinion. BIAW argues only that *Manufactured Housing's* lead opinion makes it easier to attack regulations and developers prefer less regulation to more regulation.⁵ A preference to retain precedent as a cudgel against hypothetical future laws is not reliance.⁶

² *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346–47, 217 P.3d 1172 (2009).

³ *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 277–78, 208 P.3d 1092 (2009). See *W.G. Clark Constr. Co. v. Pac. NW Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (grounds for reconsidering precedent).

⁴ *Lunsford*, 166 Wn.2d at 278.

⁵ BIAW Brief at 4–5.

⁶ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 304 (2004) (Scalia, J., four-justice lead opinion) (The claims of *stare decisis* are “weak because it is hard to imagine how any action taken in reliance upon [existing case law] could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant.”)

B. BIAW’s claims about the FIT Rule’s efficacy are irrelevant, misplaced, and unsupported.

1. This Court should decline BIAW’s invitation to referee a debate over a law’s efficacy.

BIAW claims the FIT Rule cannot survive the “rational basis” analysis because the Rule “does not cure the problem it claims to solve” and “ignores the unintended consequences of FIT on the supply of affordable housing.”⁷ This Court should decline BIAW’s invitation to referee a debate over the FIT Rule’s efficacy.

BIAW tacitly invokes the discredited “substantially advances” analysis, not the deferential “rational basis” analysis.⁸ Under “substantially advances,” a challenged law must be more than merely rational; it must also be effective in achieving its purpose.⁹ “Substantially advances” was an error limited to takings law and was ultimately rejected by *Lingle* in 2005.¹⁰ Citing “rational basis” precedents, *Lingle* found “substantially advances” has no place even in substantive due process law: “[W]e have

⁷ BIAW Brief at 1, 19. *Accord id.* at 1 (“FIT does not serve the government interest the City of Seattle claims”), 19 (“The [City’s] policy argument ignores the unintended consequences of regulatory scarcity.”).

⁸ *See* City’s Reply at 2–4 (distinguishing the two analyses).

⁹ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005). *See Nollan v. California Coastal Comm’n*, 483 U.S. 825, 835 n.3 (1987) (distinguishing “substantially advances” from “rational basis”).

¹⁰ *Lingle*, 544 U.S. at 542–45. *Accord Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010). *See* City’s Reply at 2–4.

long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established”¹¹ *Lingle* also highlighted the “serious practical difficulties” of having courts weigh evidence of a law’s efficacy: “[I]t would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.”¹² *Lingle* warned against “the hazards of placing courts in this role.”¹³

Lingle’s warning is apt here. Even if one were to accept BIAW’s factual claims, BIAW is asking this Court to compare the proverbial apples to oranges in this multi-factor policy arena. For example, BIAW appears more concerned about the applicant who just misses a landlord’s published criteria and is denied tenancy because the FIT Rule limits

¹¹ *Lingle*, 544 U.S. at 544–45 (citations omitted) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124–125 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 730–732 (1963)).

¹² *Id.* at 544.

¹³ *Id.*

“flexibility,”¹⁴ but the FIT Rule is more concerned with the applicant who meets the criteria and is denied tenancy due to implicit bias. And BIAW appears more concerned about the impacts of landlords who might abandon the rental market because the FIT Rule reduces their “flexibility” to act on their positive or negative biases,¹⁵ but the FIT Rule is more concerned with landlords who use those biases to make tenancy decisions. With respect, this Court is not institutionally suited to resolving those value-laden differences and should be especially reluctant to do so when the FIT Rule calls for an evaluation to enable the City Council to assess the Rule and consider amending or repealing it.¹⁶

2. BIAW picks a needless fight over positions the City does not assert.

BIAW starts from the premise that the City asserts the FIT Rule causes no economic harm and is intended to enhance access to affordable housing.¹⁷ That premise is false on both counts.

¹⁴ *E.g.*, BIAW Brief at 7–9.

¹⁵ *E.g.*, *id.* at 9–10.

¹⁶ CP 338 (adding SMC 14.08.050.D).

¹⁷ *E.g.*, BIAW Brief at 2 (the FIT Rule “will reduce supply which is exactly the opposite desired outcome if the City’s goal is to make housing more affordable), *id.* (the FIT Rule “will make housing affordability worse, and therefore the trial court’s ruling should be affirmed”), 6 (“The City asserts . . . that FIT causes no economic harm.”).

The City has never staked a position on whether the Rule causes economic harm, which is irrelevant to any legal standard Plaintiffs invoke. The City notes Plaintiffs allege no impact on their property values resulting from the FIT Rule, which the City contends undercuts their claim under the “undue oppression” analysis,¹⁸ but that is not an argument about “economic harm” in the general sense BIAW intends.

The City’s briefing never mentions access to affordable housing as a rationale for the FIT Rule. Instead, the City maintains the Rule is aimed at curbing implicit bias in all tenancy decisions, no matter the affordability of the housing.¹⁹ This is consistent with City Council staff memoranda supporting development of the FIT Rule—they referred to the proposed Rule as “decreasing discrimination”²⁰ and being based on an industry best practice “to ensure that unconscious biases do not result in discrimination when a landlord is deciding between multiple tenants.”²¹

¹⁸ City Opening 29–30.

¹⁹ *E.g., id.* at 11 (“The FIT Rule attempts to limit implicit bias through first-in-time decision-making.”), 17 (“The FIT Rule advances the venerable governmental purpose of curbing implicit bias in tenancy decisions.”).

²⁰ CP 106 (the original Council staff memo about introducing the FIT Rule as an amendment to an existing bill). *See* CP 39 ¶ 12 (stipulated facts about the memo).

²¹ CP 138 (the Council staff memo about options for crafting the FIT Rule amendment). *See* CP 39 ¶ 14 (stipulated facts about the memo). The recitals to the ordinance enacting the FIT Rule mention housing affordability, CP 319–20, but only to support the portion of the ordinance banning certain uses of income screening criteria. *See* CP 332. The affordability recitals predated the FIT Rule amendment. *See* CP 74–76 (original bill).

BIAW is shooting at a target the City does not present. BIAW's resulting argument is needless.

3. BIAW mischaracterizes the primary sources it marshals for its needless fight.

The City will not offer a detailed rebuttal of BIAW's specific contentions because they prompt an assessment no Court should undertake and attack things the City never said. The City will merely note how BIAW misuses its three primary sources.

First, BIAW mischaracterizes a California Legislative Analyst's Office report by claiming it "indicated that government regulation can add dramatically to rent prices."²² The 44-page report never mentions "regulation." Instead, it points to four uniquely high building costs in California: land, materials, labor, and government fees levied as a condition of development.²³ Even then, the report indicates the effect of higher building costs differs depending on the location, favoring tenants in some areas and landlords in others.²⁴

²² BIAW Brief at 5 (citing Legislative Analyst's Office, California Legislature, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 14 (2015)). The report is available at <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> (accessed April 1, 2019).

²³ *Id.* at 14.

²⁴ *Id.*

Second, BIAW relies on a City-commissioned, University of Washington survey of landlords without imparting key context.²⁵ The survey—and the larger report of which it is a part—did not analyze the effect of any law. The report clarified it could not undertake that analysis, so merely developed baseline data: “In the absence of consistent baseline data, **a formal evaluation of these ordinances is not possible.** Thus, a central goal of the project is to develop baseline information to inform the development and assessment of future ordinances.”²⁶ Still, BIAW wields the survey as proof of the FIT Rule’s “unintended consequences.”²⁷ BIAW overlooks the report’s caution that the survey is not statistically valid: “Although our sample is large and diverse, because it is voluntary, we cannot be certain that the sample is random. For this reason, we do not refer to statistical significance of differences in the report.”²⁸ The survey sought landlords’ views on a slate of three City ordinances, not just the

²⁵ BIAW Brief at 7–11 (citing what is properly cited as University of Washington Center for Studies in Demography and Ecology, SEATTLE RENTAL HOUSING STUDY, FINAL REPORT (June 2018) (“UW Survey”). The document is available at <https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/UWSRHFINAL.pdf> (accessed April 1, 2019).

²⁶ UW Survey at 1 (emphasis added).

²⁷ *E.g.*, BIAW Brief at 8.

²⁸ UW Survey at 14 n.2.

FIT Rule,²⁹ but BIAW casts those views into its critique of the FIT Rule alone.³⁰ BIAW also omits the survey’s conclusions about landlords’ misunderstanding of those laws (“comments offered by respondents also point to considerable misinformation about the intent and operation of these ordinances”) and landlords’ antipathy to the laws’ goals (“only 10% supported any of the central goals the City has adopted in developing new housing policies”).³¹ Not surprisingly, a nonrandom, voluntary survey of those subject to laws they neither understand nor support paints a negative picture of their anticipated responses to it.

Finally, BIAW puts words in the mouth of a Harvard national housing report.³² BIAW cites the report for the proposition that “older, small buildings tend to have a consistently high percentage of affordable housing,” but the cited page of the report says no such thing.³³ BIAW also invokes the report for these claims:

²⁹ *Id.* at 1 (goal was to assess landlords’ reactions to “ordinances related to criminal background checks and move-in fees, and the First-in-Time ordinance”).

³⁰ *E.g.*, BIAW Brief at 7–11.

³¹ UW Survey at 2 (part of the Executive Summary).

³² BIAW Brief at 12–13 (citing Joint Center for Housing Studies of Harvard University, THE STATE OF THE NATION’S HOUSING (2017) (“Harvard Report”). The document is available at https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_state_of_the_nations_housing_2017.pdf (accessed April 1, 2019).

³³ BIAW Brief at 13 (citing Harvard Report at 3). *See* Harvard Report at 3.

The number of households has steadily increased in Seattle since 2010, while the inventory of homes for sale in the same timeframe has fallen by more than 65%. In spite of the incredibly low supply-to-demand ratio, homeownership rates have actually increased, showing that the influx of high paying jobs has brought more wealthy, non-landlords to occupy homes that may have previously been rentals.³⁴

The report does not support the bolded text. The report addresses only 2010 – 2016, not 2010 to the present.³⁵ It mentions Seattle on only six pages and never in the context of trends in the number of households, a “supply-to-demand ratio,” or whether any wealthy non-landlords occupy homes that “may have” been occupied by renters.³⁶ To the extent the report addresses Seattle rental trends, it is to include Seattle among areas where growth in new large, multifamily rentals added significantly to the housing stock.³⁷ A more recent version of the report noted the relatively positive impact of that growth for Seattle renters: “As might be expected,

³⁴ BIAW Brief at 12 (emphasis added; footnotes omitted; citing Harvard Report at 9, 19).

³⁵ Harvard Report at 9.

³⁶ See Harvard Report at 9 (for-sale inventories and for-sale listing times), 10 (home price appreciation and nominal house prices), 19 (homeownership rates), 27 (large multifamily share of rentals), 28 (stock of low-rent units), and 34 (homeless population trends).

³⁷ *Id.* at 27.

rent growth was generally slowest in markets where new apartments outnumbered new renters on net, such as . . . Seattle.”³⁸

Although BIAW’s mischaracterizations are regrettable, they ultimately are meaningless because courts should not attempt to referee counsels’ use or misuse of academic publications in a fight over a law’s predicted efficacy. To do so would invite “the hazards of placing courts in th[e] role” of “substitut[ing] their predictive judgments for those of elected legislatures and expert agencies.”³⁹

III. CONCLUSION

BIAW and its members may prefer *Manufactured Housing*’s lead opinion, but no one has changed their position in reliance on it. BIAW’s claims about the efficacy of the FIT Rule are irrelevant under the “rational basis” analysis, are untethered to the City’s arguments, and ultimately rest on mischaracterizations of academic publications.

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³⁸ Joint Center for Housing Studies of Harvard University, *THE STATE OF THE NATION’S HOUSING* at 28 (2018). The document is available at https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf (accessed April 1, 2019).

³⁹ *Lingle*, 544 U.S. at 544–45.

The City respectfully asks this Court to reverse the trial court and reform Washington's substantive due process and regulatory takings law to obviate the policy debates BIAW asks this Court to referee.

Respectfully submitted April 3, 2019.

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