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Hon. Jason Poydras
Noted for Hearing:
Friday, February 14, 2025, 10:00 a.m.

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

GRE DOWNTOWNER LLC, a Washington limited liability company, d/b/a ADDISON ON FOURTH, Plaintiff, v. CITY OF SEATTLE, Defendant.	No. 24-2-24318-6 SEA DEFENDANT CITY OF SEATTLE'S **REPLY** REGARDING ITS MOTION TO DISMISS

I. ARGUMENT

This Court should grant the City's motion to dismiss because GRE cannot prevail on its takings claims under any hypothetical facts consistent with its Complaint.

A. GRE's challenge is untimely.

A regulatory takings claim must be subject to a limitations period. Arguing otherwise, GRE cites *Petersen*, which held that a claim of direct government appropriation is subject to no limitations period, but is practically constrained by the ten-year adverse possession period. Response at 10–11 (citing *Petersen v. Port of Seattle*, 94 Wn.2d 479, 483 (1980)). *Petersen* has no place in regulatory takings law:

> We recognize that, unlike eminent domain and inverse condemnation [for direct appropriation], regulatory takings do not involve actual appropriation of property, and therefore could never meet the elements of adverse possession. Thus, if we

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> applied the *Petersen* rule to a regulatory taking, there would be no time bar whatsoever on a claim for compensation. . . . This prospect is a troubling possibility.

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 632 (1987), *abrogated on other grounds*, *Yim v. City of Seattle*, 194 Wn.2d 651 (2019); *accord Lambier v. City of Kenniwick*, 56 Wn. App. 275, 285 n.7 (1989) (the Washington Supreme Court "held the adverse possession theory did not apply to cases of regulatory taking").

Because the Washington Supreme Court has yet to determine which period applies to regulatory takings claims, this Court must. Using the three-year period is not ceding to federal law. *Cf*. Response at 11. It is recognizing persuasive federal authority and reducing forum shopping. *See* Motion at 11–12.

GRE argues that its *Penn Central* claim—though not its physical invasion claim—is timely under the three-year period, asserting that it did not accrue until 2022, when "the impacts of the Ordinances on the Addison manifested to the point that there existed a taking . . . ." Response at 12:21. That contradicts: (1) the Complaint's repeated allegation that those impacts manifested in 2018 or 2019, *e.g.*, Complaint ¶¶ 9, 15, 18, 70, 99; and (2) caselaw holding that "the final decision of the government actor . . . triggers accrual of [an as-applied] takings claim, not the ultimate impact of that decision," *Campbell v. United States*, 932 F.3d 1331, 1337–39 (Fed. Cir. 2019); *accord* Motion at 13:8 (citing caselaw holding that as-applied claims accrue when there is no question about how the challenged law applies to the property). Under GRE's "combined" theory, that decision was passage of the final two ordinances in September 2021.

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B. GRE fails to state a physical invasion claim.

GRE alleged a physical invasion takings claim premised on the cumulative impact of four laws. Complaint ¶ 23. Because controlling and persuasive caselaw holds two of those laws effect no taking, GRE's "combined" claim fails. *See* Motion at 14.

GRE now focuses on the Roommate Ordinance ("as exacerbated by" the other laws), complaining that it forces GRE to accept "individuals to whom [GRE] has never rented nor ever agreed to rent." Response at 22–23. Even if this new argument is consistent with the Complaint, it fails.

GRE urges this Court to follow *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), not *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Id*. But GRE overlooks binding Washington authority—backed by federal caselaw—holding that *Yee*, not *Cedar Point*, controls challenges to landlord-tenant regulations. *See* Motion at 16–17. Like GRE, the *Yee* landlords could not "decide who their tenants will be," 503 U.S. at 526, but *Yee* rejected a physical invasion takings claim: "Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531.

The Washington Supreme Court likewise recognizes that a landlord may have to accept unwanted tenants:

> [Per se] regulatory takings claims are appropriate only in extraordinary circumstances. It is unlikely that [the U.S. Supreme Court] would recognize extraordinary circumstances are present whenever a regulation limits the right to choose to whom one will rent their property. If that were so, every antidiscrimination law that prohibits a landlord from rejecting a tenant based on protected characteristics would be a per se regulatory taking requiring either compensation or invalidation.

Yim, 194 Wn.2d at 670 (cleaned up).

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Without explanation, GRE complains incorrectly that the City's argument "crosses the line to deal with the merits, not the allegations of the Complaint." Response at 23:6. To dismiss under Rule 12(b)(6) is to dismiss on the merits. *See Eng v. Specialized Loan Servicing*, 20 Wn. App. 2d 435, 442 (2021).

C. GRE fails to state a *Penn Central* claim.

1. Courts routinely dismiss *Penn Central* challenges to tenant protections under Rule 12(b)(6).

"Although the *Penn Central* balancing test is necessarily quite fact specific, federal courts often examine these factors at the motion to dismiss stage to assure plaintiffs have satisfied their burden to establish the plausibility of their claims." *Pakdel v. City and Cnty. of San Francisco*, 636 F. Supp. 3d 1065, 1074–75 (N.D. Cal. 2022) (dismissing a tenant-protection challenge under Rule 12(b)(6)). Courts routinely dismiss *Penn Central* challenges to tenant protections under Rule 12(b)(6). In the last two years alone, examples include: *GHP Mgmt. Corp. v. City of Los Angeles*, No. 23-55013, 2024 WL 2795190, *2 (9th Cir. May 31, 2024), *cert. petition filed* No. 24-435 (Oct. 17, 2024); *74 Pinehurst LLC v. New York*, 59 F.4th 557, 566–68 (2d Cir. 2023), *cert. denied,* 218 L. Ed. 2d 66 (2024); *335-7 LLC v. City of New York*, No. 21-823, 2023 WL 2291511, *3-*4 (2d Cir. Mar. 1, 2023), *cert. denied*, 218 L. Ed. 2d 66 (2024); *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 553–56 (2d Cir.), *cert. denied*, 144 S. Ct. 264 (2023); *Evans Creek, LLC v. City of Reno*, No. 21-16620, 2022 WL 14955145, *1–*2 (9th Cir. Oct. 26, 2022), *cert. denied*, 143 S. Ct. 2561 (2023); *Williams v. Alameda Cnty.*, No. 3:22-CV-01274-LB, 2024 WL 4050393, *4–*5 (N.D. Cal. Sept. 3, 2024); *Brothers Holding LLC v. Township of Weehawken*, No. 2:23-cv-03185 (BRM) (LDW), 2024 WL 2815027, *5–*7 (D.N.J. May 31, 2024); *1210 Cacique St., LLC v. City of Santa Barbara*, No. CV 23-8152 PA (RAOX), 2024 WL 2037143, *4–*6 (C.D. Cal. Apr. 26, 2024), *appeal filed*

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1 No. 24-7728 (9th Cir. Nov. 21, 2024); *Gallo v. District of Columbia.*, No. 1:21-CV-03298
2 (TNM), 2023 WL 7552703, *6 (D.D.C. Nov. 14, 2023), *appeal filed* No. 23-7158 (D.C. Cir.
3 Nov. 22, 2023); *Ruradan Corp. v. City of New York*, No. 22-CV-03074 (LJL), 2023 WL
4 2632185, *9–14 (S.D.N.Y. Mar. 24, 2023); *accord Rancho de Calistoga v. City of Calistoga*,
5 800 F.3d 1083, 1090–91 (9th Cir. 2015).

6 Three decisions cited by GRE suggesting caution when considering a motion to dismiss
7 provide no reason to deny the City's motion. *See* Response at 14–15. None involved a takings
8 claim against tenant protections, which courts routinely dismiss under Rule 12(b)(6). *McDougal*
9 *v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991), is outdated. When it was decided, courts had
10 "to balance the strength of the public interest against the severity of the private deprivation,"
11 prompting *McDougal* to observe that "[t]his can seldom be done on the pleadings." 942 F.2d at
12 676 (citing *Agins v. City of Tiburon,* 447 U.S. 255 (1980)). But the Supreme Court later mooted
13 *McDougal*'s observation by removing that requirement from regulatory takings law. *Lingle v.*
14 *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (overruling *Agins*). *Berst v. Snohomish County*, 114
15 Wn. App. 245, 257 (2002), is undercut by its reliance on *McDougal*. Besides, both decisions
16 acknowledged that "dismissal of a complaint for inverse condemnation is not always
17 inappropriate." *Id.* (quoting *McDougal*, 942 F.2d at 676). And *Washington Food Indust. Ass'n v.*
18 *City of Seattle*, 1 Wn.3d 1, 33–35 (2023), merely held it inappropriate to dismiss a unique claim
19 arising from a gig worker premium pay ordinance. That decision has no bearing on the more
20 settled law surrounding challenges to tenant protections.

21 **2. *Penn Central*'s factors favor the City.**

22 GRE cites no decision upholding a landlord's *Penn Central* claim against a tenant
23 protection, while the City cites many rejecting such claims. *E.g.*, Motion at 21:5, 22:12, 24:11.

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1 The Complaint fails to allege "before" and "after" *property* values—required elements
2 under *Penn Central*'s "economic impact" factor. *See* Motion at 19–20. Instead, the Complaint
3 and Response focus on alleged *income* impacts. "But the mere loss of some income because of
4 regulation does not itself establish a taking. Rather, economic impact is determined by
5 comparing the total value of the affected property before and after the government action."
6 *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018).

7 Even if this Court could imagine facts showing that the City laws sufficiently reduced
8 GRE's property value, GRE does not contest that the City can prevail on the second two factors
9 alone. *Cf.* Motion at 21–22. *See, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers*
10 *Pension Trust*, 508 U.S. 602, 645 (1993) ("mere diminution in the value of property, however
11 serious, is insufficient to demonstrate a taking").

12 The "expectations" factor favors the City. GRE recites its projections for the Addison,
13 notes how they were informed by "the stability of the relevant landlord-tenant laws," and asserts
14 that its expectations "are alleged to be objectively reasonable." Response at 19–20. But alleging
15 objectivity cannot overcome caselaw holding that expecting stable tenant protections is
16 objectively unreasonable. *See* Motion at 22–23. GRE claims it anticipated changes to City laws,
17 just not ones with such an impact. Response at 20:12. But that conflates the "expectation" factor
18 (which gauges the type of expected change) with the "economic impact" factor (which measures
19 its magnitude).

20 GRE argues the "character" factor favors GRE because the Roommate Ordinance effects
21 a physical invasion taking. Response at 20–22. It does not. Even if it did, GRE fails to explain
22 how that shapes the character of the other five laws. GRE offers no response to caselaw routinely
23 holding that the "character" factor favors government when applied to generally applicable

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tenant protections, or the decisions recognizing the broad public purposes of the City laws. *See* Motion at 24–25.

II. CONCLUSION

Because GRE cannot sustain its claims under any hypothetical facts consistent with its Complaint, the City respectfully asks this Court to grant the City's motion to dismiss.

We certify that MS Word calculates that all portions of this memorandum required by the Local Civil Rules to be counted contain 1,738 words, which is in compliance with the Local Civil Rules.

Respectfully submitted February 10, 2025.

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of this document with the Clerk of the Court using the KC Scripts Portal, which will send notification of the filing to the following:

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I further certify that, on this date, I sent a copy of this document and a copy of [Proposed] Order Granting City of Seattle's Motion to Dismiss by email pursuant to an agreement under CR 5(b)(7) to the above-named attorneys for Plaintiff GRE Downtowner LLC and:

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DATED this 10th day of February, 2025, at Seattle, Washington.

s/Eric Nygren
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