The Honorable Anita Farris
January 18, 2019 at 1:30 PM
With Oral Argument

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

BRETT BASS, an individual; CURTIS MCCULLOUGH, 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; and EDMONDS POLICE DEPARTMENT, a department of the City of Edmonds,

Defendants.

CASE NO. 18-2-07049-31

DEFENDANTS' SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

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I. RELIEF REQUESTED

Defendants submit this reply brief in further support of their motion to dismiss the Verified Amended Complaint ("VAC"). Plaintiffs' opposition brief does not address the core deficiencies in the VAC, namely: (1) the Individual Plaintiffs -- even the newly added Plaintiff -- do not clearly or adequately allege an intent to violate the Ordinance; (2) the Organizational Plaintiffs have not alleged that this lawsuit is germane to their purpose; and (3) no Plaintiff alleges any facts suggesting that waiting until this dispute becomes ripe would be a hardship.

II. LEGAL AUTHORITY

A. The Individual Plaintiffs Must Clearly and Adequately Allege That They Intend to Violate the Ordinance; They Have Not Done So.

As an initial matter, the Individual Plaintiffs do not seriously argue – nor could they – that they have alleged a likelihood that a minor, at risk, or prohibited person will access their firearms. Without that, they have no standing to challenge Section .030. Because their argument is so weak as to Section .030, Plaintiffs go on to argue that this Court could still issue an advisory opinion as to the validity of that Section. *See* Opp'n at 10-11. But they are wrong – the Court may not issue an advisory opinion about Section .030 because any dispute here is far too speculative and hypothetical. In *Walker v. Munro*, 124 Wn. 2d 402, 415, 879 P.2d 920 (1994), the Washington Supreme Court reviewed cases where it had issued advisory opinions and those where it had declined to do so, concluding: "An examination of the numerous cases cited for this claim reveals . . . that even if we do not always adhere to all four requirements of the justiciability test, this court will not render judgment on a hypothetical or speculative controversy, where concrete harm has not been alleged." The Court emphasized that it only issues an advisory opinion where a party has suffered actual harm and is precluded from review for some other reason. Here, no Plaintiff has

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suffered or is presently suffering harm. In the absence of harm – past or current – this Court should not issue an advisory opinion as to Section .030.

The remaining (and only) questions are then with respect to Section .020. Taking each Plaintiff individually and closely parsing what the VAC actually says (as opposed to Plaintiffs' counsel's broad and imprecise characterizations of what the VAC says), the reality remains that Plaintiffs have failed to clearly and adequately allege an intent to violate Section .020. Plaintiffs have now had several bites at the apple, and with each pleading and brief, they have avoided saying clearly and in plain language what they know they must allege: that once the Ordinance goes into effect, they intend to store their firearms in an unlocked state when it is both *outside of their possession and outside of their control*. If it was the case that each Individual Plaintiff actually intended to violate the ordinance in this way, why have they not just said so in so many words? Yet one continues to search in vain for this straightforward but essential allegation as to each Plaintiff.[1]

Taking each Plaintiff in turn: the opposition virtually concedes that Mr. Seaberg lacks standing by arguing that only two of the three individual plaintiffs – excluding Seaberg – "intend to engage in prohibited conduct after the City begins to enforce the Ordinance." Opp. at 8; *see also id.* at 5 (same). That Mr. Seaberg dislikes the law does not suffice to establish standing. *See Forbes v. Pierce County*, 427 P.3d 675 (Wash. Ct. App. 2018) ("Because there is not a current threat of

[1] Plaintiffs' briefing repeatedly suggests that the Ordinance requires guns to be kept locked "at all times." *See, e.g.*, Opp'n at 1 (describing the purportedly "prohibited practice of keeping firearms in an unlocked and usable state for self-defense"); 8-9 ("The VAC contains specific allegations regarding Mr. Bass's and Mr. McCullough's current practice of storing firearms outside their control, desire to continue storing firearms unlocked and unsecured, and intent to store firearms unlocked and unsecured after the City begins to enforce the Ordinance."), 12 n.4 ("[I]n context it is clear that Plaintiffs' refer to the Ordinance's requirement to use locking mechanisms *at all times.*" (emphasis added)). Not so. The Ordinance allows gun owners to carry their weapon or keep it under their control without locking it; this is not a case about the Ordinance's impact on self-defense and there is no requirement that Edmonds residents use locking mechanisms at all times.

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criminal penalty, the appellants' standing to challenge PCC 5.14.250 must be based on future violations.").

Plaintiffs' attempts to distinguish *Forbes* are unavailing. It is squarely applicable, as discussed in Defendants' opening brief. Mot. to Dismiss VAC at 4. Moreover, abiding by a law one does not like does not confer standing. *Superior Asphalt & Concrete Co. Inc. v. Washington Dep't of Labor & Indus.*, 121 Wn. App. 601, 607, 89 P.3d 316 (2004) (expressly rejecting the argument that being "required to abide by [a] . . . regulation . . . is enough to create standing" in a vagueness challenge to a safety regulation brought under Washington's Uniform Declaratory Judgment Act). Further, Plaintiffs' protestations to the contrary notwithstanding, Washington courts routinely cite to federal authority on standing and ripeness. *See, e.g. High Tide Seafoods v. State*, 106 Wn.2d, 695, 702, 725 P.2d 411 (1986) (citing federal authority in evaluating standing to challenge constitutionality of tax on fish). This is especially so in cases, such as the instant case, involving the Uniform Declaratory Judgment Act. *Walker*, 124 Wn.2d at 419 (citing federal authority in discussing whether plaintiffs had standing to seek declaratory and injunctive relief). Indeed, the Washington Supreme Court has held that the "federal case-or-controversy requirement" is "[i]nherent in" the Declaratory Judgment Act's justiciability requirements. *To-Ro Trade Shows v. Collin*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

Nor is a vague allegation that Mr. Seaberg *may*, at some unspecified time in the future, spend some unspecified amount of money sufficient to establish standing to bring a pre-enforcement challenge to the Ordinance. Plaintiffs point to no specific facts alleged in the VAC about Mr. Seaberg's planned expenditures, leaving Defendants and the Court to speculate about what specific future harm might be sufficient to give Plaintiff Seaberg standing to bring a pre-enforcement challenge. This absence of allegations is, on its own, sufficient grounds to dismiss,

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given the Court's November 8, 2018 Order ("If Plaintiffs have further facts to support their opposition to the Motion to Dismiss those must be presented in either an amended verified complaint or in a sworn declaration."). As Defendants noted in their earlier briefs, the cost of a cable lock or trigger lock is simply too insignificant to give rise to standing, especially because such a *de minimus* expense would be incurred because Mr. Seaburg intends to *comply* with the law, rather than violate it. *See* Def. Mot to Dismiss at 7; Reply at 6.[2]

As for Mr. Bass, his allegations are too vague to even determine whether his *current* conduct would violate the Ordinance. Though Plaintiffs argue now that Paragraphs 20 and 21 of the VAC indicate that Mr. Bass's present storage methods would violate the Ordinance (Opp'n at 5, 8, 9), those paragraphs state only that he keeps his firearms unlocked when he is in his home, (VAC ¶ 18-20), with one conclusory example of how his current conduct *may* violate the ordinance – e.g. he leaves his firearm unsecured when he is home and "no authorized users are in the room where the unsecured firearm is stored." Id. ¶ 21. The allegation lacks details about when or how this happens (or how frequently it occurs) and is insufficient to determine whether his storage practice deviates from the Ordinance's requirements since control is a highly fact specific concept. *See, e.g.*, *Com. v. Patterson*, 946 N.E.2d 130, 134 (Mass. App. Ct. 2011) ("Of course, the determination whether a particular firearm is under an individual's control will depend on the facts and circumstances of any given case."). Perhaps the circumstances he describes would be found to show the firearm was under his control, and perhaps they would not. Either way, such strategic vagueness cannot meet

[2] The Edmonds Ordinance allows compliance through a range of options. If Mr. Seaberg elected to secure his firearms using cable locks or trigger locks, his costs are likely to be minimal – around $5 per gun. Though Plaintiffs object that this is outside the pleadings, they do not object that it is inaccurate. And, "[u]nlike a CR 12(b)(6) dismissal, a CR 12(b)(1) dismissal … may be based on evidence outside of the pleadings." *Wright v. Colville Tribal Enter. Corp.*, 159 Wn. 2d 108, 118–19, 147 P.3d 1275 (2006) (Madsen, J., concurring).

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the standard for bringing a pre-enforcement challenge under the Uniform Declaratory Judgment Act. *See Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn. 2d 811, 815, 514 P.2d 137 (1973) (a controversy is not justiciable where it involves a "possible, dormant, hypothetical, speculative, or moot disagreement").

And with respect to Mr. McCullough, Plaintiffs appear to acknowledge that they do not allege necessary facts when they ask this Court to settle for an inference about what Mr. McCullough intends to do. Opp'n at 9. The Court's November 8, 2018 Order required that Plaintiffs submit "facts to support their opposition to the Motion to Dismiss," not facts that give rise to inferences that support their opposition to this Motion to Dismiss. After extensive briefing and allowance for an amended complaint and the Court's clear directions, Plaintiffs remain either unable or unwilling to come out and allege expressly and clearly that they intend to violate the Ordinance. Though they point the Court to paragraphs 25-33 (Opp'n at 8) to argue that Mr. McCullough has described his current conduct and future intention, those paragraphs do not contain allegations that Mr. McCullough intends to store his firearms in an unlocked state when they are *outside his control*. See VAC ¶¶ 32, 33 (describing a "strong desire to continue having his firearms in an unlocked and usable state" and an intent to keep "his firearms in an unlocked and usable state in his home, even when not in his possession."). Nowhere does Mr. McCullough state that he intends to store his firearms in an unlocked state outside of his possession *and control*. Absent such allegations, the Court need not speculate about the hypothetical intent of these Plaintiffs. The remedy for this situation is straightforward: Plaintiffs must wait until such time as the Ordinance is enforced against them to challenge its validity.

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B. **The Organizational Plaintiffs Do Not Allege a Purpose That is Adversely Affected by the Ordinance.**

Plaintiffs argue that, in the VAC, "all Plaintiffs, including the organizations, assert their right to be free from local interference with the possession of firearms." Opp'n at 12. A close look at the paragraphs in the VAC that they cite – 49, 53 and 54 – reveals the weakness of this argument: these paragraphs say nothing that is specific to either Organizational Plaintiff and do not speak to any Plaintiffs' *purpose*, but instead are general statements of the claims that all Plaintiffs seek to raise. *See, e.g.*, VAC ¶ 53 ("The Plaintiffs' statutory rights to be free from local interference with the possession of firearms is in jeopardy of immediate invasion, causing actual and substantial injuries without any adequate remedy at law."). The relevant paragraphs of the VAC for establishing the Organizational Plaintiffs' purpose are 4, 5, and 45-47. Those paragraphs make plain that the organizations' purposes are not at odds with the Ordinance.[3]

As for Plaintiffs' argument that the "context" should indicate that they intended to say the opposite of what they actually said in VAC Paragraph 45 (*see* Opp'n at 12 n.4): this Court should not credit their arguments, because Plaintiffs -- and their counsel -- used identical language in a proposed amended complaint that they filed in support of their motion for reconsideration in the Seattle case and were alerted there that this language indicates organizational *support* for the requirement of responsible storage. *See* Exhibit C to Goldman Declaration ("The storage methods proscribed by the Ordinance does not comport with the best practices for safe storage as outlined and recommended by the NRA and SAF.").[4] In opposing that motion for reconsideration,

[3] Though Defendants have pointed to Plaintiffs' public -- and uncontested -- statements in favor of precisely the type of responsible storage measures contemplated by the Ordinance, the Court need not rely upon these public statements, as the VAC does not allege what it must: that the Organizational Plaintiffs' purpose is at odds with the Ordinance.

[4] The Organizational Plaintiffs in this case are also plaintiffs in the Seattle lawsuit and they are represented by the same law firm.

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Defendants noted that the proposed complaint contained language indicating that "the Organizational Plaintiffs agree that responsible storage is important and that the practices prohibited by the Ordinance are not best practices." Exhibit D to Goldman Declaration. Plaintiffs therefore knew that the language they used to describe the Organizational Plaintiffs' position on the Ordinance's requirements indicated their general agreement with the policies underlying the Ordinance. They chose not to change this language in the intervening months, and the Court should not credit these eleventh-hour protestations.

C. Plaintiffs Must Show Hardship to Bring a Pre-Enforcement Challenge.

The VAC also does not present a dispute that is ripe for judicial resolution. This is a separate ground for dismissal under CR12 and *Diversified Industries Dev. Corp v. Ripley*, 82 Wn.2d at 815.

"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); *see also First Covenant Church of Seattle, Wash. v. City of Seattle*, 114 Wn. 2d 392, 399, 787 P.2d 1352 (1990) ("Deciding whether a case presents a cause of action ripe for judicial determination requires an evaluation of 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967))).

Plaintiffs point to nothing in the VAC that suggests any hardship that will accrue should they be required to wait until enforcement of the Ordinance before they may test its validity. Pre-enforcement review of a statute is an extraordinary step, and it is one that – as Defendants noted in their opening brief – Washington courts disfavor. Plaintiffs argue that paying the fine would be a

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hardship, but that is not the relevant question; ripeness turns on whether *waiting* for a determination of the validity would be a hardship. Plaintiffs have pointed to no hardship that accrues from waiting until the Ordinance is enforced, at which time they would be able to challenge the validity of the Ordinance.

III. CONCLUSION

Because Plaintiffs' Verified Amended Complaint does not plead a justiciable case, it should be dismissed with prejudice.

DATED this 17th day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused the foregoing to be served, as indicated, upon the following:

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DATED this 17th day of January, 2019.

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