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Honorable Jason Poydras  
Hearing Date: February 14, 2025 at 10:00AM  
With Oral Argument

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

**NOTICE OF PRESENTATION FOR  
HEARING ON MOTION TO DISMISS**

# GRE Downtowner's Opposition to The City of Seattle's Motion to Dismiss

February 14, 2025 Hearing  
Hon. Jason Poydras

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

GRE DOWNTOWNER LLC, a Washington limited liability company, d/b/a ADDISON ON FOURTH  
v.  
CITY OF SEATTLE

# The Addison - 308 Fourth Ave. S



## “Master of the Complaint”

*Royal Canin U. S. A., Inc. v. Wulfschleger*, No. 23-677, 604 U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, 2025 WL 96212, at \*7 (Jan. 15, 2025)

**“The plaintiff is ‘the master of the complaint,’**  
and therefore controls much about her suit.”

## Facial Versus As Applied Challenges Rule 12(b) Versus Rule 56

*Rental Housing Association (“RHA”) v. City of Seattle*, 22 Wash. App. 2d 426, 437, 512 P.3d 545, 553 (2022)

Applying Rule 56: “The Landlords present facial constitutional challenges to the ordinances. **In facial challenges, we consider only if the ordinances’ language violates the constitution and not whether the ordinance would be constitutional as applied to the facts of a particular case.** We reject a facial claim if there are any circumstances where the [challenged law] can constitutionally be applied.” *(citations and internal quotation marks omitted)*

## GRE's As Applied Takings Claims

- ▶ GRE's as applied takings claims are based on and limited to the cumulative impacts of the Ordinances as applied to the Addison
- ▶ No facial challenges are alleged
- ▶ GRE alleges two, as applied challenges based on the cumulative impact of the Ordinances:
  - 1.** a regulatory taking of the Addison under Penn Central
  - 2.** a per se physical taking of the Addison

(Both in violation of Article I, section 16 of the Washington State Constitution)
- ▶ The nature and extent of this cumulative impact is, by definition, a question of fact

48. The effects of the six aforementioned ordinances are summarized below:

Ordinance	Name/Summary	Cumulative Effects
Ordinance 125515 SMC 14.09.025 passed 1/16/18 enforced since 2/19/18	<b>Fair Chance Housing Ordinance</b> <ul style="list-style-type: none"> <li>Prevents landlords from denying a prospective tenant residency based on their criminal record</li> </ul>	<ul style="list-style-type: none"> <li>GRE can no longer screen or manage its tenants and maintain a safe and healthy environment at the Addison.</li> <li>Many of the Addison's tenants, who have done nothing wrong, have been forced to move out to seek a safer home.</li> <li>Occupancy rates and rent collections have plummeted.</li> <li>GRE cannot run the Addison at anything but a significant financial loss.</li> <li>Maintenance and security costs have increased.</li> <li>GRE is currently unable to pay its mortgage and is in default.</li> <li>The property is not saleable at all due to the inability to generate positive net cash flow (the property's negative cash flow would make its value on an income basis negative as well).</li> <li>The collective impact of the City's ordinances amounts to a physical taking.</li> </ul>
Ordinance 125950 SMC 7.24.030 Passed 9/30/19 (Mayor Durkan refused to sign)	<b>Roommate Ordinance</b> <ul style="list-style-type: none"> <li>Bestows the right to occupy a rented unit upon any roommate or "immediate family" member</li> <li>Prevents landlords from denying occupancy based on criminal history</li> <li>Prevents landlords from screening any "family member" (which is broadly defined)</li> </ul>	
Ordinance 126041 SMC 22.205.080 Passed 2/10/20 (Mayor Durkan refused to sign)	<b>Winter Eviction Ban</b> <ul style="list-style-type: none"> <li>Forces landlords to allow tenants to occupy their property even if they stop paying rent entirely (for 3 months or more)</li> </ul>	
Civil Emergency Order; Executive Order ("EO") 2020-05; EO 2020-06; EO 2020-09; EO 2020-12; EO 2021-06; EO 2021-07; EO 2022-01; EO 2022-03 In effect 3/16/20 – 2/28/22 (with some protections extending through 8/28/22)	<b>COVID-19 Eviction Moratorium</b> <ul style="list-style-type: none"> <li>Provided a complete defense to eviction of residents (with limited exceptions for tenants posing an imminent threat to health and safety)</li> <li>Applied to all non-payment of rent without requiring a showing of inability to pay</li> </ul>	
Ordinance 126450 SMC 7.24.030 Passed 9/27/21 (Mayor Durkan refused to sign)	<b>180-Day Notice Requirement</b> <ul style="list-style-type: none"> <li>Requires landlords to provide tenants with 180 days of notice before imposing any rent increase</li> </ul>	
Ordinance 126451 SMC ch. 22.212 Passed 9/27/21 (Mayor Durkan refused to sign)	<b>Economic Displacement Relocation Assistance</b> <ul style="list-style-type: none"> <li>Requires landlords to pay significant amounts to low-income tenants should the landlord increase rent by 10% or more and a tenant decides to move</li> </ul>	

## ***Penn Central* and CR 12(b)(6)**

“[A] partial taking is more nuanced and **must be analyzed on a case-by-case basis according to the *Penn Central* factors.**”

“Consistent with this understanding, [courts] have described determinations of liability in regulatory takings cases as essentially **ad hoc, factual inquiries, requiring complex factual assessments of the purposes and economic effects of government actions.**”

“We review a superior court's decision on a CR 12(b)(6) motion de novo. Dismissal is proper **only if the court concludes the plaintiff cannot prove any set of facts which would justify recovery. We presume all facts alleged in the complaint to be true and may consider hypothetical facts supporting the plaintiff's claims.** The gravamen of our inquiry is whether the plaintiff's claim is legally sufficient....”

“**We consider the following factors on a case-by-case basis:** (1) [t]he economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action.”

## Penn Central and CR 12(b)(6)

*Washington Food Indus. Ass'n & Maplebear, Inc. v. City of Seattle*, 1 Wn.3d 1, 34–35, 524 P.3d 181 (Wash. 2023)

The Court of Appeals affirmed **the trial court's refusal to dismiss** a regulatory takings claim because “the economic impact, extent of interference with investment-backed expectations, and character of the regulation are **highly factual inquiries**” that cannot be answered “[a]bsent more factual development.”

*Berst v. Snohomish County*, 114 Wn. App. 245, 257–58, 57 P.3d 273 (2002) (internal quotations omitted)

“**Cases involving claims of inverse condemnation can seldom be dismissed on the pleadings** .... While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs are not denied a full and fair opportunity to present their claim.”

## GRE's Claims Are Timely – Peterson

- ▶ The Supreme Court of Washington: Inverse condemnation claims brought under state law are of “constitutional magnitude,” and, therefore, the “mere passage of time alone does not bar” a plaintiff’s “cause of action.”<sup>(1)</sup>
- ▶ The City’s request for a 3-year statute of limitations is contrary to *Peterson*, controlling Washington law.
- ▶ There is no personal injury or Section 1983 claim here.

(1) *Petersen v. Port of Seattle*, 94 Wn.2d 479, 483, 618 P.2d 67 (1980)

## GRE's Claims Are Timely – Valley View

- ▶ The City urges this Court to depart from the Supreme Court's holding in *Peterson*, citing *Valley View*.
- ▶ But the City omits the *Valley View* Court's holding that **“it is well settled in Washington that where a taking occurs by . . . Inverse condemnation, a landowner's right to seek just compensation may not be barred merely by the passage of time.”**
- ▶ The City also omits the Court's conclusion that **it “need not reach the issue of what statute of limitations, if any, applies in a regulatory taking.”**<sup>(1)</sup>
- ▶ *Peterson* also did not involve “direct government appropriation,” as the City says, but rather, “inverse condemnation” and “just compensation” for the diminished value of plaintiff's property, just as this case does.

(1) *Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 632, 733 P.2d 182, 189 (1987), abrogated by *Yim v. City of Seattle*, 194 Wash. 2d 682, 451 P.3d 694 (2019).

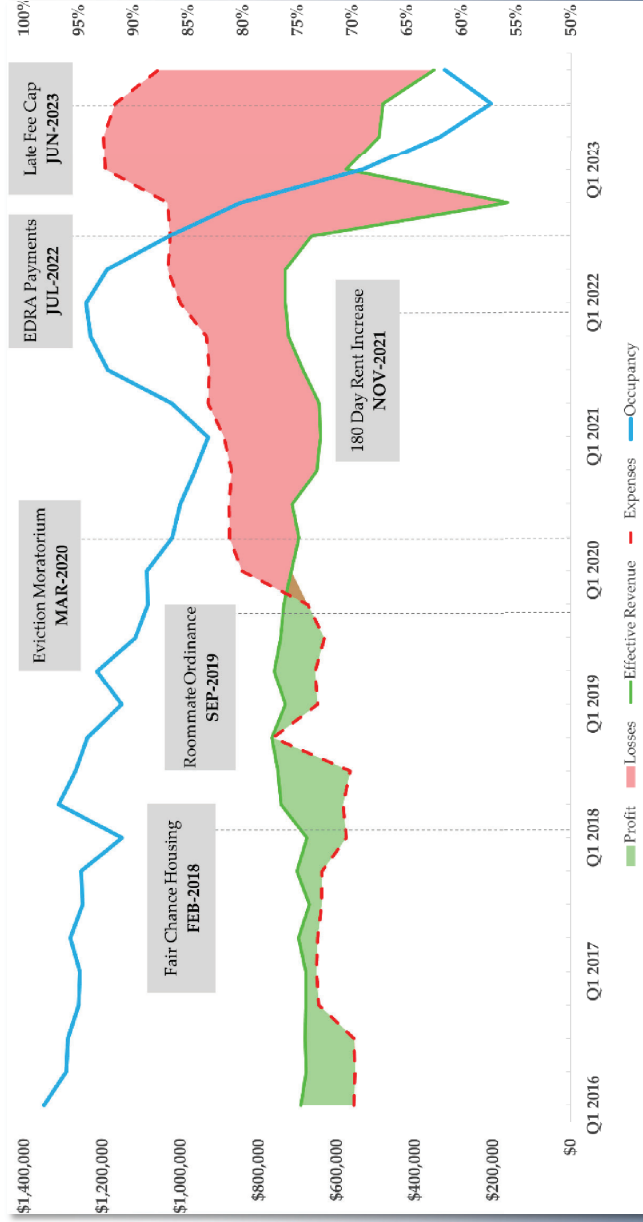
## GRE's Claims Are Timely

Even under The City's 3-year proposed statute of limitation

- ▶ “A cause of action accrues on the occurrence of the *last element* essential to the action.”<sup>(1)</sup>
- ▶ GRE's claim did not accrue until the Ordinances' impacts on the Addison manifested to the point that there existed a taking under *Penn Central*.
- ▶ This occurred in late 2022, at the earliest. The City makes no serious effort to deny this, but rather, points to only some allegations that certain ordinances went into effect in 2018 or 2019. But this violates the basic rule that the Court must accept all the allegations of the complaint as true.
- ▶ The City's cherry picking does the opposite.
- ▶ GRE Downtowner's *Penn Central* claim could not have accrued on law's passage, and cases cited by City demonstrate accrual is a question of fact. (*Suitum* and *Nat'l Advertising Co.* decided on Summary Judgment)

(1) *Highline Sch. Dist. No. 401, King Cnty. v. Port of Seattle*, 87 Wn.2d 6, 14, 548 P.2d 1085 (1976)

# Cumulative Impact of the Ordinances on the Addison



- ▶ As of October 2021, the value of the Addison had begun to decline
- ▶ The Addison's value cratered in 2022 (expenses and losses rose while occupancy plummeted)
- ▶ Rent collections plummeted
- ▶ GRE Downtowner's bad debt has become unmanageable
- ▶ Security and maintenance costs have almost quintupled
- ▶ The Addison experienced millions of dollars in unavoidable operational losses in 2022, 2023 and 2024
- ▶ GRE Downtowner is unable to pay its mortgage and is in default as of November 2023

## Penn Central Factor 1

“[t]he economic impact of the regulation on the claimant”

- ▶ When evaluating this factor, courts consider numerous forms of “economic impact,” including the damage done to the value of the property in question and separate economic harms wrought on the plaintiff attributable to the offending regulatory activity

*Washington Food Indus. Ass'n & Maplebear, Inc. v. City of Seattle*, 1 Wn.3d 1, 34–35, 524 P.3d 181 (Wash. 2023)

Upholding denial of MTD the Court stated, “[Plaintiff] has alleged that the ordinance has a significant economic impact because the premium pay requirements and the limitations on how food delivery network companies can defray those costs are ‘unsustainable’ and render its contracts with drivers ‘commercially impracticable.’”

# The Complaint Allegations Satisfy Penn Central Factor 1

“[t]he economic impact of the regulation on the claimant”

The Complaint Alleges that the Ordinances have both destroyed the property value and caused multiple economic losses

## Destruction of Property Value (Unsaleable)

- “In addition to causing safety and severe quality-of-life issues for tenants, the economic effect of the City’s various ordinances on GRE Downtowner has been catastrophic.”
- “The Addison now hemorrhages money—more than \$2.7 million in just 2023 alone. As a result . . . the Addison’s overall value has been destroyed.”
- “The City, through its functional commandeering of low-income housing properties in Seattle, has destroyed the value of GRE Downtowner’s property so significantly as to make the Addison unsaleable.”
- “GRE Downtowner has invested approximately \$39 million into the property, plus nearly \$5.8 million in additional losses between 2019 and 2023. There is no chance of recouping these outlays through a sale of the property given the further diminution to value and operations caused by the City’s ordinances.”
- “The Addison must be operated as a low-income housing development for the next 23 years, due to its LIHTC structure. But the City’s ordinances have so severely hampered the Addison’s income that it is impossible to run the Addison at anything other than a significant operational loss—making the Addison functionally valueless on an income approach valuation basis.”
- “The long-term restrictions placed on properties by the LIHTC program also significantly limit the market for the Addison. The Washington State Department of Revenue has itself acknowledged that ‘due to the difficulty of transferring these properties because of the program requirements, the conventional “willing seller/willing buyer” concept is altered.’”
- A property that required \$39 million of investment is now unsaleable, meaning that it has no value as an income producing property.

Compl. ¶¶ 20, 22, 92-93

## Economic Losses (\$13.5 million)

- “The City’s ordinances have also systematically destroyed GRE Downtowner’s ability to keep the Addison occupied at sustainable levels. Combined, they have had two destructive effects on GRE Downtowner’s revenue from the Addison.”
- “First, they have caused the Addison’s long-term residents to move out, causing vacancy rates to skyrocket to a peak of 44.85% in 2023.”
- “Second, GRE Downtowner cannot realize any rents owed from a large portion of its involuntary tenant base meaning that even renting an apartment to a resident frequently results in little or no revenue from that resident.”
- “As a result of the City’s ordinances, rent collections have plummeted from roughly 93% between 2015 and 2018 to below 45% in 2023.”
- “Between 2015 and 2018, GRE Downtowner paid, on average, \$115,830 per year for security and maintenance—that is, to keep the Addison’s residents safe and apartments habitable. But since and including 2019, these costs have almost quintupled, rising to an average of \$486,926 per year, including an astonishing \$833,353 in 2022.”
- “After hovering around \$41,000 per year between 2015 and 2017, primary property insurance on the Addison has increased between 19.5% and 29.5% each year, culminating in a \$151,377 premium for 2023.”
- “Further, the City’s ordinances have resulted in damages to GRE Downtowner’s financing as well. . . . GRE Downtowner has been unable to pay either the ‘developer fee’ or ‘deferred developer fee’ it owes. . . . GRE Downtowner’s inability to pay has resulted in GRE Downtowner owing not just \$4,735,209 in principal on the two fees, but also an additional \$3 million in interest!”

Compl. ¶¶ 63, 68, 80, 84, 89, 92 (emphasis in original)

## The Complaint Allegations Satisfy Penn Central Factor 1

“[t]he economic impact of the regulation on the claimant”

- ▶ The Complaint alleges the destruction of the Addison’s value and that it is now unsaleable
- ▶ Plus an additional \$13.5 million in out-of-pocket losses

# The Complaint: Destruction Caused by Tenants and Roommates



## ***Penn Central Factor 2***

“the extent to which the regulation has interfered with distinct investment-backed expectations”

The status of the **“regulatory environment at the time of the acquisition of the property,”** is also a relevant and important consideration in judging reasonable expectations.

## The Complaint Allegations Satisfy Penn Central Factor 2

“the extent to which the regulation has interfered with distinct investment-backed expectations”

### The Complaint alleges GRE Downtowner’s reasonable investment-backed expectations have not only been harmed, but destroyed

- “GRE Downtowner developed informed expectations on how to sustainably manage and operate the property over the long term. These expectations were based on GRE Downtowner’s own projections (which were themselves based on the performance of numerous past projects and the current state of the low-income housing market) . . . .”
- “No fewer than five other stakeholders reviewed and were comfortable with these financial projections at the time of financing. This includes Freddie Mac, the [Washington State Housing Finance] Commission, Citigroup (as bond underwriter), East West Bank (as provider of a letter of credit), and Stratford (as the tax credit investor).”
- “Also informing GRE Downtowner’s expectations and projections was the stability of the relevant landlord-tenant laws in Washington state and Seattle, which at that point had not changed in significant respects for many years.”
- “Between 2015 and 2018, when the Addison was redeveloped and fully operational and stable, the Stakeholders and GRE Downtowner’s 2012 projections and expectations were met in all material respects.”
- “During the Addison’s redevelopment, two sets of detailed financial projections were made to track many financial metrics associated with the operation of the Addison through the Compliance Period. Both sets of projections considered LIHTC regulations and restrictions, as well as state and local housing regulations as they existed at the time.”
- “Between 2015 and 2018, the projections largely held as an accurate reflection of actual returns.”
- “GRE Downtowner’s financial data demonstrates that vacancy loss, bad debt, and other concessions were materially congruent in the 2015–2018 timeframe, ranging from 5 to 7 percent. The same was true for total economic rent, administrative expenses, maintenance and repair expenses, insurance premiums, and capital expenses. Overall, net cash flow remained positive and did not materially depart from the projections.”

**The cumulative effects of the 6 ordinances lead to a destruction of the value of the Addison and economic losses of \$13.5 million**

## ***Penn Central* Factor 3**

“the character of the governmental action”

**a “taking may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”**

*MHC Fin. Ltd. P’ship v. City of San Rafael*, 714 F.3d 1118, 1128 (9th Cir. 2013) (quoting *Penn Cent.*, 438 U.S. at 124) (internal citations and quotations omitted).

## The Complaint Allegations Satisfy Penn Central Factor 3

“the character of the governmental action”

### The Complaint alleges a Physical Invasion of the Addison

- Before the City passed its ordinances, GRE Downtowner had the right to utilize trespass laws to expel unwanted individuals from the Addison. This was an indispensable method through which GRE Downtowner could ensure the safety of the Addison’s tenants.
- This is no longer the case. Through the Fair Chance Housing Ordinance and Roommate Ordinance, the City grants the right of occupancy to any tenant’s “immediate family” (which is so broadly defined as to include both ex-dating partners or anyone “presently residing” with the tenant) or “an additional resident who is not a member of the tenant’s immediate family.”
- There is no minimum time for a person to “reside” in an apartment before gaining occupancy rights to that apartment—as long as that person “presently resides” in an apartment, they are entitled to occupy it.
- These individuals now have a *legal right* to occupy the Addison . . . .
- The only way GRE Downtowner can remove these individuals is through the eviction process, formerly reserved for actual tenants.
- “The City has granted a right of occupancy to individuals whom GRE Downtowner never contracted with and whom GRE Downtowner wants to expel from its property.”

Compl. ¶¶ 123–26  
(emphasis in original)

# Cumulative Impact of the Ordinances on the Addison

## The Complaint

Ordinance	Name/Summary	Cumulative Effects
Ordinance 125514 SAC 1409425 Passed 12/18/18	<b>Fair Chance Housing Ordinance</b> Prevents landlords from denying a rental application based on a tenant's criminal record.	GRE can no longer screen tenants to maintain a safe and healthy environment at the Addison.
Ordinance 125906 Morse Decision referred to sign Passed 12/18/18	<b>Roommate Ordinance</b> Allows the right to occupy a rental unit to be exercised by a family member, friend, or roommate. Prevents landlords from screening any potential tenants based on criminal history or occupancy based on criminal history (which is broadly defined).	Many of the Addison's tenants, who have done business with GRE, have been forced to move out to seek a safer home.
Ordinance 126841 Morse Decision referred to sign Passed 12/18/18	<b>Winter Eviction Ban</b> Forces landlords to allow tenants to pay rent in arrears for up to 90 days without paying rent entirely (for 2 months or more).	Occupancy rates and rent collections have plummeted.
Ordinance 126841 Morse Decision referred to sign Passed 12/18/18	<b>COVID-19 Eviction Moratorium</b> Prohibits landlords from evicting tenants posing an imminent threat to public health or safety. Applied to all non-payment of rent evictions requiring a showing of inability to pay.	GRE cannot run the Addison at anything but a significant financial loss.
Ordinance 124608 Morse Decision referred to sign Passed 12/18/18	<b>180-Day Notice Requirement</b> Requires landlords to provide tenants with 180 days of notice before imposing any rent increase.	Maintenance and security costs have increased.
Ordinance 124651 Morse Decision referred to sign Passed 12/18/18	<b>Economic Displacement Relocation Assistance</b> Requires landlords to pay significant relocation assistance to tenants if the landlord increases rent by 10% or more and a tenant decides to move.	GRE is currently unable to pay its mortgage and is in default.

- ▶ “GRE can no longer screen or manage its tenants and maintain a safe and healthy environment at the Addison.”
- ▶ “Many of the Addison’s tenants, who have done nothing wrong, have been forced to move out to seek a safer home.”
- ▶ “Occupancy rates and rent collections have plummeted.”
- ▶ “GRE cannot run the Addison at anything but a significant financial loss.”
- ▶ “Maintenance and security costs have increased.”
- ▶ “GRE is currently unable to pay its mortgage and is in default.”
- ▶ “The property is not saleable at all due to the inability to generate positive net cash flow (the property’s negative cash flow would make its value on an income basis negative as well).”
- ▶ “The collective impact of the City’s ordinances amounts to a physical taking.”

## Per Se Physical Taking

- ▶ The Roommate Ordinance (exacerbated by the Fair Chance Housing Ordinance and the two eviction moratoria) gives third parties “a right to invade” the Addison and, therefore, effects a per se physical taking on GRE Downtowner<sup>(1)</sup>
- ▶ These third parties are individuals to whom GRE Downtowner has never rented nor ever agreed to rent, such as tenants’ former dating partners and their family members. They were never “invited” and cannot be excluded.
- ▶ Thus, the City has imposed a landlord-tenant relationship with these individuals<sup>(2)</sup>

(1) *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149, 141 S. Ct. 2063, 2072, 210 L. Ed. 2d 369 (2021)

(2) Compl. ¶¶ 39-40, 105-126

## Per Se Physical Taking

*Darby Dev. Co v. United States*, 112 F.4th 1017, 1035 (Fed. Cir. 2024)

“[W]e see **nothing ... that immunizes**—as a categorical matter—government action implicating **the landlord-tenant relationship from being treated as a physical taking.**”

*Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149, 141 S. Ct. 2063, 2072, 210 L. Ed. 2d 369 (2021)

“Government action that physically appropriates property **is no less a physical taking because it arises from regulation.**” As in *Cedar Point*, third parties here were never invited.

*Yee v. City of Escondido, California*, 503 U.S. 519, 528, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)

The Supreme Court noted that the government did not “require[] any physical invasion of . . . property,” because the “tenants were invited by [the owners], not forced upon them by the government,” and that **a “different case would be presented were the statute . . . to compel a landowner over objection to rent his property.”**

*Rental Housing Association (“RHA”) v. City of Seattle*, 22 Wash. App. 2d 426, 437, 512 P.3d 545, 553 (2022)

The RHA court explained that **“there is a critical difference between tenants invited to live on a landlord’s property in exchange for rent and union organizers with whom the landowners had no contractual relationship** and who never had permission to enter the land in the first place.”

## Summary

- ▶ GRE's claims are timely
- ▶ GRE has plead facts to sufficiently allege that a regulatory taking has occurred under *Penn Central*
- ▶ GRE has also plead sufficient facts to support the allegation that the City's Ordinances amount to a per se physical taking
- ▶ Accordingly, the City's Motion to Dismiss should be denied