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

BRETT BASS, an individual; SWAN SEABERG, an individual; THE SECOND AMENDMENT FOUNDATION, INC., a Washington non-profit corporation; and NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; a New York non-profit association;

Plaintiffs,

v.

CITY OF EDMONDS, a municipality; DAVE EARLING, Mayor of the City of Edmonds, in his official capacity; EDMONDS POLICE DEPARTMENT, a department of the City of Edmonds; and AL COMPAAN, Chief of Police, in his official capacity,

Defendants.

CASE NO. 18-2-07049-31

CITY OF EDMONDS' REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs spend most of their opposition brief throwing up a host of technical, non-substantive, and erroneous arguments, apparently trying to divert the Court's attention from the core deficiencies highlighted in Defendants' motion to dismiss: that standing is a prerequisite to bringing this challenge, and that Plaintiffs have failed to adequately allege an intent to engage in the kind of irresponsible storage that the narrowly tailored Edmonds Ordinance prohibits, such as leaving firearms unlocked and unsecured when plaintiffs are not home or when children are likely to access their firearms.

Just last week, in an essentially identical lawsuit filed by the same two organizations challenging an almost identical responsible storage ordinance in Seattle,[1] the Honorable Barbara Linde of King's County Superior Court granted Seattle's nearly identical motion to dismiss for precisely this reason. (Goldman Decl., Ex. A, Hearing Transcript in *Alim, et al. v. City of Seattle*, Cause No. 18-2-18114-3 (SEA), at 28-29 (Oct. 19, 2018) ("There's no allegation of an intent or a desire to allow the firearm to be anything other than under the control of the owner or other lawfully-authorized user.").)

Apparently recognizing that the same deficiencies that led to dismissal in Seattle are present in this lawsuit, Plaintiffs here, represented by the same counsel as plaintiffs in the challenge to Seattle's ordinance, have submitted a vague and conclusory declaration from one of the individual plaintiffs. But this substantively empty last-ditch effort cannot cure the

[1] Plaintiffs erroneously cite the text of the responsible storage ordinance enacted by the Seattle City Council in their opposition brief. (Opp. 2-3). The Edmonds Ordinance is even more narrowly tailored than its counterpart in Seattle; notably, it allows gunowners to store their firearms in a locked container or secured with a locking device, such as a trigger lock or cable lock, when the gun is out of the owner's control (in Seattle, only storage within a locked container, such as a gun safe, is sufficient when the gun is out of the owner's control). A full copy of the text of the Edmonds Ordinance was attached as Exhibit A to Defendants' Motion to Dismiss.

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complaint's fundamental defects. Absent allegations in the complaint that clearly assert how the Plaintiffs intend to store their firearms in a manner that would be proscribed by the Ordinance, and for other reasons further explained below, Plaintiffs' claims should be dismissed.

II. ARGUMENT

A. Plaintiffs' Failure to Adequately Plead Standing is Fatal to the Complaint.

Plaintiffs argue that standing is not a basis for a CR12(b)(1) motion to dismiss for lack of jurisdiction and that, even if it was, they have adequately pled standing and need not allege a concrete plan or intent to violate the Ordinance. They are wrong on both counts.

Whether this motion should have been brought under CR12(b)(6) or CR12(b)(1) is a distinction without a difference. Plaintiffs cite Washington Court of Appeals decisions holding or stating that standing is not jurisdictional and can be waived (here, there is no waiver argument), but even those cases acknowledge that "[t]he claims of a plaintiff who lacks standing cannot be resolved on the merits and must fail." *Trinity Universal Ins. Co. v. Ohio Cas. Ins. Co*, 176 Wn. App. 185, 199, 312 P.3d 976 (2013). *See also Ullery v. Fulleton*, 162 Wn. App. 596, 605, 256 P.3d 406(2011) ("Having found that [plaintiff] lacked standing, the trial court should not have proceeded to the merits."). More importantly, the Washington Supreme Court has held that standing *is* a jurisdictional question. *See High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 1986) ("If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it."); *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186 (holding that union's standing was "a jurisdictional issue that can be raised for the first time on appeal"), *amended on denial of reconsideration*, 50 P.3d 618 (2002). Judge Linde, in her opinion dismissing the challenge to Seattle's responsible storage ordinance, rejected this same argument made by plaintiffs in that case, concluding that justiciability –

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including standing and ripeness – was properly raised under CR12(b)(1) or CR 12(b)(6). (Goldman Decl., Ex. A at 28 ("that motion to dismiss is well taken, whether under 12(b)(1), which I think is the appropriate avenue, or 12(b)(6)").) (Indeed, Plaintiffs in this case now appear to concede, in their opposition brief, that it is within the Court's power to convert a CR12(b)(1) motion if the Court determines it would have been more properly brought as a CR12(b)(6) motion (Opp. 6)).[2]

Plaintiffs also argue that, even if standing is properly considered on a motion to dismiss (which it clearly is), they have alleged sufficient facts to establish standing here. But the very cases Plaintiffs cite underscore that (1) they must show they "will be specifically and perceptibly harmed by the" Ordinance, *Save a Valuable Env't v. City of Bothell,* 89 Wn.2d 862, 866, 576 P2d 401 (1978); and (2) "'one who is not adversely affected by a statute may not question its validity'" under the UDJA. *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (quoting *Walker v. Munro,* 124 Wn.2d 402, 879 P.2d 920 (1994)). And that is why Plaintiffs' claims fail here – because they have not adequately alleged that they intend and plan to store their firearms in an irresponsible way that would be prohibited by the Ordinance, and thus they fail to adequately allege that the Ordinance would harm and adversely impact them.

[2] To the extent this Court has any concerns about CR 12(b)(1) vs. CR 12(b)(6), it would be well within its power to deem this motion to dismiss as being brought under CR 12(b)(6). *See, e.g., Voicelink Data Servs v. Datapulse, Inc.*, 86 Wash. App. 613, 622-24, 937 P.2d 1158 (1997), in which the court cited, with approval, *Lambert v. Kysar*, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993), which found it was proper to treat a motion brought under Rule 12(b)(3) as a Rule 12(b)(6) motion. Plaintiffs' brief wrongly suggests that *Donlin v. Murphy*, 174 Wash. App. 288, 300 P.3d 424 (2013), supports denial of a CR 12(b)(1) motion to dismiss if it would have been more properly brought under CR 12(b)(6). (Opp. 6). But the *Donlin* Court did not discuss this issue and instead reversed a dismissal because it concluded that the plaintiff had standing to bring the claim. *Id.* at 293 n.7, 302.

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Plaintiffs argue that Washington law does not require that they "plead that they intend to violate the Ordinance, or that they have a concrete intent to violate the law," and that Washington courts have not looked to or adopted federal cases so holding. (Opp. at 15). Again, they are wrong on both counts. Just last month, in *Forbes v. Pierce County*, No. 51548-2-II, 2018 WL 4441786, at *5 & n.2 (Wash. Ct. App. Sept. 18, 2018), the Court of Appeals explained that federal standing doctrine is "instructive" and held that, in the absence of "a current threat of criminal penalty" or "any allegation that they *intend to engage in conduct prohibited by*" a particular section of the law they sought to challenge, plaintiffs lacked standing and their challenge was "speculative." (emphasis added); *see also id.* at n.1 ("a party's standing goes to this court's jurisdiction"). Plaintiffs' preemptive attempt to distinguish *Forbes* is unavailing. The plaintiffs in that case had requested declaratory relief – just as Plaintiffs do here. *Id.* at *1. And the *Forbes* Court held that, where "there is not a current threat of criminal penalty" – indisputably absent here, a plaintiff's "standing to challenge [a statute] 5.14.250 must be based on future violations." *Id.* at *5.[3]

Once Plaintiffs' unpersuasive attempts to contest the controlling legal standards are put to the side, the fundamental pleading failure warranting dismissal becomes even more apparent: Plaintiffs do not allege that they presently store their firearms in a manner that would violate the Ordinance, or that they intend to do so in the future. Plaintiffs allege they store their firearms unlocked and desire to continue to do so, but that allegation is too broad and too general to

[3] This analysis and holding are consistent with many other Washington decisions that routinely cite to federal authority on standing and import the federal standing requirements into the Declaratory Judgment Act justiciability analysis. *See, e.g. High Tide Seafoods*, 106 Wn.2d at 702 (citing federal authority in evaluating standing to challenge constitutionality of tax on fish); *Walker*, 124 Wn.2d at 419 (citing federal authority in discussing whether plaintiffs had standing to seek declaratory and injunctive relief); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (holding that the "federal case-or-controversy requirement" is "[i]nherent in" the Declaratory Judgment Act's justiciability requirements).

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confer standing to challenge an Ordinance that (a) very specifically and carefully allows them to keep their firearms unlocked in circumstances where they could be used for self-defense and it is safe to do so (*i.e.*, when they are carrying or otherwise have the gun under their control) and (b) prohibits unlocked firearms only in circumstances where the gun is not under the owner's control (such as when they are out of the house).

Perhaps in recognition of these deficiencies, Plaintiffs' opposition brief misleadingly describes a very different Complaint from the one that is actually before this Court. Plaintiffs assert – without citation to any paragraph in the Complaint – that: "As the complaint sets forth, Plaintiffs' current storage method, while reasonable, would violate the requirements of the Ordinance." (Opp. 9.) But in fact, the Complaint is devoid of any description of either Plaintiff's storage method or any detail that would allow the court to conclude such method is "reasonable" or would violate the Ordinance. Similarly, Plaintiffs' brief claims that "both individuals alleged that they keep a firearm in the home, unlocked, unsecured, and not in anyone's control or possession." (Opp. 13.) But again, no paragraph in the Complaint is cited, and it is simply untrue that either Plaintiff has alleged he leaves one or more of his guns "unlocked, unsecured, *and not in anyone's control or possession*." (Emphasis added.) The Court should not be misled by these sleights of hand. All the Complaint alleges is that Plaintiffs keep their firearms "in an unlocked and usable state." There simply are no allegations in the Complaint describing what Plaintiffs now belatedly realize they must plead – namely, that they store their firearms in the irresponsible manner that the Ordinance prohibits, *i.e.*, unlocked and unsecured *when the firearms are not in their possession and are out of their control.*

Plaintiffs fare no better in their weak attempt to cure these pleading deficiencies by introducing a belated declaration from one of the individual Plaintiffs, Swan Seaberg. Seaberg's

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declaration does not move the needle. While he states that "[s]ome of my firearms are stored in a way that I consider safe, but that does not comply with the restrictions in the Ordinance," and that he "intend[s] to continue storing these firearms in this manner," (Seaberg Decl. ¶ 6), those assertions are far too vague and conclusory to adequately establish that his method of storing his firearms is to leave them unlocked and outside of his possession and control in a manner that violates the Ordinance. It is that fatal pleading defect that requires dismissal of the Complaint, as to Seaberg and all the other Plaintiffs.

Mr. Seaberg separately claims that he would be forced to purchase a gun safe or lock, causing economic injury, but that alone cannot cure his fundamental pleading deficiency. The test for standing in a pre-enforcement challenge is whether you intend to engage in conduct that is proscribed by the law in question, not whether, if you follow that law, it will require some modest expenditure of funds. More fundamentally, neither Mr. Bass nor Mr. Seaberg has made any allegation that he intends to engage in the specific, limited conduct that is prohibited by the Ordinance.[4]

It also a red-herring to argue, as Plaintiffs do, that the Ordinance impairs their Second Amendment right to bear arms for self-defense. (Opp. 3.) The Ordinance leaves gun owners ample room to carry and keep firearms in their home for self-defense, which is why the Ninth Circuit upheld a similar law against Second Amendment challenge. *See Jackson v. City & Cnty. of San Francisco,* 746 F.3d 953, 966 (9th Cir. 2014) (finding gun owners unlikely to succeed on merits of Second Amendment challenge to San Francisco safe storage ordinance because the city "has drawn a reasonable inference that mandating that guns be kept locked when not being

[4] Trigger locks and cable locks in particular are very inexpensive – often costing less than $5 – and are also given away free by many entities. Gun shops in Edmonds carry cable locks that cost less than $3 and trigger locks costing less than $7.

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carried will increase public safety and reduce firearm casualties" and such a law "imposes only a minimal burden on the right to self-defense in the home"). *See also Dist. of Columbia v. Heller*, 554 U.S. 570, 632 (2008) (explaining that its decision to recognize an individual right of law-abiding citizens to keep a firearm in the home for self-defense *should not* be read to "suggest the invalidity of laws regulating the storage of firearms to prevent accidents").[5]

Nor is it sufficient for Plaintiffs to allege that they have a family in order to challenge § 5.26.030. That section only applies if it is ***likely*** that a child (or at-risk person or prohibited person) will access the firearm. If Plaintiffs had pled, for example, that they routinely left an unlocked weapon in a room where children played unsupervised, that would be sufficient to allege standing to challenge § 5.26.030; but allegations that Plaintiffs have both a family and an unlocked gun are not sufficient to show that Plaintiffs intend to engage in the unsafe conduct prohibited by the Ordinance. Nor does the Seaberg Declaration cure this deficiency as it only indicates that Mr. Seaberg's grandchildren and great-grandchildren visit his house; it does not indicate that he leaves children, unsupervised, in a room with an unlocked gun.

As for the Organizational Plaintiffs, they have not alleged that this lawsuit is germane to their purpose, except to claim that the Ordinance's "broad-brush requirements . . . to keep firearms locked away impedes self-defense." (Opp. 14.) But it is difficult to understand, and more importantly the Organizational Plaintiffs have failed to allege, how an Ordinance that allows firearms to be kept and carried in the home so long as under the owner's control, and only prohibits unsecured firearms when they are outside the owner's control, "impedes self-defense."

[5] Plaintiffs cite the district court decision finding standing to bring a Second Amendment challenge in *Jackson v. San Francisco*, 829 F. Supp. 867 (N.D. Cal. 2011), but they fail to acknowledge that ultimately the appellate court in that case found that San Francisco's safe storage ordinance – which is much stricter than Edmonds' – did not violate the Second Amendment. In the Complaint in this lawsut, there is no Second Amendment claim. Plaintiffs' invocations of some alleged interference with a claimed right to self-defense are therefore beside the point, especially as it is clear that the Edmonds Ordinance does not infringe any such right.

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Plaintiffs rely upon *Washington Association for Substance Abuse and Violence Prevention v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012), but in that case, the Supreme Court held that a non-profit that sought to reduce alcohol abuse had standing to challenge a ballot initiative that would have increased the availability of liquor. Here, where both Organizational Plaintiffs urge their members to safely store their firearms, it makes sense that neither organization has been able to plead that its goals "could reasonably be impacted" and "injured" by the Ordinance. *Id*. at 653. Judge Linde recognized this same logical and pleading flaw in dismissing the Seattle case, explaining: "With respect to the organizational plaintiffs, the declarations of purpose and interest and values that goes out to their membership talking about safety and storage is not in conflict with this ordinance, at least as it's been presented to this Court." (Goldman Decl., Ex. A at 29.) And following that ruling, in the brief filed before this Court, Plaintiffs NRA and Second Amendment Foundation now concede that they "support firearms safety." (Opp. 14.)

Plaintiffs argue that the Organizational Plaintiffs believe that their members should be free to choose the safe storage model best suited to their individual needs. (*Id.* at 14-15 & n.4.) But this Ordinance allows individuals freedom to choose the storage method they prefer – including what type of locking device to use – so long as they choose to be responsible at all times; more fundamentally, this kind of generalized grievance – which effectively argues that gun owners should have complete freedom to handle their guns as they see fit – would confer standing on these organizations to challenge just about any firearm regulation. That, wisely, is not the law; more is required to bring a legal challenge to a duly enacted ordinance, and it is that more that is missing here.

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B. Plaintiffs' Justiciability Arguments Are Unavailing.

Plaintiffs argue that Defendants failed to cite to the *Diversified Industries* test – which both parties agree is controlling – "or to make any arguments in its Motion as to why Plaintiffs' claims do not satisfy the test." (Opp. 6.) Not so. Both Plaintiffs and Defendants agree that the test for justiciability under the Declaratory Judgments Act was articulated in *Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973). Defendants cited to that case in their opening brief, as well as to subsequent cases interpreting the standing and ripeness inquiries that are part of the justiciability requirement. (Mot. to Dismiss at 4.) Indeed, Plaintiffs themselves concede that this Supreme Court authority "incorporate[s] the doctrines of standing, mootness, and ripeness." (Opp. 6.) And, it is Plaintiffs' failures to adequately allege standing (discussed above) and ripeness (discussed below) that require dismissal of this lawsuit.

C. Plaintiffs' Lawsuit Is Not Ripe.

Plaintiffs agree ripeness is a prerequisite to justiciability but gloss over the test for ripeness under Washington law. "Washington courts have largely applied the federal test of balancing the fitness of the issues for judicial decision against the hardship to the parties in not deciding a matter." Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 718 (1999).

As to hardship, the cases Plaintiffs cite do not support their position: in each case, the plaintiffs risked a much more severe hardship than Plaintiffs risk here. There is no threat that Plaintiffs will receive a salary cut once the Ordinance goes into effect. *See Clallam Cnty. Deputy Sheriff's Guild v. Bd. of Clallam Cnty. Comm'rs*, 95 Wn.2d 844, 601 P.2d 943 (1979). Nor does the Ordinance affect an entitlement or property interest currently held by Plaintiffs. *See Arnold v. Dep't of Retirement Sys.*, 74 Wn. App. 654, 875 P.2d 665 (1994). Instead, here, at most one

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Plaintiff may have to incur a small cost to obtain some kind of locking device, and both Plaintiffs will have to ensure they store their firearms in a manner that comports with the responsible storage Ordinance. None of this rises to the level of irreparable hardship if Plaintiffs are required to wait until enforcement of the ordinance to test its validity.

III. CONCLUSION

For the foregoing reasons, Defendants urge this Court to dismiss Plaintiffs' lawsuit.

DATED this 26th day of October, 2018.

Respectfully submitted,

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