

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

COUNCIL HOUSE,)
)
Plaintiff,)
)
v.)
)
JEANNE (LAUREN) HAWK,)
)
Defendant.)

No. 05-2-19641-6 SEA
**MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER
JURISDICTION**

I. Relied Requested

Pursuant to CR 12(b)(1) and upon the basic rights guaranteed by the United States Constitution, defendant Jeanne Hawk asks the Court to dismiss plaintiff Council House’s Complaint for Unlawful Detainer.

II. Statement of Facts

This is an eviction action initiated by Council House, a Section 8 housing project, against a federally subsidized, wheel-chair bound tenant, Jeanne Hawk, soon after Ms. Hawk complained that Council House tolerates racism and discrimination. At a June 30, 2005 hearing before Commissioner Prochnau, Council House, through its counsel, stated that its unlawful detainer action was based on breaches of sections 13 and 14 of Ms. Hawk’s lease. Council House denied that this action was an attempted termination for other good cause as allowed

MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 1

1 under 24 CFR 247.3(a)(4).¹

2 Section 13 of Ms. Hawk’s lease states: “The Tenant agrees not to: . . . [(e)] make or
3 permit noises or acts that will *disturb the rights or comforts of neighbors.*” Exhibit A (emphasis
4 added). Section 14 of the lease states: “The Tenant agrees to obey the House Rules which are
5 Attachment No. 3 to this Agreement.” *Id.* In particular, section G of the House Rules—the
6 section cited in Council House’s Complaint—states “[*r*]ude or abusive behavior towards
7 residents and staff for any reason, will not be tolerated. A warning will be issued for the first
8 offense. Repeated offenses will subject resident to eviction.” Exhibit B (emphasis added).

9 The complaints on which Council House bases this action involve reports of “rude”
10 and/or “abusive” behavior that purportedly violate the lease. For example, Council House
11 asserts that Ms. Hawk was rude and violated her lease when she told a prospective client that the
12 management of the building is racist. Ms. Hawk is also accused of “loudly proclaiming” her
13 opinion that the staff will be fired, and that management is racist, while speaking to other tenants
14 and guests in the lobby.

15 At his deposition, Mr. Mitchell—Council House’s manager and the person entrusted with
16 enforcing the lease—was unable to define the terms “rude” or “abusive.” Mitchell Dep. 38:19-
17 40:12; 47:3-48:8.² He admitted that reasonable people could and do differ as to whether a
18 particular behavior or statement is rude and/or abusive. *Id.*, 49:5-49:22. In addition, Mr.
19 Mitchell admitted that his enforcement of the lease is based on his personal discretion, and that

20 ¹ In any event, Council House is precluded from arguing that its unlawful detainer action is based
21 on “other good cause,” as it failed to provide Ms. Hawk with at least 30-days written notice of
22 termination as required by HUD. *See* 24 CFR 247.4(c) (“When the termination is based on other
23 good cause pursuant to Sec. 247.3(a)(4), the termination notice shall be effective . . . in no case
earlier than 30 days after receipt of the tenant of the notice.”).

² According to an agreement between counsel, a copy of Mr. Mitchell’s deposition transcript will
be filed separately.

MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 2

1 some violations result in written warnings and ultimately an eviction action while others do not.
2 *Id.*, 40:13-41:3; 41:18-42:12. Several times, Mr. Mitchell stated that Ms. Hawk’s (alleged)
3 statements that Mr. Mitchell is racist, that the building mismanaged, and that the staff would
4 soon be fired upset tenants. *See, e.g., id.*, 75:22-76:15. Mr. Mitchell further asserted that any
5 level of stress caused by the expression of these opinions “adversely affects the health or safety
6 of any person” (*see* Ex. A, § 23) because stress is unhealthy. *Id.*, 67:22-69:21. Mr. Mitchell
7 opined that calling a staff member “a liar” is rude, and a violation of the lease. *Id.*, 88:17-88:23.

8 **III. Statement of Issues**

9 Whether the provisions of the Lease relied upon by Council House are impermissibly
10 overbroad or vague because they encompass constitutionally protected activity and invite
11 selective or arbitrary enforcement.

12 **IV. Evidence Relied Upon**

13 This motion is based on the pleadings and records herein, copies of Ms. Hawk’s lease and
14 the House Rules attached hereto, and excerpts of Mr. Mitchell’s deposition transcript.

15 **V. Authority**

16 **A. Council House is a state actor that must abide by the Fourteenth Amendment of the United States Constitution.**

17 The Fourteenth Amendment applies to private conduct “if . . . there is such a ‘close nexus
18 between the State and the challenged action’ that seemingly private behavior ‘may be fairly
19 treated as that of the State itself.’” *Brentwood Academy v. Tennessee Secondary Sch. Athletic
20 Ass’n*, 531 U.S. 288, 295 (2001). In particular, a nominally private entity acts “as a state actor . .
21 . when it is ‘entwined with governmental policies’ or when government is ‘entwined in [its]
22 management or control.’” *Id.* at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

23 Private landlords who received HUD subsidies are state actors for purposes of the

1 Fourteenth Amendment. *See, e.g., Joy v. Daniels*, 479 F.2d 1236, 1239-40 (4th Cir. 1973);
2 *Appel v. Beyer*, 39 Cal. App. 3d Supp. 7, 114 Cal. Rptr. 336, 340 (Cal. App. Dep’t Super. Ct.
3 1974); *see also In re Oksentowicz*, 314 B.R. 638, 641-42 (Bankr. E.D. Mich. 2004) (holding a
4 private landlord who participates in a HUD subsidized housing program is a governmental unit
5 for purposes of the Bankruptcy Code).

6 In *Joy*, the Fourth Circuit held that a private landlord who participates in a federal
7 housing program was a state actor because the private landlord “received mortgage benefits from
8 the FHA” and “receive[d] rent supplements from the FHA.” 479 F.2d at 1239. Similarly, in
9 *Appel*, the court based its finding on the fact that “[t]he restrictions imposed on the owner by the
10 FHA lease form and the ‘regulatory agreement’ with FHA again underscore the government’s
11 purpose to make private capital a tool of government housing policy.” 114 Cal. Rptr. at 339.

12 Here, Council House is a private landlord that participates in HUD Section 8 housing.
13 The notice of purported “material non-compliance” upon which this action is premised
14 references “Section 8 – HUD.” Additionally, Ms. Hawk’s lease states: “[t]his lower rent is
15 available either because the mortgage on this project is subsidized by [HUD] and/or because
16 HUD makes monthly payments to the Landlord on behalf of the Tenant.” Ex. A, § 3. All
17 aspects of the landlord-tenant relationship at Council House including changes in rent,³
18 modifications to the terms and conditions of the lease,⁴ and termination of tenancy,⁵ are governed
19 by federal regulations. Here, as in *Joy* and *Appel*, the Court should find that HUD is so entwined
20 in Council House’s activities—especially with regard to its lease to Ms. Hawk—that Council
21 House is a “state actor” governed by the Fourteenth Amendment.

22 ³ Ex. A, §§ 4, 15.

23 ⁴ Ex. A, § 22.

⁵ Ex. A, § 23.

MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 4

SEA 1674605v3 50062-81223

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square · 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 · Fax: (206) 628-7699

1 **B. The lease terms that Council House relies on are impermissibly vague and**
2 **overbroad.**

3 Because Council House is a state actor, the provisions of the lease are effectively
4 government regulations. Council House may not, therefore, promulgate a lease that curtails or
5 narrows federal rights and may not apply the lease terms in a manner that violates those rights.
6 The ban on unreasonable clauses is underscored by 42 U.S.C. § 1437d(l)(2), which states that
7 public housing leases must “not contain unreasonable terms and conditions.” *See, also, Diggs v.*
8 *Housing Authority of City of Frederick*, 67 F. Supp. 2d 522 (D. Maryland 1999) (granting
9 preliminary injunction under 42 U.S.C. § 1437d(l)(2) prohibiting housing authority from
10 enforcing a draconian trespass policy). Landlords may not, in sum, “impose. . . provisions which
11 may be unfair to tenants.” 48 Fed. Reg. 43311 (1983).

12 Council House is seeking to evict Ms. Hawk based on alleged violations of section 13(e)
13 of her lease and section G of the House Rules (incorporated into the lease by section 14 of the
14 lease). Because neither the lease nor the House Rules provide any guidance as to how the
15 phrases “disturb the rights or comforts of neighbors,” “rude . . . behavior,” or “abusive behavior”
16 should, or indeed will be, interpreted, these lease terms are impermissibly vague and inherently
17 unreasonable. *See* Ex. A, § 13; ex. B, § G. Further, because “acts that will disturb the rights or
18 comforts of neighbors” and “rude or abusive behavior” encompasses protected First Amendment
19 activity, these lease terms are impermissibly overbroad.

20 **1. The lease terms are impermissibly vague.**

21 “The purpose of the vagueness doctrine is twofold: ‘first to provide citizens with fair
22 warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or
23 discriminatory law enforcement.’” *State v. Williams*, 144 Wn.2d 197, 203 (2001) (finding a
harassment statute that sought to criminalize threats that harm another’s “mental health”

1 impermissibly vague and overbroad); *see also City of Bellevue v. Lorang*, 140 Wn.2d 19, 29
2 (2000). “A statute is unconstitutionally vague if either requirement is not satisfied.” *Williams*,
3 144 Wn.2d at 204. Furthermore, courts are particularly cautious in interpreting vague statutes
4 that implicate First Amendment protected activity. *Lorang*, 140 Wn.2d at 31 (quoting *Grayned*
5 *v. City of Rockford*, 408 U.S. 104 (1972)).

6 Council House seeks to prohibit “noises or acts that will ***disturb the rights or comforts of***
7 ***neighbors.***” Ex. A (emphasis added). The lease does not provide any definition of “disturb the
8 rights or comforts of neighbors.” In *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the
9 United States Supreme Court held an ordinance prohibiting “conduct . . . annoying to persons
10 passing by” void for vagueness because “[c]onduct that annoys some people does not annoy
11 others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his
12 conduct to an imprecise but comprehensible normative standard, but rather in the sense that no
13 standard of conduct is specified at all.” *Id.* at 612-14.

14 The phrase “disturb the rights or comforts of neighbors” suffers from the same lack of
15 specificity. Webster’s II New College Dictionary defines “disturb” as: “1. To trouble or destroy
16 the tranquility or serenity of. 2. To trouble emotionally or mentally : UPSET. 3.a. To interfere
17 with : INTERRUPT . . . b. To intrude on : INCONVENIENCE . . . 4. To put into disorder :
18 DISARRANGE.” *Webster’s II New College Dictionary* 332 (2001).⁶ Just as “conduct that
19 annoys some people does not annoy others,” conduct that “trouble or destroy the tranquility or
20 serenity of” some people will not “trouble or destroy the tranquility or serenity of” others.

21 This Court should find Council House’s lease provision seeking to prohibit “noises or

22 ⁶ The interconnectedness between “annoy” and “disturb” is demonstrated by the dictionary’s
23 definition of “annoy”—“1. To bother or irritate. 2. To disturb by repeated attacks : HARASS.”
Webster’s II New College Dictionary 46.

1 acts that will *disturb the rights or comforts of neighbors,*” unconstitutionally vague, and
2 evictions of tenants on the basis of such language impermissible. *See also Williams*, 144 Wn.2d
3 at 204 (finding a statute vague because it was unclear whether “the statute prohibit[ed] a person
4 from making threats which cause others mere irritation or emotional discomfort or [whether] it
5 only prohibit those threats which cause others to suffer a diagnosable mental condition”); *City of*
6 *Everett v. Moore*, 37 Wn. App. 862, 866 (Div. I 1984) (finding an ordinance vague because it
7 sought to prohibit acts intended to “harass, annoy, or alarm another person”).

8 Council House also seeks to forbid “rude . . . behavior.” Ex. B (House Rule G). The
9 term “rude . . . behavior,” is not defined in Ms. Hawk’s lease or in the House Rules. The term
10 “rude” suffers from the same constitutional infirmity that the terms “annoy” or “disturb” suffer
11 from; that is, “no standard of conduct is specified at all.” *Coates*, 402 U.S. 614.⁷ Courts in other
12 jurisdictions have found statutes that seek to penalize rude behavior unconstitutionally vague.
13 *See, e.g., Original Fayette County Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 89, 92
14 (W.D. Tenn. 1970) (finding that “[a] statute prohibiting and making criminal . . . ‘the use of rude
15 . . . language in any public place’ . . . does not provide fair warning to the public and certainty of
16 interpretation by courts and juries that is required by the Due Process Clause of the Fourteenth
17 Amendment”). In *Moore*, Division I held an ordinance to be vague because “[t]he people of
18 Everett must not live in the continual fear that something they say to another might bother the
19 listener to the point of invoking the ordinance.” Here, Council House residents are forced to
20 “live in the continual fear that something they say to another might bother the listener to the

21 _____
22 ⁷ “Rude” is defined as: “1. Primitive : uncivilized . . . 2. Lowly : humble . . . 3.a. Lacking the
23 graces of civilized life : UNCOUTH. b. Without education or knowledge : SIMPLE. c. Lacking
good manners : DISCOURTEOUS. 4. Formed without skill or precision : CRUDE . . . 5. Lively
: robust. 6. Sudden and jarring.” *Webster’s II New College Dictionary* 967.

MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 7

1 point of invoking [this House Rule].” The Court should find the House Rule seeking to prohibit
2 “rude . . . behavior” unconstitutionally vague because conduct that some find rude will not be
3 considered rude by others.

4 Finally, Council House seeks to prohibit “abusive behavior.” Ex. B (House Rule § G).
5 Courts have frequently found ordinances and statutes that seek to prohibit “abusive” behavior
6 void for vagueness. *See, e.g., Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 704
7 (W.D. Pa. 2003) (finding a school policy that sought to proscribe “inappropriate language” and
8 “verbal abuse” unconstitutionally vague because “the terms abuse, offend, harassment, and
9 inappropriate . . . are simply not defined in any significant manner”); *Alexander v. Johnson*, 217
10 F. Supp. 2d 780, 798-800 (S.D. Tex. 2001) (discussing in detail how the Texas Court of Criminal
11 Appeals had found a harassment statute that sought to criminalize acts committed “with intent to
12 harass, annoy, alarm, abuse, torment, or embarrass another” void for vagueness); *Church of the*
13 *American Knights of the Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583, 591-92 (W.D. Pa.
14 2000) (finding an ordinance that restricted the “wearing of a mask ‘with the intent to intimidate,
15 threaten, abuse or harass any other person’” unconstitutionally vague). In *Church of the*
16 *American Knights*, the court noted that “[b]ecause the provision does not define the terms
17 ‘intimidate,’ ‘threaten,’ ‘abuse’ or ‘harass,’ the speaker is not given adequate notice as to what
18 form of potentially legitimate speech . . . may run afoul of the Ordinance.” *Id.* at 592. As with
19 the terms “rights or comforts of neighbors,” and “rude . . . behavior,” the Court should find that
20 the term “abusive behavior” is unconstitutionally vague.

21 Not only are the terms at issue unconstitutionally vague because they fail “to provide [the
22 residents of Council House] with fair warning of what conduct they must avoid,” they are also
23 void because they fail to “protect them from arbitrary, ad hoc, and discriminatory . . .

MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 8

1 enforcement.” *Williams*, 144 Wn.2d at 203. At his deposition, Mr. Mitchell—Council House’s
2 manager—was unable to define the terms “rude” and “abusive.” Indeed, he admitted that
3 reasonable people could and do differ when assessing whether a particular behavior or statement
4 is rude and/or abusive. In addition, Mr. Mitchell admitted that his enforcement of the contested
5 sections of the lease are based on his personal discretion, and that some violations result in
6 written warnings and ultimately an eviction action and others do not.

7 Mr. Mitchell’s inability to objectively define these terms, and his admission that
8 reasonable people are unable to agree upon application of the terms, emphasize that the lease
9 conditions that underlie Council House’s attempt to evict Ms. Hawk “contain no standards and
10 allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes
11 or what conduct will comply with a statute in any given case.” *Lorang*, 140 Wn.2d at 31.

12 Council House’s only rationale for attempting to evict Ms. Hawk appears to be either to
13 quash dissent or to protect other tenants from the “stress” of controversy regarding operation of
14 the apartment building. Several times, at his deposition, Mr. Mitchell stated that tenants were
15 upset when Ms. Hawk (allegedly) opined that Mr. Mitchell is racist, the building mismanaged,
16 and that the staff would soon be fired. Mr. Mitchell asserted that any level of stress caused by
17 the expression of these opinions “adversely affects the health or safety of any person” because
18 stress is unhealthy. However, there can be no regulation consistent with the First Amendment
19 that curtails free speech to protect others from “stress.” *See, e.g., Collin v. Smith*, 578 F.2d 1197,
20 1205 (7th Cir. 1978) (rejecting the argument that Nazis can be prohibited from marching in a
21 town populated by Holocaust victims even though the march would indubitably inflict psychic
22 trauma on resident Holocaust survivors and other Jewish residents).

23
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 9

SEA 1674605v3 50062-81223

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square · 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 · Fax: (206) 628-7699

1 **2. The lease terms are impermissibly overbroad.**

2 “A statute is overbroad if its prohibitions extend beyond proper bounds and violate the
3 First Amendment’s protection of free speech.” *Lorang*, 140 Wn.2d at 26. “An overbreadth
4 challenge is facial, and will prevail even if the statute could constitutionally be applied to a
5 litigant.” *Id.* The lease terms seeking to prohibit “acts that will disturb the rights or comforts of
6 neighbors” and “rude or abusive behavior” are impermissibly overbroad.

7 In *Gooding v. Wilson*, 405 U.S. 518 (1972), the United States Supreme Court considered
8 the constitutionality of a statute that sought to criminalize the “use to or of another, and in his
9 presence . . . opprobrious words or abusive language, tending to cause a breach of the peace”
10 *Id.* at 518-19. The Court rejected the argument, based on *Chaplinsky v. New Hampshire*, 315
11 U.S. 568 (1942), that “opprobrious words” or “abusive language” were not protected by the First
12 Amendment. *Id.* at 524-25 (noting that these terms were “not fighting words as *Chaplinsky*
13 defines them”). The Court noted that the dictionary definition of “abusive” included “harsh
14 insulting language,” but held that the First Amendment protected even such language. *Id.* at 525.
15 The Court found the statute overbroad because “the separation of legitimate from illegitimate
16 speech calls for more sensitive tools than [Georgia] has supplied.” *Id.* at 528.

17 In *Coates*, the United States Supreme Court found an ordinance that sought to prohibit
18 “conduct . . . annoying to persons passing by” overbroad. The Court held that “[t]he First and
19 Fourteenth Amendments do not permit a State to make criminal the exercise of the right of
20 assembly simply because its exercise may be ‘annoying’ to some people.” *Coates*, 402 U.S. at
21 615. Just as in *Coates* and *Gooding*, the lease clauses at issue sweep too broadly because they
22 seek to prohibit acts and speech that are “disturbing,” “rude,” or abusive.” *See also Moore*, 37
23 Wn. App. at 864-65 (finding the ordinance overbroad because “[a] discussion of any political,

1 social, economic, philosophic or religious topic might well vex, irritate or bother the listener”).

2 As the Supreme Court noted in *Williams*, “[s]peech is protected, even though it may
3 advocate action which is highly alarming to the target of communication, unless it fits under the
4 narrow category of a ‘true threat.’ Courts have routinely found First Amendment protection
5 extends to speech and conduct that society at large views as vile, politically incorrect, or borne of
6 hate.” *Williams*, 144 Wn.2d at 209. Because Council House’s attempted proscription of “acts
7 that will disturb the rights or comforts of neighbors,” “rude . . . behavior,” or “abusive behavior,”
8 reaches far beyond acts or speech that constitute a “true threat,” the Court should find these lease
9 terms unconstitutionally overbroad. *Cf. Williams*, 144 Wn.2d at 207-08 (defining a “true threat”
10 as “a statement made ‘in a context or under such circumstances wherein a reasonable person
11 would foresee that the statement would be interpreted . . . as a serious expression of intention to
12 inflict harm upon or take the life of [another individual]’”); *Moore*, 37 Wn. App. at 865 (“if
13 unsettling, disturbing, arousing, or annoying communications could be proscribed, or if they
14 could only be conveyed in a manner that would not alarm, the protection of the First Amendment
15 would be a mere shadow indeed”).

16 As noted by the court in *Richmond Tenants Organization, Inc. v. Richmond*
17 *Redevelopment and Housing Authority*, 751 F. Supp. 1204, 1205-06 (E.D. Va. 1990), “this Court
18 must decide what constitutes an ‘unreasonable’ lease term. . . . Lease provisions which are
19 arbitrary and capricious, or excessively over-broad or under-inclusive, [must] be invalidated.”

20 **C. The Court lacks subject matter jurisdiction because the 10-day notice to**
21 **comply or vacate served in this matter was improper.**

22 Because the “unlawful detainer statute is in derogation of common law, [it] must be
23 strictly construed in favor of the tenant.” *Housing Authority of the City of Everett v. Terry*, 114

MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION - 11

SEA 1674605v3 50062-81223

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square · 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 · Fax: (206) 628-7699

1 Wn.2d 558, 563 (1990). In particular, if an unlawful detainer action is based on an improper 10-
2 day notice to comply or vacate, the Superior Court lacks subject matter jurisdiction to hear the
3 case and must dismiss. *Id.* at 564. It is well-established law that “[a] party may challenge
4 subject matter jurisdiction at any time” *J.A. v. DSHS*, 120 Wn. App. 654, 657 (Div. II 2004).

5 Here, Council House’s unlawful detainer action is based on a 10-day notice to comply or
6 vacate. The 10-day notice was served on Ms. Hawk based solely on her allegedly failure to
7 comply with ¶ 13(e) of the lease and House Rule G (incorporated into the lease by reference in ¶
8 14). Because, as discussed above, these lease terms are unconstitutionally vague and overbroad,
9 the 10-day notice is improper and this Court does not have subject matter jurisdiction over this
10 complaint. *See also* 24 CFR 247.3(a) (“[t]he landlord may not terminate any tenancy in a
11 subsidized project except upon the following grounds: (1) Material noncompliance with the
12 rental agreement”).

13 **VI. Conclusion**

14 For the foregoing reasons, the Court should conclude, as a matter of law, that the terms
15 relied upon by the plaintiff are unenforceable and that the Court is without jurisdiction to
16 consider any other supposed grievance against Ms. Hawk.

17 DATED this 29th day of July, 2005.

18 Davis Wright Tremaine LLP
19 Attorneys for Jeanne Hawk

20
21 By _____
22 Kaustuv M. Das
23 WSBA #34411