

Sword & Scales

SPRING 2019

MAKE HOUSING LEGAL AGAIN



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Home means a lot. It's something I've always known intuitively, but the real-life implications of home didn't resonate until my family sold our row house in Washington, DC—the only one we'd all known together—to move to California.

To this day, both my sons, now six and four, wistfully and affectionately refer back to our DC home simply by its address, as in, "I miss 609," as if our home had a name. (Admittedly, our oldest, Thomas, also longed for his old dresser, but I had to explain that it was recalled by IKEA.)

It occurred to me, then, that home is really an extension of us, a member of the family, an enduring part of our story. Home is where I carried my wife, Lyndsay, over the threshold after we married. Where we brought Thomas and his brother, Henry, after they entered the world. Where we celebrated with friends and family over events both happy and sad.

Because home is so significant, the fact that home is increasingly out of reach for so many Americans is a tragedy—especially as the younger generations are seeking their own slice of the American Dream. And that's what we tackle in this first issue of the year.

As you'll read, home can be too expensive or too far away. Home can be unbuilt, unavailable, or unknown. All in all, home can be out of reach.

Thankfully—though frustratingly—the cause of these dilemmas is man-made. And while it's a vexing thicket of impediments, we know there are solutions, mostly achieved by getting government to back off, respect our rights, and let the market do its work.

Property, in the end, is really just about people—people whose homes provide shelter, memories, and maybe just a little equity to pay for school or pass along to the kids. At PLF, we'll be doing everything we can to ensure everyone can reminisce about their own 609.

Steven D. Anderson

PRESIDENT & CEO

To read more about the work that PLF is doing, visit pacificlegal.org.

The state of housing in America

Much has changed in America over the last 60 years. When it comes to housing, we have witnessed a dramatic downward shift in both accessibility and affordability. Before we can figure out how we got here and decide what steps can be taken to plot a new course, we must first assess the current situation. How much more distant is the American Dream today than it was back then?

Houses are more expensive than they used to be

Adjusted for inflation



Housing costs are rising faster than incomes³



Not enough new homes are being built, which causes prices to rise



Home construction per household is now at its lowest levels in nearly six decades⁴

Nearly half of renters struggle to afford their housing



Spend more than 30% of their income on housing⁵

Sources: ¹US Census Bureau, ²Zillow, ³Harvard, ⁴Federal Reserve Bank of Kansas City, ⁵Rentanomics

America is the real 'Fixer Upper'



By Jaclyn Boudreau
CONTENT DIRECTOR



THE WORRISOME DECLINE in US home ownership hasn't killed the dream of having a place of one's own. As evidence, consider that each week nine million Americans tune into HGTV, the prime-time powerhouse celebrating buying and renovating houses.

To the uninitiated, HGTV's endless carousel of home-remodeling shows must appear repetitive. For example, the channel's breakout hit, *Fixer Upper*, features an almost-identical Cinderella story in every airing.

In each episode, the show's peppy stars, Chip and Joanna Gaines, help families buy and renovate a home. It goes something like this:

1. Earnest family picks a home, typically in an excellent school district.
2. Chip and Joanna begin working on the redesign, but a problem arises—perhaps mold or a structural challenge. The family invariably decides safety is worth the repair cost.

We watch because we're dreaming of the homes we hope to have one day.

3. Joanna, often with her adorable children, stages the space according to the family's taste and lifestyle (but always with shiplap).
4. The big reveal: the family loves it, and everyone lives happily ever after.

True, the show is formulaic. But the formula works for a reason. It taps into Americans' deep-rooted need for a place to call our own—a place where we create and nurture loving memories of family, and where we put down roots in our community.

That's reflected in families' make-over choices. These choices always focus on communal spaces that signify togetherness: living rooms where families gather, playrooms where imaginations soar, and open-concept kitchens where drywall doesn't block cook from company.

But our appetite for these shows also symbolizes something else: aspiration. Take millennials like me, many

of whom don't own homes yet. We make up a third of HGTV's audience. We don't watch HGTV for practical instructions like learning to install an island or prime a wall. We watch because we're dreaming of the homes we hope to have one day.

We might even argue that the American Experiment, now in its 243rd year and subject to ongoing improvements, is something of a "fixer-upper" itself. Perhaps you think that's stretching the point. But what's more American than the optimistic drive to look at one's corner of the world and seek ways to make it better?

Above all, this drive characterizes the American story. We watch HGTV because it's a story about us. If its characters' dreams are realized, ours can be too. ♦

The government-created housing shortage



By Larry Salzman
SENIOR ATTORNEY



THE AMERICAN SPIRIT is synonymous with a can-do attitude—we are builders, creators, and innovators. The remarkable construction of New York's legendary Empire State Building symbolizes that spirit: from start to finish, the completion of this American landmark took a single year.

But that spirit now seems diminished. Many US cities face a housing shortage, thanks to prohibitive, heavy-handed regulations pushed by local governments—and the shortage has pushed median rents and purchase prices too high for those with ordinary incomes to afford.

The way to make housing more affordable is to build more housing. Americans of yesteryear could have made short work of the problem: build, baby, build! But as PLF's cases show, property owners and developers today must navigate a minefield of land use regulations that stymie or punish development. The result? Dwindling new construction of homes, higher costs and, ultimately, stagnation.

Consider a few examples:

- For years, PLF litigated against “urban growth boundaries” in Seattle, which constrained the supply of housing by effectively prohibiting homebuilding beyond a politically-established ring drawn on a map around the city.
- PLF's recent case involving small developers Jonathan and Shelah Lehrer-Graiwer in West Hollywood, California. They bought several lots with older, single-family homes,

which they wanted to demolish and replace with an 11-unit condominium complex. City officials welcomed the project because it increased the housing supply. The city then demanded an extraordinary fee of more than a half-million dollars as a condition for granting the building permit, to subsidize a government-run affordable housing program.

- In Berkeley, California, the city blocked the construction of a large, modern apartment building by abusing a “historical preservation” ordinance to prohibit the property owner from first razing a smaller, aging apartment building. The city justified its decision on the grounds that it was important to preserve the last wood-shingle-sided apartment building in the city.

These anecdotes merely hint at the gauntlet property owners face today when exercising their right to build on their own land.

Cities and counties throughout the country routinely require lot sizes of one, five, or even more acres per home; they demand the dedication of free “open space;” they prohibit multi-family housing in large segments of a community; they demand all manner of studies, fees, and restrictions under the guise of environmental restrictions with dubious connection to public health or safety; and they wield zoning ordinances so detailed that they effectively allow the



government to control the style, building materials, and even landscaping of every proposed home.

In New York, an estimated 40 percent of today's buildings could not be built again under the state's complicated and prohibitive land use laws. Some of America's most loved historic neighborhoods in other large cities, like the Los Feliz neighborhood of Los Angeles, Boston's Beacon Hill, or New Orleans' French Quarter, are effectively outlawed in our modern regulatory state. Beyond cities, many suburban land use policies are arguably worse, as the cases of Seattle and West Hollywood suggest.

All this has the predictable result of creating skyrocketing prices in the most regulated cities. Prohibitive local regulations act like a tax, sometimes adding 50 percent or more to housing prices, according to Wharton economist Joseph Gyourko. Left-leaning economist Paul Krugman has

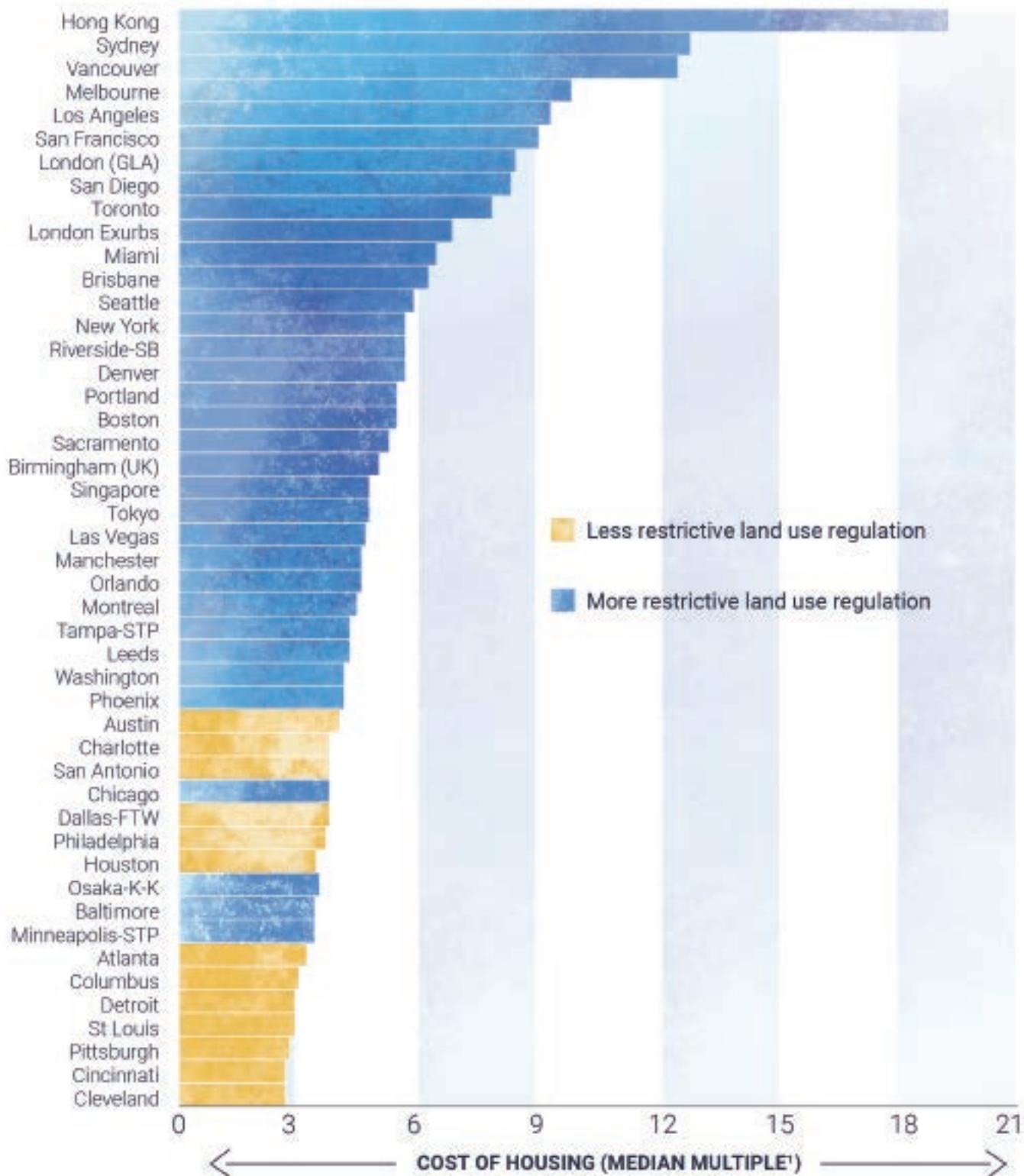
pointed out that California's high housing prices "owe a lot to policies that sharply limit construction."

But it doesn't have to be this way. Houston, Texas, for instance—one of America's largest and fastest-growing cities—has one of the nation's most lightly regulated housing markets, allowing for an orderly but relatively free market in housing production.

Many people today find their budgets stretched to put a roof over their heads—this may include you, your children, or your grandchildren—and can't afford to live in the neighborhoods where they grew up. The root of that problem is regulation, which needlessly limits the supply and raises the cost of housing. The only long-term solution lies in respect for property rights and a renewal of the American spirit of building. ♦

The way to make housing more affordable is to build more housing. Americans of yesteryear could have made short work of the problem: build, baby, build!

Housing affordability and land regulation



¹The ratio of the median house price by the median gross (before tax) annual household income.

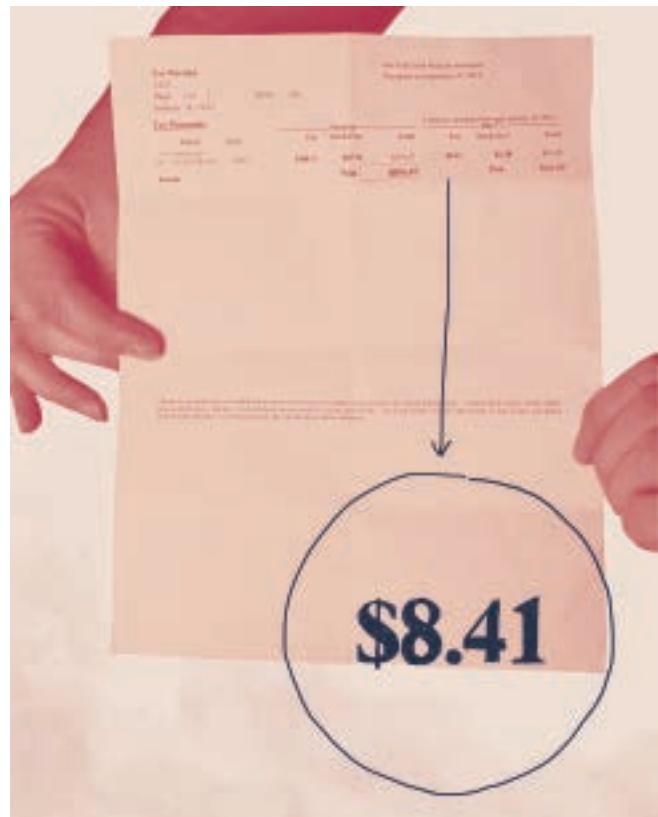
Source: <http://www.demographia.com/dhi.pdf>

Uri Rafaeli's fight to end state-sanctioned property theft



By Christina Martin

ATTORNEY



WHEN I GRADUATED from law school in Michigan in 2008, the state had fallen on hard economic times, even before the nation's Great Recession.

Michigan was reeling from the loss of 800,000 jobs since 2000, double-digit unemployment, and incomes declining at a rate not seen in most states since the 1930s.

It was hard enough for struggling families and business owners to ride out the lean years that followed.

But for property owners who fell behind on their tax bills, government vultures made it far worse: seizing their property and selling it at auction—often far below its market value. The government then kept not just the tax debt, but every last penny. It's a practice that continues to this day, and it's perfectly legal in Michigan.

In other words, local governments in Michigan are effectively lining their coffers with residents' homes, life savings, and retirement plans. An outstanding tax bill of just \$8.41 can even strip you of the American Dream.

That's what happened to PLF's client Uri Rafaeli. He paid \$60,000 for a modest rental property in metro Detroit's

Oakland County, in 2011. Like many entrepreneurs, he figured providing a place for people to live would be a win-win for everyone—those needing a roof over their heads would benefit from affordable housing, and he'd enjoy a boost in revenue and perhaps some capital appreciation on his property.

He was shocked by what happened next. In 2013, the county let Uri know he had underpaid his 2011 taxes by \$496. Uri paid up but miscalculated the accrued interest by \$8.41.

An outstanding tax bill of just \$8.41 can even strip you of the American Dream.

For the price of a burger at Oakland County's famous Grand Tavern restaurant, the county confiscated Uri's property, sold it at auction for \$24,500—well below Uri's purchase price—and kept all the money, on top of Uri's tax debt.

Uri's math mistake was a drop in the bucket. Altogether, Oakland County collected some \$22.5 million through government-sanctioned property theft from 2006–2015. Nearby Wayne County, which includes the city of Detroit, has even officially budgeted for this predatory revenue stream to bring in more than \$10 million by 2020.

No one disputes that government is entitled to seize and sell private property to collect delinquent taxes.



"You can't confiscate a house for such a ridiculous amount"

-Yair Adegeko, son-in-law of Uri Rafaeli

In most states, local governments try to help property owners avoid foreclosure.

Not the Wolverine State, however. Michigan's General Property Tax Act doesn't just allow local governments to keep all the proceeds from foreclosure sales regardless of the tax debt amount. The law requires it, creating a perverse incentive for counties to foreclose. Rather than aiming to avoid foreclosures, Michigan counties all too often provide the least amount of notice required by law and then eagerly foreclose for the potential profits they may gain.

By requiring governments to bank the excess equity from tax foreclosure sales, the law blatantly violates property protections in both the US and the Michigan Constitution. This theft of private equity is destroying the American Dream for people across the state.

Since beginning this fight, I've had calls from people across Michigan who have lost their homes, businesses, and life savings to these kinds of foreclosures.

Some thought they had paid their taxes, only to learn too late that they had missed a payment or underpaid by trivial amounts. Others, because of hospitalizations or great financial setbacks in the fallout from the Great Recession and housing crisis, simply failed to pay before it was too late.

Representing Uri free of charge, PLF asked the Michigan Supreme Court to review and overturn this unconstitutional tax law.

The court granted our request for a hearing. We expect the argument to take place this fall, and we are poised to restore property rights—and the American Dream—to Uri and all Michiganders. ♦

Nearby Wayne County, which includes the city of Detroit, has even officially budgeted for this predatory revenue stream to bring in more than \$10 million by 2020.

The destructive power of rent control



By James Burling

VICE PRESIDENT
FOR LITIGATION



Photo credit: Jean-Pierre Laffont

BOMB DAMAGE OR rent control? That was the caption under a series of photographs in a 1981 book about rent control across the world. Looking at the photos, it was impossible to tell the difference.

Almost 40 years later, the story hasn't changed: outside of wars and natural disasters, rent control is the single most effective destroyer of property and property rights. And yet, in an expression of majoritarian short-sightedness in urban areas, its popularity remains unabated.

PLF has been fighting rent control since our founding because there is no legal, economic, or moral case for this insidious policy. The US Supreme Court first approved rent control in 1921 as an emergency wartime measure. Since then, however, the Court hasn't directly addressed the question of whether rent control is an unconstitutional taking of private property. Because rent

control laws often take a landlord's equity and award it to tenants through reduced rents, a receptive court might well put the brakes on this taking of private property.

All economists who study rent control conclude it is counterproductive. A few years ago, PLF commissioned a study that compared rent-controlled communities with neighboring towns that had a free market. We wanted to see whether rent control actually achieved the laws' stated purpose of helping minority and other economically

and socially disadvantaged populations. Without exception, every rent-controlled community had fewer poor and minority residents—that is, the very people the law was

designed to help. That is to be expected, because study after study has shown that wealthier and more educated people are better positioned to take advantage of rent control's guarantee of below-market rates. That's because these populations

have the stability to stay in one place for longer periods of time.

Rent control accelerates the deterioration of existing housing stock. Why? Because when landlords cannot recoup significant investments in upkeep and improvement, most will only do what is required to maintain habitability. When that gets too expensive, landlords will abandon their buildings. And forget about developers building enough new units in rent-controlled cities.

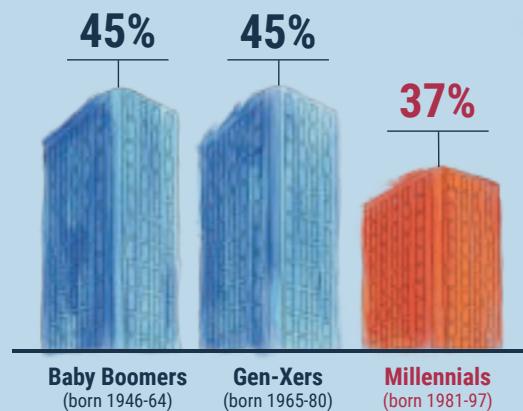
There is no economic justification for rent control. Rent control cannot repeal the law of supply and demand in cities, which means higher housing costs that ultimately make it impossible for working and middle-class families to live there. When rent control in major cities is combined with the "not-in-my-backyard" attitude writ large, we see the result: wretched tent cities filled with the victims of bad policy choices.

With renewed vigor, PLF will continue its fight and look for new and innovative opportunities to take to the US Supreme Court.♦

Do millennials even want to own homes?

Is the American Dream of home ownership really dead in the hearts and minds of millennials, or is it just waiting for them to be able to afford it? If we can find ways to make the dream of homeownership more accessible and affordable for younger generations, perhaps there is still hope that they will be able to carry the torch forward for future generations.

Millennials are slower to take up home ownership¹



Millennials also have more student debt

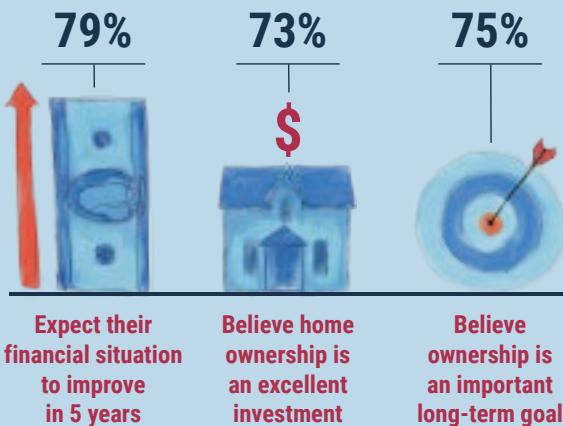


Housing in metro areas, where millennials seek jobs, is expensive



The time it will take for millennials in large metro areas to save a 20% down payment on a condo³

But millennials still want home ownership⁴



Sources: ¹The Urban Institute, ²Value Penguin, ³Rentanomics, ⁴Demand Institute

Why no city wants to be Seattle



By Ethan Blevins
ATTORNEY



CITY PLANNERS TREMBLE as they whisper a new term that embodies their fears: “Seattle-ization.” Washington’s Emerald City, once the byword for urban vitality, is now outpacing San Francisco as a cautionary tale in how over-regulation strangles the housing market.

That does not mean, unfortunately, that observers understand the root cause of the problem. Like Seattle’s leadership, they wrongheadedly blame the affordable housing shortage on the influx of new residents and a booming tech industry.

But the real culprit behind Seattle-ization? Shortsighted policies imposed by a cloying city government enraptured by its own wisdom.

Those housing policies are a blueprint for crisis.

First, like many urban locales, Seattle smothered the landscape in single-family zoning, with 75 percent of the city’s residential land locked up by large lots and few people. That huge landscape has contributed a measly 5 percent to all new housing in

Seattle in the last decade. Yet the city largely ignores calls for greater density in housing.

Meanwhile, Seattle officials have taken to persecuting housing providers through the policy process. For example, the city implemented a “first-in-time” rule, requiring landlords to rent to the first applicant who provides an adequate application. The city also prohibits its landlords from checking rental applicants’ criminal history. These policies have driven small-time

landlords from the housing market and pressured the remainder to increase rent to adjust to a riskier market.

Pacific Legal Foundation successfully struck down the first-in-time rule and is now challenging the ban on criminal background checks on behalf of small landlords like Kelly Lyles, a single woman who wants to feel safe with her own tenants. But the city remains bent

on tenant “protections” that only exacerbate the affordability crisis.

Housing developers have not escaped the city’s ire, either. Seattle is escalating the costs of housing construction through a program called “Mandatory Housing Affordability,” which slaps a fee on every square foot of development to go toward “affordable housing” when, in fact, the fee only

drives costs. The fees either make new construction infeasible or are passed on to home buyers.

Sadly, these trends are hard to reverse when public officials congratulate themselves for pushing policies that flatter their own sense of virtue while thrusting the blame onto the people who build housing and the industries that attract newcomers. If other cities fail to understand the true causes of “Seattle-ization,” they may find an “-ization” tag suffixed to their names, too. ♦

Houston's booming housing market is Economics 101



By Timothy Snowball

ATTORNEY



HOUSTON, TEXAS, is one of the fastest growing metropolitan areas in the entire United States. With its continually developing industrial bases in energy, manufacturing, aeronautics, and transportation, including being home to the headquarters of more than 25 Fortune 500 companies, the city attracts more than 100,000 new residents annually.

What makes Houston so different from Seattle or other American cities struggling with sluggish economic growth and a stagnant housing market? The answer is simple: it has embraced the bedrock economic benefits of market-driven growth and innovation spurred through less onerous government regulation and lower taxes.

It's Economics 101. Somewhere, Milton Friedman is smiling.

What's Houston's secret formula? First, the city has some of the most relaxed zoning laws in the entire country. Zoning, as you will remember, is the

ubiquitous government practice of telling people where they can and cannot build certain structures.

For housing, as in every other sector of the economy, less regulation... well, you get the picture.

Add to this mix relatively low taxes (including Texas' lack of a state income tax), strategic targeted public infrastructure investments, and a steady stream of entrepreneurial professionals, and you get one of the fastest growing, most affordable, and most desirable metropolitan areas in the United States.

As so often happens, market-driven solutions have done a better job at achieving growth-oriented policy goals in Houston than any central planner or government bureau could.

This smarter approach to regulation and lower taxes means more growth and opportunity for everyone in American society, especially the most vulnerable or disadvantaged. Lower home prices in Houston mean more low-income and minority families can afford to achieve the American Dream. Just compare: in New York and Los Angeles, less than 40 percent of Latino families own their own homes. But in Houston, that number is 52 percent and growing.

American cities across the country should follow Houston's common-sense example to combat the housing crisis—not through more growth-killing rules and regulations, but by embracing basic economics. ♦

Fighting on all fronts for housing affordability



By **Mark Miller**
SENIOR ATTORNEY



THE AFFORDABLE HOUSING crisis facing America today is complex. No single villain exists. Rather, a tangle of problems arose over the last century, beginning with well-meaning but misguided local governments deciding they knew better what do with private property than the property owners themselves.

Once the US Supreme Court gave local authorities the unconstitutional privilege to ignore private property rights in defense of “the public welfare,” the problems metastasized and created the housing crisis before us.

This thicket of housing laws created new problems that now are much worse than the problems governments intended to solve because they restrict the building and availability of affordable housing. We must untangle this government-created Gordian knot.

That is why Pacific Legal Foundation exists: to untangle the knots in the courts through litigation. A society cannot flourish and individuals cannot advance their private interests without the right

to create and productively use property. As this issue has detailed, PLF litigates in several areas of law to improve housing affordability as a foundation of liberty:

- **We fight onerous and unconstitutional local zoning and permitting schemes designed to slow down and ultimately stop housing development.**
- **We oppose state laws that allow the government to take people's property, including rental property, in the name of recovering a small fraction of the property's value.**
- **We sue governments that impose burdensome regulations on landlords and make it impossible to feasibly rent a piece of property to a tenant.**

It bears repeating: The only way to make housing more affordable is to build more housing. That will bring down the costs of owning, leasing, and renting property for all Americans.

More people are coming around to our way of thinking. As President Barack Obama neared the end of his eight years in office, his administration

all but adopted the PLF approach to housing in a well-received but little-publicized September 2016 report known as the Housing Development Toolkit:

“Over the past three decades, local barriers to housing development have intensified, particularly in the high-growth metropolitan areas increasingly fueling the national economy. The accumulation of such barriers—including zoning, other land use regulations, and lengthy development approval processes—has reduced the ability of many housing markets to respond to growing demand...By modernizing their approaches to housing development regulation, states and localities can restrain unchecked housing cost growth, protect homeowners, and strengthen their economies.” (emphasis added).

Pacific Legal Foundation will continue to seek new and innovative ways to prevent bureaucrats from strangling housing affordability, just as we will continue to defend those entrepreneurs who are trying to bring additional and affordable housing into the market. ♦

It bears repeating: The only way to make housing more affordable is to build more housing.

Joining the fight



Kathy Hoekstra

DEVELOPMENT
COMMUNICATIONS OFFICER

WHEN PAT BENNIE showed up for the San Mateo County Development Association luncheon in 1974, she never guessed she'd still feel its impact today.

"It gave me hope," she recalls.

At the time, Pat's husband, Joe, was a land surveyor by trade, and the couple had become increasingly concerned about the government's rapidly growing abuse of private property rights. Their concern grew to a fever pitch when Proposition 20 came along and created the California Coastal Commission.

"I was beginning to see an erosion of our freedoms, and we fought against Prop. 20," says Pat. "When it passed, granting unprecedented powers to a handful of powerfully connected people to control the coastal lands of California, it was, 'Katie, bar the door!'"

Then came the luncheon. The speaker was Ronald Zumbrun, who had worked previously in then-Governor Ronald Reagan's administration, discussing his new job as president of the newly formed Pacific Legal Foundation.

"It hit me that what he was saying was exactly what I believed. I had felt for some time the system had become stacked against property owners."

Pat says. "And I realized there was now an organization of young people being given an opportunity to practice the kind of law I hadn't seen before."

Such an organization was desperately needed. The Coastal Commission's strong-arm tactics against the Nollan family in a famous beachfront land use dispute in 1987 was the first PLF case that really angered and frustrated her. PLF's 1987 Supreme Court victory in *Nollan* convinced her there was a better way.

"Government bureaucrats have nothing but time on their hands, and pay no price for the delays they cause. So PLF's ability to stay with the fight is the key to winning," Pat says of that case today. "I doubt the Nollan family would have ever gotten justice without PLF."

The Bennies became avid followers and ardent PLF supporters. That support continues today despite Joe's death in 2009, and will continue into the future through Pat's generous estate planning.

"I just want PLF to succeed mightily," explains Pat. "It's worth the commitment and investment because it's the only organization I can see that gives any hope of preserving our rights that are protected in the Constitution."

*"It's a marvelous organization.
Absolutely marvelous." ♦*



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BECOME A LEGACY PARTNER TODAY

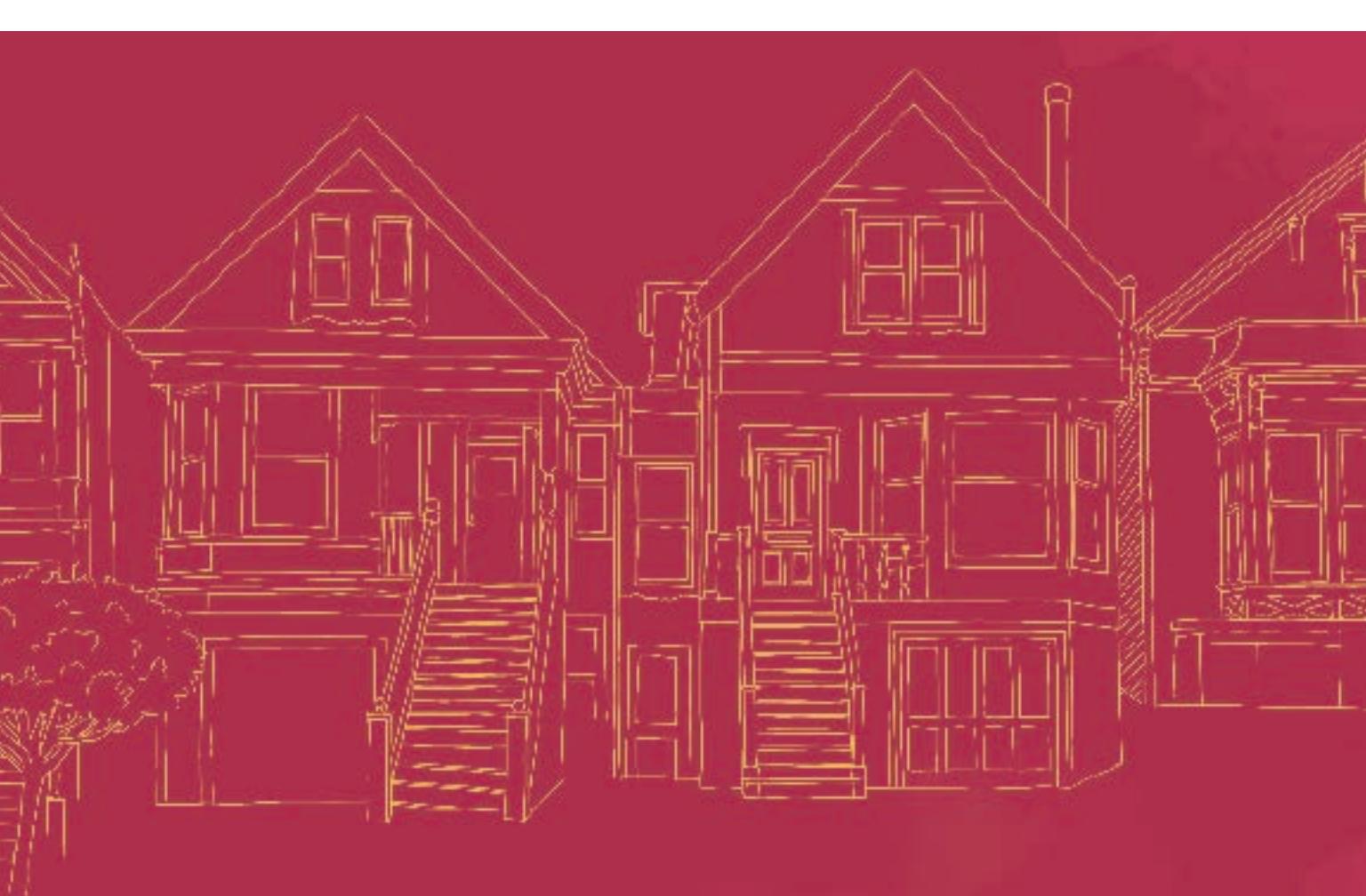
Pacific Legal Foundation is humbled to have an extraordinary group of supporters who have felt so strongly about defending liberty and justice for all, they enshrined their legacies with us through their estate planning.

You are invited to join this growing coterie of Legacy Partners simply by adding PLF to your will, trust, or other estate plans.

Contact Jim Katzinski,
Gift Planning Officer,
at **425.576.0484** or
jkatzinski@pacificlegal.org
for more information.

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