

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

KEENA BEAN, JOHN B. HEIDERICH,
GWENDOLYN A. LEE, MATTHEW
BENTLEY, WESLEY WILLIAMS, JOSEPH
BRIERE, SARAH PYNCHON, WILLIAM
SHADBOLT, and BOAZ BROWN, as
individuals and on behalf of all others
similarly situated,

Plaintiffs,

vs.

CITY OF SEATTLE, a Washington municipal
corporation, and the STATE OF
WASHINGTON,

Defendants.

No. 18-2-56192-2 SEA

**DEFENDANT CITY OF SEATTLE'S
MOTION TO DISMISS**

I. INTRODUCTION AND RELIEF REQUESTED

The City of Seattle's ("City") Rental Registration and Inspection Ordinance ("RRIO") ensures the safety of rental properties by requiring that all such properties in Seattle meet basic habitability requirements: running water, a functioning heat source, proper ventilation, and similar necessities. In order to achieve this goal, RRIO requires that rental properties be registered with

1 the City and pass an inspection for these habitability requirements at least once every ten years.
2 Landlords may hire a private inspector to conduct this inspection. Plaintiffs, a group of Seattle
3 tenants and their landlords, claim that RRIO violates tenants’ privacy rights under the Washington
4 Constitution by forcing them to submit to an inspection. Plaintiffs’ claims fail on their face, as
5 binding Washington Supreme Court precedent holds that private inspectors conducting rental unit
6 inspections under a similar ordinance are not state actors. Moreover, Plaintiffs cannot meet the
7 significant burden required to bring a facial challenge: that there is no set of circumstances in
8 which RRIO can be applied constitutionally. Because Plaintiffs’ facial challenge fails to state a
9 claim upon which relief can be granted, this Court should dismiss Plaintiffs’ claims with prejudice.

10 **II. STATEMENT OF FACTS**

11 The Seattle City Council passed RRIO in 2012, finding it “necessary to protect the health,
12 safety, and welfare of the public; and prevent deterioration and blight conditions that adversely
13 impact the quality of life in the city.” SMC 22.214.010. RRIO accomplishes this goal “by
14 requiring rental housing be registered and properly maintained, and that substandard housing
15 conditions be identified and corrected.” *Id.* RRIO requires property owners to register all¹ rental
16 housing units with the City; a property cannot be rented without a current registration. SMC
17 22.214.040(A). A registration application must include, among other things, a declaration from
18 the owner or owner’s agent that all housing units available for rent meet or will meet the
19 habitability standards of RRIO prior to being rented. SMC 22.214.040(G)(6). Registrations are
20 valid for two years. SMC 22.214.040(C).

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23 ¹ RRIO exempts certain types of units from its requirements, including hotels, short-term rentals, and emergency and transitional housing. *See* SMC 22.214.030(A).

1 RRIO also requires periodic inspections of rental units. All registered rental properties
2 must be inspected at least once every ten years, and the properties to be inspected are selected by
3 the City at random from the registered properties. SMC 22.214.050(B), (A). The City gives the
4 property owner at least 60 days' notice that the property² must be inspected, and the property
5 owner, in turn, must give any tenants occupying the property at least two days' notice of an
6 inspection. SMC 22.214.050(A), (H). The owner must hire a "qualified rental housing inspector"
7 to conduct the inspection. SMC 22.214.050(A). A "qualified rental housing inspector" is either:
8 a) a City Housing and Zoning Inspector; or b) a private inspector who is registered with the City
9 and who maintains certain credentials. SMC 22.214.020(9). The inspector must physically inspect
10 the interior and exterior of the property, and if the property meets RRIO's habitability standards,
11 the inspector issues a certificate of compliance so stating, which is submitted to the City. SMC
12 22.214.050(E), (F), .020(2). If the property does not pass the initial inspection, the owner must
13 correct the issues and pass a re-inspection. "What You Need to Know About Inspections" 2, *at*
14 <http://www.seattle.gov/Documents/Departments/SDCI/Codes/RRIO/RRIOWhatYouNeedtoKnow>
15 [AboutInspections.pdf](#) (last visited February 28, 2019).³ Once a certificate of compliance has been
16 submitted for a rental property, that property shall not be selected for inspection for at least five
17 years, unless the City determines that the certificate is no longer valid. SMC 22.214.050(I).

18 III. STATEMENT OF ISSUES

19 Does Plaintiffs' facial challenge to RRIO fail to state a claim upon which relief can be

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21 ² In properties with more than one rental unit, property owners may choose to have a sample of 20 percent of the units
inspected. SMC 22.214.050(G)(1). If a sampled unit fails the inspection, RRIO provides a process for additional units
to be inspected. SMC 22.214.050(G)(3).

22 ³ Because this document is referenced in Plaintiffs' Complaint (¶ 36), it can be considered in the City's motion to
23 dismiss without converting the motion into one for summary judgment. *Sebek v. City of Seattle*, 172 Wn. App. 273,
275 n.2, 290 P.3d 159 (2012).

1 granted because private inspectors are not state actors, and because Plaintiffs cannot show that
2 there is no set of circumstances in which RRIO can be applied constitutionally?

3 IV. EVIDENCE RELIED UPON

4 This motion relies upon Plaintiffs' Complaint and the arguments and authority cited herein.

5 V. ARGUMENT AND AUTHORITY

6 A. Standard of Review

7 Plaintiffs challenge the constitutionality of RRIO on its face.⁴ "A statute is presumed to be
8 constitutional, and the party attacking a statute has the heavy burden of proving its
9 unconstitutionality beyond a reasonable doubt." *State v. Shultz*, 138 Wn.2d 638, 642, 980 P.2d
10 1265 (1999) (quotation omitted); *see also City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d
11 572 (1989) (same for ordinances). In order to succeed on their facial challenge, Plaintiffs must
12 prove that "no set of circumstances exists in which the statute, as currently written, can be
13 constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004);
14 *see also Didlake v. Washington State*, 186 Wn. App. 417, 422-23, 345 P.3d 43 (2015) (explaining
15 difference between facial and as-applied challenge). Facial challenges to statutes are generally
16 disfavored. *State v. McCuiston*, 174 Wn.2d 369, 389, 275 P.3d 1092 (2012). A complaint may be
17 dismissed under CR 12(b)(6) if it fails to state a claim upon which relief can be granted. *Hoffer v.*
18 *State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988). A court may also dismiss a complaint if it
19 contains allegations that show on its face "that there is some insuperable bar to relief." *Kinney v.*

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21 ⁴ Based on the allegations in the Complaint, Plaintiffs have brought a facial challenge. *See* Complaint, ¶¶ 41-51 (no
22 allegations that inspections of tenant Plaintiffs' homes have occurred), ¶ 53 (alleging that without injunction "tenant
23 Plaintiffs will be subjected to an unconstitutional search without their consent and without a warrant"); *Asarco, Inc. v.*
Dept. of Ecology, 145 Wn.2d 750, 759-60, 43 P.3d 471 (2002) (plaintiff could not bring an as-applied challenge to
statute when agency had not yet issued its order under that statute; "[i]f we find 'applied challenges' justiciable before
anything has been applied, we risk becoming an advisory court and overstepping our constitutional authority.").

1 *Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (internal quotation omitted).

2 **B. Plaintiffs Cannot Demonstrate That No Set of Circumstances Exists in Which RRIO**
3 **Can Be Constitutionally Applied.**

4 Plaintiffs claim that RRIO violates article I, section 7 of the Washington State Constitution
5 (Complaint, ¶ 7), which provides that “[n]o person shall be disturbed in his private affairs, or his
6 home invaded, without authority of law.” Specifically, Plaintiffs allege that the City’s
7 “warrantless rental inspections” without tenant consent violate this constitutional provision.
8 Complaint, ¶ 67. Unless the individual conducting the inspection is a state actor, however, no
9 constitutional violation occurs. *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157
10 (2007). Plaintiffs’ challenge fails because: a) they cannot show that private inspectors engaged by
11 landlords for the purposes of complying with RRIO are state actors, and b) even if the private
12 inspectors were state actors in some circumstances, Plaintiffs cannot show that private inspectors
13 are state actors in all circumstances, a requirement for a facial challenge.

14 **1. Under *City of Pasco*, There Is No State Action.**

15 In 1997, the City of Pasco faced an issue with substandard rental units, including units with
16 no source of heat, weather leaking through the windows, plumbing in disrepair, or cockroach
17 infestation. *City of Pasco*, 161 Wn.2d at 454. To remedy this problem, the City of Pasco passed
18 Ordinance 3231, which required landlords to obtain a current business license. *Id.* at 455. In order
19 to get the license, landlords had to provide a certificate of inspection every two years certifying
20 that the rental units met certain standards of habitability. *Id.* Landlords had the option to have the
21 certificate certified by a City of Pasco Code Enforcement Officer, or by a qualified private
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1 inspector.⁵ *Id.* at 455-56. Landlords and tenants brought a facial challenge to Ordinance 3231,
2 arguing, among other things, that it violated tenants’ privacy rights under article I, section 7 of the
3 Washington State Constitution. *Id.* at 456-57.

4 The Washington Supreme Court disagreed. The Court found that the question before it was
5 whether the constitution is violated “where a landlord and a privately engaged inspector inspect a
6 rental property for code violations that impact health and safety.” *Id.* at 459. In determining the
7 threshold question of whether state action had occurred, the inquiry is the capacity in which an
8 individual acted at the time of the search. *Id.* at 460. The Court noted that Ordinance 3231
9 permitted a landlord to hire a private inspector to further the landlord’s private aim of maintaining
10 a business license. *Id.* Because the landlords furthered their own ends by hiring a private
11 inspector, the inspections were not state action. *Id.* at 461.

12 The Court also found it significant that Ordinance 3231 did not exceed the scope of what
13 the Residential Landlord-Tenant Act (“RLTA”) already permitted. 161 Wn.2d at 461. Under the
14 RLTA, a tenant cannot unreasonably withhold consent for the landlord to enter the premises for
15 inspection. *Id.*; *see also* RCW 59.18.150(1). Further, inspections under Ordinance 3231 were
16 limited to determining whether the premises met habitability requirements; the ordinance did not
17 permit searches of a tenant’s belongings, searches for evidence of a crime, or contemplate
18 inspectors assisting law enforcement regarding tenants’ illegal acts. 161 Wn.2d at 461. The Court
19 found no state action, and held that Ordinance 3231 did not require anything that was not already
20 permitted by law. *Id.* at 462.

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22 ⁵ Other than a city code enforcement officer, landlords could have the property inspected by a licensed structural
23 engineer, a licensed architect, a certified private inspector approved by the City of Pasco, or a federally-certified
inspector. *City of Pasco*, 161 Wn.2d at 456.

1 The *City of Pasco* analysis compels the same result for RRIO. Under RRIO, landlords also
2 have the option of engaging a private inspector, rather than a City inspector. SMC 22.214.050(A),
3 (J). The purpose of the inspection is to obtain a certificate of compliance, which is required to
4 avoid an enforcement action against the landlord. Such enforcement action may include fines,
5 penalties, or a revocation of a property’s registration. See SMC 22.214.086(A), SMC
6 22.214.045(A). Like the business license in *City of Pasco*, this is a purpose that furthers the
7 landlord’s own ends. Because the inspection is for the landlord’s benefit, there is no state action.
8 See *State v. Walter*, 66 Wn. App. 862, 866, 833 P.2d 440 (1992) (film lab manager who provided
9 photos to police was not a state actor because her motivation was to avoid liability).

10 In addition, as in *City of Pasco*, the scope of the inspection under RRIO does not exceed
11 what is already permitted by the RLTA. The RLTA provides that a tenant “shall not unreasonably
12 withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises”
13 RCW 59.18.150(1).⁶ RRIO mirrors that language: “[a] tenant shall not unreasonably withhold
14 consent for the owner or owner’s agent to enter the property as provided in RCW 59.18.150.”
15 SMC 22.214.050(H)(1)(d). Both laws require that the tenant be given at least two days’ notice
16 prior to the inspection. See SMC 22.214.050(H)(1); RCW 59.18.150(6). As long as the required
17 notice is given, a landlord (or landlord’s agent) may enter the rental property under the RLTA and
18 RRIO to inspect; a tenant does not have a reasonable expectation of privacy that such reasonably-
19 noticed inspection will not occur. See *Kalmas v. Wagner*, 133 Wn.2d 210, 219-20, 943 P.2d 1469
20 (1997) (landlords have limited right to invade tenants’ privacy in their residence, and tenants had
21 no reasonable expectation that landlords would not show premises to potential renter when given

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23 ⁶ Notably, Plaintiffs’ Complaint does not challenge this provision of the RLTA, or otherwise assert that a landlord cannot lawfully inspect her own property with proper notice to the tenants under the RLTA.

1 proper notice of that entry).

2 Moreover, the inspection necessary to fulfill RRIO's requirements is limited to a survey of
3 habitability requirements. *See* SMC 22.214.050(L), (M) (a checklist⁷ based on requirements of the
4 Housing and Building Maintenance Code, SMC Chapters 22.200 through 22.208, will determine
5 whether a unit will pass or fail inspection). For example, the inspector determines whether the
6 roof or walls leak, whether windows and doors are secure, and whether the unit has a permanently-
7 installed, functioning heat source. *See* Checklist⁸ 2-4, 7, 9, at
8 http://www.seattle.gov/DPD/cs/groups/pan/@pan/documents/web_informational/s048492.pdf (last
9 visited February 28, 2019). RRIO does not permit or contemplate inspectors searching tenants'
10 belongings, searching for evidence of a crime, or searching for anything other than whether a unit
11 meets basic habitability requirements. *See id.*; *see also* SMC 22.214.050(L), (M). Under *City of*
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13 ⁷ This checklist ("Checklist"), discussed in Plaintiff's Complaint (*see* ¶ 26), can be found at
14 http://www.seattle.gov/DPD/cs/groups/pan/@pan/documents/web_informational/s048492.pdf (last visited February
15 28, 2019).

16 ⁸ Plaintiffs allege that the Checklist "gives inspectors the discretion to check 'property conditions that should be
17 addressed for other reasons.'" Complaint, ¶ 26. Plaintiffs seriously misconstrue the Checklist's language. The
18 portion cited by Plaintiffs states, in its entirety:

19 **Limitations**

20 This checklist is used solely to determine if a rental property meets the requirements of the Rental
21 Registration and Inspection Ordinance, Seattle Municipal Code Chapter 22.214. It is not an evaluation of
22 whether a property meets other City, State, or federal requirements. There may, however, be property
23 conditions that should be addressed for other reasons.

24 Checklist, at 1. Read in context, this provision does not give inspectors the right to check property conditions that
25 "should be addressed for other reasons," but rather informs the reader of the limitations of the inspection and that the
26 only purpose of the Checklist is to determine whether RRIO standards are met, and that RRIO's standards may not
27 encompass all concerns about property conditions. The Checklist certainly does not give the inspector discretion to
28 check any non-RRIO-related property conditions. In fact, this limitation is confirmed by two City documents
29 Plaintiffs cite in paragraphs 36 and 37 of their Complaint: "What You Need to Know About Inspections" 2, at
30 <http://www.seattle.gov/Documents/Departments/SDCI/Codes/RRIO/RRIOWhatYouNeedtoKnowAboutInspections.pdf>
31 (last visited February 28, 2019) ("Only items on the RRIO checklist are inspected."), and "Rental Registration &
32 Inspection Ordinance – Renters" 1, at [http://www.seattle.gov/sdci/codes/licensing-and-registration/rental-registration-
33 and-inspection-ordinance/renters](http://www.seattle.gov/sdci/codes/licensing-and-registration/rental-registration-and-inspection-ordinance/renters) (last visited February 28, 2019) ("An inspection is not a look at your possessions,
34 how you live, or what you do in your living space.").

1 *Pasco*, there is no state action and the Complaint must be dismissed.

2 **2. Even If Private Inspectors Were State Actors in Some Circumstances,**
3 **Plaintiffs’ Facial Challenge Still Fails.**

4 The City anticipates that Plaintiffs will attempt to distinguish *City of Pasco* from this case
5 by arguing that, unlike Ordinance 3231, RRIO requires private inspectors to report failed
6 inspections to the City. *See* 161 Wn.2d at 460-61; Complaint, ¶ 31 (alleging that RRIO forces
7 private inspectors to provide inspection results to the City). As an initial matter, Plaintiffs
8 misrepresent RRIO’s requirements. The ordinance is silent as to who must provide failed
9 inspection results to the City; such results may be provided by the private inspector or the property
10 owner. *See* SMC 22.214.050(J) (failed inspection results “must be provided” to the City).
11 Therefore, to the extent that Plaintiffs’ claim relies on the argument that RRIO mandates that a
12 private inspector give the City any failed inspection results, the claim fails. No state action is
13 involved when a landlord provides to the City documentation of an inspection done by another
14 private party hired by the landlord.

15 But even assuming that all failed inspection results are provided to the City by the private
16 inspector (instead of the property owner), RRIO still survives Plaintiffs’ facial challenge. The
17 proper inquiry in determining whether the person is a state actor is the capacity in which the
18 person acted at the time of the search. *City of Pasco* at 460. Here, the capacity in which the
19 private inspector is acting at the time of the search is as an agent of the landlord, serving the
20 landlord’s purpose of submitting a certificate of compliance. The mere fact that contact between
21 the private inspector and the City may occur does not change that capacity and convert the
22 inspection into a state action. *See Walter*, 66 Wn. App. at 866 (“mere fact that there are contacts
23 between the private person and police does not make that person an agent.”).

1 Moreover, because Plaintiffs have brought a facial challenge, they must show that no set of
2 circumstances exists in which RRIO can be constitutionally applied. In other words, even if a
3 private inspector who reports code violations to the City becomes a state actor (a point which the
4 City does not concede), Plaintiffs must show that there is no set of circumstances in which such
5 state action would not occur. *City of Redmond*, 151 Wn.2d at 669 (“a successful facial challenge is
6 one where no set of circumstances exists in which the statute, as currently written, can be
7 constitutionally applied.”). Of course, Plaintiffs cannot do this, because inspection results must
8 only be reported to the City if the rental property fails the initial inspection. SMC 22.214.050(J).
9 If the property passes the inspection, RRIO does not require that the City be provided with the
10 inspection results. Instead, the City is only provided with the certificate of compliance (*see* SMC
11 22.214.050(E), (F)), which, like the certificate of inspection provided to Pasco in *City of Pasco*,
12 merely states that the property is compliant. In this factual scenario, there is no state action under
13 *City of Pasco* because no failed inspection results are given to the City. Therefore, Plaintiffs’
14 facial challenge fails.

15 The structure of RRIO and rationale of *City of Pasco* provide an additional reason why
16 Plaintiffs’ facial challenge fails. The *City of Pasco* Court noted that Ordinance 3231 gave
17 landlords a six-month window within which to complete the inspection. 161 Wn.2d at 462 n.3.
18 Noting that the plaintiffs were bringing a facial challenge, the Court found that “at least some
19 landlords will be able to conduct inspections between tenancies, thereby eliminating any tenant
20 involvement at all.” *Id.* The same rationale holds true under RRIO. When a property is selected
21 for inspection, the City must provide at least 60 days’ written advance notice to the landlord that
22 an inspection is required. SMC 22.214.050(A). At least some properties selected for inspection
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1 will be unoccupied or between tenants, thereby eliminating any privacy concerns.⁹ RRIO is thus
2 not unconstitutional in all of its applications, under all circumstances, and Plaintiffs' facial
3 challenge should be dismissed.

4 In addition to *City of Pasco*, other Washington case law discussing facial challenges
5 supports this conclusion. In *State v. Blight*, 89 Wn.2d 38, 44, 569 P.2d 1129 (1977), the defendant
6 claimed that a statute was facially unconstitutional when the statute provided that a presumption of
7 intent to commit a crime flowed from unlawful entry of a dwelling. The Court found that the
8 statute was not facially unconstitutional because, depending on the circumstances, the presumed
9 fact of intent to commit a crime could flow beyond a reasonable doubt from the fact of unlawful
10 entry of a dwelling. 89 Wn.2d at 45. Other cases similarly hold that facial challenges fail when a
11 set of circumstances exists in which the statute can be applied constitutionally. *See, e.g., In re*
12 *Dependency of T.C.C.B.*, 138 Wn. App. 791, 801, 158 P.3d 1251 (2007) (statutes regarding the
13 termination of parental rights survive facial challenge that they are not narrowly drawn to achieve
14 a compelling state interest because mother's unfitness did cause harm to child, and therefore she
15 could not prove that no set of circumstances existed in which the statutes could be constitutionally
16 applied); *State v. Nelson*, 81 Wn. App. 249, 256, 914 P.2d 97 (1996) (statutes relating to arrest
17 were facially constitutional because, even though a case could arise in which the alleged negligent
18 driving was not truly dangerous and therefore the arrest was unconstitutional, that was not the case
19 in every scenario); *see also Doe v. State*, No. 75228-6-I, 2017 WL 2242304, *3-4 (Wash. Ct. App.
20 May 22, 2017) (unpublished, cited pursuant to GR 14.1) (facial due process challenge to statute

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22 ⁹ The fact that RRIO provides for inspection of a sample of units in multi-unit properties further supports this
23 argument. The units selected for inspection might be unoccupied and therefore not subject to tenant privacy concerns.
In addition, if tenants in units selected for inspection object to inspection, RRIO does not prohibit an alternate unit
from being selected for inspection.

1 placing notification requirements on convicted sex offenders who travel abroad was unsuccessful
2 when a hypothetical existed in which the sex offender fulfilled the requirements and traveled
3 abroad). Because a set of circumstances exists in which inspection results are not provided to the
4 City, and another in which a rental unit is inspected while vacant, Plaintiffs' facial challenge to
5 RRIO must be rejected.

6 **VI. CONCLUSION**

7 Because private inspectors act on behalf of property owners' interests when they inspect
8 properties, and do not exceed the scope of what is already permitted under the RLTA, RRIO does
9 not implicate state action. Even if the transmission of failed inspection results to the City
10 transforms a private inspection into a state action, Plaintiffs' facial challenge still fails, as there are
11 factual circumstances in which no such action occurs. Plaintiffs therefore do not state a claim
12 upon which relief can be granted, and this Court should grant the City's motion to dismiss with
13 prejudice.

14 I certify that this brief contains 3,590 words in compliance with the Local Civil Rules.

15 DATED this 1st day of March, 2019.

16 PETER S. HOLMES
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1 **DECLARATION OF SERVICE**

2 I hereby declare under penalty of perjury under the laws of the State of Washington, that on
3 this date, I electronically filed the foregoing document, along with a proposed order, with the Clerk
4 of the Court using the ECR E-filing Application, and caused a true and correct copy to be served
5 on the following in the manner(s) indicated:

6

| | |
|---|--|
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DATED this 1st day of March, 2019, at Seattle, Washington.

s/ Vanessa Haralson
VANESSA HARALSON