Residential Preferences in Affordable Housing Developments

2019 Forum on Affordable Housing and Community Development Law Annual Conference

Supplemental Materials

1. Fair Housing Act Excerpts
3. City of San Francisco Preference for City-Sponsored Housing Policies
4. Aug. 25, 2016 Letter from Dennis Herrera, San Francisco City Attorney, to Secretary Julian Castro and General Counsel Helen Kanovsky, HUD
5. Sept. 21, 2016 Letter from Gustavo Velasquez, Assistant Secretary of Fair Housing and Equal Opportunity, HUD, to Mayor Edwin Lee, City of San Francisco
6. Portland N/NE Preference Policy Website
Fair Housing Act Excerpts

26 U.S.C. Section 3604: [I]t shall be unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities include connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

* * * *

26 U.S.C. Section 3605(a): It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin."

26 CFR § 100.500 Discriminatory effect prohibited.

Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in paragraph (a) of this section, even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.

(a) Discriminatory effect. 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.

(b) Legally sufficient justification.

(1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

Residential Preferences in Affordable Housing Developments, p. 2
(ii) Those interests could not be served by another practice that has a less discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.

(c) Burdens of proof in discriminatory effects cases.

(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

(d) Relationship to discriminatory intent. A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination.

[78 FR 11482, Feb. 15, 2013]
New York, July 7 -- The Anti-Discrimination Center (ADC), acting on behalf of three African-American plaintiffs, is challenging New York City’s policy of barring City residents who live outside the community district in which affordable housing is being built from competing on an equal basis for all available units. The complaint [http://www.antibiaslaw.com/sites/default/files/Complaint.pdf] was filed in federal district court in Manhattan today.

New York City remains the second-most residentially segregated major city in the country, within one of the most segregated major metropolitan areas in the U.S. The patterns of segregation in New York City are unmistakable, and arose from decades of intentional discrimination and segregation.

The segregation extends to the community district level. For example, about 50 percent of the City’s African-American population lives in only about 15 percent of the City’s community districts. Because of existing segregation, New York City’s policy in connection with half of the units in a development -- favoring existing community district residents and disfavoring New Yorkers who live outside the community district -- winds up helping the dominant racial or ethnic group in the community district and hurting those groups who are underrepresented in the community district.

**The Supreme Court just reaffirmed that perpetuation of segregation is illegal**

The three developments identified in the complaint -- at 160 Madison Avenue, 200 East 39th Street, and 40 Riverside Boulevard, all in Manhattan -- are all in community districts where whites are overrepresented and where African-Americans are underrepresented.

“As the Supreme Court has just reaffirmed, policies that have a disparate impact on racial and ethnic minorities or perpetuate segregation are illegal under the Fair Housing Act,” said Craig Gurian, ADC’s executive director and co-counsel for plaintiff. “The City’s outsider-restriction policy starts with segregated neighborhoods and helps keep that segregation in place,” he continued.

“Surely in 2015, there is no place for a policy that denies New Yorkers the ability to compete on a level playing field for all affordable housing opportunities,” said Mariann Wang, a partner in the law firm of Cuti Hecker Wang LLP and co-counsel for the plaintiffs.
In establishing and maintaining its outsider-restriction policy, the complaint alleges, the City ignored the negative impact on families who live in racially concentrated areas of poverty; ignored the positive effects of residential mobility for families who move into neighborhoods of higher opportunity; and paid no heed to the voices of New Yorkers who want to be able to move freely to any City neighborhood and to do so on equal terms with other City residents.

(A recent study -- They’re Our Neighborhoods, Too -- shows that strong majorities of African-American and Latino New Yorkers are willing to consider affordable housing in a wide range of new neighborhoods.)

**An equal playing field does not affect affordability**

It is important to understand that, whether an insider or an outsider, a New Yorker must meet the same income-eligibility criteria in order to be eligible for the affordable housing being developed. In other words, the outsider-restriction policy has no impact on the ability of persons of limited financial means to obtain housing. The outsider-restriction policy does not determine where housing will be built, only who (among people of the same income level) will get to live in it.

**A new direction: becoming one city**

“Mayor de Blasio has provided strong leadership in moving to try to increase the supply of affordable housing and in taking concrete steps to protect residents who wish to stay in place from harassment by housing providers,” Gurian noted. “Supply and security are two important pieces of the affordable housing puzzle, but mobility -- giving people the opportunity to move freely to neighborhoods that had traditionally excluded them on the basis of race or national origin -- cannot be ignored,” he concluded.

“If we are to have any chance of becoming one city, rising together, we need to abandon the outsider-restriction policy this administration inherited from its predecessors and chart a path of equal opportunity and access,” said Eric Hecker, another partner at Cuti Hecker Wang LLP who is also representing the plaintiffs.

**About the Anti-Discrimination Center**

The Anti-Discrimination Center works to prevent and remedy all forms of discrimination in housing, employment, education, and public accommodations through advocacy, litigation, education, outreach, monitoring, and research. Its motto is “one community, no exclusion.” ADC brought the landmark False Claims Act case against Westchester County that resulted in the historic housing desegregation court order that Westchester continues to resist.

**About Cuti Hecker Wang LLP**
Cuti Hecker Wang LLP is a six-attorney civil rights litigation boutique. Its practice focuses primarily on employment discrimination and retaliation, including sexual assault and harassment, housing discrimination, First Amendment issues, children’s rights, election law, police misconduct, and prisoners’ rights.
City of San Francisco
Preferences for City-sponsored affordable housing
https://sfmohcd.org/lottery-preference-programs#city

These preferences appear in the following priority, on most of our housing opportunities.

1. **Certificate of Preference (COP)**
   - For **former San Francisco residents displaced in the 1960s and 70s**, during the SF Redevelopment Agency’s federally-funded urban renewal program.
     - Addresses affected were in the Western Addition and Hunters Point. However, not all addresses in these neighborhoods are eligible.
   - All available units can be set aside for applicants with COP.

   If you lived at an **affected address** between the 1960s and 1970s, you may be able claim this preference. You will need to prove you lived at the address at that time.

2. **Displaced Tenant Housing Preference Program (DTHP)**

   DTHP is only available in properties with 5 or more units in a MOHCD program.

   - Two ways for San Francisco residents to be eligible:
     - **For tenants evicted by Ellis Act or owner move-in.**
       1. You’ll need prove that your landlord issued one of the following:
          1. Notice of Intent to Withdraw (NOI)
          2. Eviction Notice
     - **For tenants whose apartment was extensively damaged by fire.**
       1. You’ll need to provide a signed Fire Displacement Verification Form.

   - 20% of available units can be set aside for applicants with DTHP.

3. **Neighborhood Resident Housing Preference (NRHP)**

   NRHP is only available in new properties funded by MOHCD. The property must also have a total of 5 or more units in a MOHCD program.

   - For San Francisco residents who currently live in the **same Supervisor district as, or half-mile from, the property being applied to.**
     - If you’re applying online on DAHLIA, the application will alert you if you are eligible.
- When applying on paper and you are not sure, check the box for this preference and we will check your address for you. If you are not eligible, your application will go into the general lottery pool.
- You’ll need to add documents to your application that prove your residency. See the accepted documents checklist »

  - 40% of available units can be set aside for applicants with NRHP.

4. **Live or Work in San Francisco**

This preference appears on every lottery we have.

  - Two ways to be eligible:
    - **You already live in San Francisco.** You’ll need to add documents to your application that prove your residency.
    - **You work at least 75% of your working hours in San Francisco.** You’ll need to add documents to your application that prove your employment.
      
      See the accepted documents checklist »

  - Any available units left are set aside for applicants with a Live or Work in SF preference.
Honorables Julian Castro, Secretary  
U.S. Department of Housing and Urban Development  
451 7th Street SW  
Washington, DC 20410

Helen R. Kanovsky, General Counsel  
U.S. Department of Housing and Urban Development  
451 7th Street SW  
Washington, D.C. 20410

Re: Neighborhood Preference Implementation in San Francisco

Dear Secretary Castro and Ms. Kanovsky:

The U.S. Department of Housing and Urban Development’s decision to disapprove the City and County of San Francisco’s Affirmative Fair Housing Marketing Plan (the “Plan”) for the Willie B. Kennedy Apartments in San Francisco is wrong as a matter of law and public policy for several reasons. The underlying main purpose of San Francisco’s Plan is to protect communities like the one that would be served by the Willie B. Kennedy Apartments from displacement as neighborhoods change and affordable housing is lost to rising costs. In particular, there are low-income residents in San Francisco who are systematically being forced out of the City through the rising cost of housing here. HUD’s decision to disallow a neighborhood preference will destabilize those existing communities.

First, the Plan is designed to address specific needs where the Willie B. Kennedy Apartments project is located and is not drafted to exclude any protected groups. The Western Addition was once a thriving, predominantly African American community that experienced large-scale displacement in the 1960s due to HUD-backed policies of “urban renewal.” It has tenaciously remained a neighborhood that is home to a rich diversity of residents. As Mayor Lee explained in his August 5, 2016 letter, lower income households have shrunk by almost 13%, while high income households grew by almost 35% in this area. Also, it is well known that housing cost increases in San Francisco have been among the highest and steepest in the country. The Plan is essential to help existing low-income families stay in their neighborhood and to maintain the existing diversity in the Western Addition, where the Willie B. Kennedy Apartments project is located. Without the Plan, the opportunity to remain in the neighborhood will not be possible for those low-income residents who are most vulnerable to displacement. Moreover, the Willie B. Kennedy Apartments project is targeted at seniors, and here the application of the Plan will help keep families together in the community, where they have their support network.

One of the primary goals the City seeks to achieve through the Plan is to mitigate adverse impacts of market rate development in San Francisco’s high cost housing market by stabilizing and maintaining diverse neighborhoods and existing communities and the community-based safety net for them. The City’s data show that low-income residents have been disproportionately impacted by rising market rents in their communities, and that the provision of a neighborhood preference applied to income-restricted affordable housing units will provide more opportunities for those facing displacement due to gentrification.
Also, as stated in the Plan, developers, community advocates, residents and the City have a long history of collaboration on housing development in San Francisco. A neighborhood preference for current low income residents for a portion of new affordable housing opportunities acknowledges this collaboration and will help increase participation in this process. That collaboration will in turn help generate additional support for, and contribute to, the successful approval of more affordable housing development in San Francisco, which is critically needed.

Second, the City’s Plan is consistent with the goals of the Fair Housing Act of 1968, a civil rights law written decades ago to protect minorities from discrimination. Here, the City is trying to stem displacement of existing residents and communities, many of whom are members of a protected class and have suffered years of discrimination. The Plan takes a tool that communities used in the past to keep protected minorities out and flips it on its head, to help residents remain in their neighborhoods instead. San Francisco’s Plan addresses gentrification forces that were unknown when the Fair Housing Act was passed in 1968, and is not what Congress intended the Fair Housing Act to address—artificial barriers that functioned unfairly to exclude minorities from certain neighborhoods without a compelling public purpose justification.

In its letter dated August 3, 2016, HUD claimed that the City’s Plan limits equal access to housing and perpetuates segregation. To the contrary, the Plan is intended to maintain diversity in neighborhoods such as the Western Addition; without the Plan, the opportunity for residents to remain in their own neighborhood will be out of reach for those who are most at risk of displacement. And HUD has long recognized another form of neighborhood preference for new affordable housing projects in San Francisco, including the certificates of preference for households in the Western Addition and Hunters Point neighborhoods that were displaced by the federally funded urban renewal projects in the 1960s. But those certificates of preference alone are far from sufficient to address the displacement of communities the City now faces.

Third, analysis in the City’s statistical study has demonstrated that for the most part the Plan is not likely to result in a disparate impact. In his letter dated March 29, 2016, Olson Lee, Director of the Mayor’s Office of Housing and Community Development (“MOHCD”), informed HUD of the results of a statistical disparate impact study that MOHCD conducted. Yet even where there may be a risk of disparate impact, courts have examined whether a “legitimate non-discriminatory reason for the discriminatory practice” exists. (Betsey v. Turtle Creek Associates (4th Cir. 1984) 736 F.2d 983, 988-89) The City has explained several public policy rationales for the Neighborhood Preference, including finding that affordable housing is a scarce resource with limited availability in San Francisco.

The City has a compelling need to provide relief for overcrowding and rent burdened households. It is in the public interest to help residents preserve their existing community-based safety nets such as access to schools, places of worship, and health care providers. As provided in the ordinance adopting the Plan, the Plan affords residents an opportunity to move into affordable, appropriately sized affordable units without leaving the community and those community-based safety nets. Indeed, the City’s General Plan Priority Policies, which guide all land use policy in San Francisco, have long emphasized retaining neighborhood character, the cultural and economic diversity of its neighborhoods, and enhancement of the affordable housing supply. (San Francisco Planning Code §101.1(b)(2), (3).)

While in its August 3, 2016 letter rejecting the application of the City’s Plan to the Willie B. Kennedy Apartments project, HUD says it hopes to be a partner with the City in addressing the affordable housing challenges the City faces and that it believes other anti-displacement strategies can be designed, HUD has not offered any alternatives to the one strategy the City has
been able to identify and was poised to implement, based on the evidence, analysis and policies generally described above. And to our knowledge HUD has not taken a position to oppose a similar neighborhood preference program that New York City has been using for years. We understand that private parties recently challenged the New York City program and that New York City is seeking to have the court dismiss the lawsuit.

There are many reasons to support the Plan. The housing crisis in San Francisco, with its severe and unprecedented effect on low-income residents and communities, compels the City to find ways to staunch the loss of its low income residents, particularly as it affects entire communities. The Fair Housing Act and HUD’s Civil Rights Related Program Requirements should not prevent this kind of effort to remedy the effects of escalating housing costs on San Francisco’s communities, particularly a vulnerable population in a historically disadvantaged neighborhood currently experiencing acute displacement pressures.

We urge HUD to reconsider its response to the City’s Plan for the Willie B. Kennedy Apartments. Because that project must begin accepting tenant applications in the near future, time is of the essence for HUD to reverse or revise its decision to allow neighborhood preference for this project.

Very truly yours,

DENNIS J. HERRERA
City Attorney

cc: Mayor Ed Lee
Members, Board of Supervisors
Olson Lee, Director of the Mayor’s Office of Housing and Community Development
Gustavo Velasquez, Assistant Secretary for Fair Housing and Equal Opportunity, HUD
September 21, 2016

The Honorable Edwin Lee
City Hall, Room 200
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Dear Mayor Lee:

On August 5th, 2016, you asked the U.S. Department of Housing and Urban Development (HUD) to reconsider its August 3rd decision that it could not support a neighborhood-based preference in the Affirmative Fair Housing Marketing Plan for the Willie B. Kennedy Apartments, a 98-unit development for low-income seniors. Specifically, the City’s neighborhood residency preference would have given eligible households living in Supervisorial District 5 or within a half-mile radius of the development a preference for 40 percent of the affordable units. According to the City, eligible households in Supervisorial District 5 are 46 percent White, 18 percent Black, 29 percent Asian, and 4 percent Hispanic, compared to the City’s eligible households, who are 42 percent White, 7 percent Black, 37 percent Asian, and 9 percent Hispanic. HUD’s August 3rd decision disapproving the use of this neighborhood preference stands.

On September 9th, the City asked HUD to consider an alternative preference for the Willie B. Kennedy Apartments. Specifically, the City proposed providing a preference in 40 percent of the affordable units for low-income City residents at elevated risk of displacement. HUD can support an “anti-displacement” preference for 40 percent of the units, where residents from throughout the City are eligible for the preference and where race is not considered in the selection process.

HUD is making this determination based on the information available to the Department at this time. As with all preferences allowed by HUD, application of the above-described anti-displacement preference must comply with the Fair Housing Act and other civil rights related laws and requirements.

For the remainder of the units, HUD evaluated the second preference for persons who live or work in the City pursuant to the conditions included in the Department’s August 3rd letter. We will reach out to your staff today to discuss the analysis of the City-wide live/work preference.
Sincerely,

Gustavo Velasquez
Assistant Secretary for Fair Housing
and Equal Opportunity
N/NE Preference Policy Maps

Everyone who applies during the application round will be sorted on a waitlist for the advertised housing opportunities. Top priority will be given to households who owned property in N/NE Portland that was taken by City government, and to their descendants.

All other applicants can receive up to six “preference points” based on their current or past residence (plus that of a parent/guardian or grandparent) within areas of concentrated urban renewal in N/NE Portland. Households will be selected for housing from the top of the waitlist in order of preference.

Preference is...

- based on the amount of urban renewal activity that occurred where you or your parent/guardian or grandparent lived (or currently live) in N/NE Portland;
- given to applicants who were displaced, are at risk of displacement, or who are the descendants of families that were displaced due to urban renewal in N/NE Portland;
- given regardless of whether you currently reside in N/NE Portland.

Use the online map

The color-coded zones on the map correspond to different preference point values, based on the level of urban renewal activity in that area.

Click here to use the online map (opens best with Chrome)

Directions: Type an address into the “address search” bar above the map to see which zone the address falls in. When you apply, you can receive up to three points for your own (current or former) address, and up to three more for a parent/guardian or grandparent, for a maximum total of six points possible.

Addresses in the blue zone qualify for 1 point.
Addresses in the purple zone qualify for 2 points.
Addresses in the orange zone qualify for 3 points.

Tip: If you have more than one eligible address, use the address search bar to look up multiple addresses until you find which one qualifies for the maximum point value. When you apply, you may use the same address twice if you currently live at the same address as a parent/guardian or grandparent, or if you live in a home formerly occupied by a parent/guardian or grandparent.