Honorable Sue Parisien
Noted for argument Friday, Feb. 23, 2018, 9:00 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CAN APARTMENTS, LLC, and EILEEN, LLC,

Plaintiffs,

vs.

CITY OF SEATTLE,

Defendant.

No. 17-2-05595-6 SEA

CITY OF SEATTLE'S REPLY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

CONTENTS

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I. INTRODUCTION

The City is entitled to summary judgment on Plaintiffs' claims.

II. ARGUMENT

A. Plaintiffs present no fundamental attribute of property ownership.

Plaintiffs tacitly concede they could not prove a taking under the federal or (incorrect) Washington takings analysis. Searching for support beyond *Manufactured Housing*, they misread a *Guimont* footnote as supporting their claim that depriving any fundamental attribute of property ownership is a *per se* taking.[1] *Guimont* explained that one may press a *facial* challenge under Washington's analysis by alleging a regulation: causes a physical invasion; denies all economically viable use; destroys a fundamental attribute of property ownership; or fails to substantially advance a legitimate state interest.[2] But only two facial challenges—physical invasion and denial of economically viable uses—qualify for *per se* treatment: "if the owner alleges a 'physical invasion' or 'total taking' and fails to prove that either has occurred, **then there is no *per se* constitutional taking**."[3] "Not every infringement on a fundamental attribute of property ownership necessarily constitutes a 'taking'."[4] If the facial claim implicates some other fundamental attribute of property ownership, "the court proceeds with its taking analysis" by asking whether the regulation substantially advances a legitimate state interest or passes the *Penn Central* factors.[5]

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[1] Response/Reply at 7-8 (citing *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993)).

[2] *Guimont*, 121 Wn.2d. at 605-06 and nn.7-8.

[3] *Id.* at 603 (emphasis added).

[4] *Id.* at 603 n.6.

[5] *Id.* at 603-04.

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Plaintiffs' takings claim rests on *Manufactured Housing*. Its lead and concurring opinions concluded a statute deprived property owners of a fundamental attribute of property ownership and effected a *per se* taking, but they arrived by different routes: the lead opinion by misreading Washington precedent and the concurrence by contorting federal authority.[6] Because no majority agreed on a rationale, *Manufactured Housing* remains nonbinding beyond its fact-specific ruling.[7]

Even if *Manufactured Housing* were good law, Plaintiffs present no fundamental attribute of property ownership. They claim a right to select a tenant, but cite no authority recognizing that right.[8] They extrapolate from the rights to exclude others and dispose of property.[9] This attempt collides with authority rejecting categorical protection for a landlord's alleged right to exclude or not choose particular individuals after opening property to others. The right to exclude or not choose tenants is a right against *all* tenants, not *certain* tenants.[10] *Guimont* used that logic to reject a physical invasion claim and a claimed infringement of the rights to exclude or dispose of property:

> The Act on its face does not force park owners to allow others to occupy their land. Rather, the park owners have voluntarily rented space to the mobile home

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[6] *Compare Manufactured Housing Communities of Wash. v. State*, 142 Wn.2d 347, 362-64, 13 P.3d 183 (2000), *with id.* at 381-83 (Sanders, J., concurring). Plaintiffs mistakenly argue a dissent endorsed the lead opinion's misreading of Washington law. Response/Reply at 6. *Cf.* 142 Wn.2d at 407 n.12 (Talmadge, J., dissenting) ("simply labeling something a fundamental attribute of property does not automatically mean its deprivation is a categorical taking").

[7] *See Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998).

[8] Opening at 8, 10.

[9] *E.g.*, *id.*; Response/Reply at 10, 12. Plaintiffs also claim the power to dictate a right of first refusal, but Plaintiffs rely on *Manufactured Housing*, which explains that power derives from the right to dispose of property. *Manufactured Housing*, 142 Wn.2d at 364-66.

[10] *E.g., Yee v. City of Escondido*, 503 U.S. 519, 528-29, 531 (1992); *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53 (1987); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 648, 854 P.2d 23 (1993).

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> owners, and the Act itself does not compel the park owners to continue this relationship . . . . Thus, the park owners have **failed to show** that the Act on its face requires any **"physical invasion"** of their property. **Likewise, for the same reasons**, the Act does **not unconstitutionally infringe any other fundamental attribute of property ownership, such as the right to** possess, **exclude others, or dispose of property**.[11]

Plaintiffs find no support in RESTATEMENT (SECOND) OF TORTS § 167, which addresses a landlord's liability as a function of the consent to occupy property.[12] Plaintiffs overlook RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 3.1, which details how antidiscrimination laws have limited landlords' freedom to refuse tenancy.

If Plaintiffs' *per se* rule were the law, government could not enforce such laws without committing a taking. Under a *per se* rule, a landlord's rationale for excluding a particular tenant—however discriminatory—would be irrelevant. Faced with this, Plaintiffs invent a "right" to select a tenant unless the government uses a "reasonable regulation" to prove "intentional discrimination" case-by-case.[13] No such right exists.

B. Plaintiffs cannot carry their burden of proving a due process violation.

The "undue oppression" analysis resulted from the Washington Supreme Court misreading federal law.[14] To resuscitate that analysis, Plaintiffs invent an illusory distinction: "undue oppression" applies to land use regulations and "rational basis" applies elsewhere. The Washington Supreme Court never limited "undue oppression" to land use disputes, as

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[11] *Guimont*, 121 Wn.2d at 608 (emphasis added; footnote omitted).

[12] Response/Reply at 10.

[13] Response/Reply at 12-13.

[14] *See* City Opening/Response at 23-26.

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demonstrated by a raft of decisions applying it elsewhere.[15] And as Plaintiffs concede in a footnote, courts have recently applied the "rational basis" test to land use disputes.[16]

Plaintiffs do not substantiate their claim that the FIT Rule fails "rational basis" review.[17] They address no "rational basis" case law, retreating to "reasonableness" and Eighteenth Century concerns about government "omnipotence." Their hypotheticals merit no response. If the City forbade "employment interviews or physician discretion," a court would review the reasons for those restrictions under the "rational basis" analysis that Plaintiffs fail to apply to the FIT Rule.

Plaintiffs cannot carry their burden even under the discredited "undue oppression" analysis. Plaintiffs cannot dodge the conclusion that "the two most important factors are the fact that the present-day effect on Plaintiffs' property values is little to none and the fact that Plaintiffs may continue to use their properties as they have been used for decades."[18] Plaintiffs claim these are not "undue oppression" factors, even though the "actual factors" they cite include "the amount and percentage of value loss [and] the extent of remaining uses."[19] They continue to insist on a nuanced *per se* rule at odds with the factors—that regulating a class of property owners is unconstitutional unless it is applied only to the individuals the government

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[15] *See, e.g., Tiffany Family Trust Corp. v. City of Kent,* 155 Wn.2d 225, 238, 119 P.3d 325 (2005) (local improvement district assessments); *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 130-31, 118 P.3d 322 (2005) (enforcement of private covenant); *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 732-34, 57 P.3d 611 (2002) (prisoner labor conditions); *Asarco Inc. v. Department of Ecology*, 145 Wn.2d 750, 761-63, 43 P.3d 471 (2002) (hazardous waste clean-up liability); *Rivett v. City of Tacoma,* 123 Wn.2d 573, 581-83, 870 P.2d 299 (1994) (forced indemnity of a city for sidewalk injuries). *Accord Greenhalgh v. Department of Corrections,* 180 Wn. App. 876, 892, 324 P.3d 771 (2014) (prisoner clothing limitations).

[16] Response/Reply at 17 n.4 (citing *Olympic Stewardship Foundation v. State*, 199 Wn. App. 668, 719-21, 399 P.3d 562 (2017); *See Jespersen v. Clark County*, 199 Wn. App. 568, 584 n.10, 399 P.3d 1209 (2017).

[17] *See* Response/Reply at 18-20.

[18] *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1194 (9th Cir. 2012).

[19] *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990). *Cf.* Response/Reply at 21.

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demonstrates cause the harm, even if: only class members could cause the harm; they suffer no economic loss; and they need not change the use of their property. No such rule exists.

C. The FIT Rule prevails under *Zauderer*, which is not limited to disclosure rules curbing deception, and would prevail even under *Central Hudson*.

Plaintiffs do not contest that the FIT Rule survives review under *Zauderer*. They claim *Zauderer* is limited to disclosure requirements designed to prevent deception,[20] even though the Ninth Circuit joins others in holding *Zauderer* applies beyond preventing deception.[21] *Zauderer* controls the FIT Rule's disclosure requirement. The City prevails under it.

Plaintiffs still cannot explain how the FIT Rule restricts their speech to bring it under *Central Hudson*. But the City would prevail even under the two *Central Hudson* prongs Plaintiffs contest. First, they maintain landlords' speech concerns lawful activity and is not misleading. A court must reject a facial challenge "if there are any circumstances where the statute can constitutionally be applied."[22] Even though the City has the burden of proof in free speech cases, the City can meet its burden under the first prong by asking the court to imagine a circumstance where a landlord discriminates or misleads potential tenants.

Plaintiffs also contend the FIT Rule is more extensive than necessary to serve the City's interest. Plaintiffs again point to other options the City could have chosen,[23] ignoring the U.S.

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[20] Response/Reply at 26-27.

[21] *E.g.*, *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1116-17 (9th Cir. 2017), *petition for cert. filed* (U.S. Jan. 9, 2018); *American Meat Institute v. U.S. Dept. of Agriculture*, 760 F.3d 18, 21-23 (D.C. Cir. 2014); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005).

[22] *Washington State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000).

[23] Response/Reply at 30.

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Supreme Court's rejection of a least-restrictive-means requirement.[24] Plaintiffs' attempt to analogize the FIT Rule to the tobacco advertising ban in *Lorillard* falls short.[25] *Lorillard* noted the need to assess "the degree to which speech is suppressed—or alternative avenues for speech remain available—under a particular regulatory scheme . . . ."[26] *Lorillard* rejected that ban because, to protect children, it would have prevented any communication about tobacco, including with adults, in over 85% of metropolitan areas.[27] The FIT Rule bans nothing and targets only the activity where implicit bias in tenancy decisions could arise.

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[24] *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480-81 (1989).

[25] Response/Reply at 29-30 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)).

[26] *Lorillard*, 533 U.S. at 562.

[27] *Id.* at 562-63.

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III. CONCLUSION

The FIT Rule passes constitutional muster. The City respectfully asks the Court for summary judgment.

I certify that MS Word 2016 calculates all portions of this brief required by the Local Civil Rules to be counted contain 1,748 words, which complies with the Order Granting Joint Motion and Adopting an Amended Case Schedule.

Respectfully submitted February 16, 2018.

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CERTIFICATE OF SERVICE

This certifies that I served a copy of City of Seattle's Reply on Cross Motions for Summary Judgment and Order Granting Summary Judgment to the City of Seattle and Denying Summary Judgment to Plaintiffs Yim, *et al.* on counsel of record in the manner stated below with the Clerk of the Court using the ECR system, which will send notification of the filing to:

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DATED February 16, 2018, at Seattle, Washington.

s/Alicia Reise
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Honorable Suzanne R. Parisien
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CITY OF SEATTLE,

Defendant.

No. 17-2-05595-6 SEA

ORDER GRANTING SUMMARY JUDGMENT TO THE CITY OF SEATTLE AND DENYING SUMMARY JUDGMENT TO PLAINTIFFS YIM, *ET AL.*

[Clerk's Action Required]

[PROPOSED]

THIS MATTER came before the undersigned judge on Cross Motions for Summary Judgment filed by Plaintiffs Chong and Marilyn Yim, *et al.* ("Plaintiffs") and Defendant City of Seattle ("City"). The Court considered the oral arguments of counsel and the following documents:

1. Stipulated Facts and Record;
2. Plaintiffs' Motion for Summary Judgment;
3. City's Opening/Response on Cross Motions for Summary Judgment;
4. Plaintiffs' Response to City's Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment;
5. City's Reply on Cross Motions for Summary Judgment;
6. *Amicus Curiae* Memorandum of Rental Housing Association of Washington;

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7. City's Response to Rental Housing Association of Washington's *Amicus Curiae* Memorandum; and

8. the other pleadings and papers related to this matter on file with the Court.

Based on the foregoing, the Court FINDS:

1. There is no genuine issue as to any material fact.

2. Plaintiffs mount a facial challenge to Seattle Municipal Code Section 14.08.050. The law, often called the First-in-Time or "FIT" Rule, attempts to limit the recognized role of implicit bias in tenancy decisions. The FIT Rule codifies an industry-recommended best practice by requiring landlords to establish screening criteria and offer tenancy to the first applicant meeting them.

3. Plaintiffs claim the FIT Rule, on its face, violates the Washington Constitution by: taking their property without compensation; taking their property for an improper public use; violating their rights to substantive due process; and violating their free speech rights.

4. The Washington Supreme Court determined that, on the question of whether a regulation effects a taking of property, the Washington Constitution provides no greater protection than the U.S. Constitution, and Washington must apply the federal takings analysis to takings claims arising under either or both Constitutions.

5. Nevertheless, the Washington Supreme Court crafted a complex takings analysis at odds with the federal takings analysis.

6. Although this court must apply the complex Washington takings analysis, this court asks the Washington Supreme Court to reform Washington's takings law by expressly adopting the federal takings analysis and overruling Washington authority to the contrary.

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7. Because Plaintiffs have not attempted to apply the complex Washington takings analysis to this case, Plaintiffs have failed to carry their burden of proving the FIT Rule, on its face, takes their property.

8. Plaintiffs misplace their reliance on *Manufactured. Housing Communities of Washington v. State*, 142 Wn.2d 347 13 P.3d 183 (2000), a nonbinding plurality opinion regarding a distinguishable "fundamental attribute of property ownership."

9. Even if *Manufactured. Housing* were binding, Plaintiffs could not prove the FIT Rule effects a taking of their property. Plaintiffs assert the fundamental right to select tenants, but no such right exists. Court have consistently ruled that, where landlords have opened their property to tenants, the landlords have no right to select or exclude specific tenants or dispose of their property by leasing to specific tenants.

10. Because the FIT Rule takes no property, this court need not entertain Plaintiffs' claim that their property was taken for an improper private use.

11. The Washington Supreme Court also determined that Washington's due process clause is coextensive with and provides no greater protection than the federal due process clause.

12. Nevertheless, for roughly two decades, the Washington Supreme Court applied the "unduly oppressive" analysis to substantive due process claims arising under the Washington Constitution, U.S. Constitution, or both.

13. Although the Washington Supreme Court rejected the "unduly oppressive" analysis in favor of the "rational basis" analysis in *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), lower courts continue to be confused about the status of

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the "undue oppression" analysis, which Plaintiffs now invoke. This court asks the Washington Supreme Court to clarify Washington's substantive due process law by expressly adopting the "rational basis" analysis and overruling case law invoking the "undue oppression" analysis.

14. Under either the "rational basis" or "undue oppression" analysis, Plaintiffs have failed to carry their burden of proving the FIT Rule, on its face, violates their rights to substantive due process.

15. Because the Washington and U.S. Constitutions offer commercial speech the same protection, Washington courts apply the federal analysis to claims a regulation of commercial speech violates the Washington Constitution.

16. The FIT Rule imposes a disclosure requirement that passes muster under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and its progeny.

17. Plaintiffs claim incorrectly that the FIT Rule restricts landlords' commercial speech, thereby subjecting it to review under *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

18. Even if *Central Hudson* applied, the FIT Rule would survive review in this facial challenge.

19. Pursuant to CR 56(c), the City is entitled to judgment as a matter of law.

NOW, therefore, this Court ORDERS:

1. The City's Cross Motion for Summary Judgment is GRANTED.

2. Plaintiffs' Cross Motion for Summary Judgment is DENIED.

3. Judgment is hereby entered in favor of the City.

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4. Plaintiffs' action is DISMISSED with prejudice.

5. Each party shall sustain its own fees and costs.

DATED this _____ day of _____, 2018.

_____

Hon. Suzanne R. Parisien

Presented by:
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