

Seattle and the State Supreme Court Wage War on Property Rights

Landlords are forced to rent to the first person who walks in – even if he has a criminal record.

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By Ethan Blevins, *The Wall Street Journal*, January 31, 2020.

Affordable-housing shortages are an abiding challenge for cities around the nation. But often policies meant to alleviate the problem aggravate it instead. That's certainly the case in Seattle, where the City Council imposed a pair of ordinances aimed at restricting property owners' right to choose their tenants.

These misguided laws, recently upheld by the Washington Supreme Court, attempt to solve problems caused by the housing shortage by destroying property rights. Property owners in other cities should take note: Such reforms have a tendency to spread once they take root.

The two ordinances in question strip landlords of the right to decide who will occupy their property. Seattle's "first in time" rule requires landlords to set rental criteria in advance and then rent to the first person who walks in the door with an adequate application. There are plenty of good reasons a landlord might prefer a different tenant, including socially beneficial ones such as a desire to help a struggling family.

The second law prohibits a landlord from inquiring about or considering an applicant's criminal history – deemed an "unfair practice" that can subject the landlord to severe civil penalties. The federal government requires background checks for federally assisted housing, and for good reason: Criminal history bears directly on factors like reliability, creditworthiness and safety.

Both Seattle laws purport to reduce discrimination in housing and help beleaguered minorities, even though there's no evidence that Seattle landlords engage in widespread discrimination. Taken together, these laws thrust landlords blindly into long-term lease relationships with renters they didn't choose.

A small band of mom-and-pop landlords, represented by the Pacific Legal Foundation, sued the city over both ordinances. Marilyn Yim owns a triplex in Seattle. She lives with her husband and children in one of the units and rents out the other two. She shares the yard and her home with her tenants, so she has understandable concerns about compatibility and safety. Plus, she's occasionally had to help her tenants find roommates. She has always considered a criminal-background check an essential service she provides a tenant looking for a roommate, for obvious reasons that apparently elude the Seattle City Council.

Another plaintiff, Kelly Lyles, is a single woman and local artist whose income derives mostly from a small single-family home she inherited from a relative. She's also a survivor of multiple sexual assaults and domestic violence. The City Council barreled onward with its first-in-time rule and the ban on criminal-background checks despite Ms. Lyles's tearful plea.

These plaintiffs challenged both laws as violations of their property rights under well-established Washington state case law. Washington courts have recognized that if government regulation destroys a "fundamental attribute" of property ownership, the regulation amounts to an unconstitutional taking unless the government compensates the owner. And if a regulation of property is "unduly oppressive," Washington courts have traditionally struck it down as a violation of due process. But in a remarkable pair of decisions issued Nov. 14, the state high court mowed down longstanding protections for property owners by overturning 61 of its own prior decisions. By clear-cutting decades of decisions protecting property owners from overregulation, the court forged a path for two of the most radical housing regulations in the nation.

Courts are usually cautious about overturning precedent. A court that goes out of its way to overturn 61 cases in a single go seems intent on making the point that no constitutional right is secure if it conflicts with the orthodoxy of the day. Now Washington property owners will have to turn to the notoriously labyrinthine and hostile world of federal takings law for relief, and the city government is free to oppress property owners so long as the oppression has a "rational basis."

Landlords aren't the only victims. Renters will suffer too. As owners like Ms. Yim and Ms. Lyles flee the housing market because they can't bear the regulatory burden, the contraction in supply will further inflate rents. Remaining landlords will raise prices even more to underwrite the risks they face because they can't adequately vet rental applicants.

Meanwhile, Seattle officials, emboldened by this win, will continue churning out false solutions that pander to their collectivist constituency, comfortable in the knowledge that longstanding constitutional protections aren't the obstacles they once seemed.

But the fight isn't over. Pacific Legal Foundation will ask the U.S. Supreme Court to review the first-in-time case and affirm that Seattle landowners do, in fact, have property rights protected by the Constitution. And the criminal background check case will now go to a federal district court, which may yet state the obvious: Property owners should have some say over who occupies their land. Until then, the state court's decision means the housing crisis in Seattle will only grow more severe.

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