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Supreme Court No. 95813-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

CITY OF SEATTLE,
Appellant.

**BRIEF OF AMICUS CURIAE
SEATTLE DISPLACEMENT COLATION**

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I. IDENTITIES AND INTEREST OF *AMICUS CURIAE*

The Seattle Displacement Coalition has advocated for the rights of vulnerable and marginalized low-income tenants for more than 40 years. The Coalition includes representatives of churches, community associations, and social service organizations, from across Seattle. On numerous occasions, the Coalition has successfully fought for the expansion of tenants' rights and to prevent the displacement of disadvantaged populations and communities of color.

The Coalition has a particular interest in measures like the City of Seattle's First in Time ("FIT") Rule that work to eliminate bias in the residential rental process as these measures benefit the populations that make up the members and clients of the Coalition.

II. INTRODUCTION

Amicus Seattle Displacement Coalition urges this Court to reverse the trial court and uphold the constitutionality of the FIT Rule. Specifically, the Coalition argues that requiring landlords to take a nondiscriminatory approach to renting residential properties does not constitute a taking under Article I Section 16 of the Washington Constitution. The Coalition asks this Court to clarify the test for determining what constitutes a regulatory taking in Washington State.

III. STATEMENT OF THE CASE

The Coalition adopts the Statement of the Case set forth in The City of Seattle's opening brief.

IV. ARGUMENT

Requiring landlords to take a nondiscriminatory approach to renting residential property does not constitute a taking. In *Manufactured Housing*, this Court conducted a *Gunwall* analysis and determined that the takings clause as articulated in Article I Section 16 of the Washington Constitution differs from the takings clause in the Fifth Amendment to the United States Constitution. However, that analysis focused on whether the property was taken for a public or a private use, not whether a government regulation amounted to a taking. Whether a government regulation constitutes a taking is governed by the United States Supreme Court analysis from 2005 articulated in *Lingle v. Chevron U.S.A. Inc.* Under that analysis, the FIT Rule does not constitute a taking.

A. Plaintiffs have not engaged in the *Gunwall* analysis required by parties who seek protections greater than those guaranteed by the United States Constitution.

In the seminal case of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), this Court developed a six-part test for determining when the Washington Constitution extends broader rights to Washington residents than does the United States Constitution. Since then, this Court has cited

Gunwall in approximately 250 different cases. One of the reasons *Gunwall* is so frequently cited is because this Court has required that “[e]ven where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications.” *State v. Ramos*, 187 Wn.2d 420, 454, 387 P.3d 650 (2017) (citing *State v. Pugh*, 167 Wn.2d 825, 835, 225 P.3d 892 (2009)). Therefore, even where this Court has previously determined that the Washington Constitution provides enhanced protections—such as in the context of takings claims—parties seeking enhanced protections are still required to evaluate why enhanced protections are appropriate in the context of their specific case.

Neither the Plaintiffs nor the trial court have provided the *Gunwall* analysis required to establish Plaintiffs’ claim that Plaintiffs are entitled to broader protections than those provided by the Takings Clause in the Fifth Amendment to the United States Constitution. Plaintiffs and the trial court cite only to *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000), to argue that the FIT Rule constitutes a taking. Because Plaintiffs have failed to provide the required analysis, this Court should evaluate Plaintiffs’ takings claims based on federal case law.

B. *Manufactured Housing* held only that takings claims under the state constitution are distinct with respect to public versus private use of taken property, not whether a regulatory taking has occurred in the first instance.

Manufactured Housing's lead opinion focused on the limits created by Article I Section 16 with respect to how property taken by the government can be used. The lead opinion determined that the Washington Constitution (which allows property to be taken only for a specific public *use*, as determined by courts) is more protective than the United States Constitution (which allows a taking for any public *purpose*, as generally determined by the legislature). See *Manufactured Housing*, 142 Wn.2d at 359-60 (contrasting federal "public purpose" law); *Kelo v. City of New London*, 545 U.S. 469 (2005) (reaffirming federal "public purpose" law).

The lead opinion assessed that distinction under the six *Gunwall* factors: "What is key is article I, section 16's absolute prohibition against taking private property for private use." *Manufactured Housing*, 142 Wn.2d at 357. "The key differences between the Fifth Amendment and article I, Section 16 are significant and support the literal interpretation of 'private use' as employed in the Washington Constitution." *Id.* at 358. "During the Washington State Constitution Convention in 1889, concern was publicly voiced over the taking of private property for private

enterprise.” *Id.* at 359. “The State of Washington has a long history of extending greater protections against governmental takings of private property by literally defining what constitutes ‘private use.’” *Id.* “The fifth *Gunwall* factor, structural differences between the federal and state constitutions, also favors enhanced protections to Washington citizens by maintaining a literal interpretation of ‘private use.’” *Id.* at 360. “It suffices to say that taking private property for private use is clearly a matter of local concern consistently recognized by Washington courts.” *Id.* at 361.

Manufactured Housing’s lead opinion then acknowledges that before determining what use the government seeks, the court must first determine whether property has been taken at all. *Id.* at 363-364 (“Before engaging in a takings analysis, however, it must first be determined if ‘property’ has actually been taken.”) The lead opinion, then engages in an analysis regarding whether the government regulation at issue constitutes a taking. *Id.* at 364-370. The analysis relies on both federal and other states’ takings jurisprudence. *See, e.g., id.* at 363-68 (citing federal, California, Maryland, Minnesota, New York, and Arizona cases).

When this Court decided *Manufactured Housing* in 2000, the state and federal case law governing what constitutes a regulatory taking was confusing and difficult to apply. *See* Roger D. Wynne, *The Path Out of Washington’s Takings Quagmire: The Case for Adopting the Federal*

Takings Analysis, 86 WASH. L. REV. 125, 134-139 (2011). However, there is no indication in the lead *Manufactured Housing* opinion itself suggesting that this Court intended to apply a unique Washington analysis to determine whether the regulation at issue effected a taking. As noted above, this Court cited to federal case law in making that determination.

Having determined that a taking occurred, the lead opinion went on to find that giving tenants of manufactured housing communities a first right to purchase could be considered a private use based on Washington State's takings clause: "Although preserving dwindling housing stocks for a particularly vulnerable segment of society provides a 'public benefit,' this public benefit does not constitute a public use." *Manufactured Housing*, 142 Wn.2d at 373. While the United States Supreme Court might have found a "public benefit" to be sufficient grounds for a taking under the federal constitution, the Washington State Supreme Court logically applied a more restrictive definition of "public use" for claims governed by Washington's Constitution.

Two subsequent decisions from this Court added nothing to the *Gunwall* analysis in *Manufactured Housing*'s lead opinion. *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003), resolved a dispute by distinguishing police powers and takings, not on whether Washington provides greater protection against regulatory takings. It mentioned

Manufactured Housing's Gunwall analysis only in a footnote without explaining or expanding it. *Id.*, 148 Wn.2d at 767 n.5. *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008), addressed a situation similar to *Eggleston* and, also in a footnote, cites *Manufactured Housing's Gunwall* analysis without expanding it. *Id.* 164 Wn.2d at 680 n.11.

As this analysis makes clear, the governing case law does not provide any indication that, whether a regulation effects a taking, should be evaluated differently under Washington takings jurisprudence than it would be under federal takings jurisprudence. The only applicable *Gunwall* analysis distinguishes the Washington Constitution only with respect to the public versus private use of property once a taking has been established. Therefore, this Court should seek guidance from the United States Supreme Court when evaluating whether a regulation effects a taking.

C. *Lingle* changed and clarified the federal analysis regarding when a regulatory taking has occurred.

After decades of confusion, in 2005, Justice O'Connor wrote a seminal decision clarifying the test for determining when a regulatory taking has occurred. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

The court articulated a three-part test for establishing takings claims:

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth

Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property -- however minor -- it must provide just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "all economically beneficial us[e]" of her property. *Lucas*, 505 U.S., at 1019, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. 505 U.S., at 1026-1032, 120 L. Ed. 2d 798, 112 S. Ct. 2886.

Outside these two relatively narrow categories (and the special context of land-use exactions discussed below, see *infra*, at 546-548), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

Id., 544 U.S. at 538 (2005). *Lingle* recognized that it was "correct[ing] course," with respect to its takings jurisprudence. *Id.* at 548.

Neither *Lingle* itself, nor the opinions *Lingle* recognized as guiding its takings analysis (*Loretto*, *Lucas*, and *Penn Central*), recognize the "fundamental attribute of property ownership" concept articulated in *Manufactured Housing*.

This Court has never directly addressed the issue of whether the United States Supreme Court's test in *Lingle* governs the question of

whether a regulation constitutes a taking under the Washington Constitution. Again, Plaintiffs offer no *Gunwall* analysis to support a claim that the Washington Constitution requires a different test. With no authority or argument otherwise, this Court now has the opportunity to explicitly adopt the federal regulatory takings analysis.

D. Under *Lingle*, the FIT Rule does not effect a taking.

A straightforward application of the three-part test articulated in *Lingle* demonstrates that the FIT Rule does not constitute a taking. The FIT Rule is not a physical invasion of the property like the requirement to install cable facilities. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In fact, the court in *Loretto* stated that its ruling would not disturb the government's ability to regulate the landlord-tenant relationship: "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id.* at 440. Further, the FIT Rule does not deprive the owner of all economically beneficial use of the property, such as a regulation that prohibits a landowner from erecting any permanently inhabitable structures. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

In *Penn Central* the United States Supreme Court explicitly rejected the idea described in *Manufactured Housing* that property rights should be considered as discrete elements with each element examined separately:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . .

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

That court found the more appropriate analysis to be based on “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . .” *Id.* at 124. In the instant action, Plaintiffs have not argued that the FIT Rule negatively impacts their invest-backed expectations. The FIT Rule simply prohibits landlords from engaging in a rental process that is inherently subject to explicit and implicit biases. Therefore, the FIT Rule is not a taking when evaluated pursuant to the *Penn Central* analysis.

V. CONCLUSION

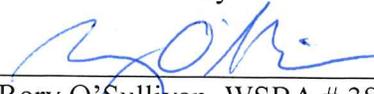
The Seattle Displacement Coalition urges this Court to adopt the federal regulatory takings analysis so that the City of Seattle can adopt

ordinances that advance the Coalition's mission of limiting displacement of its members and clients.

Respectfully submitted this 25th day of April, 2019.

SEATTLE DISPLACEMENT COALITION

By



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