International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 19 – November 21, 2019

Housing: Seattle Rule Requiring Landlords to Accept First Conforming Rental Applications Is Not a Taking and Does Not Violate Due Process

Yim v. City of Seattle, No. 95813-1 (Wa. Nov. 14. 2019)

Reversing the lower court and disavowing a substantial body of Washington regulatory takings law precedents, the state's Supreme Court holds that Seattle's "FIT" rule, which requires a landlord to provide all interested rental applicants with the same criteria and data, and to accept the first conforming rental application, does not constitute a taking under the Washington Constitution, and does not require intermediate scrutiny.

In 2014, the Seattle City Council amended Seattle's Open Housing Ordinance to include the so-called "first in time" rule ("FIT"). FIT requires that Seattle property owners seeking to fill a tenancy must first "provide notice to a prospective occupant" of "the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion," as well as "all information, documentation, and other submissions necessary for the owner to conduct screening." The owner must note the date and time when each completed rental application is received and screen them in chronological order—and then "offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for approval of the application."

Various landlords sued, challenging FIT facially, seeking "a declaration that the City's [FIT] rule … violates the Takings, Due Process, and Free Speech Clauses of the Washington State Constitution" and moving for a permanent injunction against enforcement of FIT.

The trial court ruled for plaintiffs on each claim, concluding that FIT facially violated Washington State Constitution article I, section 16 (the takings clause), section 3 (the due process clause), and section 5 (the free speech clause).

The Washington Supreme court reversed. It framed the case along four questions:

- Does the FIT rule facially effect a regulatory taking under the Washington Constitution?
- If so, is the taking for private use?
- Does FIT facially violate the plaintiffs' right to substantive due process?
- Does FIT facially violate the plaintiffs' right to free speech?

Regulatory Taking: The plaintiffs asserted that, under the state's *Manufactured Housing* decision, Washington courts have recognized a unique species of regulatory takings--any regulation that "destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others and to dispose of property)." They argued that FIT fell into this category "because it strips landlords of a fundamental attribute of property ownership—the right to choose to whom one will rent their property."

The state Supreme Court disagreed, affirming that it "has always attempted to define regulatory takings [under the Washington Constitution] consistently with federal courts applying the takings clause of the Fifth Amendment. And because "the federal definition of regulatory takings has been substantially clarified since we last considered the issue," a long line of Washington state regulatory takings precedent, including *Manufactured Housing,* had been invalidated.

The first federal decision to undermine *Manufactured Housing* was the US Supreme Court's 2002 holding in *Tahoe Sierra*, a case construing two temporary development moratoria. A number of property owners brought a facial takings claim, arguing that the regulations "g[ave] rise to an unqualified constitutional obligation to compensate [them] for the value of its use during [the moratoria]." The Supreme Court rejected their claim, cautioning that categorical rules for regulatory takings claims are appropriate only in an "'extraordinary circumstance,'" such as when a permanent regulation provides that "'no productive or economically beneficial use of land is permitted.'" *Tahoe-Sierra* thus deeply undermined *Manufactured Housing's* view that a categorical rule is appropriate whenever a property owner is deprived of any part of "the 'bundle of sticks' representing the valuable incidents of ownership."

The Supreme Court's 2005 decision in *Chevron USA* further clarified the issue (and further undermined *Manufactured Housing*), holding that the sole federal standard in analyzing a facial takings claim is whether the restriction is a "per se" taking—one that "requires an owner to suffer a permanent physical invasion of her property" or "completely deprive[s] an owner of ' all economically beneficial us[e]' of her property"--or a "partial" taking, which federal courts decide based on a multifactor test (the *Penn Central* factors).

The plaintiffs had not argued that FIT fell into either of the per se categories set forth in *Chevron U.S.A*., and they could not: "On its face, the FIT rule does not require any property owners to suffer any permanent physical invasion of their properties, and the plaintiffs do not contend that the FIT rule deprives them of any economically beneficial uses of their properties, let alone every economically beneficial use." Nor had the plaintiffs contended that FIT was a regulatory taking under the *Penn Central* factors. The state Supreme Court reversed the trial court, holding that plaintiffs did not show how FIT facially effected a regulatory taking of their property. Without such a taking, there was no need to determine whether it was for private use.

Substantive Due Process: Plaintiffs next claimed that FIT facially violated their right to substantive due process, arguing for heightened scrutiny because FIT regulates a fundamental attribute of property ownership. The Washington Supreme Court, again deferring to federal Fifth and Fourteenth Amendment jurisprudence, found that rational basis applied to a claim under the Washington Constitution. Under *Chevron U.S.A*., 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." Here, the purpose of FIT was to mitigate the impact of implicit bias in tenancy decisions, and the FIT requirements were rationally related to achieving that purpose:

> Rational basis review does not invite a demanding inquiry by this court into whether the FIT rule is good policy. Instead, our task is limited to deciding whether mandating industry-recommended best practices for avoiding discrimination in tenancy decisions is rationally related to reducing the influence of implicit bias in tenancy decisions. The answer is clearly yes.

Free Speech: Finally, the Washington court held that FIT did not facially violate free speech rights. The trial court had agreed with the plaintiffs that FIT was subject to intermediate scrutiny and "cannot survive." The state Supreme Court pointed out that, under *Zauderer,* the level of scrutiny applied to laws governing commercial speech depends on whether the law at issue actually restricts commercial speech or simply requires commercial speakers to include factual disclosures: if the law merely requires factual disclosures by commercial speakers, review is deferential because a person's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal." The plaintiffs contended that FIT provides that "[l]andlords cannot decline to communicate a minimum threshold or communicate a flexible standard and then weigh the credit history against other positive or negative factors in the application." But the court found nothing in the text of FIT to supports that contention.

"On its face, the FIT rule requires only that landlords disclose factual information about their own rental criteria. It is therefore subject to deferential scrutiny in accordance with *Zauderer*." Against this backdrop, the City could easily demonstrate that the rule passed deferential scrutiny—it was "directly connected to the City's interest in ensuring that the

same rental criteria are applied to all applicants rather than subjecting some applicants to more demanding criteria due to the influence of implicit bias."

Sitting en banc, all nine justices reversed the trial court and remanded with instructions to grant Seattle's motion for summary judgment.

LINK

IMLA congratulates Roger Wynne and Sara O'Connor-Kriss of the Seattle City Attorney's Office, as well as Pete Holmes, Seattle City Attorney, on this significant win.