WORKFORCE HOUSING AND HOUSING PREFERENCE POLICIES UNDER THE FAIR HOUSING ACT

by
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The workforce housing movement grew out of two urgent realities. First, the lack of affordable housing near where workers are employed has a substantial impact on local economies and local business. Second, the lack of affordable housing near where workers live undermines the twin goals of inclusive communities and reversing historical patterns of segregation. The latter remains a primary obstacle to equality of opportunity throughout the United States. There is no one definition of "workforce housing." The leading definition of workforce housing is provided by the influential Urban Land Institute (ULI). The ULI defines workforce housing as housing that is affordable to households earning 60%–120% of the area median income. This Article examines workforce housing under the federal Fair Housing Act (FHA) and Oregon fair housing law. Section II details the need for affordable housing. Section III explains how housing preference policies can run afoul of the FHA and Oregon law. Section IV summarizes the relatively sparse FHA case law on housing preference policies and the lessons that can be learned from it. Section V explains how demographics present challenges to housing preference policies. The Conclusion offers guidance for housing providers interested in workforce housing or other housing preference policies.

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I. INTRODUCTION: BEYOND GOOD INTENTIONS

The workforce housing movement grew out of two urgent realities. First, the lack of affordable housing near where workers are employed has a substantial impact on local economies and local business. Second, the lack of affordable housing near where workers live undermines the twin goals of inclusive communities and reversing historical patterns of segregation. The latter remains a primary obstacle to equality of opportunity throughout the United States.

There is no one definition of "workforce housing." Intuitively, it is housing that is both affordable to workers and near to local jobs. Historically, long after the demise of Pullman-like company towns,[1] workforce housing came to be identified with government-subsidized housing for police officers, firefighters, teachers, and other categories of worker deemed "essential" to communal health and public safety. This definition of workforce housing can apply to any public or private efforts to make housing accessible to specific categories of worker: service workers, young professionals, etc. The leading definition of workforce housing is provided by the influential Urban Land Institute (ULI). The ULI defines workforce households as those "earning between 60 and 120 percent of [the area median income]."[2]

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[1] "Pullman" refers to Pullman, Illinois and George Pullman. In 1884, Pullman finished construction of a manufacturing complex and town on 4,000 acres of land south of Chicago. The development was specifically designed to house the employees of Pullman Palace Car Co., established in 1867 to manufacture luxury railroad sleeping cars. Pullman envisioned a planned community near the plants that would attract skilled labor and a suburban environment that would increase worker satisfaction and productivity. Pullman was a small city featuring 1,000 homes with then-rare amenities such as backyards, indoor plumbing and gas, and daily trash pickup. By 1893, the community of Pullman boasted 12,000 residents. But things were not as they first seemed. Workers could only rent, not own, their homes. The homes were subject to random inspection and workers could be evicted on short notice. In 1894, a down economy prompted Pullman to conduct mass layoffs and reduce wages, but with no corresponding reduction in rents. The result was a violent strike quelled only after summoning federal troops. So went one of the early American experiments in workforce housing. *See* Elizabeth Nix, *5 Famous Company Towns*, HIST. (Aug. 22, 2018), https://www.history.com/news/5-famous-company-towns.

[2] J. RONALD TERWILLIGER, URBAN LAND INSTITUTE, AMERICA'S HOUSING POLICY—THE MISSING PIECE: AFFORDABLE WORKFORCE RENTALS 2 (2011), https://americas.uli.org/wp-content/uploads/2012/06/JRTPaperFinal.pdf.

Workforce housing is a powerful planning tool—one increasingly essential to the work of building inclusive communities. The potential benefits of locating housing near jobs include: providing access to opportunity for residents at all income levels; decreasing commute times, gas usage, vehicle miles, and greenhouse emissions; enabling employees to bike or walk to work; creating options for public transportation (and, possibly, forgoing car ownership); reducing living costs; enhancing in-fill development and shared parking; leveraging city and state "fair share" housing goals; improving employee recruitment and retention outcomes; and increasing response times for critical services workers.[3]

Indeed, workforce housing represents a unique "win/win/win/win": it can improve outcomes for cities, developers, workers, and employers alike.[4] But housing preference policies raise the specter of housing discrimination. Such policies risk violating the federal Fair Housing Act (FHA) and state and local antidiscrimination laws. Even well-intentioned workforce housing policies, if not structured with care and advanced planning, can result in unwitting violations.

This Article examines workforce housing under the federal FHA and Oregon law. Section II details the need for affordable housing. Section III explains how housing preference policies can run afoul of the FHA and Oregon law. Section IV summarizes the relatively sparse FHA case law on housing preference policies and the lessons that can be learned from it. Section V explains how demographics present challenges to housing preference policies. The Conclusion offers guidance for housing providers interested in workforce housing or other housing preference policies.

II. THE NEED FOR AFFORDABLE HOUSING

To repeat, *workforce housing* is defined as housing that is affordable to households earning 60%–120% of the area median income. Very often, however, the public and private development of workforce housing has the primary aim of increasing *affordable housing* stocks. The U.S. Department of Housing and Urban Development (HUD) defines affordable housing as housing that is affordable to households for 30% or less of their gross income.[5] Commonly, the goals of workforce and affordable housing are accomplished within the same development project, such as when, in exchange for Low-Income Housing Tax Credits (LIHTC), a

[3] *See* Steve Raney, *Local Workforce Housing Preference: The Most Cost-Effective Suburban Traffic Reduction Policy*, CITIES21, at 2 (Aug. 22, 2005), www.cities21.org/workforceHsngPref.doc.

[4] *Id.* at 1.

[5] *Resources, HUDUser Glossary Archives,* U.S. DEP'T HOUS. & URBAN DEV., https://web.archive.org/web/20190502144359/https://www.huduser.gov/portal/glossary/glossary_a.html (last visited Dec. 21, 2020).

developer marks a percentage of rental units as "affordable" within an apartment building located in a middle-class or upper-income neighborhood.[6] For this reason, before discussing workforce housing, it will be useful to understand Oregon's specific affordable housing challenges.

One out of three of all renters in Oregon are paying more than 50% of their income in rent.[7] Three out of four of all renters with extremely low incomes are paying more than 50% of their income in rent.[8] At any point in time, nearly 14,000 Oregon residents experience homelessness.[9]

The Housing Opportunity Index (HOI) for a given residential area is defined as "the share of homes sold in that area that would have been affordable to a family earning the local median income, based on standard mortgage underwriting criteria."[10] According to the HOI, for the first quarter of 2019, Portland's metro area ranked among the least affordable in the country: 207th out of 239.[11] Only 47% of homes in Portland's metro area are affordable to Oregon residents near where they live.[12] Put differently, more than half of local housing in Portland's metro area is unaffordable to local residents.

One of the factors in Oregon's housing affordability crisis is housing underproduction. According to the Oregon Community Foundation, "[h]ousing starts have fallen well below the pace of household formation in the region since 2000," and particularly in 2010–2016, when the ratio was "0.59 in Multnomah County, 0.71 in Washington County, 0.78 in Clackamas County, and 0.90 in Clark County."[13] Multnomah County's 0.59 ratio, for example, means that 59 new units of housing were produced for every 100 new households formed during 2000–2016.[14] The ratios are far worse in other counties in Oregon: 0.48 in Josephine County, 0.60 in Jackson County, 0.55 in Lane County, and 0.45 in Marion

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[6] *Cf. Low-Income Housing Tax Credits*, OFF. POL'Y DEV. & RES. (June 5, 2020), https://www.huduser.gov/portal/datasets/lihtc.html#codebook.

[7] *Oregon Demographic & Housing Profiles*, OR. HOUS. & CMTY. SERVS. (Oct. 2017), https://www.oregon.gov/ohcs/Documents/swhp/oregon-statewide-housing-data-profile.pdf.

[8] *Id.*

[9] *Id.*

[10] *NAHB/Wells Fargo Housing Opportunity Index*, NAT'L ASS'N HOMEBUILDERS, https://www.nahb.org/research/housing-economics/housing-indexes/housing-opportunity-index.aspx (last visited Dec. 21, 2020).

[11] *Id.* (follow "The NAHB/Wells Fargo Housing Opportunity Index: Complete History by Metropolitan Area (2012–Current)" hyperlink for Portland metro area; follow "The NAHB/Wells Fargo Housing Opportunity Index (2012–Current)" hyperlink for all metro areas).

[12] *Id.*

[13] JOHN TAPOGNA ET AL., OR. CMTY FOUND., HOMELESSNESS IN THE PORTLAND REGION: A REVIEW OF TRENDS, CAUSES, AND THE OUTLOOK AHEAD 20–21 (2018), https://oregoncf.org/assets/PDFs-and-Docs/PDFs/homelessness_in_portland_report-v2.pdf.

[14] *See id.* at 20.

County.[15] This underproduction has decreased vacancy rates, put upward pressure on housing costs, and contributed to high rents and cost burdening across the state.[16]

Similarly, according to the Oregon Office of Economic Analysis, most of Oregon's coastal counties are among the 10% least affordable rural counties in the nation.[17] Other rural counties—Hood River, Lake, Klamath, Wasco, Crook, Grant, Wallowa and Union—are similarly strained.[18] While rural Oregonian incomes are on par with incomes in other parts of rural America, home prices in rural Oregon on average are 30% higher and rents are 16% higher.[19] These differences mean rural Oregonians face a severe housing affordability crunch as well.

Another primary source of rural Oregon's housing crisis reaches back into the 1990s, when rural Oregon began to experience substantial population growth. The increases in population increased the demand for housing, but new construction did not keep pace. Many of Oregon's coastal communities—also considered rural—face additional challenges in the form of vacation homes, which tend to displace opportunities for workforce housing.[20] The housing affordability issues in rural areas make it particularly difficult for local businesses to hire and retain workers and results in longer commutes for individuals taking these jobs.

Land use policies and housing discrimination have also been key contributing factors in housing underproduction or unavailability. Of particular note, Oregon's Urban Growth Boundaries (UGBs) limit available building areas. In 1973, then-governor Tom McCall advocated for the institution of urban growth boundaries; his coalition of farmers and environmentalists shared a concern that "the state's natural beauty and easy access to nature would be lost in a rising tide of urban sprawl."[21] Under Oregon's land use policies, every urban area in Oregon is required to fix a

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[15] JOHN TAPOGNA & MADELINE BARON, OR. CMTY FOUND., HOMELESSNESS IN OREGON: A REVIEW OF TRENDS, CAUSES, AND POLICY OPTIONS 24 (2019), https://oregoncf.org/Templates/media/files/reports/OregonHomelessness.pdf.

[16] "Cost-burdened" households are households that spend more than 45–50% of their income on housing and transportation. BONNIE GEE YOSICK, CITY OF PORTLAND BUREAU OF PLANNING & SUSTAINABILITY, HOUSING AND TRANSPORTATION COST STUDY ii (2009).

[17] Josh Lehner, *Rural Housing Affordability*, OR. OFF. ECON. ANALYSIS (Feb. 9, 2017), https://oregoneconomicanalysis.com/2017/02/09/rural-housing-affordability/.

[18] *Id.*

[19] Josh Lehner, *Update on Rural Housing Affordability*, OR. OFF. ECON. ANALYSIS (Mar. 7, 2018), https://oregoneconomicanalysis.com/2018/03/07/update-on-rural-housing-affordability/.

[20] *Id.*

[21] *Urban Growth Boundary*, OR. METRO (Feb. 24, 2020), https://www.oregonmetro.gov/urban-growth-boundary.

UGB. Residential housing, commercial real estate and other types of urban development are prohibited from sprawling past such boundaries, while farmland, forests and other open spaces outside of UGBs are preserved.

The Portland-area regional government Metro was created by voters in 1978, with a primary responsibility of managing the UGBs in Multnomah, Clackamas, and Washington counties.[22] UGB zones require regular updating to maintain a "twenty-year supply" of land for future development.[23] And while the population in Oregon is expected to grow at a reasonable 2%–3% per year in the near future, "[o]ver the next 20 years, Portland is projected to add approximately 260,000 new residents to the roughly 620,000 people who live here today and about 140,000 new jobs to the 370,000 jobs in Portland now."[24]

Discriminatory housing policies have also played a significant role in housing availability and affordability, particularly for communities of color in Oregon.[25] Oregon joined the United States in 1859, and held the distinct dishonor of being the only state to constitutionally forbid African-Americans from living, working or owning property within the state.[26] In fact, it was illegal for African-Americans to even move to Oregon until 1926, and they were prohibited from voting until 1927.[27] Oregon was also a Ku Klux Klan stronghold, with substantial influence in state and local politics.[28] The result is that Portland—Oregon's biggest city—quickly became known as one of the most segregated cities in the North and continues to be one of the whitest major cities in the United States.[29]

Oregon, following segregationist policies promoted by the Federal Housing Administration, engaged in discriminatory housing policies throughout the twentieth century, such as redlining, racially restrictive covenants, exclusionary zoning and other practices specifically targeted at segregating Blacks and other racial minorities,

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[22] Carl Abbott, *Metro Regional Government*, OR. ENCYC. (Mar. 17, 2018), https://oregonencyclopedia.org/articles/metro/.

[23] David Oates, *Urban Growth Boundary*, OR. ENCYC. (Feb. 6, 2020), https://oregonencyclopedia.org/articles/urban_growth_boundary/.

[24] *2035 Comprehensive Plan*, CITY OF PORTLAND, at I-8 (Dec. 2018), https://www.portlandoregon.gov/bps/2035-comp-plan.pdf (emphasis omitted).

[25] *See, e.g.*, Alana Semuels, *The Racist History of Portland, the Whitest City in America*, ATLANTIC (July 22, 2016), https://www.theatlantic.com/business/archive/2016/07/racist-history-portland/492035/.

[26] Natasha Geiling, *How Oregon's Second Largest City Vanished in a Day*, SMITHSONIAN MAG. (Feb. 18, 2015), https://www.smithsonianmag.com/history/vanport-oregon-how-countrys-largest-housing-project-vanished-day-180954040/.

[27] *Id.*

[28] *Id.*

[29] *Id.*

meanwhile investing heavily in developers creating subdivisions for white residents.[30] As a result, most African-Americans who moved to Portland were steered into the Albina community, one of the only places in Portland where African-Americans were permitted to live.[31]

By 1940, nearly 60% of Portland's Black residents lived in the Albina area.[32] By 1960, that number would climb to 80%, and deliberate City policies of neglect ensured that the neighborhood remained rife with social ills.[33] Despite the odds and lack of resources from the City, African-American residents built a thriving and vibrant community in Albina.[34] While African-American residents worked to maintain the community, a systematic program of urban renewal projects from the 1950s through 1970s (made possible by the City's indiscriminate use of eminent domain and declaration of much of the area as "blighted") led to the destruction of more than 1,000 homes and businesses of predominantly Black families.[35]

Near the end of the twentieth century, large public infrastructure investments made the Albina district attractive to white Portlanders, who began moving into the district.[36] The ensuing gentrification has displaced more than 10,000 African-Americans who had called Albina home after once having no choice about where in the city they could reside.[37]

Even before the Albina district became historically Black, a large number of African-Americans migrated to the greater Portland area during World War II for

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[30] JENA HUGHES, BUREAU PLANNING & SUSTAINABILITY, HISTORICAL CONTEXT OF RACIST PLANNING: A HISTORY OF HOW PLANNING SEGREGATED PORTLAND 5–10 (2019), https://www.portland.gov/sites/default/files/2019-12/portlandracistplanninghistoryreport.pdf?fbclid=IwAR3FVkyLpr_NH9Ru0Cf9ddMU2pqrmsPSnrVtJEQuo7K-KobfIUF6olBed8E; JOINT TASK FORCE ADDRESSING RACIAL DISPARITIES IN HOME OWNERSHIP, REPORT ON ADDRESSING BARRIERS TO HOME OWNERSHIP FOR PEOPLE OF COLOR IN OREGON 16–17 (2019); Greta Smith, *"Congenial Neighbors": Restrictive Covenants and Residential Segregation in Portland, Oregon*, 119 OR. HIST. Q. 358, 361–64 (2018).

[31] Stuart McElderry, *Building a West Coast Ghetto: African-American Housing in Portland, 1910–1960*, 92 PAC. NW. Q. 137, 143–44 (2001).

[32] *Id.* at 139.

[33] *See* Karen J. Gibson, *Bleeding Albina: A History of Community Disinvestment, 1940–2000*, 15 TRANSFORMING ANTHROPOLOGY 3, 11–13 (2007), http://kingneighborhood.org/wp-content/uploads/2015/03/BLEEDING-ALBINA_-A-HISTORY-OF-COMMUNITY-DISINVESTMENT-1940%E2%80%932000.pdf.

[34] PORTLAND BUREAU OF PLANNING, HISTORY OF PORTLAND'S AFRICAN AMERICAN COMMUNITY (1805 TO THE PRESENT) 55 (1993), https://multco.us/file/15283/download.

[35] *See, e.g.*, Gibson, *supra* note 33, at 11; KGW Staff, *How Market Forces and Bias Displaced African-Americans in Portland*, KGW8 (June 7, 2017), https://www.kgw.com/article/news/how-market-forces-and-bias-displaced-african-americans-in-portland/446257644.

[36] HUGHES, *supra* note 30, at 13.

[37] *See id.*

work.[38] Many of these workers settled in Vanport, a federally-funded city built by Henry Kaiser to house shipyard workers.[39] Due to segregated housing policies, Vanport was one of only two public housing projects built in Portland that would accept Blacks.[40] Although intended to be temporary, many African-Americans remained in Vanport following the war.[41] The Columbia River flooded Vanport out of existence in 1948 when the dam which protected the depressed and segregated land broke open.[42] At the time Vanport was home to 40,000 residents, approximately 6,000 of whom were Black.[43] The demise of Vanport accelerated the steady migration of African-Americans to the Albina district and other areas of North Portland.[44]

Oregon and many of its counties and municipalities continue to struggle to improve housing affordability. For example, the State of Oregon has adopted a rent control law that caps rent increases at 7% per year plus the annual increase in the consumer price index, and requires most landlords to give three months' notice of lease termination and to pay one month's rent for termination without cause.[45] The City of Portland's inclusionary housing program now requires all new residential housing developments of 20 or more units to include a percentage of units affordable to residents with income at 80% of the median family income or to pay into a fund to develop affordable units. Portland is also attempting to address the displacement of African-Americans due to urban renewal projects by trying to create programs for African-Americans to remain in or return to their former neighborhoods. And, most recently, Oregon effectively banned single-family zoning, allowing for the development of duplexes, triplexes, quadplexes and cottage clusters, depending on city size. Most recently, the Governor of Oregon has launched a number of pilot projects for the development of workforce housing across the State of Oregon.[46]

The tools that can be used to promote workforce housing are voluminous. For would-be workers and renters, there are housing choice vouchers, designated affordable apartments, employer assistance, and local government assistance. For homebuyers, there are federal, state, and local loan programs and programs directed at specific populations. Employers may grant employees housing subsidies or one-time

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[38] *Id.* at 6.

[39] Geiling, *supra* note 26.

[40] *See id.*; Gibson, *supra* note 33, at 6.

[41] *See* Geiling, *supra* note 26; HUGHES, *supra* note 30, at 6.

[42] Gibson, *supra* note 33, at 10.

[43] Geiling, *supra* note 26.

[44] *See* Tania Hyatt-Evenson et al., *Albina Residents Picket the Portland Development Commission, 1973*, OR. HIST. SOC'Y (2014), https://oregonhistoryproject.org/articles/historical-records/albina-residents-picket-emanuel-hospital/#.XSt-JJNKjOQ.

[45] OR. REV. STAT. §§ 90.600(2), 90.427(6) (2019).

[46] *Governor Brown's Workforce Housing Initiatives*, OR. HOUS. & CMTY SERVS., https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/159551 (last visited Dec. 20, 2020).

grants, short-term employer loans, and even employer-developed housing. And developers interested in building multifamily or attached workforce housing can seek housing tax credits, federal or state grants and development loans, or urban renewal or other tax credits. However, most such development must comply with the federal Fair Housing Act.[47]

III. THE FEDERAL FAIR HOUSING ACT

A. Fair Housing Is a Civil Right

Congress enacted the Fair Housing Act (FHA) in 1968 and amended the Act in 1988.[48] The FHA (or "the Act") established a national policy "to provide, within constitutional limitations, for fair housing throughout the United States."[49] In commemorating the 40th anniversary of the FHA, the House of Representatives reiterated that "the intent of Congress in passing the FHA was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States."[50]

The Act requires all federal agencies to "administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further" fair housing.[51] Affirmatively furthering fair housing requires housing authorities "not merely to follow a policy of 'color blindness,' but literally to act affirmatively to achieve fair housing, that is, not merely to desegregate, but to integrate housing."[52]

The federal FHA prohibits discriminatory practices that make housing unavailable to persons because of race or color, religion, sex, familial status, or national origin.[53] Oregon's housing discrimination laws mirror the FHA and contain the same protected classes. But Oregon law further prohibits housing discrimination on the bases of sexual orientation, marital status, source of income, or status as victims

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[47] "The Fair Housing Act covers most housing. In very limited circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family houses sold or rented by the owner without the use of an agent, and housing operated by religious organizations and private clubs that limit occupancy to members." *Housing Discrimination Under the Fair Housing Act*, FAIR HOUS. & EQUAL OPPORTUNITY, https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_What_Types_of (last visited Dec. 20, 2020).

[48] *See* 42 U.S.C. §§ 3601–31 (2018).

[49] *Id.* at § 3601.

[50] 154 CONG. REC. 6002 (2008).

[51] 42 U.S.C. § 3608(d) (2018).

[52] Otero v. N.Y.C. Hous. Auth., 354 F. Supp. 941, 943 (S.D.N.Y.), *rev'd*, 484 F.2d 1122 (2d Cir. 1973).

[53] 42 U.S.C. § 3604(a) (2018).

of domestic violence.[54] Some cities and counties in Oregon add still more classes protected against housing discrimination. For example, many of the counties in Oregon prohibit housing discrimination on the bases of age and/or domestic partnership.[55]

Under both federal and Oregon state and local law, taking any action because of membership in these protected classes "which otherwise makes housing unavailable" is illegal discrimination. For example, it is illegal to refuse to rent or sell housing, to set different terms or conditions for sale or rental of a dwelling, to falsely deny that housing is available for sale or rent, to impose different rental or sale prices, or to discourage sales or rentals, if done because of a person's membership in a protected class.[56] Of course, this list is not exhaustive. But the FHA's objective should be clear: Housing must be offered to members of protected classes on terms and conditions equal and identical to those offered to the public at large.

B. "Disparate Impact" and "Segregative Effect" under the FHA[57]

Regardless of whether there was an intent to discriminate, the FHA prohibits housing policies and practices which have either a "disparate impact" or a "segregative effect."[58] Disparate impact claims focus on how a challenged practice harms a racial minority or other FHA-protected class. Segregative effect claims focus on how a challenged practice affects residential segregation in an area.[59]

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[54] OR. REV. STAT. § 659A.145(2) (2019) (disability); *id.* § 659A.421(2) (sexual orientation, marital status, source of income); *id.* § 90.449(1)(a) (victims of domestic violence, sexual assault, or stalking).

[55] *See, e.g.*, Multnomah County Code § 15.340 (2019); Eugene Code § 4.630 (2020).

[56] Fair Housing Act, 42 U.S.C. § 3604 (2018).

[57] This Section relies heavily on, and reproduces direct language from, Professor Robert G. Schwemm's two seminal articles: Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After* Inclusive Communities, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 685 (2016); Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709 (2017) [hereinafter Schwemm, *Segregative-Effect Claims*]; *see also* Robert G. Schwemm, *Fair Housing Litigation After* Inclusive Communities*: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106 (2015).

[58] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,467 (Feb. 15, 2013) (describing 24 C.F.R. § 100.500(a)). This regulation provides that "[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a) (2019).

[59] Note that the FHA's prohibitions on intentional and disparate impact discrimination are not the only antidiscrimination provisions. For example, the FHA regulations contain site selection standards requiring that new construction and rehabilitation of existing housing be consistent with "deconcentrating poverty and expanding housing and economic opportunities." *See* 24 C.F.R. § 983.57(b)(1) (2019). These regulations fall outside of the scope of this Article.

1. Disparate Impact Claims

A "disparate impact" is one that "actually or predictably results in a disparate impact on a group of persons . . . because of race, color, religion, sex, handicap, familial status or national origin."[60] Disparate impact claims have three elements: (i) identifying a housing policy or practice of defendant used to limit housing opportunities; (ii) showing through statistical evidence a sufficiently large disparity in how the policy or practice affects an FHA-protected class as compared with others; (iii) proving that the disparity is actually caused by defendant's policy or practice.[61]

Disparate impact claims apply to facially neutral, generally applicable policies. This has two implications. First, disparate impact theory is not appropriate for policies or practices that are discriminatory on their face or applied in a discriminatory manner. Such policies are intentional discrimination directly prohibited under the FHA. Second, disparate impact theory also does not apply to a defendant's single act or decision.[62] Disparate impact theory has been used to challenge:

- Screening devices by landlords used to limit units based on applicant's status (e.g., source of income, citizenship status, criminal history);
- Exclusionary zoning and other land use practices that block housing proposals that disproportionately affect FHA-protected classes;
- Occupancy restrictions that disproportionately harm families with children; and
- *Residency preferences and other techniques used by housing officials and private developers to favor local residents over outsiders.*[63]

The leading case for disparate impact claims is *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* In that case, the Texas Department of Housing and Community Affairs was accused of employing discriminatory standards in its administration of the LIHTC program. Plaintiff Inclusive Communities alleged that the Department and its officers had perpetuated segregated housing patterns by allocating too many tax credits to housing in predominantly Black inner-city areas and too few in predominantly white suburban ones. The non-profit relied solely on statistical evidence.[64]

The United States Supreme Court used the *Inclusive Communities* case to clarify—and limit—disparate impact liability under the FHA. The Court explained that "cautionary standards" were needed to prevent disparate impact claims from unduly

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[60] 24 C.F.R. § 100.500(a) (2019).

[61] *See* Schwemm & Bradford, *supra* note 57, at 693.

[62] *Id.*

[63] *Id.* at 693–95.

[64] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

encroaching upon housing providers' legitimate planning and development choices.[65] First, the Court held that the FHA only mandates the "removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies."[66] Second, the Court held that a mere statistical showing of harm of an FHA-protected class would "not, without more, establish a prima facie case of disparate impact."[67] Instead, to state a disparate impact claim one must show a "robust" causal connection between the challenged practice and any statistical disparities.[68] Third, a policy or practice proven to have a disparate impact may still be justified with proof that the policy or practice is "necessary to achieve a valid interest."[69]

The cautionary standards adopted in *Inclusive Communities* appear to insulate many "one-off" decisions by housing providers from FHA disparate impact claims, as such decisions do not involve the administration of any policy. But such decisions may still be challenged as intentional housing discrimination or for causing segregative effects upon housing.

2. Segregative Effect Claims

A "segregative effect" is one that "creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status or national origin."[70] Segregative effect claims have three elements: (i) identifying a particular housing practice of a defendant to challenge; (ii) showing through statistical evidence that the challenged housing practice exacerbates segregation in the relevant community to a sufficiently large degree; (iii) proving that the challenged housing practice is the actual cause of the segregative effect.[71]

Most segregative effect claims have a common fact pattern: a zoning decision or other governmental action is challenged for preventing the development of a housing project that would help to integrate a predominantly white area.[72] Three cases from the 1970s and 1980s laid the foundation for the segregative effect theory.[73]

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[65] *Id.* at 2524.

[66] *Id.* at 2522 (internal quotations omitted).

[67] *Id.* at 2523 (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)).

[68] *Id.*

[69] *Id.*

[70] 24 C.F.R. § 100.500(a) (2019).

[71] Schwemm, *Segregative-Effect Claims*, *supra* note 57, at 712–13.

[72] *Id.* at 713.

[73] *Id.* at 715.

In *United States v. City of Black Jack, Missouri*, the Eighth Circuit found that the defendant-city Black Jack violated the FHA by blocking a proposed 108-townhouse development intended for low- and moderate-income households.[74] The City of Black Jack was virtually all white, while the population of nearby St. Louis was 40.9% Black. Moreover, St. Louis' minority population lived disproportionately in neighborhoods that were segregated, overpopulated, and in housing that was substandard. The Eighth Circuit found that the FHA limits the discretion of local zoning officials where "the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods."[75]

The Eighth Circuit further held that in order to justify blocking the development, Black Jack needed a compelling justification. In ruling against the City, the court found as fact that "many blacks would [have] live[d] in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white."[76] The City's proffered reasons—traffic problems, school overcrowding, single-family home devaluation, and the lack of a "market" or "need" for the development—all failed.[77]

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, a proposed development would have created 190 townhouse apartments in a white suburb of Chicago.[78] The proposed units were income restricted and residents would comprise a group in the metro area that was 40% minority. The Seventh Circuit found evidence of disparate impact to be weak because the class of people eligible for the proposed development—and thus harmed by the defendant's action—was 60% white.[79]

But the Seventh Circuit found strong evidence of segregative effect, because "the Village remains overwhelmingly white at the present time, and the construction . . . would be a significant step toward integrating the community."[80] Notably, in *Village of Arlington Heights* the Seventh Circuit found that although other factors might favor the Village, that "we must decide close cases in favor of integrated housing."[81] The Seventh Circuit remanded the case to determine if the segregative effect would be ameliorated if the development could be built elsewhere in the Village.[82]

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[74] United States v. City of Black Jack, 508 F.2d 1179, 1182 (8th Cir. 1974).

[75] *Id.* at 1184 (quoting Banks v. Perk, 341 F. Supp. 1175, 1180 (N.D. Ohio 1972)).

[76] *Id.* at 1186.

[77] *Id.* at 1187–88.

[78] Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1286 (7th Cir. 1977).

[79] *Id.* at 1291.

[80] *Id.*

[81] *Id.* at 1294.

[82] *Id.* at 1294–95.

In *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, the Town's zoning plan confined all new private multifamily construction to a minority urban renewal area.[83] The Town refused to approve zoning changes necessary to the development of a 162-unit subsidized project in a different area of the Town. The developer and the NAACP argued that the Town violated the FHA by barring multifamily developments outside of the urban renewal area, and separately by refusing to rezone the specific site for the proposed project. Plaintiffs prevailed on both claims. The Second Circuit rejected the Town's justification that allowing multifamily development outside of the urban renewal zone was more likely to cause developers to invest in places other than the Town and that tax incentives would be a more effective and less discriminatory means to the same end.[84]

In *Dews v. Town of Sunnyvale, Texas*, a more recent case, a court ruled that a town's zoning restrictions had both a disparate impact and segregative effect in violation of the FHA.[85] Sunnyvale, a suburb of Dallas, Texas, banned all apartments and mandated one-acre lots for other residential developments. The court found that "Sunnyvale's ban on apartments and stubborn insistence on large lot, low density zoning also perpetuate racial segregation in Dallas County."[86] As part of the evidence, the court compared the population in areas immediately adjoining Sunnyvale, finding that those areas—which allowed multifamily housing and smaller single-family lot sizes—contained several HUD-assisted housing complexes and had the largest numbers of African-American Section 8 tenants. "There is no question," the court concluded, "that Sunnyvale's planning and zoning practices as well as its preclusion of private construction of multifamily and less costly single-family housing perpetuate segregation in a town that is 97 percent white."[87]

The previous Section on disparate impact liability discussed the *Inclusive Communities* case and the cautionary standards courts now use to properly limit FHA disparate impact claims. It is important to note that the *Inclusive Communities* case also recognized the validity of FHA segregative effect claims. Presumably, the cautionary standards applicable to disparate impact claims also apply to segregative effect claims.[88]

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[83] Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988).

[84] *Id.* at 939–41.

[85] Dews v. Town of Sunnyvale, 109 F. Supp. 2d 526, 567–68 (N.D. Tex. 2000).

[86] *Id.* at 567.

[87] *Id.* at 568.

[88] HUD has a new proposed rule which, if approved, would codify the standards set forth in the *Inclusive Communities* case above. *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42,854, 42,857 (proposed Aug. 19, 2019).

C. *Oregon-Specific Considerations: Source of Income*

Section III.A above noted that Oregon state law, and some Oregon county and municipal laws, also recognize fair housing protected classes beyond those contained in the federal Act.[89] Among these is source of income (SOI) as a protected class.[90] Oregon law prohibits landlords from refusing to rent to voucher holders based on source of income.[91] ORS § 659A.421(2) prohibits intentional housing discrimination on the bases of "race, color, religion, sex, *sexual orientation*, national origin, *marital status*, *familial status* or *source of income* of any person."[92]

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[89] *See Fair Housing Protected Classes in Oregon*, FAIR HOUS. COUNCIL OR., http://fhco.org/index.php/learning-resources/fhco-downloads/category/8-pdfs?download=321:fair-housing-protected-classes-in-oregon-10-19 (last visited Dec. 21, 2020).

[90] The federal FHA does not prohibit landlords from refusing to rent to voucher holders. There is good evidence that landlords in states that permit SOI discrimination often adopt such policies. According to HUD:

> The [Housing Choice Voucher] participant is free to choose any housing that meets the requirements of the program and is not limited to units located in subsidized housing projects . . . . [T]he only distinction between housing that HCV and nonsubsidized tenants live in is the method of payment—in this case, partial payment is made via a voucher provided by the government. Despite evidence that subsidized housing residents cause no more problems than market-rate tenants; that the units rented to HCV tenants are certified as being up to code and located in and near other market-rate units and developments; and that overall, there is little to distinguish properties that rent to HCV recipients besides a willingness on the part of the landlord to do so, there is considerable evidence of discrimination against voucher holders.

J. Rosie Tighe et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3, 9–10 (2017).

[91] OR. REV. STAT. § 659A.421(1)(d) (2019).

[92] *Id.* § 659A.421(2) (emphasis added). Administrative regulations further provide that:

> A person may not, because of race, color, religion, sex, sexual orientation, national origin, marital status, disability, familial status, source of income or other protected class of any individual:
>
> (a) Refuse to sell, lease or rent any real property to a purchaser except that a person may refuse to lease or rent real property to a prospective renter or prospective lessee:
>
> (A) Based upon the past conduct of a prospective renter or prospective lessee provided the refusal to lease or rent based on past conduct is consistent with local, state and federal law, including but not limited to fair housing laws; or
>
> (B) Based upon the prospective renter's or prospective lessee's inability to pay rent, taking into account the value of the prospective renter's or prospective lessee's local, state and federal housing assistance, provided the refusal to lease or rent based on inability to pay rent is consistent with local, state and federal law, including but not limited to fair housing laws.

OR. ADMIN. R. 839-005-0205(1)(a) (2020); *see also, e.g.*, *In re* Hye I. Dickinson, 2019 WL 2103050, at *5–6 (Or. Bureau of Labor & Indus. Feb. 12, 2019) (finding source of income discrimination in violation of statute in light of testing evidence proffered by Fair Housing Council of Oregon on behalf of Complainant).

SOI discrimination is not strictly limited to discrimination based on holding a housing voucher. ORS § 659A.421(1)(d)(A) defines "source of income" as including: "federal rent subsidy payments under 42 U.S.C. 1437f and any other local, state or federal housing assistance."[93] As such, SOI under Oregon law likely extends beyond Section 8 housing vouchers to other sources of income such as unemployment compensation, Social Security Disability Insurance (SSDI), Temporary Assistance for Needy Families (TANF), Aid for Dependent Children (AFDC), and could also likely include third-party housing vouchers from local non-profits providing housing assistance.[94] "Source of income" does not include income derived from a specific occupation or income derived in an illegal manner.[95]

Oregon law also prohibits disparate impact discrimination under ORS § 659A.421, including on the basis of SOI. ORS § 659A.425 empowers a court or the Commissioner of the Bureau of Labor and Industries to find a person has violated ORS § 659A.421 if the "person applies a facially neutral housing policy to a member of a protected class in a real property transaction involving a residential tenancy subject to ORS Chapter 90[] and [a]pplication of the policy adversely impacts members of the protected class to a greater extent than the policy impacts persons generally."[96] ORS § 659A.425 adopts the same definition of protected class as ORS § 659A.421, and defines "facially neutral housing policy" to mean "a guideline, practice, rule or screening or admission criterion, regarding a real property transaction, that applies equally to all persons."[97]

The plain language of ORS § 659A.421 and ORS § 659A.425 suggests that these prohibitions on disparate impact discrimination in housing reach housing preference policies.[98] SOI as a protected class in Oregon is significant when considering a preference policy for workforce housing. Housing providers using housing

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[93] OR. REV. STAT. § 659A.421(1)(d)(A) (2019).

[94] I say "likely" only because no Oregon appellate court has interpreted § 659A.421. *See, e.g.*, Colquitt v. Mfrs. & Traders Tr. Co., 2016 WL 1276095, at *3 (D. Or. Apr. 1, 2016) ("There is not any Oregon appellate decision interpreting Oregon Revised Statute § 659A.421(3). This Court, therefore, looks to federal authority related to the FHA and other federal discrimination statutes to interpret § 659A.421(3)(a)."); *see also, e.g.*, Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 247 (9th Cir. 1997) (reversing district court dismissal of plaintiff's claim that landlord's policy of prohibiting all AFDC recipients from applying for apartments was disparate impact discrimination); L.C. v. LeFrak Org., Inc., 987 F. Supp. 2d 391, 402 (S.D.N.Y. 2013) (involving defendant's "facially neutral policy regarding applicants who are recipients of housing subsidies, [which] cause individuals within a protected group to be provided with limited information and to face a more burdensome rental process").

[95] OR. REV. STAT. § 659A.421(1)(d)(B) (2019).

[96] *Id.* § 659A.425(2)(a)–(b) (2019).

[97] *Id.* § 659A.425(1)(a) (2019).

[98] *But see* Ekas v. Affinity Prop. Mgmt., 2017 WL 7360366, at *3 n.5 (D. Or. Dec. 7, 2017), in which the Magistrate Judge, in dicta, called into question whether disparate impact theory is available for ORS § 659A.421 claims:

preference policies must continue to accept fully qualified applicants to their properties who are voucher holders. Housing providers who deny fully qualified applicants who are voucher holders, while favoring others under a housing preference policy, may face liability for intentional discrimination or disparate-impact-based claims related to the SOI protected class.

IV. HOUSING PREFERENCE POLICIES UNDER THE FHA

Congress and HUD have established various types of preferences in an effort to provide housing to those most in need. HUD rules currently include four different kinds of preferences that apply to various programs. Owners must apply statutory and HUD-mandated preferences to applicants based on the property subsidy type.[99] Owners may also apply tenant preferences mandated by state and local law (e.g., for military veterans, persons with disabilities, etc.) "only if they are consistent with HUD and applicable civil rights requirements."[100]

Owners may also adopt their own tenant preferences for HUD-assisted properties provided they "comply with applicable fair housing and civil rights statutes." Some owner-adopted preference policies require prior HUD approval and some do not.[101] HUD Handbook 4350.3 sets forth specific restrictions for administration of preference policies in favor of residency, working families, disability, victims of domestic violence, and for specific groups of single persons.[102]

HUD Handbook 4350.3's restrictions on residency preference policies are instructive for stakeholders interested in using housing preference policies in conjunction with affordable and workforce housing. According to HUD Handbook 4350.3:

- Outright residency *requirements* (refusal to rent to applicants outside of a jurisdiction or municipality) are strictly prohibited;

It is not entirely clear that a claim under ORS 659A.421 may proceed under a disparate impact theory. Legislative enactments that prohibit acts "fair in form but discriminatory in operation" such as ORS 659.850(1), clearly permit a discrimination claim premised upon a disparate impact theory. *See Nakashima v. Or. Bd. of Educ.*, 344 Or. 497, 509–10 (2008) (noting that "prohibition of an act that is 'fair in form but discriminatory in operation' describes disparate impact discrimination," language expressly included in ORS 659.850). However, ORS 659A.421, enacted long after the seminal Supreme Court case articulating the disparate impact theory discussed in *Nakashima, id.* (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)), does not include that critical language.

[99] U.S. DEP'T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, at 4-13 (Nov. 2013), https://www.hud.gov/sites/documents/43503HSGH.PDF.

[100] *Id.* at 4-15.

[101] *Id.*

[102] *Id.* at 4-15–17.

- Residency *preferences* must be "developed, implemented, and executed in accordance with" non-discrimination and equal opportunity requirements;
- The definition of *resident* must include applicants who work or who have been hired to work or who are expected to live in the jurisdiction as a result of a bona fide offer to work in the jurisdiction;
- The definition of *resident* may include graduates and active participants in education or training programs within a jurisdiction if the education or training program is designed to prepare individuals for the job market.[103]

HUD Handbook 4350.3 restrictions do not apply to all affordable housing developments that receive federal funds.[104] Notably, HUD Handbook 4350.3 does not apply to either the HOME Investments Partnerships Program or Community Block Development Grant Programs.[105] Housing not covered by HUD Handbook 4350.3 does not require advance approval of tenant selection, marketing or waitlist management plans. Nonetheless, virtually all housing is subject to the FHA's prohibitions on intentional and disparate impact discrimination, including in the use of housing preference policies.[106]

A. Langlois v. Abington Housing Authority

The leading case on housing preference policies is *Langlois v. Abington Housing Authority*.[107] There, the Massachusetts Coalition for the Homeless (MCH) brought a class action against eight Massachusetts public housing authorities (PHAs) located in majority-white, low-poverty communities. MCH argued that the PHAs used residency preferences that violated the FHA. MCH also argued that the PHAs' residency restrictions undercut their obligation to affirmatively further fair housing for low-income minorities.

The individual plaintiffs in the case were four women, all low-income racial minorities residing in suburban communities with few racial minorities and low poverty rates. None of the plaintiffs lived in any of the defendant PHAs' communities, and none of them would have qualified for the residency preference.[108] Plaintiffs' main argument was that the use of a preference policy for local residents to determine Section 8 applicants' place on the waiting list "effectively discriminated

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[103] *Id.* at 4-16.

[104] *Id.* at 1-3. Covered funding programs include: Section 221; Section 236; Rental Assistant Payment; Rent Supplement; Section 8 Project-Based Assistance. *Id.* at 1-2.

[105] *See id.* at 1-2.

[106] *See id.* at 2-9; *Housing Discrimination Under the Fair Housing Act*, *supra* note 47.

[107] Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33 (D. Mass. 2002).

[108] *Id.* at 43–44.

against minorities by favoring local, predominantly white applicants and violated the PHAs' duties to target housing to extremely low-income families, and to 'affirmatively further' fair housing."[109]

The eight PHAs in *Langlois* had all adopted a Section 8 application process designed to generate a high rate of application. They issued a public notice explaining when applications could be requested from participating PHAs, including windows of date and time, and then each PHA would hold a separate lottery. The initial lotteries to determine which applicants would make the waiting list was random. However, each PHA's waiting list pool subsequently gave preference to applicants currently living or working in the community where the PHA was located.[110] "In other words, once it was established who made the waiting list and who did not, local residents on the waiting list moved to the front of the line for receipt of a Section 8 voucher."[111]

The Court easily concluded that defendants' residency preference policies violated the FHA.[112] *Langlois* identifies a practical and widespread obstacle to housing preference policies. The case identifies an "overarching intuitive principle" that compromises many well-meaning housing preference policies in low-diversity communities: ". . . where a community has a smaller proportion of minority residents than does the larger geographical area from which it draws applicants to its Section 8 program, a selection process that favors its residents *cannot but* work a disparate impact on minorities."[113]

The defendant PHAs in *Langlois* tried unsuccessfully to attack this logic, claiming that it inevitably led to "a ban on all residency preferences unless a community is 'politically perfect,' that is, unless the racial breakdown of the community's residents is statistically similar to that of nonresidents."[114] The Court rejected this line of reasoning:

> Defendants overstate the problem. The standard is not just disparate impact, but substantial disparate impact; a "politically perfect" community is not required.
>
> In any case, though HUD does expressly permit residency preferences . . . it does not declare that communities are entitled to institute them without re-

[109] *Id.* at 37.

[110] *Id.* at 43.

[111] *Id.*

[112] *Id.* at 37–38.

[113] *Id.* at 62 (emphasis in original).

[114] *Id.* at 62 n.34.

> gard to their substantial impact on minorities. . . . [I]t is clear from the regulations that residency preferences are allowable only insofar as they do not conflict with fair housing principles.[115]

Other attempts to use residency preferences in conjunction with fair housing principles for Section 8 housing have also been alleged to violate the FHA.[116]

The reality is that in communities that already present identifiable patterns of residential segregation and/or little racial or ethnic diversity, local housing preference policies can very easily have disparate impacts, segregative effects or both, in violation of the FHA. And this risk is not unique to PHAs, but is present for all FHA-covered housing providers interested in using this particular housing tool.

The majority opinion in *Langlois* is long but essential reading prior to implementing any housing preference policy. The legal takeaways are: (1) housing preference policies must comply with the FHA's prohibition on both intentional and impact discrimination; (2) the duty of PHAs to affirmatively further fair housing includes maintaining statistics to determine the extent to which their policies will affect fair housing principles. In *Langlois*, the latter duty required "gathering and reviewing data on exactly the question of the impact of their residency preferences on the availability of vouchers for minorities."[117]

B. "Anti-displacement"/Community Preference Policies

Many housing preference policies seek to protect local residents—often low-income and/or minorities—from displacement. A major drawback of such policies is that, even when well-intended, they seek to keep existing residents in place. For example, in November 2015 San Francisco enacted its "resident housing preference" ordinance.[118] San Francisco's ordinance had several provisions. First, the ordinance required lotteries for up to 40% of new affordable housing units.[119] Second, the lotteries gave priority to applicants who reside within the project's supervisorial district or within one-half mile of the property.[120]

The express purpose of San Francisco's ordinance was to stem "the alarming rate of displacement of African-Americans" in the City, which had declined from

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[115] *Id.*

[116] Renee Williams, *Recent Developments in Challenges to Residency Preferences*, 43 HOUS. L. BULL. 129, 131–33 (2013).

[117] Langlois, 234 F. Supp. 2d at 64.

[118] ELI KAPLAN, IMPLEMENTING A COMMUNITY PREFERENCE POLICY FOR AFFORDABLE HOUSING IN BERKELEY 37 (2019), https://www.urbandisplacement.org/sites/default/files/images/eli_kaplan_client_report.pdf.

[119] *Lottery Preference Programs*, S.F. MAYOR'S OFF. HOUSING & COMMUNITY DEV., https://sfmohcd.org/lottery-preference-programs#NRHP (last visited Dec. 20, 2020) [https://perma.cc/6ART-UYMN].

[120] *Id.*

13.4% in 1970 to just 5.5% in 2014.[121] HUD denied San Francisco's application to implement the policy in a new affordable housing development for seniors citizens located in Western Addition, a historically African-American neighborhood.[122] In August 2016—under the Obama administration no less—HUD took the position that San Francisco's resident housing preference policy "could limit equal access to housing and perpetuate segregation" and "may also violate the Fair Housing Act."[123]

HUD would later approve an alternative proposal wherein San Francisco residents at an elevated risk of displacement could gain priority for 40% of the new units.[124] But San Francisco's revised plan had to be broadened to win HUD approval. What began as an attempt to stem the demonstrated displacement of African-American residents in historic Western Addition ended up extending to residents from five neighborhoods including Western Addition, and applying to income-eligible applicants who lived in neighborhoods undergoing "extreme displacement pressures" according to Census tract data.[125]

V. HOUSING PREFERENCE POLICIES AND DEMOGRAPHIC CHALLENGES

Housing preference policies often run afoul of the FHA due to the very demographic challenges they seek to address. As explained by Keaton Norquist, "[a]n FHA claim against a local government's resident preference is likely to succeed when the locality is significantly more homogenous than its surrounding region."[126] Mr. Norquist continues,

> The risk that local resident preferences will create or perpetuate a disparate impact, coupled with the difficulty of defending such an occurrence, should convince local governments that it is necessary to extend preferences beyond

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[121] Hannah Albarazi, *Supes Shift Housing Preference Toward Neighborhood Residents*, SFBAY (Nov. 17, 2015), https://sfbay.ca/2015/11/17/supes-shift-housing-preference-toward-neighborhood-residents/.

[122] J.K. Dineen, *HUD to Rethink Veto of SF's Preference Housing Law*, SFGATE (Sept. 2, 2016, 4:25 PM), https://www.sfgate.com/bayarea/article/HUD-will-rethink-veto-of-SF-preferential-housing-9200758.php.

[123] KAPLAN, *supra* note 118, at 43.

[124] *Id.*

[125] Zachary C. Freund, Note, *Perpetuating Segregation or Turning Discrimination on Its Head? Affordable Housing Residency Preferences as Anti-Displacement Measures*, 118 COLUM. L. REV. 833, 850–51 (2018).

[126] Keaton Norquist, *Local Preferences in Affordable Housing: Special Treatment for Those Who Live or Work in a Municipality?*, 36 B.C. ENVTL. AFF. L. REV. 207, 234 (2009).

> only current residents. . . . [L]ocal governments would be wise to extend preferences to households that have a member who works in the jurisdiction. Additionally, a locality could reduce the risk of a disparate impact by extending preferences to residents of a more diverse surrounding geographic area, such as a county. Expanded preferences increase the ethnic diversity of the preferred applicant pool, thereby reducing the risk of creating or perpetuating a disparate racial impact.
>
> Finally, it may be possible to mitigate a discriminatory impact through the use of partial preferences. For example, a local government could require developers to grant preference to local residents in fifty percent of their affordable housing set-asides, rather than the entire stock. Additionally, developers could be required to grant local resident preferences only when filling initial vacancies. Selection of subsequent occupants could be based on income alone, without regard to residency. Both of these partial preferences would reduce the risk of creating or perpetuating discriminatory racial impacts.[127]

As suggested above, housing preference policies which extend to individuals who work within a jurisdiction can help to reduce the risk of FHA violations. "The legitimacy of keeping essential workers close to home has not been directly tested in the courts, but it certainly seems reasonable on its face and is likely a justification courts would find legitimate."[128] Neither have the courts directly addressed the validity of workforce housing under the FHA. But the rationales for both are obvious and compelling.

In *Inclusive Communities*, Justice Kennedy wrote:

> Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a 'reasonable measure[ment] of job performance,' [] so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.[129]

If housing providers articulate well—and in advance—the vital interests served by their policy, they will have made their best case for purposes of the FHA.

The Supreme Court may soon have an opportunity to clarify the circumstances under which housing preference policies comply with the FHA. *Noel v. City of New York* challenges New York City's longstanding community preference policy, which

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[127] *Id.* at 235.

[128] John Relman & Reed Colfax, *Fair Housing Implications of 'Essential Workforce' Housing*, FLA. HOUSING COALITION, Fall 2006, at 3, 5 (referring to Thomas v. Texas Dept. of Criminal Justice, 220 F.3d 389, 391 (5th Cir. 2000) for approval of the proposition that residential housing to ensure the availability of essential personnel in times of emergency is a valid governmental purpose).

[129] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015) (internal citation omitted).

requires that 50% of affordable housing units be set aside in the housing lottery for residents of the local community districts.[130] New York's community preference policy was originally implemented to protect historical enclaves like Chinatown and Harlem, and the City has resisted proposals to alter or eliminate it.[131]

Plaintiffs in the case are African-Americans who entered New York City's housing lottery to obtain homes in three of New York's community districts.[132] The three districts in which plaintiffs sought homes are in Manhattan, predominately white, and "neighborhoods of opportunity" with "high quality schools, health care access, and employment opportunities; well-maintained parks and other amenities; and relatively low crime rates."[133] None of the plaintiffs were selected for interviews for units in the areas.

Plaintiffs argue that New York's community preference policy has a disparate impact on racial and ethnic minorities outside of New York's neighborhoods of opportunity and perpetuates existing segregation throughout New York.[134] From all appearances—the fact pattern favors *Langlois*—the plaintiffs have a compelling case.[135] In *Langlois*, the court said that mere reference to "local needs and priorities" does not result in "*carte blanche* to effect preferences for local residents."[136] As with New York's community preference policy, in *Langlois* public housing authorities applied a local resident preference to determine Section 8 applicants' position on a waiting list which moved local residents "to the front of the line for receipt of a Section 8 voucher."[137] Plaintiffs in *Noel* allege that New York's community preference policy has similar effects. In their Memorandum of Law in Support of Motion for Partial Summary Judgment, the plaintiffs argue that New York's community preference policy causes disparate impacts and perpetuates segregation:

> Instead of permitting all participants in a lottery to compete on a level playing field for affordable housing opportunities regardless of where in the City the

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[130] Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment at 2, Noel v. City of New York, No. 15-CV-5236-LTS-KHP (S.D.N.Y. Mar. 6, 2020) [hereinafter Noel Summary Judgment Memo].

[131] Catherine Hart, *Community Preference in New York City*, 47 SETON HALL L. REV. 881, 884 (2017).

[132] First Amended Complaint at 4, Winfield v. City of New York, No. 1:15-cv-05236-LTS-KHP (S.D.N.Y. Sept. 1, 2015).

[133] *Id.* at 2.

[134] Hart, *supra* note 131, at 886–88.

[135] *See id.* at 904; *see also infra* Conclusion.

[136] Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 38 (D. Mass. 2002).

[137] *Id.* at 43.

> applicant household comes from and regardless of where the applicant household wishes to move, defendant imposes what it calls a "community preference" policy in respect to 50 percent of the units.
>
> That policy takes the highly diverse citywide applicant pool that is generated each time a lottery is announced and artificially splits that pool into two subpools. One consists of those applicants who live in the community district ("CD") where the development is located ("insiders" or "CP Beneficiaries"); the other consists of New York City applicants who live outside of the CD where the development is located ("outsiders" or "non-beneficiaries").[138]

Plaintiffs go on to describe the community preference policy as an "outsider restriction" policy by *allocation* and *sequencing*:

> Defendant's policy has an *allocation* element: requiring that insiders receive priority for 50 percent of the units *regardless of how small a fraction of all applicants that insiders constitute*. Defendant's policy also has a *sequencing* element: requiring that, until the priority units are filled, insiders *(regardless of how bad their assigned lottery numbers may be)* normally have their applications reviewed by developers before any outsider applications *(regardless of how good any outsider's number may be)*.
>
> . . . [Defendant] takes what would otherwise be an equal-access system (when you enter, you have the same odds as everyone else to compete) and distorts the system so that insiders at the moment they enter the lottery have far better odds of getting an award than outsiders (30 times better in the case of lotteries in majority-White CDs).
>
> . . . [O]utsiders are more apt than insiders to be *partially closed-out* (have some of the unit types for which they are apparently eligible no longer available by the time they are considered by the developer) or *fully closed-out* (have *all* of the unit types for which they are apparently eligible no longer available by the time they are considered by the developer).[139]

The *Noel* plaintiffs round out their case by attacking the "valid interests" purportedly served by the community preference policy. In *Langlois*, the defendant public housing authorities cited protection of "administrative fees," "to make it easier for their residents to keep living in their communities," and the importance "for community morale to know that the PHAs are working for the town's *own* residents" as the legitimate and substantial goals of the residency preference.[140] The court found that all of these reasons "collapse[d] into the very definition of residency preferences."[141]

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[138] Noel Summary Judgment Memo, *supra* note 130, at 1–2.

[139] *Id.* at 2–3.

[140] *Langlois*, 234 F. Supp. 2d at 69.

[141] *Id.* ("If I accepted these as legitimate justifications, residency preferences in and of themselves would forever justify the disparate impacts that they cause.").

New York identifies four substantial, legitimate interests served by its community preference policy: (1) an interest in prioritizing the needs of those who have "persevered through years of unfavorable living conditions"; (2) an interest in "preventing and mitigating displacement"; (3) an interest in reducing the "*fear* of displacement"; and (4) an interest in forcing legislative support for land-use changes needed to facilitate affordable housing production or for particular affordable housing developments.[142] Of course, it is unclear whether this case will even reach the Supreme Court, or, if so, how the court will rule on the empirical questions of whether New York's community preference policy causes a disparate impact or perpetuates segregation. However, it is interesting to note that New York seems to stake its defense of community preference policy on housing stability for local residents, prioritizing that above housing mobility for New Yorkers generally.[143]

VI. CONCLUSION

Nothing can entirely eliminate the risk of FHA challenges to housing policies. Moreover, extrapolating from fair housing legal cases to general, safe, reliable housing practices is hard because the issues of disparate impact and perpetuation of segregation are so policy and fact dependent.[144] However, we can draw two broad lessons from this research. First, preference policies which are limited to a specific

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[142] Noel Summary Judgment Memo, *supra* note 130, at 48–62.

[143] *See, e.g.*, CITIZENS HOUS. & PLANNING COUNCIL, COMMUNITY PREFERENCE POLICY IN NEW YORK CITY 2 (2019), https://chpcny.org/wp-content/uploads/CHPC-Community-Preference-Policy-in-NYC.pdf (noting that the housing policies issues underlying the Noel case are far broader than the narrow legal issues of disparate impact and perpetuation of segregation):

> The policy issues at stake are of housing mobility versus housing stability; of improving underserved neighborhoods versus enabling mobility into neighborhoods highly sought after; of integration versus gentrification. Fighting segregation and preventing displacement are both worthy and important policy goals. Many New Yorkers want to challenge racism in their neighborhoods, yet the city's ethnic enclaves are a source of livelihood and pride. Should the ongoing transformations in historically African-American neighborhoods, such as Harlem and Bed-Stuy, be applauded as "integration?" Can a colorblind policy that delinks race and ethnicity from housing opportunity achieve equity moving forward, when the legacy of segregation persists? These are nuanced and sometimes painful discussions, and there will always be differences of opinion over the means and methods to achieve complex, sometimes conflicting goals.

Id.

[144] One resource document I strongly recommend is Eli Kaplan's *Implementing a Community Preference Policy for Affordable Housing in Berkeley*, *supra* note 118. That document supplements this legal research in two ways. First, it observes that housing preference policies aren't just challenged for violating the FHA. Such policies may also violate the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, or specific state housing laws and regulations. Kaplan, *supra* note 118, at 10–12. Second, and most importantly, it provides case studies of housing preference programs implemented in the cities of Santa Monica,

geographic area are particularly susceptible to disparate impact or segregative effects claims due to challenges often presented by the discriminatory history and demographic makeup of particular communities. Second, the more expansive—and the more inclusive—a housing preference policy is, the better it will fare under the FHA.

Cambridge, San Francisco, Portland, and Oakland with appendices of the actual policy documents used for each program. *Id.* at 22–57. According to Kaplan—at least as of this writing—"[n]one of the case study cities have faced lawsuits related to violating the Fair Housing Act, constitutional rights, or other aspects of the law. In all of these cities, preference is not limited solely to current residence in a city." *Id*. at 58.