FILED
10/26/2026
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GRE DOWNTOWNER LLC, a Washington limited liability company, d/b/a ADDISON ON FOURTH, Appellant, v. CITY OF SEATTLE, Respondent.	No. 87886-7-I DIVISION ONE PUBLISHED OPINION

MANN, J. — GRE Downtowner LLC (GRE Downtowner) is a real estate company that operates Addison on Fourth (Addison), a low-income apartment complex in the City of Seattle (City). In 2024, GRE Downtowner sued the City alleging inverse condemnation claims for partial and per se regulatory takings stemming from the collective impact of a series of rental housing ordinances. GRE Downtowner appeals the trial court's order dismissing its claims under CR 12(b)(6). Because we conclude that GRE Downtowner pleaded sufficient facts to support its claims, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Addison is a low-income housing complex located near the City's downtown area. In 2012, GRE Downtowner purchased the Addison for $12.5 million and invested

an additional $26.5 million to qualify for the federal Low-Income Housing Tax Credit (LIHTC) program.[1]

The LIHTC program was created to incentivize private developers to invest in and maintain affordable housing by offering a 10-year annual tax credit in exchange for restricting rents and reserving units for low-income tenants over a 30-year period. It is currently considered the most important resource for creating affordable housing in the United States. In Washington, the LIHTC program is administered by the Washington State Housing and Finance Commission (Commission), which is responsible for creating the plan and the policies for the fair allocation of the tax credit to housing projects. In awarding tax credits to GRE Downtowner, the Commission provided bond financing for the acquisition and redevelopment of the Addison.

While understanding that sustainably running low-income housing can be challenging, GRE Downtowner considered its financial projections for the Addison reasonable based on its considerable institutional experience in developing housing projects, as well as working with federal, state, and municipal housing and landlord-tenant regulations. Confidence in the financial projections for the Addison was shared by several entities: the Commission; Citigroup as bond underwriter; Freddie Mac as credit enhancer for the bonds issued by the Commission to finance the project; East West Bank as credit enhancer for the bonds issued during the construction and

[1] The LIHTC gives state and local LIHTC-allocating agencies approximately $12 billion annually to issue tax credits for the acquisition, rehabilitation, or new construction of rental housing targeted to lower-income households. Low-Income Housing Tax Credit (LIHTC) Program, U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. AND RSCH. (PD&R), https://www.huduser.gov/portal/datasets/lihtc.html (last visited Oct. 5, 2026).

renovation of the Addison; and Stratford Downtowner LP as LIHTC investor (collectively, stakeholders).

The Addison was placed in service under the LIHTC program in 2013 and was fully renovated and operationally stable by 2015. It provides 254 studio and one-bedroom apartments for City residents earning 60 percent of the area's median income, including set-asides for residents with disabilities, 46 artist studios, and four commercial spaces. The maximum monthly rent for studio and one-bedroom apartments is set annually by the United States Department of Housing and Urban Development (HUD) based on the City's median income. For instance, based on a one-person median income of $54,360 in 2022, HUD set the Addison's maximum monthly rent at $1,358 for a studio unit and $1,455 for a one-bedroom unit.

From 2015 through 2018, the annual net cash flow stemming from the Addison remained positive, with GRE Downtowner collecting 90.6 percent, 93.4 percent, 93.7 percent, and 93.9 percent of the Addison's maximum annual rental income, respectively. Starting in 2018, however, the Seattle City Council (City Council) adopted a series of ordinances and a resolution aimed at increasing access to affordable housing (collectively, the City ordinances). Beginning in 2019, GRE Downtowner began experiencing changes in the Addison's occupancy levels. The collection of maximum annual rental income dropped from 87 percent in 2019 to 73.3 percent in 2020, 69.2 percent in 2021, 56.1 percent in 2022, and 44.1 percent in 2023. In addition, bad debt—unrealized rent unlikely to be recovered from the resident—surged. So did expenses related to security, maintenance, administration, marketing, and insurance. According to GRE Downtowner, the City ordinances made the sustainable operation of

the Addison impossible because they fundamentally altered its economic relationship with tenants and nontenants. From having a positive annual net cash flow, the Addison lost $683,353 in 2020; $980,043 in 2021; $1.8 million in 2022; and $2.7 million in 2023.

On January 16, 2018, the City Council passed the Fair Chance Housing Ordinance (FCHO). Ordinance 125515. The FCHO prevents landlords from denying tenancy or evicting an existing tenant based on their criminal history. SEATTLE MUNICIPAL CODE (SMC) 14.09.025(A).

On September 30, 2019, the City Council passed the Roommate Ordinance. Ordinance 125950. The Roommate Ordinance bestows occupancy rights to "a tenant's immediate family, an additional resident who is not a member of the tenant's immediate family, and the additional resident's immediate family." SMC 7.24.030(I)(1). The definition of "immediately family" under the Roommate Ordinance includes a broad variety of third parties, including family members and nonfamily members. SMC 7.24.020. The Roommate Ordinance permits a landlord to screen and deny occupancy to the additional nonfamily resident based on the screening results, subject to the FCHO. SMC 7.24.030(I)(5). While a tenant's immediate family can be screened, they may not be excluded from occupancy absent limited exceptions, such as a lifetime sex offender registration requirement. SMC 7.24.030(I)(5), 7.24.032(A). Lastly, if a tenant vacates the rental unit before the expiration of the lease agreement, the tenant's immediate family and the additional nonfamily resident may become parties to the existing agreement. SMC 7.24.031(A)-(C).

On February 10, 2020, the City Council passed the Winter Eviction Ban, which precludes evictions from December 1 through March 1 based on a series of factors,

including evictions that are the result of nonpayment of rent. Ordinance 126041; SMC 22.206.160(C)(8).[2]

Throughout the COVID-19 pandemic—March 2020 through February 2022—the City also maintained an additional eviction moratorium that provided a nearly complete defense to eviction (COVID-19 Eviction Moratorium). City of Seattle Res. 31938 (March 16, 2020). The COVID-19 Eviction Moratorium applied to all instances of nonpayment of rent without requiring a showing of inability to pay.

On September 27, 2021, the City Council passed Ordinance 126450, which increased the minimum notice period that landlords must provide before imposing any rent increase on their tenants from 60 to 180 days. SMC 7.24.030(A). That same day, the City Council also passed Ordinance 126451, the Economic Displacement Relocation Assistance (EDRA). Ch. 22.212 SMC. EDRA requires a landlord to pay a tenant if the landlord proposes a rent increase of 10 percent or more, causing the tenant to vacate the housing unit. SMC 22.212.030-.070. Specifically, EDRA requires a landlord to provide financial assistance to a tenant equivalent to the tenant's average new monthly rent for three months, regardless of whether the tenant suffered any increased costs. SMC 22.212.050.

According to GRE Downtowner, the economic effect of the City ordinances on the Addison has been severe. From being an economic success, the Addison now loses millions of dollars each year, with operational losses totaling nearly $6 million

[2] SMC 22.206.160(C) has since been recodified as SMC 22.205.080(A)-(C).

through 2023. In addition, the Addison is now functionally valueless on an income approach appraisal basis.

On October 22, 2024, GRE Downtowner sued the City in King County Superior Court, alleging inverse condemnation claims for partial and per se regulatory takings under Article I, Section 16 of the Washington Constitution. The claims stemmed from the combined effect of the City ordinances as applied to the Addison.

On January 17, 2025, the City moved to dismiss GRE Downtowner's claims under CR 12(b)(6). After hearing argument, the trial court granted the City's motion via oral ruling on February 14, 2025, and entered a written order reflecting the same on February 21, 2025.

GRE Downtowner appeals.[3]

II. DISCUSSION

GRE Downtowner argues that the trial court erred in dismissing its inverse condemnation claims for partial and per se regulatory takings at the CR 12(b)(6) stage. We agree.

A. Standard of Review

We review a superior court's decision on a CR 12(b)(6) motion de novo. Wash. Food Indus. Ass'n & Maplebear, Inc. v. City of Seattle, 1 Wn.3d 1, 17, 524 P.3d 181 (2023). Dismissal is proper only if the court concludes that the plaintiff cannot prove any set of facts consistent with the complaint that would justify recovery. Wash. Food Indus., 1 Wn.3d at 17. The court presumes "all facts alleged in the complaint to be true

[3] On October 10, 2025, the City's motion to transfer the appeal to the Washington Supreme Court was denied. Comm'r's Ruling at 4, No. 104634-1 (Wash. Oct. 10, 2025).

and may consider hypothetical facts supporting the plaintiff's claims." Wash. Food Indus., 1 Wn.3d at 17. The focus of our analysis is "whether the plaintiff's claim is legally sufficient: if the plaintiff's claim remains legally insufficient even under their proffered hypothetical facts, dismissal is appropriate."[4] Wash. Food Indus., 1 Wn.3d at 17.

Like its nearly identical federal counterpart, the Washington Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made."[5] WASH. CONST. art. I, § 16; accord U.S. CONST. amend. V. A regulation that is an otherwise valid exercise of police power may go overboard in its impact on a property owner such that it constitutes a regulatory taking, requiring compensation. Wash. Food Indus., 1 Wn.3d at 30. Under Washington law, regulatory takings are characterized as either "partial" or "per se." Wash. Food Indus., 1 Wn.3d at 32.

In Yim v. City of Seattle, 194 Wn.2d 651, 658-59, 451 P.3d 675 (2019), Washington's Supreme Court clarified that there was no Washington-specific test for a regulatory takings analysis; rather, Washington courts follow the framework laid out by the United States Supreme Court in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125, S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Chevron first recognized two categories of per

[4] Unlike its federal counterpart, Fed. R. Civ. P. 12(b)(6), Washington's CR 12(b)(6) employs a more lenient standard of review. In McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 102, 233 P.3d 861 (2010), Washington's Supreme Court declined to adopt the federal "plausibility" standard, which includes "a determination of the likelihood of success on the merits, so that a trial judge can dismiss a claim, even where the law does provide a remedy for the conduct alleged by the plaintiff, if that judge does not believe it is plausible the claim will ultimately succeed."

[5] The United States Constitution prohibits only the "taking" of private property for public use without just compensation. U.S. CONST. amend. V.

se regulatory takings: (1) a regulation that results in a physical invasion of property and (2) a regulation that deprives an owner of all economically beneficial uses of their property. 544 U.S. at 538. Outside of those two narrow categories, "[partial] regulatory takings challenges are governed by the standards set forth in Penn Central Transportation Co., v. New York City, 438 U.S. 104, 98, S. Ct. 2646, 57 L. Ed. 2d 63 (1978)."[6] Chevron, 544 U.S. at 538.

A Penn Central partial regulatory taking analysis "depends largely 'upon the particular circumstances [in that] case.'" 438 U.S. at 124 (alteration in original) (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 78 S. Ct. 1094, 2 L. Ed. 2d 1228 (1958)). Three factors guide the court's analysis: (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, 438 U.S. at 124. The Penn Central analysis was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 438 U.S. at 123.

B. Partial Regulatory Takings Claim

GRE Downtowner first argues that its complaint included sufficient factual allegations to support its claim for a partial regulatory taking under Penn Central. The City responds that (1) no set of hypothetical facts consistent with GRE Downtowner's complaint could give rise to a cognizable Penn Central claim and (2) assuming that there was, the claim is time-barred anyway. Each argument is addressed in turn.

[6] Regulatory takings under the federal framework are referred to as "partial" regulatory takings by the Washington Supreme Court. See, e.g., Wash. Food Indus., 1 Wn.3d at 32.

1. GRE Downtowner Pleaded Sufficient Facts Under Penn Central

a. First Penn Central Factor

The first factor guiding courts in a Penn Central analysis is "[t]he economic impact of the regulation on the claimant." 438 U.S. at 124. GRE Downtowner asserts that the allegations in its complaint, taken as true, show that it suffered severe economic consequences caused by the City ordinances.

In evaluating the first Penn Central factor, the threshold consideration is "'serious financial loss'" that "merit[s] compensation." Cienega Gardens v. United States, 331 F.3d 1319, 1340 (Fed. Cir. 2003) (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed Cir. 1994)). "[S]pecific findings of fact about the effects of the legislation on the plaintiffs are necessary to complete the analysis of the economic impact factor." Cienega Gardens, 331 F.3d at 1341.

"[E]conomic impact is determined by comparing the total value of the affected property before and after and government action." Colony Cove Props., LLC v. City of Carson, 888 F.3d 445, 451 (9th Cir. 2018). "Projected income streams can contribute to a method for determining the post-deprivation value of property, but the severity of the loss can be determined only by comparing the post-deprivation value to [the] pre-deprivation value." Colony Cove, 888 F.3d at 451. In addition, property value diminution must be enormous, with some courts "observ[ing] that diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking." Colony Cove, 888 F.3d at 451.

GRE Downtowner's complaint included over 35 paragraphs of factual allegations on the economic impact that the City ordinances have had on the Addison, such as:

(1) GRE Downtowner purchased the [Addison] in 2012 for $12.5 million. It then invested $26.5 million in major renovations and other soft costs associated with its placement into the LIHTC program.
(2) 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.
(3) GRE Downtowner has invested approximately $39 million into the [Addison], 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 [Addison] given the further diminution to value and operations caused by the City's ordinances.
(4) [The Addison] required $39 million of investment [and] is now unsaleable, meaning that it has no value as an income producing property.
(5) The Addison now hemorrhages money—more than $2.7 million in just 2023 alone. As a result, GRE Downtowner is currently unable to pay its mortgage and is in default, and the Addison's overall value has been destroyed.
(6) [The City ordinances] have caused the Addison's long-term residents to move out, causing vacancy rates to skyrocket to a peak of 44.85% in 2023.
(7) As a result of the City's ordinances, rent collections have plummeted from roughly 93% between 2015 and 2018 to below 45% in 2023.
(8) The Addison's (nearly non-existent) market value today would reflect only speculation by an investor that the City may repeal its ordinances and make running a low-income housing development financially possible again.

(Emphasis added.)

The City argues that GRE Downtowner's allegations are immaterial because they are premised on the LIHTC program restrictions that GRE accepted in exchange for financing, rather than on the City ordinances. Without the LIHTC program restrictions, the City contends, a buyer could convert the Addison into market-rate or owner-occupied housing and value the property accordingly. We disagree.

As we already explained, the touchstone of the first Penn Central factor is a comparison of the affected property's value before and after the challenged regulation, and "the discounted future cash flows produced by an income-producing property can provide an appropriate valuation methodology." See Colony Cove, 888 F.3d at 451. Because the affordability restrictions that the LIHTC program places on the Addison last a minimum of 30 years, converting the Addison into anything other than low-income housing is not possible for at least the next 23 years.

Moreover, "specific findings of fact about the effects of the [City ordinances] on the [Addison]" are "necessary to complete the analysis of the economic impact factor." Cienega Gardens, 331 F.3d at 1341. Any weighing of evidence at this stage is premature. And for good reason: there is no evidence or record to be weighed. Instead, the allegations in GRE Downtowner's complaint must be taken as true, including hypothetical facts consistent with it. See, e.g., Heights Apts., LLC v. Walz, 30 F.4th 720, 735 (8th Cir. 2022) (remanding a dismissal for failure to state a claim after concluding that the property owner sufficiently pleaded a partial regulatory takings claim under the economic impact factor).

Based on that, we conclude that GRE Downtowner pleaded sufficient facts, or there is a hypothetical set of facts consistent with its complaint, to support its claim under Penn Central's first factor.

b. Second Penn Central Factor

The second factor guiding courts in a Penn Central analysis is "the extent to which the regulation has interfered with distinct investment-backed expectations." 438

U.S. at 124. GRE Downtowner asserts that the allegations in its complaint, taken as true, show that its reasonable investment-backed expectations were ruined.

"To form the basis for a taking[s] claim, a purported distinct investment-backed expectation must be objectively reasonable." Colony Cove, 888 F.3d at 452. GRE Downtowner's complaint included several allegations explaining how its investment-backed expectations were reasonable:

> (1) GRE Downtowner developed informed expectations on how to sustainably manage and operate the [Addison] over the long term. These expectations were based on GRE's own projections (which where themselves based on the performance of numerous past projects and the current state of the low-income housing market).
> (2) 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.
> (3) Between 2015 and 2018, when the Addison was redeveloped and fully operational and stable, the [s]takeholders and GRE Downtowner's 2012 projections and expectations were met in all material respects.
> (4) 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.
> (5) Between 2015 and 2018, the projections largely held as an accurate reflection of actual returns.
> (6) Starting in 2019, when the effect of the [FCHO] became manifest, everything changed. Revenue dramatically decreased and operating expenses dramatically increased . . . resulting in a material divergence from GRE Downtowner's investment-backed expectations.
> (7) If [the status quo remained] between 2019 and 2023, GRE Downtowner would have been $1,553,984 in the black over that period. Instead, the [City] ordinances caused GRE Downtowner to lose $5,816,245 over five years, a difference of nearly $7.4 million.

The City responds that neither the allegations nor any set of hypothetical facts consistent with the complaint can render GRE Downtowner's expectations objectively

reasonable because it operates in the housing market, a highly regulated field. But that is not necessarily the case.

In Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 645-46, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), the United States Supreme Court held that "those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end," and "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts." Further, "unilateral expectation[s]" or "abstract need[s]" cannot form the basis of a "reasonable investment-backed expectation." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 104 S. Ct. 2682, 81 L. Ed. 2d 815 (1984). That said, "a property owner does not automatically relinquish her Fifth Amendment rights by entering a highly regulated industry."[7] Reoforce, Inc. v. United States, 853 F.3d 1249, 1270 (Fed. Cir. 2017) (citing Ruckelshaus, 467 U.S. at 990).

[7] The City argues that Ruckelshaus does not stand for the proposition that a property owner in a highly regulated field does not relinquish a takings claim. We disagree. Ruckelshaus concerned the submission of data from a major agrochemical corporation to the Environmental Protection Agency (EPA) for the registration of a pesticide—some of which included trade secrets—that the EPA could then consider in evaluating subsequent applicants. 467 U.S. at 990. One of the issues on appeal was whether an amendment to the statutory scheme that governed the submission of data, whereby the EPA was allowed to disclose health, safety, and environmental data to qualified requesters despite a prohibition against the disclosure of trade secrets, rendered reasonable the corporation's expectations that the EPA would keep data that was submitted after the effective date of the amendment confidential. Ruckelshaus, 467 U.S. at 995-96, 1005-06. The Court answered in the negative, explaining that because the corporation was aware that any data it submitted to the EPA after the amendment was adopted could be disclosed, "it can hardly argue its reasonable investment-backed expectations are disturbed when the EPA acts . . . in a manner that was authorized by law." Ruckelshaus, 467 U.S. at 1006-07. The result is that Ruckelshaus would apply here only if GRE Downtowner had decided to enter the Seattle affordable housing market after the City ordinances were adopted but nevertheless argued that its investment-backed expectations about the Addison were reasonable. Because that is not the case, Ruckelshaus does not support the City's position.

To be sure, GRE Downtowner's decision to participate in the LHTIC program "represented a choice to enter a highly regulated field." Pakdel v. City of San Francisco, 636 F. Supp. 3d 1065, 1075-76 (N.D. Cal. 2022). But "the regulatory environment at the time of the acquisition of the property" is important in making a reasonableness determination. Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610, 634 (9th Cir. 2020). After all, the "investment-backed expectations" factor in a partial regulatory takings claim is a "highly factual inquir[y]." Wash. Food Indus., 1 Wn.3d at 34.

The outcome, then, is that the participation in a highly regulated industry—here, the affordable housing market in Seattle—without more, does not categorically make any expectations of regulatory stability unreasonable. To conclude otherwise would upend the notion that the "factual inquiry" that goes into a partial regulatory takings analysis "is appropriate for the trial court, not this court." Wash. Food Indus., 1 Wn.3d at 34. And contrary to what the City suggests, the analysis does not presuppose that a property owner expects industry regulations to remain static, such that any possible change would render whatever investment-backed expectations it may have unreasonable. Nor does the analysis require property owners to anticipate every possible change that may affect those investment-backed expectations.

Partial regulatory takings claims are nuanced and "'must be analyzed on a case-by-case basis according to the Penn Central factors.'" Wash. Food Indus., 1 Wn.3d at 32 (quoting Yim, 194 Wn.2d at 670). This fact-intense approach is incongruous with a CR 12(b)(6) motion, where dismissal "is proper only if the court concludes the plaintiff cannot prove any set of facts consistent with the complaint that would justify recovery." Wash. Food Indus., 1 Wn.3d at 34. And the City offers no case law showing that the

bar to relief is insurmountable in partial regulatory takings claims brought in the landlord-tenant context. We conclude that GRE Downtowner pleaded sufficient facts to support its claim under Penn Central's second factor.

c. Third Penn Central Factor

The third and last factor guiding courts in a Penn Central analysis is "the character of the governmental action." 438 U.S. at 124. GRE Downtowner argues that the trial court misapplied this factor in dismissing its claim. We agree. At the outset, it is important to note that the first two factors in a Penn Central analysis are the most important. Chevron, 544 U.S. at 538-39 ("Primary among those factors are '[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.'" (quoting Penn Central, 438 U.S. at 124)).

While Penn Central cautions that it is harder to find a "taking" when the government interference "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," 438 U.S. at 124, Chevron jettisoned a means-ends approach that commingles due process and takings inquires, clarifying that a proper analysis of the third Penn Central factor involves determining "the actual burden imposed on property rights," "how that burden is allocated," and "when justice might require that the burden be spread among taxpayers through the payment of compensation." 544 U.S. at 543; accord S. Grande View Dev. Co. v. City of Alabaster, 1 F.4th 1299, 1311 (11th Cir. 2021) ("The [Chevron] court explicitly rejected the argument that the Penn Central factor of 'the character of government action' addressed the purpose of the regulation."). After all, "the Takings Clause presupposes

that the government has acted in pursuit of a valid public purpose." Chevron, 544 U.S. at 543.

The City contends that the character factor favors dismissal because the challenged ordinances apply broadly across Seattle, do not single out GRE Downtowner, nor do they only benefit private parties. See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986) ("[I]t cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."). But as we already explained, at this stage there is no evidence for us to weigh; we must presume the allegations in GRE Downtowner's complaint as true, including hypothetical facts consistent therewith.

Indeed, the fact-intense nature of a Penn Central analysis is only accentuated by its third factor. See Palazzolo v. Rhode Island, 533 U.S. 606, 636, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to per se rules . . . must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."); see also Wash. Food Indus., 1 Wn.3d at 34 ("Th[e] factual inquiry into the magnitude and degree to which the ordinance affects [a plaintiff's property] is appropriate for the trial court, not this court."). It would be incautious at this stage, then, to accept the City's opinion about the character of the ordinances over GRE Downtowner's allegations about the economic impact that they have had on the Addison. Based on that, we conclude that GRE Downtowner pleaded enough facts to support its claim under Penn Central's third factor.

In sum, because GRE Downtowner pleaded sufficient facts to support its partial regulatory takings claim under Penn Central's three guiding factors, we conclude that the trial court erred in dismissing it at the CR 12(b)(6) stage.

2. Limitations Period for Partial Regulatory Takings Claims

The City also contends that a three-year statute of limitations (SOL) period should apply to GRE Downtowner's partial regulatory takings claim, thus rendering it untimely.[8] Admittedly, Washington law is distinctly opaque as to what the applicable SOL period is.

Washington's Supreme Court first addressed the issue in Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960). Ackerman addressed a constitutional takings action to recover for diminution in the value of land allegedly caused by the activities of an airport and its scheduled airlines. 55 Wn.2d at 402-03. The Ackerman court distinguished indirect "damaging" claims, where the government cannot appropriate property, from direct "takings" claims, which expire after the government acquires property by prescription after ten years.[9] Based on that, the Ackerman court recognized the action as a "damaging" claim and held that the three-year SOL period for personal injury claims under RCW 4.16.080 applied. 55 Wn.2d at 406.

[8] "The standards for claim accrual in physical takings and regulatory takings are distinct." Campbell v. United States, 932 F.3d 1331, 1337 (Fed. Cir. 2019). Contrary to GRE Downtowner's assertions, "where a [partial] regulatory taking is alleged, it is the final decision of the government actor alleged to have caused the taking that triggers accrual of a takings claim, not the ultimate impact of that decision." Campbell, 932 F.3d at 1338. The last of the City ordinances challenged by GRE Downtowner, EDRA, was passed on September 27, 2021. Because GRE Downtowner filed its complaint on October 22, 2024, applying a three-year SOL period to its partial regulatory takings claim would render it untimely.

[9] For instance, a direct "takings" claim can take place when planes physically invade private airspace, while an indirect "damaging" claim can stem from the noise of nearby planes, regardless of whether the planes physically invade private airspace. See Martin v. Port of Seattle, 64 Wn.2d 309, 312-13, 391 P.2d 540 (1964); WASH. CONST. art. I, § 16.

Nonetheless, in Highline Sch. Dist. No. 401, King County v. Port of Seattle, 87 Wn.2d 6, 11, 548 P.2d 1085 (1976), the Washington Supreme Court rejected Ackerman's "'difficult and treacherous' distinction between a 'taking' and a 'damaging,'" and held that "inverse condemnation actions seeking recovery for interference with the use and enjoyment of property, whether characterized by physical invasion or not, are governed by the ten-year prescriptive period." But that framework was also short-lived.

Four years later, in Petersen v. Port of Seattle, 94 Wn.2d 479, 618 P.2d 67 (1980), the Washington Supreme Court, although not providing a definite SOL period, held that inverse condemnation claims are of "constitutional magnitude," and thus "mere passage of time alone does not bar [a plaintiff's] cause of action." 94 Wn.2d at 483. Perhaps unsurprisingly, the court's pattern of discussing without declaring the applicable SOL period for a partial regulatory takings claim did not end there.

In Orion Corp. v. State, 109 Wn.2d 621, 634-35, 747 P.2d 1062 (1987), abrogated on other grounds by Yim, 194 Wn.2d 651, Washington's Supreme Court considered the possibility of a 3-, 6-, or 10-year SOL period for a partial regulatory takings claim: (1) in favor of a three-year period, the court once again pointed to Washington's general limit for personal injury cases under RCW 4.16.080; (2) on a possible six-year period, the court pointed to RCW 4.16.040(3), which provides the SOL period for actions involving "the use and occupation of real estate"; and (3) in favor of a 10-year period, the court discussed the possibility of applying the prescriptive period from Washington's adverse possession statute, RCW 4.16.020, albeit "without requiring the other adverse possession elements." Ultimately, however, the Orion Corp. court did not lean toward any of the three possible SOL periods because the partial regulatory

takings claim on appeal in that case came within all of them. 109 Wn.2d at 635. See also Tiffany Fam. Tr. Corp. v. City of Kent, 155 Wn.2d 225, 246 n.4, 119 P.3d 325 (2005) ("We have since noted, without deciding, a 3-, 6-, or 10-year period may apply to [partial] regulatory takings." (Sanders, J., dissenting), abrogated on other grounds by Yim, 194 Wn.2d 651).

The result of that series of decisions is a legal quagmire that is not clearer today than it was more than 60 years ago. That said, policy considerations and practical implications can guide us in reaching a conclusion.

In favor of a three-year SOL period, the City argues that we should adopt the federal approach to actions brought under 42 U.S.C. § 1983 and apply Washington's personal injury limitations period under RCW 4.16.080. Doing so, the City contends, would enhance consistency and reduce forum shopping by subjecting identical claims to the same limitations period regardless of whether they were brought under Washington or federal law. But that argument suffers from two critical flaws: (1) GRE Downtowner's as-applied challenge does not involve a § 1983 claim and (2) Washington courts have long held that inverse condemnation claims and personal injury claims do not overlap. See Maslonka v. Pub. Util. Dist. No. 1 of Pend Oreille County, 1 Wn.3d 815, 830, 533 P.3d 400 (2023) ("We have long distinguished takings claims from tort claims. . . . [i]t is true that tort actions are unnecessary where the defendant is a governmental entity and 'the recovery sought is only for loss of property rights, not personal or other injuries.'" (internal quotation marks omitted) (quoting Maslonka v. Pub. Util. Dist. No. 1 of Pend Oreille County, 23 Wn. App. 2d 1, 50-51, 514 P.3d 203 (2022))).

Moving on to a six-year SOL period, RCW 4.16.040(3) places a limit of six years on "[a]n action for the rents and profits or for the use and occupation of real estate." Indeed, the statute's plain language appears to fit a partial regulatory takings claim alleging diminished property value stemming from government action, and in which lost projected income is a factor generally considered by courts in determining the post-deprivation value of property under Penn Central's first factor. See Colony Cove, 888 F.3d at 451. Moreover, the City's argument in opposition—that RCW 4.16.040(3) does not fit a partial regulatory taking because it involves no direct government use or occupation of land—also applies to RCW 4.16.080(2), which places a limit of three years on "[a]n action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof." In fact, given the clear distinction that Washington law draws between takings claims and tort claims, see Maslonka, 1 Wn.3d at 830, the City's reasoning seems to apply with greater force to RCW 4.16.080, the statute addressing personal injuries.

Lastly, out of the three options, a 10-year SOL period finds the least support in policy, practical implications, or case law, for the same reason that it is the applicable SOL period for regulatory per se takings in Washington. While Petersen held that the constitutional nature of inverse condemnation claims prevents the "mere passage of time" from being a bar to relief, the court also recognized that compensation is unavailable for inverse condemnation claims involving physical acts where, after a 10-year period coupled with the other requisite elements of adverse possession, the government could acquire prescriptive rights to the plaintiff's property. 94 Wn.2d at 483; see RCW 4.16.020. In other words, as the City correctly points out in its brief, because

the government does not physically invade property through regulation, it cannot assert adverse possession or a prescriptive easement over the plaintiff's property after 10 years, so a plaintiff's ability to seek compensation under that theory could never be extinguished.

Washington's Supreme Court has echoed the same concern:

> We recognize that . . . [partial] regulatory takings do not involve actual appropriation of property, and therefore could never meet the elements of adverse possession. Thus, if we applied the Petersen rule to a [partial] regulatory taking, there would be no time bar whatsoever on a claim for compensation. Moreover, if [partial] regulatory takings merit the imposition of damages, the Petersen approval would put a premium on letting property owners wait to challenge zoning ordinances until their temporary damages became impressively large. This prospect is a troubling possibility.

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 631-32, 733 P.2d 182 (1987) (citation omitted), abrogated on other grounds by Yim, 194 Wn.2d 651; see also Orion Corp., 109 Wn.2d at 634 ("Unless some [SOL] applies, the State could never extinguish a [partial] regulatory takings claim.").

For those reasons, there appears to be greater support in favor of adopting the six-year SOL period for claims concerning "the use and occupation of real estate" under RCW 4.16.040(3). Applying that limitations period to GRE Downtowner's partial regulatory takings claim, we conclude that it is timely.

C. Per Se Regulatory Takings Claim

GRE Downtowner also argues that the trial court erred in dismissing its claim for a per se or physical taking at the CR 12(b)(6) stage. We agree.

1. Legal Standard

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." Chevron, 544 U.S. at 537. There are two types of "regulatory action that generally will be deemed per se takings for Fifth Amendment purposes," and for which the government "must provide just compensation." Chevron, 544 U.S. at 538. First, "where government requires an owner to suffer a permanent physical invasion of her property—however minor." Chevron, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)). Second, "regulations that completely deprive an owner of 'all economically beneficial us[e]' of her property." Chevron, 544 U.S. at 538 (emphasis omitted) (alteration in original) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

In Washington, inverse condemnation actions involving the physical invasion of property are governed by a 10-year limitations period. See, e.g., Highline, 87 Wn.2d at 11; Petersen, 94 Wn.2d at 483.

2. The Roommate Ordinance Amounts to a Per Se Regulatory Taking

GRE Downtowner contends that the Roommate Ordinance, individually or exacerbated by the FCHO, the Winter Eviction Ban, and the COVID-19 Eviction Moratorium, amounted to a per se physical taking of the Addison. The City responds that a landlord-tenant regulation cannot effect a per se physical taking. We agree with GRE Downtowner.

The City relies on Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). Yee concerned a challenge to a rent control ordinance by the

owners of mobile home parks (park owners). 503 U.S. at 523. The park owners argued that the rent control ordinance, coupled with a state law that restricted their ability to terminate a mobile home owner's tenancy, "transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner." Yee, 503 U.S. at 526-27. The United States Supreme Court disagreed because of the voluntary nature of the landlord-tenant relationship:

> Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government. While the "right to exclude" is doubtless, as petitioners assert, "one of the most essential sticks in the bundle of rights that are commonly characterized as property," we do not find that right to have been taken from petitioners on the mere face of the [rent control ordinance].
>
> . . . .
>
> 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.

Yee, 503 U.S. at 528, 531 (citations omitted).

Notably, however, the Yee court clarified that a physical invasion may occur if the challenged regulation, "on its face or as applied," compels a landowner to become a landlord against their will or continue serving as a landlord in perpetuity. 503 U.S. at 528; accord Rental Hous. Ass'n v. City of Seattle, 22 Wn. App. 2d 426, 448, 512 P.3d 545 (2022) (explaining that under the Yee exception, a per se regulatory takings claim would arise "if the ordinance compelled a landlord to rent to someone over the landlord's objection or prohibited the landlord from ever terminating the tenancy.").

Contrary to what the City suggests, the Roommate Ordinance hinders GRE Downtowner's ability to exclude nontenant third parties. Specifically, it gives occupancy rights to a tenant's "immediate family," "an additional resident who is not a member of

the tenant's 'immediate family,'" and that additional resident's "immediate family." SMC 7.24.030(I)(1). At the same time, the Roommate Ordinance defines "immediate family" broadly to include nontenant third parties who are unrelated to the tenant or the additional resident:

> spouses, domestic partners, former spouses, former domestic partners, adult persons related by marriage, siblings, persons 16 years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, and persons who have a parent-child relationship, including parents, stepparents, grandparents, adoptive parents, guardians, foster parents, or custodians of minors.

SMC 7.24.020 (emphasis added). The Roommate Ordinance also defines "dating relationship" broadly: "social relationship of a romantic nature. Factors a court may consider in determining the existence of a dating relationship include: (a) the length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties." SMC 7.24.020. The consequence of the Roommate Ordinance is that GRE Downtowner is required to accept uninvited, nontenant third parties, including their former spouses, domestic partners, and dating partners. Those requirements go beyond the quotidian regulation of "the economic relations of landlords and tenants," which does not effect a per se regulatory taking. F.C.C. v. Florida Power Corp., 480 U.S. 245, 252, 107 S. Ct. 94 L. Ed. 2d 282 (1987).

The distinction between the type of rent control ordinance at issue in Yee and the Roommate Ordinance is further elucidated by Cedar Point Nursery v. Hassid, 594 U.S. 139, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). Cedar Point addressed a regulation that granted "labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization." 594 U.S. at 143. Under the access

regulation, agricultural employers "must allow union organizers onto their property for up to three hours per day, 120 days per year." Cedar Point, 594 U.S. at 143. Fruit growers claimed a per se physical taking, alleging that the access regulation "appropriat[ed] without compensation an easement for union organizers to enter their property." Cedar Point, 594 U.S. at 145. The Court agreed and held that "[r]ather than restraining the [fruit] growers' use of their own property, the [access] regulation appropriates for the enjoyment of third parties the owners' right to exclude." Cedar Point, 594 U.S. at 149. In so holding, the Court reaffirmed the "right to exclude" as "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Cedar Point, 594 U.S. at 150 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176, 179-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)). Further, the Court clarified that "a physical appropriation is a taking whether it is permanent or temporary," and "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." Cedar Point, 594 U.S. at 157.

Applying those last two principles here, the Roommate Ordinance grants occupancy rights to nontenant third parties to access the Addison, a property that is closed to the public and open exclusively to the individuals with which GRE Downtowner voluntarily enters into a landlord-tenant relationship. And while landlord-tenant regulations are generally recognized as permissible, the City's position

necessarily extends that principle to regulations granting uninvited occupants full tenancy rights under a rental agreement over the landlord's objection.[10]

Alternatively, the City contends that once GRE Downtowner invited a class of people onto their property—tenants—the Roommate Ordinance merely regulates how it may treat those tenants. According to the City, once GRE Downtowner has invited a type of "invasion," tenancy, the Roommate Ordinance simply prevents a landlord from discriminating against a prospective tenant or third party until they become an existing tenant. We disagree.

The City relies on Rent Stabilization Ass'n of New York City v. Higgins, 83 N.Y.2d 156, 630 N.E.2d 626 (1993) (RSA), a case from New York's highest court. At issue in RSA were "emergency regulations extending noneviction protection to qualified family members of a tenant of record in all rent-regulated housing where the tenant vacated the unit." 83 N.Y.2d at 166. The emergency regulations broadened the definition of "family member" to include "[a]ny other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant." RSA, 83 N.Y.2d at 166-67. Several landlords alleged a per se physical taking, claiming that the new regulations "forced"

[10] In a statement of additional authorities, the City provides several examples of non-Washington cases supporting the proposition that in the landlord-tenant context, Yee controls rather than Cedar Point. But a more accurate statement would be that Yee controls in cases concerning the quotidian regulation of "the economic relations of landlords and tenants," which does not effect a per se regulatory taking. F.C.C., 480 U.S. at 252. As we already explained, in cases where a regulation grants occupancy rights to nontenant third parties at the expense of a landlord's right to exclude, Yee is of little help. The touchstone of our analysis is whether the landlord-tenant relationship was initially voluntary: if it was, Yee applies with full force; if it was not, Cedar Point is where we look. The effect of the Roommate Ordinance on the Addison places this case in the latter category.

them "to accept strangers as tenants." RSA, 83 N.Y.2d at 171. The RSA court rejected their argument, explaining that "the fact that an owner must offer a renewal lease to a departed tenant's newly defined family member—potentially a stranger to the owner—[does not] give rise to such a physical occupation." 83 N.Y.2d at 172. According to the RSA court, due to "the owner's voluntary acquiescence in the use of its property for rental housing," there is a difference between "forced occupation," which would effect a physical taking, and "requiring an owner to accept a purported stranger as a tenant." RSA, 83 N.Y.2d at 172.

Notwithstanding, even assuming the applicability of RSA here, the Roommate Ordinance goes beyond the emergency regulations at issue there. Unlike the Roommate Ordinance, the emergency regulations at issue in RSA did not require landlords to accept an additional resident beyond an individual that fit within the broadened "family member" definition, let alone that additional resident's "immediate family," as broadly defined under the statutory scheme. Put differently, contrary to the City's suggestion, the Roommate Ordinance does not require that GRE Downtowner allow additional members of a class of people—tenants—that it has already invited onto its property. Rather, the Roommate Ordinance transforms uninvited, third-party tenants into tenants at the expense of GRE Downtowner's "right to exclude," contravening "'one of the most treasured' rights of property ownership." Cedar Point, 594 U.S. at 149 (quoting Loretto, 458 U.S. at 435).

For those reasons, we conclude that GRE Downtowner pleaded sufficient facts to support its per se regulatory takings claim, and the trial court erred in dismissing it at the CR 12(B)(6) stage.

We reverse.

Mann, J.

WE CONCUR:

ACJ