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The Honorable Barbara J. Rothstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF MONROE, a Washington municipal
corporation

Plaintiff,

v.

SETH FISHER, an individual and sole
proprietor, d/b/a FISHER'S TOWING

Defendant

SETH FISHER, a single person

Counterclaim-Plaintiff

v.

CITY OF MONROE, a Washington municipal
corporation; AMY BRIGHT, an individual;
BEN SWANSON, an individual; TIM
QUENZER, an individual; and MICHAEL
FITZGERALD, an individual,

Counterclaim-Defendants.

Civil Action No. 2:20-1308-BJR (lead case)

Civil Action No. 2:20-cv-1253-BJR

ORDER GRANTING IN PART AND
DENYING IN PART THE MOTION TO
DISMISS

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I. INTRODUCTION

This dispute centers on a piece of property that Defendant/Counterclaim Plaintiff Seth Fisher (“Fisher”) owns in the City of Monroe (“the City”). Fisher operates a towing and storage business on the property pursuant to two conditional use permits issued by the City. He alleges that since at least 2007, the City and four of its employees, Amy Bright, Ben Swanson, Tim Quenzer, and Michael Fitzgerald (“the City employees”), have taken “arbitrary” and “affirmative” steps to shut down his business, including attempting to revoke the conditional use permits and coercing him into signing a Voluntary Correction Agreement. He alleges that the City’s and the City employees’ actions violated his due process and equal protection rights, as well as Article 1, Section 3 of the Washington State Constitution.

Currently before the Court is the City and the City employees’ motion to dismiss Fisher’s claims. Dkt. No. 23. The City employees move to dismiss all claims against them; the City moves to dismiss the monetary claim against it based on the Washington State Constitution. Fisher opposes the motion. Dkt. No. 24. Having reviewed the parties’ pleadings, the record of the case, and the relevant legal authorities, the Court will grant in part and deny in part the motion. The reasoning for the Court’s decision follows.

II. PROCEDURAL BACKGROUND

Fisher initiated this action by filing and serving a Claim for Damages against the City pursuant to RCW 4.96 on May 29, 2020. Case No. 20-1253, Dkt. No. 1-2 at ¶ 2.1. The requisite sixty days passed without a response from the City, so Fisher filed a complaint for damages in Snohomish County Superior Court on August 4, 2020. *Id.* at ¶ 1.8. In this complaint, not only did Fisher sue the City, but he also sued the above four City employees in their individual capacities.

1 The City and the City employees removed the matter to this Court on August 19, 2020 (“Case No.
2 20-1253”). Case No. 20-1253, Dkt. No. 1.

3 Just shy of one month earlier, on July 27, 2020, the City filed a complaint for damages
4 against Fisher, also in Snohomish County Superior Court. Case No. 20-1308, Dkt. No. 1, Ex. 1.
5 Fisher removed that case to this Court on September 1, 2020 (“Case No. 20-1308”) and on
6 October 7, 2020, the City, the City employees, and Fisher filed a joint motion to consolidate Case
7 No. 20-1253 with Case No. 20-1308. Case No. 20-1308, Dkt. No. 14. This Court granted the
8 motion two days later and instructed that all future filings be made in Case No. 20-1308. The
9 Court further instructed that it will treat Fisher’s complaint in Case No. 20-1253 as counterclaims
10 in Case No. 20-1308. Case No. 20-1308, Dkt. No. 26.
11

12 The instant motion to dismiss was filed on February 9, 2021 and the matter is now ready
13 for this Court’s review.
14

15 III. FACTUAL BACKGROUND

16 As stated above, Fisher owns Fisher’s Towing, which he operates pursuant to two
17 conditional use permits issued by the City. Fisher claims that the City and the City employees
18 have been trying to shut down his towing and storage business for years. As evidence of this,
19 Fisher alleges the following:¹
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21 (1) In 2007, the City conducted a permit revocation hearing but later “withdrew and
22 cancelled the revocation”;

23 (2) In 2012, Fisher and a “City Official” “got into a heated discussion” regarding the fact
24 that Fisher was stacking shipping containers on his property and the City assumed he was
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26 ¹ All allegations are taken from the Complaint in Case No. 20-cv-1253 and the “Tort
27 Claim/Complaint Fisher v. City of Monroe” dated May 20, 2020 attached as Exhibit A to the
Complaint. See Dkt. No. 1-2, Case No. 20-cv-1253.

1 building a structure (“rack”) without a permit. The City issued a “Notice to Stop Work” and a
2 “Racking Violation” to Fisher, but “no compliance action was undertaken.” Instead, Fisher
3 reduced the size of the stacked shipping containers;

4 (3) Between 2012 and 2015, “the City took arbitrary but affirmative steps to stop Mr.
5 Fisher’s towing operation”, including issuing notices of violations, attempting to retract the
6 conditional use permits, and trying to “link” the two conditional use permits together because one
7 of the permits “has a provision that could no longer be met by Mr. Fisher”. “Nonetheless, Mr.
8 Fisher always relied on both permits for his operation”;

9
10 (4) In 2015 and 2016, the City continued to cite Fisher “for code violations”;

11 (5) In early 2017, Fisher leased his property to Pauley’s Towing. Mr. Pauley attempted to
12 obtain a license to operate a towing business on Fisher’s property from the City, but Ms. Bright
13 rejected the application. In rejecting the application, Ms. Bright allegedly “cited the wrong
14 address and therefore the wrong [conditional use] permit.” Fisher alleges that Ms. Bright did this
15 intentionally;

16
17 (6) Fisher alleges that Mr. Pauley abandoned the lease and sued him as a result of the
18 City’s refusal to issue the operating license. Fisher claims that he lost over \$180,000 in rental
19 fees, plus another \$70,000 in litigation expenses; and

20
21 (7) In 2018, Fisher alleges that after “misapplying its own codes”, the City “coerced”
22 Fisher into signing “an extremely burdensome” Voluntary Correction Agreement that caused him
23 to forfeit a number of his rights with respect to the property.

24 Based on the foregoing allegations, Fisher seeks: (1) a declaratory judgment that the
25 Voluntary Correction Agreement is void, (2) an injunction barring the City and the City
26 employees from continuing their “unconstitutional harassment”, (3) an award of lost rental
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1 income, (4) an award of just compensation of the fair market value of his property (this is in the
2 alternative to the request for injunction and declaratory relief), and (5) punitive damages.

3 IV. STANDARD OF REVIEW

4 “Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable
5 legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory.” *Somers v.*
6 *Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). “To survive a motion to dismiss, a complaint must
7 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
8 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550
9 U.S. 544, 570 (2007)). The Court must disregard allegations that are legal conclusions, even when
10 disguised as facts. *See Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996
11 (9th Cir. 2014). “Although ‘a well-pleaded complaint may proceed even if it strikes a savvy judge
12 that actual proof is improbable,’ plaintiffs must include sufficient ‘factual enhancement’ to cross
13 ‘the line between possibility and plausibility.’” *Id.* at 995 (quoting *Twombly*, 550 U.S. at 556–57)
14 (internal citations omitted).
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17 V. DISCUSSION

18 The City employees move to dismiss the § 1983 counterclaims against them, arguing
19 among other things that Fisher has failed to allege personal participation by each of the employees
20 sufficient to allow this Court to infer that they violated his equal protection and/or due process
21 rights. The City employees also move to dismiss the monetary counterclaim based on the alleged
22 violations of Article 1, Section 3 of the Washington State Constitution. The City joins in this
23 motion. The Court will address each of the counterclaims in turn.
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1 **A. The § 1983 Counterclaims against the City Employees**

2 Title 42 U.S.C. § 1983 provides a cause of action for the deprivation of “rights, privileges,
3 or immunities secured by the Constitution or laws of the United States” by any person acting
4 “under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory.”
5 *Gomez v. Toldo*, 446 U.S. 635, 638 (1980). To state a claim under § 1983, a plaintiff must allege
6 that: (1) the conduct complained of was committed by a person acting under color of state law;
7 and (2) the conduct violated a right secured by the Constitution or laws of the United States. *West*
8 *v. Atkins*, 487 U.S. 42, 48 (1988). In addition, liability under § 1983 must be based on the
9 personal involvement of the defendant in the alleged constitutional violation. *Fayle v. Stapley*,
10 607 F.2d 858, 862 (9th Cir. 1979); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (“Liability
11 under section 1983 arises only upon a showing of personal participation by the defendant.”).
12 Therefore, in order to maintain his § 1983 counterclaims against the City employees individually,
13 Fisher must allege facts that show that each was personally involved in the alleged deprivation of
14 his civil rights. *May*, 633 F.2d at 167.

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17 Fisher alleges that the City employees’ actions violated his equal protection and due
18 process rights and, as such, each is liable under § 1983. The City employees argue that the § 1983
19 counterclaims against them must be dismissed because the counterclaims fail to allege facts that
20 demonstrate that they were personally involved in the conduct that gave rise to the alleged
21 constitution violation.
22

23 **1. The Equal Protection Counterclaim**

24 Fisher alleges that the City employees have conducted a fifteen-year campaign of arbitrary
25 harassment against him to force him to shut down the towing and storage operations on his
26 property. He claims that he is a “class of one” who has been impermissibly singled out for
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1 unfavorable treatment by the City employees and that such treatment violates his equal protection
2 rights. However, Fisher fails to allege that he has been treated differently from “similarly
3 situated” landowners, a basic tenant of an equal protection claim. As such, the equal protection
4 counterclaim against the City employees fails as a matter of law. *See Buchanan v. Maine*, 469
5 F.3d 158, 178 (1st Cir. 2006) (“Plaintiffs claiming an equal protection violation must first identify
6 and relate *specific instances* where persons *situated similarly in all relevant aspects* were treated
7 differently.”) (emphasis in original) (internal quotation marks omitted).

9 **2. The Due Process Counterclaim**

10 To state a claim for substantive due process, Fisher must allege that the City employees:
11 (1) arbitrarily deprived him of a fundamental right, and (2) that the alleged deprivation “shock[ed]
12 the conscience and offend[ed] the community’s sense of fair play and decency.” *Marsh v. Cnty. of*
13 *San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012). To state a claim for procedural due process,
14 Fisher must allege that the City employees: (1) deprived him of a constitutionally protected
15 liberty or property interest, and (2) denied him adequate procedural protections. *Brewster v.*
16 *Board of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971, 982 (9th Cir. 1998).

18 **1. Amy Bright**

19 Amy Bright is an associate planner and code compliance officer for the City. Case No. 20-
20 cv-1253, Dkt. No. 1-2, ¶ 1.3. Fisher alleges that Bright violated his due process rights by
21 attaching a letter to his gate in which the City demanded the right to inspect his property, by
22 sending written correspondence directly to Fisher instead of his attorney, and by denying the
23 operating license to the third-party to which Fisher leased his property. *Id.* at ¶¶ 2.4 and 3.6.1, fn2,
24 and Ex. A.
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1 Simply posting a letter “demanding entry” on the gate to Fisher’s property does not
2 constitute a due process violation. The letter was issued pursuant to the Voluntary Correction
3 Agreement and it notified Fisher that the City intended “to conduct a site visit” one week later. *Id.*
4 at p. 27. There is no allegation that Ms. Bright (or anyone else for that matter) entered Fisher’s
5 property as a result of the letter. To the contrary, Fisher refused to let the City inspect his property
6 on the designated date. Dkt. No. 24, Ex. G. Likewise, the allegation that Ms. Bright corresponded
7 directly with Fisher instead of his attorney does not establish a constitutional violation. While
8 Fisher may wish that Ms. Bright only contact him through his attorney, her failing to do so does
9 not constitute a constitutional violation in these circumstances.
10

11 However, the Court concludes that the allegation that Bright willfully denied the operating
12 license to Fisher’s leasee—while weak—is sufficient to withstand dismissal at this stage of the
13 litigation. Fisher alleges a concerted effort by the City to arbitrarily stop towing operations on his
14 property. While to date (per Fisher’s allegations), the City has been unsuccessful in revoking
15 Fisher’s operating license, denying such a license to a leasee of the property could potentially
16 amount to the arbitrary deprivation of a property right. If the City intends to deny such a license to
17 any leasee of the property, such action could amount to an arbitrary diminishment in the
18 property’s value. The analysis will turn at least in part on the level of discretion the City has in
19 issuing permits, information the Court does not have before it. *See e.g., Biser v. Town of Bel Air*,
20 991 F.2d 100, 104 (4th Cir. 1993) (stating that “if a local agency has ‘[a]ny significant discretion’
21 in determining whether a permit should issue, then a claimant has no legitimate entitlement and,
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1 hence, no cognizable property interest”). Because Fisher alleges that Bright was personally
2 involved in the permit denial, the allegation against her survives the motion to dismiss.²

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4 **2. Tim Quenzer**

5 Tim Quenzer is the City’s police chief. Case No. 20-cv-1253, Dkt. No. 1-2 at ¶ 1.5. There
6 are no allegations against Chief Quenzer in the counterclaims. Fisher tries to overcome this deficit
7 by arguing that as police chief, Chief Quenzer was responsible for enforcing City regulations
8 regarding public safety. According to Fisher, “the City and [Chief] Quenzer wielded their
9 exceptionally broad discretion under the regulations in a discriminatory manner in order to stop or
10 impede [Fisher’s] tow truck operation.” Dkt. No. 24 at 4. Fisher also claims that Chief Quenzer
11 was one of the signatories on the Voluntary Correction Agreement and, as such, the “facts in the
12 [Voluntary Correction Agreement] are attributable to him”. Dkt. No. 24 at 3.

13
14 Fisher’s vague allegations that Chief Quenzer enforced the public safety regulations in a
15 discriminatory manner are not sufficient to give rise to personal liability under § 1983. As stated
16 above, Fisher must allege facts that show that each individually named City employee was
17 personally involved in the alleged deprivation of his civil rights. Fisher does not allege that Chief
18 Quenzer was in any way personally involved in the alleged dispute between Fisher and the City.
19 And, while Chief Quenzer, as a supervisor, could be liable in his individual capacity for the
20 actions of those he supervises, that is only the case if Fisher can establish that Chief Quenzer “set
21 in motion a series of acts by others, or knowingly refused to terminate a series of acts by others,
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23
24 ² Ms. Bright argues that she is entitled to qualified immunity. Qualified immunity shields federal
25 and state officials from lawsuits unless a plaintiff establishes (1) that the official violated a statutory
26 or constitutional right, and (2) that the right was “clearly established” at the time of the challenged
27 conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity very well may be
appropriate in this case at a later stage, but at this point in the litigation this Court does not have
sufficient record in front of it to determine whether Ms. Bright’s alleged action violated a clearly
established constitutional right.

1 which he knew or reasonably should have known, would cause others to inflict the constitutional
2 injury.” *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998). There are no such
3 allegations in this case. Indeed, there are no factual allegations whatsoever regarding police action
4 in this case.

5
6 Nor does Chief Quenzer’s signature on the Voluntary Correction Agreement open him to
7 personal liability under § 1983. Fisher claims that he was “coerced” into signing the Agreement.
8 Coercion may be a defense to the validity of the Agreement itself, but the fact that Fisher was
9 allegedly coerced into signing it cannot be the basis for an independent constitutional violation.
10 *See Avalos v. Baca*, 596 F.3d 583, 590-91 (9th Cir. 2010) (there is no “freestanding constitutional
11 right to be free from a coercive waiver”); *Lil’ Man In the Boat, Inc. v. City & Cty of San*
12 *Francisco*, 2018 WL 4207260, *7 (N.D. Cal. September 4, 2018) (noting that the law does not
13 recognize a standalone claim of coercion). In this lawsuit, the City is seeking to enforce the terms
14 of the Voluntary Correction Agreement and Fisher has raised coercion as a defense to the City’s
15 breach of the Agreement claim, but the alleged coercion that caused him to sign the Agreement
16 does not constitute a separate constitutional violation—and the fact that Chief Quenzer signed the
17 Agreement in his official capacity of chief of police does not state a claim for personal liability
18 under § 1983. The counterclaims against Chief Quenzer must be dismissed.
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21 **3. Michael Fitzgerald**

22 Mr. Fitzgerald is the Fire Marshal for the City. There are no factual allegations
23 specifically referencing Mr. Fitzgerald or the fire department in the counterclaims. In his
24 opposition to the motion to dismiss, Fisher alleges that Mr. Fitzgerald personally participated in
25 the alleged violation of Fisher’s constitutional rights by signing the Voluntary Correction
26 Agreement and by citing him for a “Combustible Materials” violation. This Court has already
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1 determined, *supra*, that signing the Voluntary Correction Agreement does not open an individual
2 to liability under § 1983. As for the “Combustible Materials” violation, Fisher refers the Court to
3 page 3 of document titled “FINAL WARNING AND NOTICE OF CITY OF MONROE CODE
4 VIOLATIONS”. Dkt. No. 24 at 4. Page 3 does not reference a “Combustible Materials” violation.
5 Nor, does it reference any action allegedly taken by Mr. Fitzgerald. In short, Fisher has failed to
6 allege any factual allegations that are sufficient for this Court to reasonable infer that Mr.
7 Fitzgerald was personally involved with the alleged constitutional misconduct. The § 1983
8 counterclaims against Mr. Fitzgerald must be dismissed.
9

10 **4. Ben Swanson**

11 Mr. Swanson is the Community Development Director for the City. Once again, there are
12 no factual allegations against Mr. Swanson in the counterclaims. Instead, in his opposition brief,
13 Fisher argues that Mr. Swanson “was the primary signer” on the Voluntary Correction Agreement
14 and was “responsible for overseeing” Ms. Bright’s conduct. Neither of these allegations is
15 sufficient to establish personal liability under § 1983. The Court has already rejected the signatory
16 argument. Moreover, it is black letter law that a supervisor is not vicariously liable for the actions
17 of their subordinates under § 1983. A supervisor is liable under § 1983 only if he was personally
18 involved in the alleged constitutional deprivation or there is a sufficient causal connection
19 between the supervisor’s own culpable conduct and the alleged constitutional violation.
20
21 *Rodriguez v. Cnty, of L.A.*, 891 F.3d 776, 798 (9th Cir. 2018). The counterclaims contain no such
22 allegations. The § 1983 counterclaims against Mr. Swanson must be dismissed.
23

24 **B. The Washington State Constitutional Counterclaim**

25 Fisher alleges that the City and the City employees are liable for violating Article 1,
26 Section 3 of the Washington State Constitution. Specifically, he alleges that the City and the City
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1 employees “failed to provide adequate notice and/or prepare a written takings impact assessment”
2 prior to taking actions adverse to his property rights, including their “arbitrary refusal to
3 reconsider their ignorance of [his conditional use permits].” Case No. 20-cv-1253 Dkt. No. 1-2 at
4 ¶¶ 3.5.1-3.5.3. The City and the City employees move to dismiss this counterclaim as frivolous
5 and unactionable. They argue that there can be no cause of action for damages based upon an
6 alleged violation of the Washington constitution without the aid of augmentative legislation,
7 something that does not exist in this case.
8

9 Fisher’s claim for monetary damages against the City and the City employees based on the
10 alleged violation of Article 1, Section 3 of the Washington State Constitution must be dismissed.
11 Washington Courts have repeatedly stated that a claim for monetary damages based on an alleged
12 violation of the Washington State Constitution does not exist without corresponding augmenting
13 legislation. *See Spurrell v. Bloch*, 701 P.2d 529, 535 (Wn. App. 1985) (“The constitutional
14 guarantee of due process, Const. art. 1, § 3, does not itself, without the aid of augmenting
15 legislation, establish a cause of action for money damages against the state in favor of any person
16 alleging deprivation of property without due process. This reasoning is equally applicable to both
17 state and municipal entities.”). The Court is not aware of, and Fisher does not cite to, Washington
18 legislation that allows for monetary damages for violations of Washington’s constitution.³
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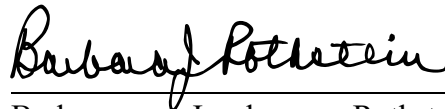
26 ³ Fisher’s reliance on *Yim v. City of Seattle*, 451 P.3d 694 (Wn. 2019) is misplaced. In *Yim*, the
27 plaintiffs sought to invalidate a city ordinance as unconstitutional; they did not seek monetary relief.

1 Therefore, Fisher’s counterclaim for monetary damages based on alleged violations of Article 1,
2 Section 3 of the Washington State Constitution must be dismissed.

3 **VI. CONCLUSION**

4 For the foregoing reasons, the Court HEREBY GRANTS in part and DENIES in part the
5 City and the City employees’ motion to dismiss. Each of the counterclaims against the City
6 employees is dismissed, except Fisher’s due process claim against Amy Bright. The monetary
7 counterclaim against the City and the City employees based on an alleged violation of Article 1,
8 Section 3 of the Washington State Constitution is also dismissed.
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10 Dated this 17th day of May 2021.

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12 _____
13 Barbara Jacobs Rothstein
14 U.S. District Court Judge
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