WASHINGTON SUPREME COURT CLARIFIES LAW ON REGULATORY TAKINGS

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The Washington Supreme Court recently overturned years of precedent and made it more difficult for parties to claim that government regulation has effected an unconstitutional "taking" of their property requiring compensation. It is no longer enough for property owners to show that government regulation destroyed a "fundamental attribute of property ownership." Now, to prevail on a regulatory takings claim in Washington, property owners must show that they either suffered a permanent physical invasion of their property or lost all economically beneficial use of it. The Washington Supreme Court's ruling in *Yim v. City of Seattle*[1] is intended to align Washington law with federal law.

The underlying issue in *Yim v. City of Seattle* was whether Seattle's First in Time ("FIT")[2] rule effected a regulatory taking of city landlords' property. The FIT rule requires Seattle landlords to note when prospective tenants submit their rental applications and to accept the first applicant who meets the landlord's rental criteria. Seattle landlords filed suit, alleging the rule "on its face" accomplished an unconstitutional regulatory taking by destroying a fundamental aspect of ownership: an owner's right to choose to whom to rent their property.

At the trial court level, plaintiffs prevailed on summary judgment, with the lower court finding that the FIT rule facially violated the Takings, Due Process, and Free Speech clauses of Washington's constitution. The Washington Supreme Court took direct review. In a victory for the City of Seattle and its efforts to regulate landlords' rental practices, it reversed the lower court and upheld the FIT rule.

In upholding the FIT rule, the Washington Supreme Court rejected its prior holdings on regulatory takings, as set forth in *Manufactured Housing Communities of Washington v. State*.[3] *Manufactured Housing* held that a law could accomplish a per se regulatory taking if it destroyed one or more of the fundamental attributes of property ownership, such as the right to occupy, exclude, dispose, or transfer. However, the holding of *Manufactured Housing* was based on earlier rulings of the U.S. Supreme Court that have since been reversed. In *Yim*, the Washington Supreme Court clarified that Washington has never defined regulatory takings as a matter of independent state law. Rather, Washington has followed and will continue to follow federal precedent when evaluating regulatory takings claims. As the federal legal underpinnings of Washington's previous stance on regulatory takings had disappeared, the court found it appropriate to realign Washington law with current federal law.

Consistent with federal law, a regulatory takings claim in Washington can now no longer be based merely on the alleged destruction of an attribute of property ownership. Rather, Washington courts will now recognize only two narrow categories of per se regulatory takings: (1) where government regulation requires a property owner to suffer a permanent physical invasion of his or her property or (2) where regulations completely deprive an owner

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of *all* economically beneficial use of his or her property. This interpretation mirrors federal law as clarified by recent U.S. Supreme Court decisions.[4]

Following *Yim*, property owners will likely find it more challenging to bring a per se regulatory taking or inverse condemnation claim against the state. Now, property owners will have to show that they meet the narrower federal standards and can no longer claim destruction of a "fundamental attribute of property ownership." Inverse condemnation claims may be particularly difficult to sustain in situations where there is no physical taking of the property.

Additionally, courts may find that laws such as the one invalidated in *Manufactured Housing*, which granted mobile home residents a right of first refusal to buy their mobile home park, no longer qualify as unconstitutional takings. After the *Yim* decision, state and local governments may be encouraged to develop new legislation impacting property that may now be considered permissible government regulation by Washington courts.

NOTES

[1] Chong Yim v. City of Seattle, No. 95813-1 (Wash. Nov. 14, 2019).
[2] Seattle Municipal Code 14.08.050.
[3] 142 Wash. 2d 347, 13 P.3d 183 (2000) (plurality opinion).
[4] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). In *Yim*, the Washington Supreme Court also clarified that substantive due process challenges to laws regulating use of property are reviewed under a "rational basis" standard, meaning that a law regulating the use of property violates substantive due process only if it "fails to serve any legitimate governmental objective," making it "arbitrary or irrational." *Lingle*, 544 U.S. at 542.

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