Honorable Roger Rogoff
Noted for argument June 21, 2019, 10:00 am

SUPERIOR COURT OF WASHINGTON
KING COUNTY

SEATTLE VACATION HOME, LLC; and ANDREW MORRIS,

Plaintiffs,

vs.

CITY OF SEATTLE, WASHINGTON; JENNY A. DURKAN, Mayor of the City of Seattle, in her official capacity only; BRUCE A. HARRELL, President of the City Council of Seattle, in his official capacity only; SALLY BAGSHAW, Councilmember of the City Council of Seattle, in her official capacity only; M. LORENA GONZÁLEZ, Councilmember of the City Council of Seattle, in her official capacity only; LISA HERBOLD, Councilmember of the City Council of Seattle, in her official capacity only; ROB JOHNSON, Councilmember of the City Council of Seattle, in his official capacity only; DEBORA JUAREZ, Councilmember of the City Council of Seattle, in her official capacity only; TERESA MOSQUEDA, Councilmember of the City Council of Seattle, in her official capacity only; MIKE O'BRIEN, Councilmember of the City Council of Seattle, in his official capacity only; KSHAMA SAWANT, Councilmember of the City Council of Seattle, in her official capacity only;

Defendants.

No. 18-2-15979-2

PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO CITY OF SEATTLE'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

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I. RELIEF REQUESTED

Pursuant to Washington Court Civil Rules 56 (a) and (d), Plaintiffs Seattle Vacation Home, LLC and Andrew Morris move that this Court: 1) deny the motion for summary judgment filed by defendant City of Seattle as premature, and 2) declare that the test adopted by the Washington Supreme Court in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990), controls Plaintiffs' substantive due process claim under Article I § 3 of the Washington Constitution.

II. INTRODUCTION AND PROCEDURAL HISTORY

Since 2018, Seattle has restricted the number of properties that any individual (or married couple) may offer as short-term rentals. Previously, they could offer an unlimited number of properties as short-term rentals. Now, pursuant to City Ordinance 125490, they may only offer two properties and, if they choose, their own primary residence as short-term rentals. Plaintiffs challenge these restrictions on three grounds: (1) as a violation of Plaintiffs' right to substantive due process under Article I § 3 of the Washington Constitution; (2) as a violation of their federal right to substantive due process under the Fourteenth Amendment; and (3) as a violation of the privileges and immunities clause (Art. I § 12) of the Washington Constitution.

While the proper standard of review is different for each claim, the City's motion for summary judgment should be denied as premature because all three standards of review require the Court to examine the evidence proffered by the parties, and the parties have stayed discovery by stipulation and agreement. Plaintiffs believe resolution of this case depends on the development of facts through discovery and that the facts alleged by Defendants in support of their motion are in dispute—a dispute which precludes the issuing of summary judgment.

For instance, Plaintiffs plan to depose City officials about the City's purported justifications for the new law and any evidence that might support those justifications. Plaintiffs have even noticed that deposition. Notice of 30(b)(6) Deposition attached as Appendix 1. But after Plaintiffs set this deposition, counsel for the City called counsel for Plaintiffs and asked for a stay of discovery. The Plaintiffs agreed to that because both parties recognized that they disagreed about the proper standard of review for the state substantive due process claim.

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Counsel for Plaintiffs therefore agreed to withdraw the deposition notice, so that the parties could resolve that legal question first.

Therefore, on March 26 of this year, the parties submitted a Stipulation to Change Trial Date and Amend Case Schedule (attached as Appendix 2) so that the standards of review could be determined. That joint stipulation states, at relevant part, that:

> The parties intend to file cross-motions for summary judgment, **regarding the constitutional standard of review**, on an agreed briefing schedule, to be heard by the Court on June 21, 2019. The parties have also **agreed to a stand down on discovery and objections thereto until they can obtain rulings on the cross-motions, which may resolve or moot a number of discovery-related issues**. The parties agree that good cause exists to extend the deadlines in the case schedule, including the trial date, by approximately four months, and respectfully request the Court to do so.
>
> (emphasis added)

According to the parties' agreement that their cross-motions for summary judgment would solely address the legal question of the proper standard of review in this case, the Plaintiffs have not conducted the discovery to which they are entitled. Yet the City's motion for summary judgment goes beyond the legal dispute and also asks the Court to enter full summary judgment for the City. That motion should be denied, because Plaintiffs require discovery on all three of their constitutional claims.

In addition to denying the City's motion for summary judgment, Plaintiffs also ask the Court to decide the legal issue of whether the substantive, three-part analysis from *Presbytery* controls their substantive due process claim under the Washington Constitution. Contrary to the City's argument, Washington Courts have never abandoned *Presbytery*, silently or otherwise. Instead, they continue to apply it to property rights cases involving substantive due process claims. In *Yim v. City of Seattle*, No. 958131, Wash. Sup. Ct. (filed Aug. 24, 2018), the question of *Presbytery*'s continuing applicability is currently pending before the state Supreme Court. The City is the appellant in that case, and counsel for Plaintiffs has submitted an *amicus* brief in favor of the respondent. Among other issues, the parties in that case have asked the Supreme Court to consider whether *Presbytery* still controls. Briefing is complete, and oral

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argument is scheduled for June 11. If this Court does not believe it can rule on the proper standard of review while *Yim* is pending, Plaintiffs suggest staying this case until the Court issues its opinion in *Yim*.

III. STATEMENT OF FACTS

Home-sharing is the rental of one's property—from a single room to an entire house—on a short-term basis. Seattle defines a short-term rental as a rental, for pay, of fewer than 30 nights. Seattle, Wash., Mun. Code § 6.600.030.

Plaintiff Andrew Morris started conducting short-term rentals in 2015, with one property. Declaration of Andrew Morris ("Morris Decl.") ¶ 1.

Since then, Andrew and his wife incorporated plaintiff Seattle Vacation Home, LLC. The business has grown to manage 12 properties owned by Andrew (in most cases he is a minority investor together with friends or family), as well as properties that he does not own, but that others entrust Seattle Vacation Home to manage. *Id.* ¶ 2. Seattle Vacation Home lists the properties it manages on multiple digital platforms, including HomeAway, Airbnb, and others. *Id.* ¶ 3. The properties offered by Seattle Vacation Home range from small 1-bedroom apartments to large 8-bedroom single-family homes. *Id.* ¶ 4.

Specifically, the short-term rental properties (collectively the "Properties") that are owned or co-owned by Andrew and are located in Seattle at the following addresses:

2606 East Thomas Street, Unit 1;

2606 East Thomas Street, Unit 2;

2606 East Thomas Street, Unit 3;

2606 East Thomas Street, Unit 4;

1728 23rd Avenue;

215A 26th Avenue East;

226B 26th Avenue East;

129A 26th Avenue East;

127A 26th Avenue East;

127B 26th Avenue East;

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1612 26th Avenue; and,

1116 25th Avenue. *Id.* ¶ 5.

The Properties are located within the City of Seattle and are not included in Downtown or First Hill exclusionary zones. *Id.* ¶ 6. Seattle Vacation Home contracts with other local entrepreneurs to maintain and clean the Properties. These entrepreneurs professionally clean every unit after every rental and conduct repairs as necessary. *Id.* ¶ 7.

Over the course of its existence, Seattle Vacation Home has managed approximately 5,300 bookings. The company carefully tracks and responds to any problems with its rentals. Over the course of over 5,300 bookings at the Properties, the police have been summoned only once (by Andrew himself, when a loud party needed to be evicted). Neighbors have complained approximately 10 times over excessive noise; and fewer than 10 complaints have been made over other minor problems like garbage bags being left in the wrong location by renters. *Id.* ¶ 8. The company takes all complaints seriously and works quickly and directly with guests, neighbors, and the City to resolve them. *Id.* ¶ 9. To date, none have related to a serious crime, continuous or repeated noise or other nuisances, or resulted in a fine or prosecution of any sort. *Id.*

Seattle Vacation Home is the primary source of income for Andrew and his wife. *Id.* ¶ 10. Their lives changed on December 11, 2017, when Seattle passed sweeping new restrictions on short-term rentals when it adopted Ordinance No. 125490, which is the subject of this lawsuit. *Id.* ¶ 11.

The new rules are codified at Seattle Municipal Code Chapter 6.600 et seq. Ordinance No. 125490 defines a short-term rental as "a lodging use, that is not a hotel or motel, in which a dwelling unit, or portion thereof, that is offered or provided to a guest(s) by a short-term rental operator for a fee for fewer than 30 consecutive nights." Seattle, Wash. Mun. Code § 6.600.030.

Ordinance No. 125490, which took effect on January 1, 2019, restricts the number of units that a property owner may dedicate to short-term rentals. Under the law, an owner will only be able to rent their primary residence plus two other properties as short-term rentals (the

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"two-property rule"). *Id.* § 6.600.040.B.1. The restrictions treat married couples as a single person, meaning that Andy and his wife are limited to two properties since they are married, whereas they could own four properties between them if they were not. *Id.* § 6.600.030. The restrictions treat majority owners in a property the same as minority owners. *Id.* Thus, a person who owned only a 1% stake in two different properties would, under the rule, be precluded from owning any more properties for short-term rentals.

The penalty for violating the two-property rule is $500 per day for the first ten days, and $1,000 per day beyond that. *Id.* § 6.600.110.B.4.a.

The two-property rule applies everywhere in the City, with two exceptions. In the Downtown Urban Center and First Hill neighborhoods, existing owners will have all of their short-term rental units grandfathered in, meaning they will not be limited to renting their primary residence plus two units when the Ordinance takes effect. *Id.* §§ 6.600.040.B.2 & B.3. In other words, if homeowners were renting more than two units prior to September 30, 2017, they can continue to do so – but only if their properties are in the Downtown or First Hill neighborhoods. *Id.*

IV. EVIDENCE RELIED UPON

Plaintiffs' rely on the Affidavit of Andrew Morris, Appendix 1 to this motion, and the other pleadings and papers on file with the Court in this action.

V. ISSUES

There are two issues before the Court:

1. Should summary judgment be granted to the City without any factual development?
2. Has the Washington Supreme Court silently abandoned the three-part *Presbytery* test for analyzing substantive due process claims, involving private property rights, under the Washington Constitution?

VI. ARGUMENT

The City's motion for summary judgment should be denied as premature because all three of Plaintiffs' claims require factual development, and that development has been stayed by agreement and stipulation of the parties. Plaintiffs' state due process claim is controlled by the

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substantive, three-part analysis in *Presbytery*. Their federal substantive due process claim is controlled by an analysis into whether the law "substantially advances" the asserted governmental interest. And their claim under the privileges and immunities clause of the Washington Constitution—while subject to rational basis review—still requires the Court to allow Plaintiffs the opportunity to demonstrate the irrationality of the City's asserted justifications for the law.

Indeed, even if the City were correct—which it is not—that rational basis review controls *all* of the claims in this case, that would *not* mean that factual development is unnecessary. And it would not mean that the Court could decide the case without the Plaintiffs being given the chance to proffer evidence that would support their claims.

Additionally, Plaintiffs address herein the question that initially prompted the agreed stay of discovery, namely: Does *Presbytery* still control substantive due process claims, involving property rights, under the Washington Constitution? Contrary to the City's argument, the Washington Supreme Court has not silently abandoned *Presbytery*'s three-part substantive due process analysis. Instead, both Washington courts and federal courts have continued to apply Presbytery in an unbroken, near-30 year line of precedent. And under *Presbytery*, the parties will need significant factual development in order to determine whether the City can satisfy all three prongs of the *Presbytery* test, as it is required to do.

A. Under any standard of constitutional review, the parties need to develop evidence before summary judgment could be granted.

Summary judgment is appropriate only where there are no genuine disputes of fact. *In re Marriage of Ferree*, 71 Wn. App. 35, 43–44, 856 P.2d 706, 710–11 (1993). The moving party—here the Defendants—bear the burden of "produc[ing] affidavits, declarations or other cognizable materials that show the absence of a genuine dispute of fact." *Id*. But at this stage, summary judgment is particularly inappropriate because the parties have agreed to postpone discovery of facts necessary to prove up the allegations in the complaint. "[A] motion for summary judgment follows commencement of an action and some opportunity for discovery." *Grant v. Alperovich*, 180 Wn. App. 1041, 2014 WL 1711403, at *4 (2014). The City's request

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for full summary judgment is premature. The parties have stipulated that discovery would be stayed until the proper standards of review in this case could be determined on cross-motions for summary judgment.

The City's motion should only be granted if the Court believes that the City is correct on two points: that rational basis review controls all claims in this case, and that such review means that the Court need not review the evidence that would have been presented by the parties. Because neither of these things is true, the City's motion should be denied. As Plaintiffs show below, evidentiary development is needed on all three of their claims. A "trial court has a duty to give [a] party a reasonable opportunity to complete the record before ruling on [a] motion [for summary judgment]." *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474, 476 (1989), *citing Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986), and *Cofer v. Cnty. of Pierce*, 8 Wn. App. 258, 262–63, 505 P.2d 476, 478–79 (1973). At present, due to the agreed stay of discovery, there remains a dispute of fact that precludes summary judgment.

1. The state substantive due process claim cannot be decided without substantial evidentiary development.

Plaintiffs allege that the two-unit rule for short-term rentals violates the substantive due process clause, Article I, Section 3, of the Washington Constitution. As explained below in Part B, this claim is analyzed under the three-part test found in *Presbytery*. First, the regulation must "substantially advance[]"—not just rationally relate to—"legitimate state interests." 114 Wn.2d at 333. Second, the regulation must use reasonable means to achieve that purpose. *Id*. at 330. And third, the regulation must not be unduly oppressive on the landowner. *Id*. This is a "higher standard of scrutiny" than many states apply to such regulations. *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 n.9 (Utah Ct. App. 1998).[1] Each element of the test must be individually scrutinized and satisfied for a law to withstand constitutional scrutiny.

[1] Washington provides higher protection for property rights in other contexts, too, like the constitutional right to protect one's property from wild animals. *See, e.g, State v. Vander Houwen*, 163 Wn.2d 25, 33 ¶ 13, 177 P.3d 93, 97 (2008) ("the holding that one may reasonably defend property against wildlife damage is still correct law in Washington").

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The following facts are necessary, at a minimum, to conduct an analysis under the three parts of this test: What are the City's purported justifications for the two-unit rule? What is the City's evidence that those interests are legitimate? How does the two-unit rule substantially advance those interests? Does it advance them directly or indirectly? Are these means reasonable or unreasonable? Are they effective? If the City's interests are legitimate (part one) and its means of achieving those interests are reasonable (part two), the parties would still need to explore the burden that the two-unit rule places on Plaintiffs. Namely, is there a burden? What is the extent of the burden? Is it an undue burden? And how does the weight of the burden on Plaintiffs balance against the extent to which the two-unit rule serves the public interest?

To take a concrete example, the City has claimed that restricting the number of units that a given owner (or couple) may own will help address housing affordability in Seattle. Even if the Court were to find that this is a legitimate governmental interest, Ordinance 125490 must still "substantially advance" that interest under *Presbytery*. Furthermore, the second and third prongs of *Presbytery* will require a substantial evidentiary record. For the "reasonable means" analysis, the parties will need to understand the City's theory of how the two-unit rule relates to housing affordability. That connection is not self-evident. Plaintiffs have alleged that there is no rational connection—and to prove their cases requires Plaintiffs to answer certain evidentiary questions: Does the City have any evidence demonstrating a connection? What do expert witnesses say about the connection, if any, between short-term rentals and housing costs? These and other questions need to be answered to determine, under *Presbytery*'s second prong, whether Ordinance 125490 substantially advances the government's interest. Without a factual record, this question is simply not appropriate for summary judgment at this time.

Likewise, to conduct the "unduly oppressive" analysis under *Presbytery*'s third prong, the parties will need to explore—through discovery—the burden that the City's new restrictions place on SVH and the Morrises. The Plaintiffs have alleged that the two-property rule is an irrational and arbitrary restriction on Plaintiffs' property rights. They should have the opportunity to prove up their allegations through the following evidence that they plan to obtain

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in discovery, including: expert testimony that analyzes the Seattle housing market and any effect that short-term rentals might have on it; depositions of the City to probe and test its theories of public benefit; evidence to refute any additional bases for the law that the City might assert during the discovery process; an analysis of the burdens that complying with the two-unit rule place on Plaintiffs; and an examination of the *extent* of any public benefit that the City alleges the law might serve. These are fact-intensive inquiries that require discovery. Because the parties have agreed to stay discovery, these causes of action are not proper for summary judgment at this time.

2. The federal substantive due process claim cannot be decided without substantial evidentiary development.

Plaintiffs' federal substantive due process claim is controlled by a standard of review that demands evidence. Contrary to the City's claims, federal law uses the "substantially advances" test to determine the constitutionality of land-use regulations, and not rational basis review. *See Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) ("[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."); *Moore v. City of E. Cleveland*, 431 U.S. 494, 498 n.6 (1977) ("*Euclid* held that land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'" (citation omitted)); *Nectow v. City of Cambridge*, 277 U.S. 183, 187–88 (1928) (same).

Under "substantially advances" review, evidence matters. The property owner may "proffer[] evidence sufficient to rebut each of the [government's] reasons" for enacting the regulation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 687–88 (1999). This means that Plaintiffs should be afforded the opportunity to, at a minimum, conduct discovery and work with expert witnesses to rebut the City's asserted bases for enacting the short-term rental restrictions.

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In practice, this will not look all that different than prongs one and two of the *Presbytery* test. Plaintiffs are still entitled to explore whether the City's justifications actually and substantially advance the interests the City asserts. Returning to the previous example: The City asserts that the two-unit rule addresses housing affordability. Defs.' Mot. for Summ. J. ("DMSJ") at 17–20. Plaintiffs should have the opportunity to probe whether this is true. Do more short-term rentals mean less-affordable housing? This dispute of material fact precludes summary judgment at this stage of the litigation. This allegation must be proven by evidence, including testimony from expert witnesses. For instance, Plaintiffs anticipate that their expert witness would need to examine the size of the Seattle housing market, compare that to the size of the Seattle short-term rental market, and perform the relevant analysis to determine whether short-term rentals have a positive or negative effect on housing prices. Similarly, Plaintiffs anticipate that they will need to conduct an entity deposition of the City in order to understand the City's evidence supporting a connection between more short-term rentals and higher housing costs. Also important will be the question of whether short-term rentals contribute meaningfully or negligibly to any increase in housing costs. These are evidence-intensive inquiries that require discovery. "The court must read the parties' submissions in the light most favorable to the nonmoving party, and determine whether reasonable minds could reach but one conclusion." *In re Marriage of Ferree*, 71 Wn. App. at 44 (internal citations omitted). Because that is not the case here—at this stage of the litigation—summary judgment must be denied.

Plaintiffs also allege that if there is any connection between short-term rentals and overall housing costs, it does not rise to the level of being "substantial," such that the two-unit rule will meaningfully address housing affordability in Seattle. Again, this allegation must be proven by evidence. At this stage of the litigation, neither party knows the answers to these questions because the parties have agreed to stay discovery. Therefore, a factual dispute remains at this point which precludes summary judgment. *Miller v. Indiana Ins. Cos.*, 31 Wash. App. 475, 479, 642 P.2d 769, 771 (1982). Instead, this case should go forward as the parties agreed: after the appropriate legal standard is established, the parties should have an opportunity

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to conduct discovery and enable the Plaintiffs to prove up their allegations so that the Court can determine whether Plaintiffs' claims have merit.

3. The state privileges and immunities claim cannot be decided without Plaintiffs being given a chance to negate the City's asserted bases for carving out certain neighborhoods and discriminating against married couples.

The City paints rational basis review as a toothless standard under which the plaintiffs are not afforded an opportunity to rebut the government's asserted justifications for a law. DMSJ at 15–16. This is a common misconception. In actuality, federal and state courts have been clear that rational-basis review is a meaningful standard and that, while that standard is deferential to the government, claims subject to rational-basis review nevertheless warrant genuine legal scrutiny *and factual analysis*.

The City argues that the state rational basis test mirrors the federal test. It does not. *Id.* at 10. But even if it does, that does not render it a hollow standard. The U.S. Supreme Court has ruled in plaintiffs' favor in at least 20 privileges-and-immunities cases since 1970.[2] There are at least three circumstances under which this occurs: (1) the absence of a logical connection between the asserted governmental interest and the law[3]; (2) the law imposes a public harm that

[2] *See United States v. Windsor*, 570 U.S. 744, 774 (2013); *id.* at 793-94 (Scalia, J., dissenting) (noting that the Court relied on rational-basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614-15 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., W. Va.*, 488 U.S. 336, 345 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972); *Mayer v. City of Chi.*, 404 U.S. 189, 196-97 (1971); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970).

[3] *See, e.g., Zobel*, 457 U.S. at 62 (rejecting Alaska's argument that long-time residents deserved a larger share of state oil revenues than newcomers).

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vastly outweighs any conceivable public benefit[4]; and (3) the law simply lacks a legitimate governmental interest.[5]

Furthermore, the Court does not apply the rational basis test purely in the abstract. Instead, a court facing a rational basis challenge like this one must adjudicate the constitutionality of the challenged law by looking at the evidence and the wider statutory background. "[E]ven in the ordinary equal protection case calling for the most deferential of standards," courts "insist on knowing the relation between the classification adopted and the object to be attained," and the answer depends on whether the challenged law is "narrow enough in scope and *grounded in a sufficient factual context* for [the Court] to ascertain some relation between the classification and the purpose it serve[s]." *Romer*, 517 U.S. at 632–33 (emphasis added). The Court has made clear for 80+ years that the rational basis test "is a presumption of *fact.* … As such it is a *rebuttable* presumption." *Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 209 (1934) (emphasis added).

While a plaintiff certainly bears the evidentiary burden, the government's *mere assertion* that a law serves a legitimate purpose is *never* enough to entitle it to judgment, even under the rational basis test. *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) ("the mere assertion of a legitimate government interest has never been enough to validate a law."); *Nunez-Reyes v. Holder*, 646 F.3d 684, 715 (9th Cir. 2011), (en banc) (Pregerson, C.J., dissenting) (Courts "cannot allow 'rational basis review' to serve as a rubber stamp.")

Plaintiffs may adduce evidence to refute the government's asserted rationales. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 (1938) ("Where the existence of a rational

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[4] *See, e.g., Plyler*, 457 U.S. at 230 (rejecting government's argument that it could save money by denying public education to undocumented immigrants and finding that interest "wholly insubstantial in light of the costs involved to these children, the State, and the Nation" from creating a subclass of illiterates.").

[5] *See, e.g., In Metro. Life Ins. Co.*, 470 U.S. at 878 (invalidating Alabama law that protected state insurance companies from out-of-state competition on the basis that economic protectionism was not a legitimate governmental interest).

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basis for legislation whose constitutionality is attacked depends upon facts … such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute … may be challenged by showing to the court that those facts have ceased to exist [or] … by proof of facts tending to show that the statute…is without support in reason." (internal citations omitted)).

Likewise, Washington courts do not apply a meaningless, government-always-wins standard to rational basis cases. Even though the test is "highly deferential to the legislature," the challenging party must still be afforded an opportunity to "to show it is purely arbitrary." *In re Det. of Thorell*, 149 Wn.2d 724, 749, 72 P.3d 708, 721 (2003). This means the challenging party may introduce evidence of irrationality by proving facts that negate the government's proffered justifications. For instance, in *Willoughby v. Dep't of Labor & Indus. of the State of Wash.*, the Washington Supreme Court rejected *all* of the government's proffered justifications for denying permanent disability benefits to certain prisoners, but not others, because, in light of the evidence, the government "fail[ed] to provide a rational basis for the statutory distinction." 147 Wn.2d 725, 741, 57 P.3d 611, 619 (2002). Thus, even if the City is right, and rational-basis review applies, summary judgment cannot be entered without a fully developed factual record.

Plaintiffs allege that the City has violated the state privileges and immunities clause in two ways: First, by carving out grandfathered units in the Downtown Urban Center and First Hill neighborhoods from the two-unit rule; and second, by treating married individuals as one owner for purposes of the two-unit rule. In its motion, the City asserts that the carve-out serves the governmental interest of "having that area serve as a tourist and convention attraction and a regional hub of cultural and entertainment activities." DMSJ at 20. It asserts that the disparate treatment for married individuals is necessary in order to "prevent[ ] [married individuals] … from essentially double-dipping." Plaintiffs, however, dispute as a factual matter whether these rules actually serve these government interests. Compl. ¶¶ 57–58. Whether these rules do rationally serve those legitimate interests is a matter to be determined on the basis of an evidentiary record. For example, it must be determined based on an assessment of whether the carve-out can be rationally believed to increase the amount of cultural and entertainment

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activities. While the government gets deference on that question, the Plaintiffs are entitled to obtain and submit evidence to substantiate their position that the carve-out does not serve those interests.

For example, Plaintiffs contend that treating certain neighborhoods differently does not, as a factual matter, rationally relate to encouraging and support tourism. Plaintiffs also contend that discriminating against married couples does not serve *any* legitimate governmental interest.[6] They intend to obtain evidence—including statistics relating to tourism and testimony from experts relating to the consequences of Ordinance 125490's discriminatory rules, to prove their case. But at the summary judgment stage, this Court must construe all facts in the light most favorable to the non-moving party, *Mulcahy v. Farmers Insurance Co. of Washington*, 152 Wn.2d 92, 98; 95 P.3d 313, 316 (2004), and grant summary judgment "only if, from all of the evidence, reasonable persons could reach but one conclusion." *Duncan v. Alaska USA Fed. Credit Union*, 148 Wn. App. 52, 60 ¶ 15, 199 P.3d 991, 995 (2008). That is not the case here. Plaintiffs dispute the Defendants' factual (and legal) claims, and this Court cannot adjudicate the case on the merits before the parties are afforded a chance to conduct discovery.

B. The Washington Supreme Court did not silently abandon the three-part *Presbytery* test for substantive due process claims involving property rights.

Turning to the issue that prompted these cross-motions, and the agreed stay of discovery, Plaintiffs' substantive due process claim is appropriately analyzed under the test established by the Washington Supreme Court, in *Presbytery*, 114 Wn.2d 320. In the property rights context, substantive due process claims are appropriate even where a taking has not occurred, if the owner's right to use property has been restricted arbitrarily or in ways that lack a constitutionally adequate relationship to a constitutionally legitimate interest. As the Washington Supreme Court noted, "even if [a] regulation protects the public from harm, and

[6] Plaintiffs dispute the City's claim that what the City calls "double dipping" by married couples is a harm that the City can legitimately address. There is no evident reason why two single people should be allowed to rent four properties, while those same people should only be allowed to rent *two* properties once they get married. Again, resolution of this question depends on factual determinations that are premature prior to discovery.

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does not deny the owners a fundamental attribute of ownership (and is thus insulated from a 'takings' challenge), it still must withstand the due process test of reasonableness." *Id*. at 330.

The *Presbytery* test was reaffirmed by the Washington Supreme Court in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). There, a group of property owners challenged a state law that required the owners of mobile home parks to provide relocation assistance to residence whenever a park was closed. The court found that, although the law did not constitute a taking, it did violate the substantive due process rights of the owners of the mobile home parks. The Court found that "addressing the statewide problem of relocation expenses associated with mobile home park closings" was a legitimate government interest, *id.* at 609, but that the "more difficult issue here is whether it is reasonably necessary to require the assistance to be paid by the closing park owner." *Id.* at 610. In order to conduct that analysis, it was necessary to "turn to the third due process question, that of undue oppression." *Id.*

The undue oppression analysis looks at "a number of nonexclusive factors to weigh the fairness of the burden being placed on the property owner." *Id.* Quoting *Presbytery*, the Court explained that:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Id. at 610 (quoting 114 Wash.2d at 331). This is a fact-intensive analysis that requires both sides of the dispute to produce actual *evidence* to support, or discredit, the landowner's claim of undue burden.

1. An uninterrupted line of caselaw continues to apply the *Presbytery* test.

Since *Presbytery* was decided in 1990, both state and federal courts continue to apply it to substantive due process claims involving property rights, under the Washington Constitution. Most recently, the Ninth Circuit applied *Presbytery* when applying Washington state law in *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1193-96 (9th Cir. 2012).

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There, the owners of mobile home parks challenged a law that zoned mobile home parks in a way that allowed *only* that use on the property. Earlier versions of the zoning permitted multiple uses, meaning that mobile home parks could be transformed into more expensive, permanent subdivisions and other higher-value uses. By disallowing any use other than mobile homes, the city council hoped to prevent closure of the parks and thereby address the issue of affordable housing in the city. Even though the case was brought in federal court under the U.S. Constitution, because it originated in Washington, the Ninth Circuit applied the *Presbytery* analysis.

That same year, the Washington Court of Appeals considered a substantive due process case involving a construction permit to place a mobile home on private land. *Cradduck v. Yakima Cnty.*, 166 Wn. App. 435, 271 P.3d 289 (2012). The county had placed a mobile home park in a floodplain, which prevented new construction from occurring there. The appellate court concluded that this was "a proper exercise of police power." *Id.* at 437 ¶ 1. To arrive at that conclusion, it applied the three-part *Presbytery* test. As the test requires, the court found that the regulation satisfied all three prongs: legitimate public purpose, reasonably necessary means to achieve the purpose, and not unduly oppressive on the landowner. *Id.* at 442–446 ¶¶ 14–22.

Two years prior to *Cradduck* and *Laurel Park*, the court of appeals applied *Presbytery* in *Bayfield Resources Co. v. WWGMHB*. 158 Wn. App. 866, 244 P.3d 412 (2010). There, a property owner objected to a rezoning of its property, which would further restrict use of the property in order to, according to the government, "increase[e] visible open space, retain[] wildlife habitat, and protect[] shellfish." *Id.* at 874 ¶ 12. Again, the court of appeals applied the *Presbytery* substantive due process test and found, after analyzing all three prongs of the test, that the rezoning withstood constitutional scrutiny. *Id.* at 885–888 ¶¶ 35–44.

One year before that, the appeals court used the *Presbytery* test in *Conner v. City of Seattle*, 153 Wn. App. 673, 223 P.3d 1201 (2009). There, the City denied a request to build additional structures on a property that was designated for historical preservation. The property owner challenged the regulation on a number of grounds, one of which was that it failed the

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Presbytery test. Although the court found the regulations unconstitutional, it had no problem applying the *Presbytery* test to the facts of the case.

Two other cases also show that the *Presbytery* line remains unbroken. In *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006), the court of appeals upheld a city's rezoning of two parcels of property under *Presbytery*. "Washington case law on regulatory takings," noted the court, "focuses on only the fourth fundamental attribute of property ownership—the right to make some economically viable use of property—presumably because the first three attributes seem far more likely to be implicated when the state physically takes property." *Id*. at 471 ¶ 28. Likewise, in *Sintra, Inc. v. City of Seattle*, an *en banc* Washington Supreme Court expressly endorsed *Presbytery*, despite the fact that Justice Talmadge wrote a lengthy dissent arguing that it should be abandoned in favor of adopting the federal *Dolan* test. 131 Wn.2d 640, 935 P.2d 555 (1997) (majority endorsement of *Presbytery* at 131 Wn.2d at 664; dissent *id*. at 691).

In short, the Washington Supreme Court has had numerous opportunities to abandon or modify the *Presbytery* test in the nearly three decades since it was decided—and has never done so. The *Presbytery* test provides a proper balance between the rights of property owners and the police power of government to address actual harms. It should be applied in this case on a full record upon completion of discovery.

2. The Washington Supreme Court did not abandon the *Presbytery* test by declining to apply it in *Amunrud*.

Although the Washington Supreme Court has never affirmatively abandoned *Presbytery*, the City argues that it *silently* abandoned the test in 2006, in *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006). This is incorrect for at least three reasons. First, *Amunrud* was not a land-use case at all. Second, courts have continued to apply *Presbytery* long after *Amunrud* was decided. And third, Washington courts apply a doctrine that precedent cannot be overturned *sub silentio*.

To the first point, the *Presbytery* analysis only applies to land use cases, and *Amunrud* was not such a case. Instead, *Amunrud* was a case about whether the government could revoke

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someone's driver's license due to unpaid child support. Because *Amunrud* was not a property rights case, *Presbytery* is not even mentioned in the majority opinion. Instead, the majority applied the *federal* version of rational basis review, which is consistent with what Washington courts have long done in non-property rights cases. *See, e.g.*, *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997) (marijuana law); *In re Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (1998) (deductions from prisoner wages); and *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 639 P.2d 853 (1982) (teacher's dismissal). *Amrund* did not repudiate *Presbytery* for the obvious reason that it simply did not fall within the *Presbytery* rule in the first place.

Second, as shown above, courts have continued to apply *Presbytery* long after *Amunrud* was decided. In these opinions, they have never discussed whether *Amunrud* amounted to an abandonment of *Presbytery*. Indeed, these opinions do not wrestle with *Amunrud* at all. The City's theory that *Amunrud* overruled *Presbytery*, both silently *and without mention in subsequent decisions*, should be rejected.

Finally, Washington follows the principle that one decision will not overrule another decision *sub silentio*. The Court "will not—and should not—overrule" existing precedents "sub silentio." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280 ¶ 22, 208 P.3d 1092, 1101 (2009). Yet the City argues the *Amrund* Court did just that—overrule decades of precedent *sub silentio* by not applying *Presbytery* to that case. But as shown above, the Court did not apply *Presbytery* because it simply was not applicable outside of the property rights context to begin with.

VII. CONCLUSION AND REQUEST FOR RELIEF

The parties stipulated to a stay of discovery until standards of review could be sorted out. The City now moves for summary judgment on the theory that no discovery in this case is even needed. As shown above, that theory is simply incorrect *regardless* of which standard of review applies. Under any applicable standard of review, all three of Plaintiffs' claims require factual development. The City's motion for summary judgment should be denied as premature.

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In the alternative, Plaintiffs request a continuance under Civil Rule 56(f) so that discovery may be conducted, pursuant to the agreement between the parties.

However, there is one important question before this Court at this stage of the litigation: Does the *Presbytery* test govern Plaintiffs' state substantive due process claims? As shown above, the Court should rule that it does, and order discovery in this case to be conducted in accordance with that test.

DATED this 17th day of May, 2019.

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* Admitted *pro hac vice*

Trial Attorneys:

Matthew R. Miller

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Plaintiffs' Cross-Motion for Partial Summary Judgment and Response to City of Seattle's Motion for Summary Judgment and the accompanying Appendices and Declaration of Andrew Morris with the Clerk of the Court using the ECR system.

I also certify that on this date, I sent a copy of this document by email to the following parties.

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DATED this 17th day of May, 2019,

/s/ *Kris Schlott*
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APPENDIX 1

Honorable Veronica Alicea Galvan

SUPERIOR COURT OF WASHINGTON
KING COUNTY

SEATTLE VACATION HOME, LLC; and ANDREW MORRIS, Plaintiffs, vs. CITY OF SEATTLE, WASHINGTON; JENNY A. DURKAN, Mayor of the City of Seattle, in her official capacity only; BRUCE A. HARRELL, President of the City Council of Seattle, in his official capacity only; SALLY BAGSHAW, Councilmember of the City Council of Seattle, in her official capacity only; M. LORENA GONZÁLEZ, Councilmember of the City Council of Seattle, in her official capacity only; LISA HERBOLD, Councilmember of the City Council of Seattle, in her official capacity only; ROB JOHNSON, Councilmember of the City Council of Seattle, in his official capacity only; DEBORA JUAREZ, Councilmember of the City Council of Seattle, in her official capacity only; TERESA MOSQUEDA, Councilmember of the City Council of Seattle, in her official capacity only; MIKE O'BRIEN, Councilmember of the City Council of Seattle, in his official capacity only; KSHAMA SAWANT, Councilmember of the City Council of Seattle, in her official capacity only; Defendants.	No. 18-2-15979-2 **NOTICE OF 30(b)(6) DEPOSITION**

TO: City of Seattle and its Attorney:

GOLDWATER INSTITUTE
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000

PLEASE TAKE NOTICE that, pursuant to CR 30(b)(6), the deposition will be taken upon oral examination of the City of Seattle through its designated representative at the time and place stated below before an officer authorized by law to administer oaths.

YOU ARE ALSO NOTIFIED that this deposition will be recorded by stenographic means and may be recorded by audio means.

YOU ARE FURTHER NOTIFIED pursuant to CR 30(b)(6), that you have the obligation to designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on the deponent's behalf, to offer knowledgeable testimony regarding the following matters:

1. Policies and procedures used by the City to record, monitor, investigate, and enforce its short-term rental laws and rules.
2. The City's responses to Plaintiffs' Interrogatories #8 and 9, including but not limited to any facts, studies, research, and reports that would support a link between the City's asserted governmental interests and the challenged Ordinance.
3. The City's governmental interests in treating married couples as one "owner" for purposes of enforcing its short-term rental laws and rules.
4. The City's purported justifications for excluding grandfathered units in the Downtown Urban Core and First Hill neighborhoods from the two-unit restriction, including the City's reasons for treating grandfathered units in those neighborhoods differently than all other neighborhoods in the City.

DATE/TIME: January 17, 2019 at 9:00 a.m.

LOCATION OF DEPOSITION: William C. Severson PLLC
1001 Fourth Avenue, Suite 4400
Seattle, WA 98154

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500 East Coronado Road
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DATED this 18th day of December, 2018.

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Attorneys for Plaintiffs

* Motion for admission *pro hac vice* pending.

Trial Attorneys:

Matthew R. Miller

CERTIFICATE OF SERVICE

I certify that on this date, I sent a copy of this document by email to the following parties.

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Kris Schlott, Paralegal

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APPENDIX 2

HONORABLE ROGER ROGOFF
WITHOUT ORAL ARGUMENT
March 27, 2018

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

SEATTLE VACATION HOME, LLC; and ANDREW MORRIS, Plaintiff, v. CITY OF SEATTLE, WASHINGTON *et al.* Defendants.	No. 18-2-15979-2 STIPULATION TO CHANGE TRIAL DATE AND AMEND CASE SCHEDULE

I. STIPULATION

1. Plaintiffs Seattle Vacation Home, LLC and Andrew Morris and Defendant City of Seattle stipulate and move the Court for an amended case schedule, including a new trial date.

2. LCR 4(d) provides that the Court may modify any date in the Case Schedule, other than the trial date, on motion of a party and for "good cause."

3. LCR 40(e)(2) provides that a motion to change the trial date more than 28 days later than the original date shall be made in writing to the assigned trial judge and "may be granted subject to such conditions as justice requires."

4. The parties intend to file cross-motions for summary judgment, regarding the constitutional standard of review, on an agreed briefing schedule, to be heard by the Court on

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June 21, 2019. The parties have already reserved that hearing date with the Court. The parties have agreed to the following briefing schedule and word limits for their cross-motions:

Pleading	Deadline	Word Limit
Defendant's Motion for Summary Judgment	April 26, 2019	8,400
Plaintiffs' Cross-Motion and Response to Defendant's Motion	May 17, 2019	10,500
Defendant's Reply in Support of its Motion and Response to Plaintiffs' Cross-Motion	June 5, 2019	4,200
Plaintiffs' Reply in Support of its Cross-Motion	June 14, 2019	2,100

5. The parties have also agreed to a stand down on discovery and objections thereto until they can obtain rulings on the cross-motions, which may resolve or moot a number of discovery-related issues. The parties agree that good cause exists to extend the deadlines in the case schedule, including the trial date, by approximately four months, and respectfully request the Court to do so. This will allow the parties to engage in dispositive motions practice and, if the case is not resolved, will provide sufficient time for the parties to complete discovery, including depositions and expert discovery, and prepare for trial.

6. The parties request that the case schedule be amended as follows:

Case Event	Current Date	Stipulated Proposed Date
Disclosure of Possible Primary Witnesses	January 22, 2019	August 5, 2019
Disclosure of Possible Additional Witnesses	March 4, 2019	September 9, 2019
Jury Demand	March 18, 2019	September 16, 2019
Change in Trial Date	March 18, 2019	September 16, 2019

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Discovery Cutoff	May 6, 2019	September 23, 2019
Engaging in Alternative Dispute Resolution	May 28, 2019	September 23, 2019
Exchanging Witness and Exhibit Lists and Documentary Exhibits	June 3, 2019	September 30, 2019
Joint Confirmation of Trial Readiness	June 3, 2019	September 30, 2019
Hearing Dispositive Pretrial Motions	June 10, 2019	October 7, 2019
Joint Statement of Evidence	June 17, 2019	October 14, 2019
Filing Trial Briefs, Proposed Findings of Fact and Conclusions of Law, and Jury Instructions	June 17, 2019	October 14, 2019
Trial Date	June 24, 2019	November 4, 2019

SO STIPULATED this 26th day of March, 2019.

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HONORABLE ROGER ROGOFF
WITHOUT ORAL ARGUMENT
MARCH 27, 2019

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

SEATTLE VACATION HOME, LLC; and ANDREW MORRIS, Plaintiff, v. CITY OF SEATTLE, WASHINGTON *et al.* Defendants.	No. 18-2-15979-2 ORDER TO CHANGE TRIAL DATE AND AMEND CASE SCHEDULE [PROPOSED] CLERK'S ACTION REQUIRED

BASED upon the Stipulation to Change Trial Date and Amend Case Schedule, it is hereby ORDERED:

1. The Court will hear the parties cross-motions for summary judgment on June 21, 2019. The briefing schedule for the parties' cross-motions is as follows:

Pleading	Deadline	Word Limit
Defendant's Motion for Summary Judgment	April 26, 2019	8,400
Plaintiffs' Cross-Motion and Response to Defendant's Motion	May 17, 2019	10,500
Defendant's Reply in Support of its Motion and Response to Plaintiffs' Cross-Motion	June 5, 2019	4,200

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Plaintiffs' Reply in Support of its Cross-Motion	June 14, 2019	2,100

2. The following amended case schedule will govern this case going forward:

Case Event	Amended Due Date
Disclosure of Possible Primary Witnesses	August 5, 2019
Disclosure of Possible Additional Witnesses	September 9, 2019
Jury Demand	September 16, 2019
Change in Trial Date	September 16, 2019
Discovery Cutoff	September 23, 2019
Engaging in Alternative Dispute Resolution	September 23, 2019
Exchanging Witness and Exhibit Lists and Documentary Exhibits	September 30, 2019
Joint Confirmation of Trial Readiness	September 30, 2019
Hearing Dispositive Pretrial Motions	October 7, 2019
Joint Statement of Evidence	October 14, 2019
Filing Trial Briefs, Proposed Findings of Fact and Conclusions of Law, and Jury Instructions	October 14, 2019
Trial Date	November 4, 2019

DATED this _____ day of _____, 2019.

_____
Honorable ROGER ROGOFF
Superior Court Judge

///

///

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SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

SEATTLE VACATION HOME ET ANO vs. CITY OF SEATTLE ET AL	Case No.: 18-2-15979-2 SEA CERTIFICATE OF E-SERVICE (AFSR)

I, Matthew Miller, certify that I initiated electronic service of the following document(s) on the parties listed below who have consented to accept electronic service via the King County eFiling Application. Service was initiated on May 17, 2019 at 04:29:09 PM.

Document(s):

1. MOTION FOR SUMMARY JUDGMENT
2. DECLARATION OF ANDREW MORRIS RE CROSS-MOTION FOR SUMMARY JUDGMENT

Parties:

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4. Roger Wynne, Attorney for Respondent/Defendant
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5. William Severson, Petitioner/Plaintiff
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Executed this 17th day of May, 2019.

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