

1 EXPEDITE
2 No Hearing is set:
3 Hearing is set:
4 Date: September 17, 2021
5 The Honorable James J.
6 Dixon, Civil Motions

7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 BUILDING INDUSTRY ASSOCIATION OF)
9 WASHINGTON, ASSOCIATED GENERAL)
10 CONTRACTORS OF WASHINGTON,)
11 DIANE GLENN, ALAN NOLAN, RON)
12 PERKEREWICZ, and DOUG ORTH,)
13 Plaintiffs,)

No. 21-2-01579-34

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

12 v.)

13 GOVERNOR JAY INSLEE, in his Official)
14 Capacity; WASHINGTON STATE)
15 BUILDING CODE COUNCIL, a Washington)
16 State Agency; JAMES MILLBAUER, in his)
17 Official Capacity as an Appointee to the State)
18 Building Code Council, and ANTHONY)
19 MASCHMEDT, in his Official Capacity as an)
20 Appointee to the State Building Code Council,)
21 Defendants.)
22 Defendants.)

I. INTRODUCTION

20 Pursuant to CR 65(b), Plaintiffs Building Industry Association of Washington
21 (“BIAW”), Associated General Contractors (“AGC”), Diane Glenn, Alan Nolan, Ron
22 Perkerewicz, and Doug Orth (collectively, “Plaintiffs”) seek entry of a temporary restraining
23 order and preliminary injunction enjoining two unlawfully-appointed members of the State of
24 Washington State Building Code Council (“the Council”) from taking official actions pending
25 the outcome of this matter. This request for injunctive relief is limited to enjoining James
26 Millbauer and Anthony Maschmedt from participating in Council business, except as Ex

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION - 1

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1 Officio members, until this action is resolved. Any injunction as to these two members will
2 not impede the 15-member Council from reaching quorum or conducting business.

3 RCW 19.27.070, which establishes the Council, provides that the governor shall
4 appoint certain members who represent specific private sector industries. Those members
5 must be chosen from a list of nominees provided by recognized organizations that represent
6 those private sector industries—and the governor must actively seek those nominees. The
7 appointed members must also maintain sufficient private sector employment or circumstances
8 within the specified industry during the duration of their term of office. But Governor Inslee
9 violated both of these provisions. He ignored the nominees from the recognized trade
10 associations of the residential and multifamily building construction, BIAW, and commercial
11 and industrial building construction industries, AGC. He also appointed a member for the
12 commercial and industrial building general construction seat that is not member of that
13 industry. Neither current general construction appointee is qualified because they were not
14 appointed in accordance with the law and Plaintiffs will be harmed by the unlawful makeup of
15 the Council that lacks representation for their industries as the Council was conceived by the
16 Legislature. The statute also specifically provides that “any member who no longer qualifies
17 for appointment under this section may not vote on council actions, but may participate as an
18 ex officio, nonvoting member until a replacement member is appointed.” RCW
19 19.27.070(4)(e). Accordingly, Plaintiffs seek an order enforcing this statutory provision,
20 maintaining the status quo, and enjoining the participation of the unlawfully appointed
21 members from Council business except in an ex officio capacity until a replacement is
22 appointed.

23 II. STATEMENT OF FACTS

24 The Council consists of 15 members representing a variety of elected officials, civil
25 servants, community members, and building industry members. RCW 19.27.070. The statute
26 establishing the Council also specifies the interests that its members must represent, and the

1 procedure by which the governor must appoint them. *Id.* A key constituency of the Council—
2 nearly half its ranks—are seven members representing private sector or professional
3 organizations. *Id.* at .070(1). Two of those private sector members must represent general
4 construction: one specializing in commercial and industrial building construction, and one
5 specializing in residential and multifamily building construction. *Id.* at .070(1)(g)(i)-(ii). The
6 governor must select those members from a list of three nominations provided by the trade
7 associations representing the industry, unless no names are put forth by the trade associations.
8 *Id.* at .070(5)

9 AGC is the trade association representing commercial and industrial building
10 construction, and the BIAW is the trade association representing residential and multifamily
11 building construction. Vanderwood Decl., at ¶ 1; Maynard Decl., at ¶ 1. Both BIAW and
12 AGC have provided nominees to the governor for appointment to the Council and until this
13 year, the governor has selected a nominee from those lists for appointment to the Council as
14 required by RCW 19.27.070(5). Those Council members included Diane Glenn and Doug
15 Orth, who represented the residential and multifamily building construction sector and the
16 commercial and industrial building construction, respectively. Maynard Decl., at ¶ 3;
17 Vanderwood Decl., at ¶ 3. Orth’s second term of office ended January 5, 2021. Vanderwood
18 Decl., Ex. C. Glenn’s second term of office ended January of 2021. Maynard Decl., Ex. B.

19 On February 5, 2021, BIAW provided a list of three nominees to the office of
20 Governor Inslee: Diane Glenn, Alan Nolan, and Ron Perkerewicz. Maynard Decl., Ex. C.

21 On January 13, 2021, AGC notified Governor Inslee’s office that it nominated Doug
22 Orth to be re-appointed to the Council. Vanderwood Decl., Ex. A. Governor Inslee’s office
23 responded requesting two additional nominees for the appointment, and stated that the
24 Governor’s office “normally implements the following limit: two full terms or ten years
25 (whichever is less),” noting that Orth had served on the Council since January 2015.
26 Vanderwood Decl., Ex. E.

1 In April 2021, Governor Inslee appointed James Millbauer to the seat representing
2 general construction, specializing in commercial and industrial building construction.
3 Vanderwood Decl. at ¶ 5, Ex. C. Millbauer is not employed in general construction,
4 commercial and industrial building construction industry. Rather, he is a journeyman
5 pipefitter who works at a government worksite and is also a city councilmember. Vanderwood
6 Decl., Ex. G. Millbauer was not nominated by AGC. Vanderwood Decl. at ¶ 3, Ex. A.

7 In July 2021, Governor Inslee appointed Anthony Maschmedt to the seat representing
8 general construction, specializing in residential and multifamily building construction.
9 Maynard Decl., Ex. E. Maschmedt was not on the list of nominees provided by BIAW.
10 Maynard Decl., Ex. B.

11 III. ISSUES PRESENTED

12 1. Whether the Governor's appointment of Anthony Maschmedt to the State
13 Building Code Council violated RCW 19.27.070 because Maschmedt was not included in the
14 nominees provided by BIAW pursuant to RCW 19.27.070(5).

15 2. Whether the Governor's appointment of James Millbauer to the State Building
16 Code Council violated RCW 19.27.070 because was he not included in the nominees provided
17 by AGC pursuant to RCW 19.27.070(5), and because Millbauer is not representative of the
18 general construction industry specializing in commercial and industrial building construction.

19 3. Whether the Court should enjoin Millbauer and Maschmedt from participating
20 in official Council actions pending a final determination of Plaintiffs' quo warranto and writ
21 of mandamus action.

22 IV. EVIDENCE RELIED UPON

23 Plaintiffs rely on the Declarations of Jackson Maynard and Jerry Vanderwood, and
24 exhibits attached thereto, the authority cited in this brief, and the record and file in this matter.
25
26

1 **V. AUTHORITY AND ARGUMENT**

2 **A. Relevant Legal Standards**

3 A preliminary injunction preserves the status quo until a trial can be held on the
4 merits. *McLean v. Smith*, 4 Wn. App. 394, 399, 482 P.2d 798 (1971); *see also* RCW 7.40.020.
5 Entry of a preliminary injunction is proper where a party seeking such relief shows that (1) it
6 has a clear legal or equitable right, (2) it has a well-grounded fear of immediate invasion of
7 that right, and (3) the acts complained of are resulting in or will result in actual or substantial
8 injury. *See, e.g., King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994). In considering a
9 motion for temporary or preliminary injunctive relief, the Court considers the likelihood that
10 the plaintiff will ultimately prevail at a trial on the merits by establishing that he has a clear
11 legal or equitable right, that he reasonably fears will be invaded by the requested disclosure,
12 resulting in substantial harm. *Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141
13 Wn. App. 98, 116, 168 P.3d 443, 453 (2007).

14 RCW 19.27.070 establishes the Council and the standards for its 15 appointed
15 members. In relevant part, it requires two members to be appointed to represent private sector
16 general construction, one of which shall represent residential and multifamily building
17 construction, and one of which shall represent commercial and industrial building
18 construction. RCW 19.27.070(1)(g)(i)-(ii). It further requires that the members representing
19 private sector industries be selected from a list of three nominees provided by the trade
20 associations representing the industry, unless no names are put forth by the trade associations.
21 RCW 19.27.070(5). The governor must seek those nominations before making any
22 appointments. *Id.* Any member who is appointed to represent a specific private sector industry
23 must maintain sufficiently similar private sector employment or circumstances throughout the
24 term of office to remain qualified to represent the specified industry. RCW 19.27.070(4)(d).
25 Any member who does not qualify for appointment may not vote on council actions, but may
26 participate as an ex officio, non-voting member. RCW 19.27.070(4)(e). Terms of office for

1 Council members are three years. RCW 19.27.070(4)(a). The statute contains no term limits.
2 See RCW 19.27.070.

3 A quo warranto action is the appropriate action for challenging the holder of public
4 office. RCW ch. 7.56; *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 893, 969 P.2d
5 64 (1998). A person who claims an interest in the office may file a quo warranto action. RCW
6 7.56.020. To establish individual standing, a claimant must plead a special interest in the
7 disputed office, not in common with the interests of the community. *Quick-Ruben*, 136
8 Wn.2d at 896; *State v. Mills*, 2 Wash. 566, 572, 27 P. 560 (1891).

9 When the law requires a government official to take a particular action, courts have
10 the power to issue a writ of mandamus to say so. See *Freeman v. Gregoire*, 171 Wn.2d 316,
11 323, 256 P.3d 264 (2011). Mandamus is an appropriate remedy “[w]here the law prescribes
12 and defines the duty to be performed with such precision and certainty as to leave nothing to
13 the exercise of discretion or judgment.” *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d
14 593, 599, 229 P.3d 774 (2010). Those seeking the writ must show that a government official
15 has a clear duty to act, RCW 7.16.160, that they have no “plain, speedy and adequate remedy
16 in the ordinary course of law,” and that they are “beneficially interested.” RCW 7.16.170.

17 **B. A Temporary Restraining Order and Preliminary Injunction is Warranted.**

18 Plaintiffs meet all elements necessary to obtain a Temporary Restraining Order and
19 Preliminary Injunction. First, they have clear legal or equitable rights as to the proper
20 appointment for the seats on the Council representing their industries and for which they are
21 the trade associations that nominate Council members (as to BIAW and AGC), and to which
22 they have been nominated (as to Glenn, Nolan, Perkerewicz, and Orth). Second, they have a
23 well-grounded fear of immediate invasion of that right, where the Governor has already
24 unlawfully appointed other Council members not qualified for the Council. Third, the
25 Governor’s improper appointment is already resulting in actual or substantial injury to
26 Plaintiffs by denying them appropriate representation, or their rightful seat, on the Council.

1 And as set forth below, Plaintiffs have shown a likelihood of success on the merits sufficient
2 to warrant the narrow and limited preliminary injunctive relief that they seek.

3 **C. The Plain Language of the Building Code Council Statute Requires the Governor
4 to Appoint Qualified Council Members**

5 The statute establishing and defining the makeup of the Council does not give the
6 Governor a blank slate to appoint any members he chooses. Rather, it requires that 7 of the 15
7 members represent specific private sector industries. RCW 19.27.070(1)(g). The Governor is
8 further constrained in appointing members to represent those private sector industries.

9 Before making any appointments to the building code council, the governor
10 shall seek nominations from recognized organizations which represent the
11 entities or interests identified in this section. *The governor shall select
12 appointees to represent private sector industries from a list of three
13 nominations provided by the trade associations representing the industry,
14 unless no names are put forth by the trade associations.*

15 RCW 19.27.070(5) (emphasis added). Two of those private sector industry members must
16 represent private sector general construction, one of which shall represent residential and
17 multifamily building construction, and one of which shall represent commercial and industrial
18 building construction. RCW 19.27.070(1)(g)(i)-(ii). Moreover, a member representing a
19 private sector industry must “maintain sufficiently similar private sector employment or
20 circumstances throughout the term of office to remain qualified to represent the specified
21 industry.” RCW 19.27.070(4)(d).

22 **1. Plaintiffs Have a “Special Interest” In Council Seats Representing Their
23 Industries**

24 A plaintiff in a quo warranto action must claim an interest in the office subject to the
25 action. RCW 7.56.020. An “interest” for purposes of the action must be “a special interest, not
26 common with the interests of the community.” *Mills*, 2 Wash. at 572. Though the community
at large has a general interest in competent and qualified representation of various industries
on the Council, Plaintiffs here have been vested by the statute establishing the Council and its
membership with special interests sufficient to grant standing for a quo warranto action.

1 The structure of the Council as authorized by the Legislature makes clear that trade
2 associations representing specific industries have special interests in the makeup of the
3 Council, which adopts and maintains state building codes and has authority to approve or
4 deny county and city amendments to building codes. *See* RCW 19.27.070; RCW 19.27.074. It
5 does so by vesting responsibility for nominating qualified representatives to represent their
6 industries in trade associations, such as BIAW and AGC. RCW 19.27.070(5). It also requires
7 that representatives of specific private industries maintain their employment in that industry to
8 exercise their vote on the Council. RCW 19.27.070(4)(d)-(e). The statute thus recognizes that
9 specific industries must have a seat at the table and a vote when considering statewide and
10 local building codes.

11 Plaintiffs BIAW and AGC are the trade associations that represent the residential and
12 multifamily building construction industry and the commercial and industrial building
13 construction industry, respectively. They have each presented lists of nominees to the
14 governor's office for past Council seats. And for each past appointment, the governor has
15 chosen Council members from those lists, pursuant to the statute. BIAW and AGC thus each
16 have an interest in ensuring that one of their proffered nominees is appointed to the Council.

17 Plaintiffs Glenn and Orth are the incumbent Council members, nominated by the
18 BIAW and AGC, respectively, for another term. Plaintiffs Nolan and Perkerewicz are the
19 additional nominees by BIAW for the residential and multifamily building construction
20 industry for that industry's seat on the Council. They likewise have a "special interest" in the
21 proper appointment of nominees to the Council. Pursuant to the statute, ***the Governor shall***
22 ***select*** one of Glenn, Nolan, and Perkerewicz for the seat representing the residential and
23 multifamily building construction industry. RCW 19.27.070(5). Likewise, pursuant to the
24 statute, the Governor ***shall select*** from the nominees presented by AGC (here, Orth) ***unless no***
25 ***names are put forth by the trade associations.*** RCW 19.27.070(5). Moreover, the governor
26 must seek those nominations before making any appointments. *Id.* As two of the four

1 individually named plaintiffs must be selected to the Council pursuant to the statute, each of
2 those plaintiffs has standing to bring a quo warranto action. The individually named plaintiffs’
3 statutory status also makes them unlike a candidate who challenges the outcome of an election
4 due to having lost the vote and consequently has no greater claim to assume the office by
5 election than any other member of the public. *See Quick-Ruben*, 136 Wn.2d at 899. Here each
6 of the individual Plaintiffs are not “losing” but were illegally rejected from consideration by
7 the Governor’s Office and therefore hold a greater interest in the seats at issue by virtue of the
8 statute authorizing the Council.

9 **2. AGC Has Sufficient Interest for a Writ of Mandamus Requiring the**
10 **Governor to Appoint a Qualified Representative to the Council**

11 Similarly, AGC has sufficient interest for a writ of mandamus requiring Governor
12 Inslee to appoint a qualified representative for its industry. As noted in the preceding section,
13 it is the trade association representing an industry identified by the Legislature as having
14 sufficient interest in the state and local building code to require membership in the Council.
15 The Legislature also recognized that representatives of specific industries must be employed
16 within those industries to hold a voting seat on the Council. RCW 19.27.070(4)(d)-(e).

17 Here, a writ of mandamus is the only appropriate remedy. The statute plainly requires
18 the governor to appoint qualified representatives to the Council who are employed in the
19 industry that they represent. RCW 19.27.070(g); RCW 19.27.070(4)(d). It also requires the
20 governor to appoint representatives for private sector industries from a list of nominees
21 provided by the trade associations representing those private sector industries. RCW
22 19.27.070(5). This is thus a matter where a writ of mandamus is appropriate as “the law
23 prescribes and defines the duty to be performed with such precision and certainty as to leave
24 nothing to the exercise of discretion or judgment.” *SEIU Healthcare 775NW*, 168 Wn.2d at
25 599. The governor has a clear duty to act by selecting a representative nominated by AGC to
26 the Council. RCW 19.27.070(5). But here, AGC nominated Orth. Though AGC has not

1 provided three nominees to the Governor’s Office, the statute does not permit the governor to
2 appoint Council members not included in AGC’s list unless *no names* are put forth. RCW
3 19.27.070(5). And the statute also requires the governor to seek nominations before making
4 any appointments. Here, the Governor’s Office made one request for two additional
5 nominations before appointing Millbauer, even though AGC re-nominated the qualified
6 incumbent and was given no notice that the governor intended to appoint an individual with
7 no apparent connection to the general construction industry if AGC failed to provide
8 additional nominees.

9 But even if the governor is permitted to appoint a Council member other than Orth
10 because AGC did not provide three nominees, the statute still requires that the representative
11 of the general construction commercial and industrial building industry be employed within
12 that industry. The current appointee, James Millbauer, is not employed in general
13 construction, specializing in commercial and industrial building. Rather, he is a journeyman
14 pipefitter and plumber working at a government worksite. That does not qualify Millbauer to
15 represent general construction. The Legislature provided separate Council seats to represent
16 “the construction building trades” and “manufacturers, installers, or suppliers of building
17 materials and components,” respectively. RCW 19.27.070(g)(vi)-(vii). Millbauer, however,
18 was not appointed for those seats, which are already filled. *See* Vanderwood, Ex. B¹

19 **D. The Governor’s Unlawful Appointments Violate Plaintiffs’ Rights to Qualified
20 Representation on the Council**

21 Plaintiffs’ clear injuries satisfy the second and third elements necessary for a
22 preliminary injunction. Plaintiffs’ well-grounded fear of immediate invasion of their rights is
23 manifest in the Governor’s appointment of Millbauer and Maschmedt to the Council.
24 Plaintiffs do not merely fear that the Governor will violate the Council statute with

25 ¹ The record suggests that Millbauer in fact applied to serve one of two “city elected
26 legislative body members or mayors” positions given his current role as a City of Kennewick
councilmember. *See* RCW 19.27.070(1)(b); Vanderwood Decl., Exhibits D, G.

1 appointments that ignore their nominees and appoint unqualified representatives, because
2 those invalid appointments have come to pass.

3 And Plaintiffs will suffer actual injury if those members are permitted to maintain
4 their seats and vote on Council actions. Among other duties, the Council is the body
5 responsible for adopting and maintaining the state building code, RCW 19.27.074(1)(a)
6 (referring to RCW 19.27.031, “State building code--Adoption--Conflicts—Opinions”), and
7 also approves or denies city or county amendments to the state building code. RCW
8 19.27.074(1)(b). The Legislature’s intent to ensure representation from key stakeholders
9 directly affected by state and local building codes is clear from its structure that includes not
10 only representatives from the general construction industry, but also representatives from
11 elected officials, local code enforcement and fire service officials, the disabled community,
12 trades, architects, engineers, and the building materials or components industry. RCW
13 19.27.070(1). The Legislature further ensured appropriate representation by directing the
14 governor to seek nominations provided by trade associations representing private sector
15 industries to appoint the seats representing those industries. Failure to do so, and instead
16 appointing unqualified representatives for those seats, self-evidently injures Plaintiffs.

17 **E. Plaintiffs’ Proposed Injunction Would Preserve the Status Quo and Is Narrowly**
18 **Drawn to Allow the Council to Continue to Function**

19 Plaintiffs’ proposed injunction would preserve the status quo before Millbauer and
20 Maschmedt were appointed to their seats. It would prevent improperly appointed
21 representatives to the two Council seats for the general construction industry from voting,
22 while still allowing the Council to make decisions pursuant to its statutory responsibilities.
23 *See* RCW 19.27.070(5)(b); *see also* .070(4)(e) (non-qualifying members may only participate
24 in ex officio status until a replacement is appointed). The balance of equities favors Plaintiffs
25 here, where there is little if any harm to the public because the Council can continue to
26 function; while the damage to Plaintiffs—and to the public—from improper representation on
the Council is substantial.

1 **VI. CONCLUSION**

2 For all of the foregoing reasons, entry of a temporary restraining order and a
3 preliminary injunction is warranted.

4 DATED: September 8, 2021

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